VeRBosity Volume 20 No. 1

Contents

January - March 2004

Vale – Peter Alexander 2

Release of 1973 Cabinet papers 2

Response to the Clarke Report 4

Questions & Answers 9

Administrative Appeals Tribunal

Elson, J P 11

Jenkin, W H 12

Johnson, K D 13

Federal Court of Australia

Roscoe 15

Van Ewijk 17

Pritchard 19

Robertson (respondent) 20

Delahunty 22

Leane 24

Statements of Principles 27

RMA Investigations 28

Index of AAT & Court cases 30

Editor's notes

VeRBosity has reached its 20th volume! Some people have wondered who came up with the name. Before this piece of trivia is lost I thought I should record that the name was suggested by Brenda Hennessy, the VRB's librarian in 1985. Stephen Skehill, the first Principal Member, approved of it as he thought it reflected the more informal approach he wished to bring to Board hearings. I remember how I incurred Stephen's ire when, in 1987, I did away with the cartoon characters on the cover without telling him (I think he saw himself as one of them). While the cartoons are no longer on the cover, Stephen's vision of an approachable, relatively informal, Board has been maintained.

We will make every effort to ensure that *VeRBosity* continues to provide useful information and be of assistance to practitioners. Your suggestions for new ideas and improvements in *VeRBosity* are always welcome. With the new *Military Rehabilitation and Compensation Act 2004* commencing on 1 July 2004, it is likely to be a challenging future and *VeRBosity* will keep you informed of developments.

Bruce Topperwien
Editor

This edition of *VeRBosity* contains reports on veterans' matters in all 6 Federal Court judgments come to attention in the period from January to March 2004 as well as selected AAT decisions handed down in the same period. Also included is an index of all AAT and Court cases received in this period, and information on recent Statements of Principles determined and investigations notified by the Repatriation Medical Authority.

Vale – Peter Alexander

CMG, OBE, OAM, FCIS, FCPA, CTuC, OLG

(Reproduced from *The Australian*, 3 February 2004)

Veterans' advocate. Born Sydney January 9, 1915. Died Sydney December 26, 2003, aged 88.

Peter Alexander lived his life devoted to the service of others. He was one of Australia's most committed veterans' advocates and his list of achievements on behalf of veterans is astounding. He served in an honorary capacity on more committees, task forces, boards and organisations than most people would think possible in one lifetime.

Alexander was secretary of the Australian Veterans and Defence Services Council for 32 years. He fought for the recognition of war-related diseases and syndromes, such as post-traumatic stress disorder, so treatments could be researched and sufferers afforded adequate care.

Through his tireless work he made a real difference to the lives of many ex-service men and women and their families. On his retirement from the council, Veterans' Affairs Minister Danna Vale paid tribute to his service.

> 'Peter, words are never enough to truly acclaim your exceptional service – you are one of Australia's finest sons. You are a national living treasure and your life is an exceptional example of citizenship of the highest order,' Vale said.

Alexander was a veteran of World War 2, serving in North Africa, Gibraltar and Italy as a wireless operator with 458 Squadron, Royal Australian Air Force. He wrote the history of the 458 Squadron entitled *We Find and Destroy*, published in three editions in 1959, 1979 and 2001. He also edited the 458 Squadron's quarterly newsletter for more than 50 years, never once missing an edition. An accountant by profession, he started the Australian branch of the (British) Association of Chartered Certified Accountants and was president for several years from 1974.

Being of Scottish ancestry, Alexander was also active in the Scottish and Celtic communities, especially in the years after his retirement. He was convenor of the Celtic Council of Australia since its foundation. Leaders of all Celtic communities attend the council which has promoted unity among Australia Celts. He was until his death a proud warden of the Scottish memorial cairn, erected in Mosman, Sydney in 1988 to mark 200 years of Scottish presence in Australia.

He edited a number of periodical papers, including Harmabee for the Kenya Australia Society and Clan McAllister News, ALBA, for the Scots, as well as the 458 Squadron News. He wrote two papers in Scottish Gaelic.

He is survived by his wife, Rita, three daughters Deborah, Julie and Melanie, and seven grandchildren.

Melanie Alexander

Release of 1973 Cabinet papers

On 1 January 2004, the National Archives released Cabinet papers from 1973. Among those papers were some 286 pages of documents relating to Repatriation matters.

The Australian withdrawal from Vietnam was nearing completion by the time the Whitlam government was elected on 2 December 1972. One of the ALP's election promises was to end National Service, and on 6 and 7 December 1972,

Lance Barnard (the other member of the interim two-member Cabinet, which operated from 5 - 19 December 1972) made announcements concerning this as well as announcing that such servicemen would be eligible for Repatriation benefits if they chose to remain in the Defence Force and completed their National Service engagement.

It was a hectic few weeks over the Christmas/New Year period in 1972-73 both for government departments and the new Ministry. On 8 January 1973, Richard Kingsland, the Chairman of the Repatriation Commission, gave a Cabinet submission to Senator Reginald Bishop, the new Minister for Repatriation, for presentation to Cabinet for the implementation of some of the Labor Party's election promises concerning veteran's matters.

That submission proposed a number of matters including:

- an increase in the special rate of pension to bring it to 50% of the minimum wage, and to adjust the other disability pension rates proportionately;
- an increase in the war widow's pension and service pensions to keep it in line with the equivalent Social Security pensions;
- the payment of pensions to student children until they cease full-time education instead of it cutting out at age 21;
- enabling legal personal representatives of deceased claimants to appeal to the War Pensions Entitlement Appeal Tribunal;
- recognising children of de facto wives as dependants of the veteran.

Cabinet endorsed these proposals on 16 January 1973 and made more detailed decisions concerning them on 13 February 1973. Draft Bills were prepared and put to Cabinet on 27 February 1973.

It took somewhat longer to get a submission to Cabinet on the proposal to provide eligibility for National Servicemen and other Defence personnel from 7 December 1972. The matter went to an Inter-Departmental Committee comprising officers from Defence, Social Security and the Repatriation Department.

On 10 April 1973, Cabinet endorsed a recommendation that determining authorities under the Repatriation Act be required to give reasons for their decisions and that legislation be prepared to give effect to this proposal.

Meanwhile, other election promises were being considered in the Budget context, including the promise that within three years, disability pension would not count as income under the service pension means test, and that a significant step towards this would be taken in the first year. Initially, it was proposed to disregard 50% of disability pensions as income (submission of 20 June 1973), but this was reduced to disregarding only 25% of the disability pension at the Cabinet meeting of 20 July 1973, apparently upon concerns from Treasury at the cost of the overall package.

Another important budget measure agreed to at that Cabinet meeting was to provide medical treatment for cancers, whether service-related or not, and free medical treatment for all disabilities to Boer War and World War 1 veterans.

In September 1973, Cabinet considered and agreed to the draft legislation to provide eligibility under the Repatriation Acts for full-time members of the Defence Force and National Servicemen who completed their full engagements. The Inter-Departmental Committee recommended changes to the original government intention that members have a *choice* of either Commonwealth Employees' Compensation or Repatriation benefits, and instead recommended to Cabinet that the legislation provide for

offsetting of one set of payments against the other, so that members could choose to take from either or both schemes. Cabinet endorsed that recommendation and approved the draft legislation that provided for this: the Repatriation Bill (No. 3) 1973.

That legislation also provided for the giving of reasons by decision-makers, and enabled Repatriation hospitals to use unused bed-capacity for non-Repatriation patients.

1973 was certainly a busy year, with a number of very significant decisions taken and legislative provisions enacted.

Bruce Topperwien

Response to the Clarke Committee Report on Veterans' Entitlements

Statement by the Minister for Veterans' Affairs, the Hon Danna Vale, MP

Today [2 March 2004] the Australian Government announced its response to the Report of the Review of Veterans' Entitlements – the Clarke Report. I established the Clarke Committee to honour the Government's election commitment to an independent review of anomalies in veterans' entitlements and the level of benefits and support to veterans receiving the disability pension.

Since the report was published, the Government has thoroughly considered its recommendations and acknowledged a range of views expressed by veterans and ex-service organisations, our Defence and Veterans' Affairs Committee and our party room. The report, and the Government response, have been subject to intense scrutiny.

I thank the members of the Review Committee – His Honour, Mr Justice Clarke, Air Marshal Doug Riding, Dr David Rosalky, and their Secretariat, the many veterans and organisations that made submissions to the review, and the wider veteran community for its interest and support.

This Government has placed a high priority on meeting our obligations to those who serve in the defence of Australia. Since coming to office in 1996, we have increased spending on Veterans' Affairs from $6.4 billion to $10 billion in the federal Budget for 2003-04. Much of this increased spending has been due to the Government's recognition of the growing and changing needs of Australia's veterans, war widows and widowers as they become older.

This is demonstrated by growth in veterans' health spending, where Government funding has increased from $1.7 billion in 1996 to a record $4.1 billion this year.

We have worked to meet the needs of our ageing veteran community, by:

- extending the Gold Card to Australian veterans aged over 70 years with Qualifying Service;
- introducing veteran partnering contracts with private hospitals to broaden the availability of quality hospital care; and
- helping veterans and war widows to continue living at home through programs such as Home Front and Veterans' Home Care.

We also have met our commitment to the health of younger veterans and their families by our Government's response to the Vietnam Veterans' Health Study.

Our aim is to maintain and protect the central services and benefits that veterans value so highly and to continue to address those areas of greatest need, in consultation with the ex-service community.

The Clarke Report is the Government's second major review in the Veterans' Affairs portfolio to be brought to the Parliament. The first – the Mohr Review – resulted in recognition and increased entitlements for a significant number of Australian service personnel who served in South-East Asia between 1955 and 1975, including more than 2, 600 members of the Far East Strategic Reserve.

Last year the Government introduced the Military Rehabilitation and Compensation Bills into the House. These Bills are the Government's detailed response to the findings of the inquiry into the Black Hawk disaster and the recommendations of the Tanzer Review of Military Compensation.

They were developed with extensive consultation with the veteran and defence force communities and, I am pleased to say, were passed by the House and are now before the Senate.

The Bills bring together the best elements of the Military Compensation Scheme and the Veterans' Entitlements Act to create a single scheme for all Australian Defence Force members who are injured or who lose their lives during future service.

In keeping with these initiatives, the Government's response to the Clarke Review also will benefit the veteran community. We have carefully worked our way through the Committee's 109 recommendations to a response that maintains Australia's fair and consistent repatriation system.

The Government has accepted some recommendations and rejected others.

The Government will be providing an additional $267 million over the next five years to implement the recommendations that we have accepted.

The recommendations can be usefully grouped into five broad areas:

- service eligibility;
- access to the Gold Card;
- benefits for Totally and Permanently Incapacitated (TPI) and disability benefit recipients;
- rehabilitation; and
- other measures.

I shall address each of these themes in turn and I have attached the Government's response to each of the 109 recommendations.

Service Eligibility

Perhaps the most fundamental issue before the Committee was the issue of service eligibility. Sixty-five of the 109 recommendations within the report relate to this issue.

In all, 38 of the 65 recommendations on eligibility suggested no change to the current provisions under the VEA. We have accepted these recommendations.

The type of service a veteran has rendered is at the centre of the veterans' entitlements system and accounts for differences in benefits and services received by individuals across the veteran community.

Traditionally, Australia has provided a special level of benefit for veterans with Qualifying Service – that is, those who have faced the risk of personal harm from an enemy – as opposed to Operational Service.

Today, the concept of Qualifying Service has been replaced by Warlike Service, defined as operations where the application of force is authorised for specific military objectives and where there is an expectation of casualties.

In the current system, such entitlements include access to the service pension at

age 60 and free health care provided through the Gold Card at age 70.

I say, quite clearly, this Government will protect the integrity of Qualifying Service to continue to give special recognition - and benefits - to those who serve their country at risk of personal injury or death from an armed enemy.

So we endorse and accept the Committee's recommendation that there be no change in the statutory test for Qualifying Service.

However, we reject the Committee's view that the 'incurred danger test' has been interpreted too narrowly by the courts and administrators.

Public support and confidence in the generosity of our Repatriation System depends on the 'incurred danger test' remaining objective. We would create anomalies if we were to confuse a state of readiness, or presence in a former enemy's territory, with the real and tangible risks of facing an armed and hostile enemy.

The Government therefore does not accept the Committee's recommendations for an extension of Qualifying Service for certain service in Northern Australia during World War II and in the British Commonwealth Occupational Forces.

The Government accepts the recommendation to extend Qualifying Service to aircrew of No 2 Squadron RAAF, who served on the Malay-Thai border between 1962 and 1966.

The Government also accepts the Committee's recommendation to extend Operational Service, the equivalent of Non-Warlike Service, to members of the RAAF directly involved in the Berlin Airlift.

The Government also accepts that Operational Service eligibility be extended wherever Qualifying Service has been recognised.

The immediate beneficiaries of this decision are the small group of minesweeping personnel who have Qualifying Service under the VEA but not Operational Service.

Extension of Operational Service will give them access to the disability pension.

The Government accepts the Committee's recommendation to extend an ex-gratia payment of $25,000 to all surviving prisoners of war held captive during the Korean War, or their widows or widowers, who were alive on 1 July 2003. This is in recognition of the extremely inhumane conditions they endured.

The Government has rejected the Committee's recommendations relating to British Commonwealth and Allied (BCAL) Veterans. These recommendations would significantly change the firmly established principle that each BCAL country maintains responsibility for its own veterans.

The recommendations also would extend benefits to BCAL veterans which are not available to some Australian veterans with similar service. Further, acceptance would grant Qualifying Service to some BCAL veterans without them meeting the incurred danger test required of other BCAL veterans.

The Government will respond positively to the needs of those affected by the British Atomic Tests programme when the outcomes of the Australian Participants in the British Nuclear Test Programme - Cancer Incidence and Mortality Study, are published later in the year.

The Government also recognises that today's military forces are concerned that personnel deployed on operations to meet the Government's national security objectives have such service properly classified. Such classification needs to be based on the extent to which ADF members are exposed to danger.

Hazardous training for any Defence personnel is best remunerated in base pay and conditions and service allowances.

The Government is reviewing the criteria for determining classification of current service and deployments.

Access to Gold Card

The Clarke Committee made 10 recommendations in relation to access to the Gold Card. The Gold Card is highly valued by the veteran community, offering access to free comprehensive health care for eligible veterans, including medical and hospital treatment, allied health care, community nursing and support at home through Veterans' Home Care. Currently, more than 273,000 members of the veteran community hold a Gold Card.

Many veterans have received the Gold Card on the basis of their health needs as determined by their level of disability. For example, the Gold Card is issued to all veterans receiving the Disability Pension at or above 100 per cent of the General Rate, including the TPI pension, the Intermediate Rate and the Extreme Disablement Adjustment.

The Gold Card also is provided to a veteran who receives the Disability Pension at or above 50 per cent of the General Rate, and who also is receiving any amount of the Service Pension.

As a result of initiatives in 1999 and 2002, the Government has extended the Gold Card to all Australian veterans and mariners aged 70 years or over who have Qualifying or Warlike Service from any conflict.

Ex-prisoners of war also receive the Gold Card, as do war widows and widowers, who are compensated for the loss of their partners as a result of their service.

The Committee received many submissions urging further extension of the Gold Card to different groups. The Government has accepted all of the Committee's recommendations that there be no further extensions of the Gold Card.

The Government has already rejected the Committee's recommendation that future Gold Card entitlement be means tested. A benefit granted in recognition of incurring danger from an enemy should not discriminate among veterans on the basis of wealth or income.

TPI and Disability Benefits

A range of submissions addressed the adequacy of benefits and support available to Totally & Permanently Incapacitated and other veteran disability benefit recipients.

There has been considerable public questioning of the merits of the Committee's recommendations for a fundamental restructuring of TPI and veteran disability benefits.

The Government does not accept the model favoured by the Committee but instead addresses the key issues of concern to veterans, that is, the treatment of the disability pension at Centrelink and indexation arrangements.

From September this year, we shall introduce a Defence Force Income Support Allowance, to be paid by the Department of Veterans' Affairs to eligible veterans receiving income support from Centrelink.

The allowance will eliminate the difference between a veteran's Centrelink benefit and the amount they would receive if their disability pension was assessed under the Veterans' Entitlements Act.

More than 19,000 disability pensioners who receive their income support from Centrelink will benefit from this change and on average will receive an additional $40 a fortnight. However, veterans in need, such as a single TPI recipient on an aged pension with no other income, will be eligible to receive an additional $257.60 a fortnight. This would take the total amount of financial assistance provided through income support and the TPI pension to a single veteran who earns no other income to $1,215.40 a fortnight.

This figure does not include the value of pharmaceutical and other allowances, nor the cost of health care provided by the Gold Card.

On adequacy, for those with Qualifying Service, the Clarke Committee concluded that the TPI benefit package was broadly adequate over the veteran's lifetime. The total benefit of TPI pension, combined with maximum service pension, currently equates to 91 per cent of post-tax Male Total Average Weekly Earnings (MTAWE) for a single veteran and 109 per cent for a couple.

Of course, this will now also be true for those veterans without Qualifying Service who receive income support from Centrelink, who will now receive the Defence Force Income Support Allowance.

From March 2004 the portion of disability pension above the general rate will be indexed to MTAWE in a similar fashion to the service pension. The Government considers it fair that those veterans who can no longer work because of their service related disabilities have the economic loss component of their disability pension maintained in line with a wage index.

Rehabilitation

The Committee emphasised the importance of rehabilitation for veterans with accepted disabilities. However, the Government rejects the recommendations for compulsory rehabilitation under the VEA. No veteran will be forced to participate in rehabilitation under the VEA.

However, the Government, will continue to promote existing programs, including the Veterans' Vocational Rehabilitation Program, Heart Health and the Men's Health Peer Education Project, which have been warmly welcomed by many veterans.

The Military Rehabilitation and Compensation Bills before the Senate include a strong rehabilitation focus. This emphasis ensures that after injury or illness people are assisted to pursue all options which may assist them and their families.

The guidelines for rehabilitation under the new Scheme will be developed in close consultation with veteran and defence force organisations. The Government will remain open to new ideas that the ex-service community may wish to suggest that would assist those who may wish to pursue rehabilitation under the VEA.

Other measures

Some 11,000 war widows and widowers will receive an increase in their income support payments as a result of the Government's decision to pay rent assistance in addition to the ceiling rate of income support supplement.

This will mean up to an additional $94.40 a fortnight for eligible war widows and builds on the Government's action in lifting the ceiling rate of the income support supplement in 2002.

The Committee's recommendation for an increased contribution towards funeral costs has been accepted. The maximum funeral benefit will be increased from $572 to $1,000. Our Government has committed an additional $267 million over the next five years to address concerns raised by the veteran community during the review.

I take this opportunity to again thank those members of the ex-service community for their important contribution to this review process.

Questions & Answers

The VRB encourages applicants and their representatives to contact their local VRB Registrar to discuss any issues relating to their cases. If you have any questions

particularly concerning the *Veterans' Entitlements Act 1986* (the VEA) you can telephone the NSW Registrar, Peter Godwin, on **1300 135 574** from anywhere in Australia at the cost of a local call.

Service in ships – style and grammar

Question: What is the correct way to speak and write about service in ships?

Answer: In many official naval documents, ships' names are often written entirely in upper case. However, this has been used as a functional approach for clarity, because it has been used in handwriting or with outdated technology (such as typewriters), rather than as an appropriate style for publishing purposes.

The correct publishing style is to write the ship's name in italics, only capitalising the first letter of each word in the ship's name. However, any abbreviations preceding the name must be in upper case and not italicised, for example, HMAS *Matthew Flinders*.

Never put the definite article, 'the', before 'HMAS', because it does not make sense to say 'the Her Majesty's Australian Ship'. One can say 'they served in the *Melbourne*' or 'they served in HMAS *Melbourne*', but not 'they served in the HMAS *Melbourne*'.

It is also important to note that a person may serve or be **'in'** a ship or a person may 'go aboard' or 'go on board' a ship, but a person is never 'on' a ship.

Continuing a deceased person's claim

Question: Who can continue a deceased person's claim for pension?

Answer: Under section 126 of the VEA, the legal personal representative (LPR) of a deceased claimant can take whatever action the claimant could have taken with respect to a claim for pension had the claimant not died (such as applying to the VRB). The LPR is either:

- the executor or administrator of the deceased's estate; or
- the Public Trustee.

In some cases, the LPR might not be interested in continuing the claim, but someone else, such as the widow or a child of the claimant, might wish to do so. Section 126 permits the Repatriation Commission to approve someone else to continue the claim, but not without first approaching the LPR.

There is a very good reason for this restriction. If the LPR is not asked whether he or she wishes to continue the claim and the Commission purports to approve someone else to do so, that other person could be regarded as an '*executor de son tort*' or an 'intermeddler' in the estate. Such action could result in substantial adverse consequences for that person, including being forced to take on the role of administrator of the entire estate.

In order that this does not occur, s.126(3) provides that the Commission cannot approve a person to continue the claim unless it is satisfied that the person has notified the LPR of the LPR's right to continue the claim and that the LPR has either refused, or failed within a reasonable time, to take any action in respect of the claim. Only if the Commission is so satisfied, can it approve the other person to continue the claim. (Note that the Commission never approves an LPR and the approved person does not become the LPR. They are merely 'a person approved by the Commission' for the purpose of the claim.)

Medical discharge and eligibility for 'defence service'

Question: If a person is discharged for medical reasons between 7 December 1972 and 6 April 1994 before they have completed 3 years effective full-time service, then their service after 7 December 1972 is treated as defence service. But, does a medical discharge after 6 April 1994 give a person 'defence service' for their service before that date?

Answer: No. Consider a hypothetical case of two soldiers, Brenda and Barry who both enlisted on 4 May 1992. They continued to serve together and were both badly injured in the same motor vehicle accident in early 1994. Brenda is discharged because of her injuries on 31 March 1994 and Barry is discharged because of his injuries on 11 April 1994.

Neither Brenda or Barry have completed 3 years effective full-time service, and so unless they are discharged for medical reasons, they will not be taken to have rendered 'defence service'.

The 'terminating date' for defence service is 7 April 1994, the date of Commencement of the *Military Compensation Act 1994*. That is, no service on or after that date is taken to be 'defence service' unless the person has continually served on continuous full-time service since before 22 May 1986 (the commencement date of the VEA).

As Brenda's service ceased before 7 April 1994, the terminating date has no relevance to her situation. She fits within s 69(1)(d), which provides that if she was serving under an engagement to serve for at least 3 years and she was discharged on medical grounds before the 3 years were completed, then her service is regarded as 'defence service'. (It should be noted that the Federal Court (*Whiteman v. Secretary, DVA* (1996)) has held that provided medical grounds were the real reason for being discharged, it does not matter that the formal reasons given by the Defence Force stated some other ground.)

But Barry is in a different situation. He was not discharged until after the terminating date. He is caught by the provisions of s 69(3)(b), which says, in effect, that if a person rendered continuous full-time service after 22 May 1986 and before 7 April 1994; but had not rendered continuous full-time service since immediately before 22 May 1986, s 69(1) does not apply to them (that is, they cannot be taken to be rendering any 'defence service') unless they have completed 3 years effective full-time service before 7 April 1994 or they were discharged on medical grounds *before* 7 April 1994.

In this case, Barry was discharged on medical grounds *after* 7 April 1994, and so subsection 69(1) cannot apply to him, and he cannot be taken to have rendered any 'defence service'.

'L of C'

Question: What does 'L of C' stand for in World War 2 Army service documents?

Answer: 'L of C' means 'Line of Communications'. It is not a place but a system of communications from the rear edge of the battlefield or area of operations back to the main supply areas. A signals unit, for example could be stretched over the whole of the L of C supporting a variety of other units.

An entry, 'NQ L of C', indicates that the veteran's unit was somewhere within a line of communications stretching from the HQ located in the North Queensland region to the front lines, which might have been in New Guinea. Similarly, 'SA L of C' indicates a line of communications stretching from Adelaide all the way to Darwin. So if a veteran's unit was within those Lines of Communication it may well have been located in Darwin or Alice Springs, and not in South Australia at all.

Administrative Appeals Tribunal

Re J P Elson and Repatriation Commission

Sassella

[2004] AATA 18
14 January 2004

War Widows pension – death by malignant neoplasm of colorectum – material contribution from operational service to the consumption of quantity of alcohol

Mrs Elson's claim for pension had been refused previously by the Tribunal on the ground that there was no material raised that linked the veteran's alcohol consumption with a war-caused alcohol habit. On appeal to the Federal Court the parties agreed that the matter be remitted to the Tribunal to be reheard on the basis that the tribunal had erred in law in saying that factor 5(c) in SoP 58 of 2002 was not a factor to which 'material contribution' applied.

Factor 5(c) of SoP 58 of 2002 required a veteran to have consumed at least 250 kilograms of alcohol (contained within alcoholic drinks) within any 25 year period within the 40 years immediately before the clinical onset of malignant neoplasm of the colon. The previous Tribunal had assumed that compliance with the SoP concerning alcohol abuse or dependence was necessary in order to meet this factor. On remittal, the Tribunal noted that having alcohol abuse or dependence accepted as a war-caused condition would only put forward a strong contention for meeting the above criteria. However, it was not a necessity: a veteran may have consumed the quantity of alcohol within the time frame and at the appropriate time without having met these conditions. The Tribunal noted that there is no reference made to the terms 'alcohol abuse' or 'alcohol dependence' in the SoP for malignant neoplasm of the colon.

The Tribunal relied on the principle in *Kattenberg* (2002) 18 *VeRBosity* 41, which held that service only had to make a significant contribution to the veteran's drinking, it did not have to be the sole contributing factor. The Tribunal noted:

> [27] ... Whatever the quantity of alcohol consumed at that time, so long as it is suggested to be at an increased rate compared to before operational service, and so long as that increase is attributable to the conditions of service, and so long as that increased consumption seems on the material linked to subsequent consumption necessary to satisfy the requirement for a total of 250 kilograms of alcohol consumed, then s 196(14) is satisfied.

To support the hypothesis, evidence was presented by Mr O'Keefe who researched alcohol consumption by troops in Vietnam at the time Mr Elson was there. He said that consumption was extremely heavy; that the position Mr Elson held as a military policeman was more conducive to alcohol problems; and these men turned to drink for solace. It was also noted by one informant who served with Mr Elson that he had a drinking problem.

Mrs Elson gave evidence that her husband had told her his drinking increased dramatically while in Vietnam and continued on his return. She stated that Mr Elson was a social drinker before his operational service and had commenced drinking two drinks a night in

World War 2 during his service. Once in Vietnam his drinks increased to six daily and continued at about that rate throughout their marriage.

The Tribunal found that the material supported the hypothesis that Mr Elson began drinking in Vietnam at a level that could not be described as merely 'social drinking', and that this material was sufficient to point to a connection between Mr Elson's service in Vietnam and an increase in his alcohol consumption.

Formal decision

The Tribunal set aside the decision under review and determined that the veteran's death was war-caused.

Re W H Jenkin and Repatriation Commission

Cunningham

[2004] AATA 198
27 February 2004

Jurisdiction – meaning of 'reviewable decision' – no jurisdiction to determine whether cirrhosis of the liver is war-caused

This decision resulted from a directions hearing at which the applicant sought to argue that the Tribunal could consider a disease that had not been determined by the Repatriation Commission or the VRB. The Commission contended that as there had been no earlier decision regarding cirrhosis of the liver there was no reviewable decision and the only matter for review was the Commission's decision that rejected Mr Jenkin's claim for malignant neoplasm of the bile duct as being war-caused.

It was argued for Mr Jenkin that the cirrhosis of the liver was a link in the chain to determine if malignant neoplasm of the bile duct was war-caused and the main question for determination was whether he was suffering from cirrhosis of the liver before the clinical onset of the malignant neoplasm of the bile duct.

Staffieri v Commonwealth (1986) was referred to concerning the extent of the tribunal powers when conducting a hearing *de novo* and the fact that it was able to take into account new evidence that was not before the original decision-maker. The Tribunal said:

> The question for the determination of the Tribunal is whether that decision [of the decision-maker] was the correct or preferable one on the material before the Tribunal.
>
> We may not be able to reach the correct or preferable decision on the material before us if we are bound to accept the findings of fact made by the decision-maker. We do not accept that the power of the Tribunal can be fettered so as to require it to consider only one aspect of the determination under review.
>
> But as stated in the text, *Veterans' Entitlements Law* by Creyke and Sutherland, the Tribunal's jurisdiction is limited by the matters referred to in the original claim or the application for review to the Board or Tribunal.
>
> However, *de novo* review does not mean that the Tribunal has a roving brief and can consider for the first time a claim for incapacity in respect of an injury or disease which has not previously been considered by the Commission or the Board.

A similar issue also arose in the Federal Court case of *Stafford v Repatriation Commission* (1993) which was upheld by the Full Federal Court on appeal. Referring to that case, the Tribunal noted that the Act provided for:

> a comprehensive statutory framework for review of Commission decisions by the VRB, at first instance and, in turn, by the Tribunal. The consideration by the Tribunal of particular issues of entitlement

> expressly not before the VRB would have the effect of circumventing a chain in the review process. Such a development is clearly contrary to the purpose and intent of the legislation.

Mr Jenkin's claim, which was subject to review by the Commission and the VRB, was malignant neoplasm of the bile duct and it was clear from the Commission's decision that it was not asked to consider the condition of cirrhosis of the liver and it was therefore not subject to a review by the VRB.

The Tribunal determined that it only had jurisdiction to review the applicant's condition of malignant neoplasm of the bile duct and that it lacked authority to make any determination in relation to Mr Jenkin's cirrhosis of the liver.

In other words, while the Tribunal could consider whether the material before it pointed to the veterans' cirrhosis of the liver being connected to his service as part of hypothesis of a connection from service to malignant neoplasm of the bile duct, it had no power to determine whether cirrhosis of the liver was a war-caused disease because no claim for pension had been made in respect of that disease.

Formal decision

The Tribunal held that it could not determine whether cirrhosis of the liver was a war-caused disease.

Re K D Johnson and Veterans' Review Board

Jarvis

[2004] AATA 242
10 March 2004

Dismissal of AAT application as frivolous or vexatious – no jurisdiction to reopen previous application – dismissal of VRB application

In 1996, Mr Johnson applied for review to the VRB. After the failure of Mr Johnson's representative to respond to a particular notice, the application was dismissed in 1999 under s 155AB(5) of the VEA by the Registrar who was acting as delegate of the Principal Member.

In 2000, the Tribunal affirmed the decision to dismiss the VRB application (see (2000) 16 *VeRBosity* 34). Mr Johnson appealed this to the Federal Court, but shortly thereafter withdrew that appeal. However, in 2002, he applied to the Federal Court for judicial review of the Registrar's actions. This application was dismissed (see (2002) 18 *VeRBosity* 114), as was a further appeal to the Full Court (see (2003) 19 *VeRBosity* 52).

In 2003, Mr Johnson wrote to the Principal Member asking him to reinstate his VRB application. This was refused.

Mr Johnson then applied to the Tribunal intending to reopen the earlier AAT application that had been finalised in 2000. Upon receiving notice of the new AAT application, the VRB asked the Tribunal to dismiss it on the ground that it was frivolous or vexatious.

Mr Johnson argued that the 2000 AAT matter should be reopened because he thought that the Registrar did not have the delegation to dismiss the VRB application because the instrument of delegation giving him authority to dismiss cases had not been interpreted correctly.

The relevant instrument of delegation in relation to these proceedings was dated 17 December 1992. Under that instrument the previous Principal Member, Mr Gallagher delegated to:

> those persons who, from time to time, hold a position designated as Registrar of the Veterans' Review Board, my powers under sections 155AA and 155AB of that Act, provided that such powers shall only be exercised by those persons in accordance with directions issued by me from time to time.

On 1 March 1999, the previous dismissal procedures were replaced by new procedures issued by the new Principal Member, Brigadier Rolfe. A new delegation was not issued to Registrars until 15 January 2001. Mr Johnson contended that the new procedures required Registrars to sign relevant notices and correspondence as a 'Delegate of the Principal Member' whereas that was not a requirement under the old procedures. He noted the letter he received on 11 March 1999 was signed as 'Delegate of the Principal Member' so that when the Registrar dismissed the application he was acting pursuant to the new procedures and was in breach of the proviso to the delegation by Mr Gallagher that the Registrar's delegated powers could only be exercised in accordance with directions issued 'by me from time to time'.

The issues raised in the previous proceeding were the adequacy of the prior notice issued by the Registrar and the proper construction of a response which was sent to the Registrar by Mr Johnson's agent. Mr Topperwien for the respondent conceded that Mr Johnson's argument that the Registrar was not authorised to dismiss his application was not raised or determined in the Tribunal hearing in 2000.

Findings

The Tribunal held that it had no jurisdiction to re-visit a decision based on a new argument that was not put before the Tribunal in the earlier proceedings and the Tribunal considered it could not reopen the previous determination in the present proceedings.

The Tribunal noted that all deficiencies with the delegation notice had been cured. Mr Johnson had not suggested the new delegation instrument issued by Brigadier Rolfe was invalid and it was also noted that his appeal would have had to have been dismissed under either the old or new delegation notice because of Mr Johnson's representative's non-compliance with the notice in February 1999.

The argument by Mr Johnson as to the proper interpretation of the instrument of delegation and the use of the words 'by me' was not decided due to the conclusion that the Tribunal would not reopen the application.

Formal decision

The Tribunal dismissed the application on the ground that it was frivolous or vexatious and further ordered that the applicant not make a subsequent application to the Tribunal of a kind that would seek to have the effect of: reinstating the application to the Tribunal in matter number S1999/234; or seeking a review by the Tribunal of the action taken by the Registrar of the VRB on 11 March 1999, under s 155AB(5) of the VEA, in dismissing the application previously made by the applicant to the Board.

Ed: Mr Johnson has appealed this decision to the Federal Court.

Federal Court of Australia

Roscoe v Repatriation Commission

Gray J

[2003] FCA 1568
23 December 2003

Entitlement – whether veteran rendered operational service – in ship off WA coast in WW2 – 'kind of death' suffered by veteran

This case was concerned with two jurisdictional fact issues affecting the relevant law to be applied by the Tribunal: (1) the nature of the veteran's eligible service; and (2) the 'kind of death' suffered by the veteran. The Tribunal's decision whether or not the veteran had rendered operational service in World War 2 determined the standard of proof to be applied; and the 'kind of death' determined which, if any, Statement of Principles had to be considered.

Nature of the veteran's eligible service

Section 6A of the VEA provides that a person is taken to have rendered 'operational service' if he or she rendered 'continuous full-time service outside Australia' during World War 2, or if the person rendered service that should be treated as being service in 'actual combat against the enemy'.

Mr Roscoe served in the RAAF and, apart from a voyage in MV *Koolinda* in August 1943, he did not leave Australia during his service. That voyage, which took Mr Roscoe from Fremantle to Broome as part of a journey from Perth to Cape Lévêque, WA, for the purpose of working at a radar tracking station, involved going outside Australian territorial waters. (Cape Lévêque is about 200 km north-east of Broome.) The Court described the effect of the evidence from Associate Professor McCarthy concerning this voyage, as follows:

> [15] ... The *Koolinda* was a standard commercial passenger and cargo vessel, equipped with defensive weapons. As a coastal ship, it would not have gone far out to sea. It was most unlikely that a military passenger in transit would have been assigned to duty on a gun station. Special training was necessary to perform this duty, which would normally be performed by the crew of the ship. There was no record of enemy submarines in the area. If there had been such a threatening event, it would have been recorded in the Operations Record Book of the veteran's unit. No such event was recorded during the relevant period. German, Japanese and Italian submarines operated in the Indian Ocean during 1943, but mainly off the South African coast, some 5000 air miles from the Western Australian coast. The closest sinking of a ship to the Western Australian coast was more than 1000 miles from that coast. There was no evidence of Italian submarines, which were cargo carriers and not attack craft, near the Western Australian coast. The German submarines were based at Penang and it was most unlikely that they would have approached the Western Australian coast. The Japanese submarines operated largely off Sri Lanka (then known as Ceylon) and there was no evidence that they ventured into Western Australian waters. The *Koolinda* was not threatened by attack from submarines during the relevant period.
>
> [16] On 16 August 1943, Broome was attacked from the air, with no record

> of casualties. This was 10 days before the veteran embarked on the *Koolinda*. On 15 September 1943, Onslow was attacked by bombers, with no casualties. At this time, the veteran was at Cape Lévêque, more than 1000 kilometres from Onslow. The overwhelming majority of aircraft tracked by the veteran's unit at Cape Lévêque were identified as friendly. No trackings were recorded until May 1944. In that month, eight unidentified aircraft were tracked, but there is no evidence that they were enemy aircraft. In June 1944, five unidentified aircraft were tracked, but there was no evidence or indication that the radar station was about to become the object of an attack. The Operations Record Book for Cape Naturaliste recorded that aircraft were tracked, both friendly and unidentified. It was almost impossible for the unidentified aircraft to have been Japanese. There was a report of suspected Japanese activity off the Western Australian coast in April 1943, four months before the veteran sailed on the *Koolinda*, but the reports were demonstrated to be false.

The Court referred to *Repatriation Commission v Kohn* (1989) 5 *VeRBosity* 108 and *Proctor v Repatriation Commission* (1999) 15 *VeRBosity* 13, both of which cases considered the meaning of 'continuous full-time service outside Australia' and held that the decision-maker had to consider the essential character of the relevant service to decide whether it could be properly characterised as service outside Australia or if being outside Australia was merely incidental to the characterisation of the voyage as being a transit from one place in Australia to another.

The Tribunal had mentioned *Kohn's* case and found that the veteran did not engage in actual combat against the enemy (a question that *Kohn* was not concerned with) and concluded that he had not rendered operational service.

In *Kohn's* case, it was held that the veteran ***had not*** rendered operational service as he was merely a passenger on a voyage from Townsville to Cairns that went outside Australia. In *Proctor's* case, it was held that the veteran ***had*** rendered operational service as he was not simply a passenger but had certain duties to perform and the Court considered it important that there was a risk of Japanese submarine attack during the voyage.

In light of the fact that the Tribunal had accepted Associate Professor McCarthy's evidence, the Court said,

> [38] ... it would have been mere speculation to have found that the veteran was actively engaged in the defence of the ship, or that the ship was subject to any threat from enemy aircraft or submarines. It was certainly open to the Tribunal to find that the voyage was a mere transit between two postings within Australia, and that the essential character of the veteran's service was that it did not involve service outside Australia. There is no suggestion that the Tribunal misunderstood the task that it had to perform. There is therefore no question of law involved. The conclusion that the veteran did not render operational service was one for the Tribunal.

The medical issues

The Tribunal found that Mr Roscoe had died from leiomyosarcoma (a cancer of smooth muscle and connective tissue) that had metastasised to the liver and lung. One medical witness gave evidence that it was possible that one of the lung lesions might have been a primary lesion and thus it would be possible to have linked that lesion with the veteran's service-related smoking. No medical experts were able to identify the primary

site, but it was said that the primary site was irrelevant as the soft tissue sarcoma Statement of Principles would have applied wherever the site was, and that the lung and liver cancer Statements of Principles were applicable only to primary tumours.

The Court held that the Tribunal had properly decided to its reasonable satisfaction that the veteran died from leiomyosarcoma and that, as the Tribunal had not found that the primary site was in the bronchus or lung, it could not consider the Statement of Principles for malignant neoplasm of the lung. Instead the Tribunal had to (and did) consider the Statement of Principles for soft tissue sarcoma.

However, it was at this point that the Tribunal made a legal error. Instead of applying section 120B (which relates to non-operational eligible war service), the Tribunal purported to apply section 120A, which relates to operational service, notwithstanding that it had found the veteran had not rendered operational service. But as the standard of proof applicable to section 120A is more generous to the claimant than that applying under section 120B, and the Tribunal found that Mrs Roscoe could not succeed under the more generous provisions, the effect of the error was of no consequence, and did not affect the ultimate result in the case. The Court said:

> [44] ... If there did not exist a reasonable hypothesis of such a connection, it is impossible to see how the Tribunal could have found more probable than not that the connection existed.

Formal decision

The Court dismissed the appeal and awarded costs against Mrs Roscoe.

Van Ewijk v Repatriation Commission

Stone J

[2004] FCA 17
30 January 2004

Assessment – special rate – second limb of s 24(1)(c) – whether ceased to engage in work for some other reason (s 24(2)(a))

Mr Van Ewijk had a number of war-caused disabilities, including post traumatic stress disorder (PTSD), gastro-oesophageal reflux disease, alcohol abuse and dependence, diabetes mellitus, and ischaemic heart disease. He was a National Serviceman who, after his discharge upon returning from Vietnam, worked with BHP as a marine engineer until he was dismissed because of excessive drinking in 1977.

In 1978-79 he worked in Ireland as a marine engineer. In 1980-81 he was a partner in a fishing business, mainly doing marine engineering work. He then worked as a shipway attendant in New Guinea for six months. From 1983 to 1987 he again worked as a marine engineer in Brisbane until he was made redundant. He then worked as a marine engineer with Pioneer Dredging from 1988 until 1991. In 1991, he injured his back at work and has not worked since. He received workers compensation payments from 1991 to 1993.

He made attempts to start his own business, but was unable to do so either because the ventures contemplated were not feasible or he was unable to raise the necessary capital.

At the Tribunal, it was conceded that he met s 24(1)(a) and (b). That is, incapacity from his war-caused disabilities on their own rendered him incapable of working for more than 8 hours a week in any kind of work for which he had skills,

experience, or expertise. The important issue was whether he could satisfy s 24(1)(c). Mr Van Ewijk contended that, though he had lost his job at Pioneer in 1991 because of his non-war-caused back injury, his present inability to undertake work was caused by his PTSD. The Commission had contended that his back condition, lack of skills, tightness of the labour market and lack of business capital were relevant factors.

Medical evidence indicated that while Mr Van Ewijk could not go back to the marine engineering work he had been doing because of his back injury, that injury would not prevent him doing lighter work for 4 hours a day and that it was his war-caused disabilities that now totally incapacitated him now for work.

The Tribunal found that Mr Van Ewijk had ceased work at BHP and in the fishing business because of his war-caused alcoholism, but that he had ceased his later employment for reasons unrelated to his war-caused disabilities, namely, his dislike of the expatriate community in New Guinea, his failure to obtain capital to begin another business, and his back injury. Thus the Tribunal found that the veteran had 'ceased to engage in remunerative work for reasons other than his ... incapacity from war-caused ... disease'.

This test, which appears in s 24(2)(a), when it applies, deems the second limb of s 24(1)(c), the 'loss of salary, wages, or earnings' test, not to be met. (The first limb of s24(1)(c) is whether the veteran is prevented from continuing to undertake the kind of work he had been undertaking by reason of incapacity from war-caused injury or disease alone.)

On appeal, counsel for Mr Van Ewijk did not argue that the Tribunal had wrongly applied the law, but that the Tribunal reached a conclusion that was not open and was against the weight of the evidence.

The Court noted that

> [15] Both limbs of s 24(1)(c) must be satisfied if the section is to apply to a veteran. In this case the Tribunal decided that the second limb of s 24(1)(c), read in conjunction with s 24(2)(a) was not satisfied. The Tribunal decided that the applicant could not be taken as suffering a loss of salary or wages or earnings on his own account as it was not satisfied that he had ceased to engage in remunerative work because of his war-caused disabilities. ...
>
> [24] Counsel for the respondent accepted that ceasing to engage in remunerative work is wider than ceasing to do a particular job but submitted that the reason why a veteran left his or her last job is nonetheless relevant. I accept that this is so. In this case however, the Tribunal also based its decision on the applicant's own evidence as to why he was not able to set up his own business, namely his inability to secure capital for the purpose. The Tribunal also pointed to the applicant's evidence as to why he left his job in New Guinea, namely that he did not like the way of life.
>
> [25] ... the claim that there was no evidence to support the Tribunal's conclusion or that no reasonable Tribunal could have come to that conclusion cannot be sustained. The Tribunal undertook the task required of it; it considered the evidence before it and, on the basis of that evidence, formed its own view of the merits of the ... claim. It is not to the point that another person might have decided the matter differently. ...

Formal decision

The Court dismissed the appeal and awarded costs against Mr Van Ewijk.

Pritchard v Repatriation Commission

Kiefel J

[2004] FCA 44
3 February 2004

Assessment – special rate – onus of proof – likelihood of potential employers to make workplace modifications that would enable a person with the veteran's non-war-caused disability to undertake the kind of work the veteran had been undertaking

The Tribunal had found that Mr Pritchard satisfied all the relevant requirements of s 24 except s 24(1)(c), namely that the veteran was prevented from continuing to undertake remunerative work by reason only of his war-caused injuries or diseases.

Mr Pritchard had a number of service-related disabilities, which included muscle contraction headaches. He gave evidence that he ceased work because of these headaches. He had worked as a janitor and groundsmen at a school where he had a very understanding employer who was aware of his headaches. A few days after ceasing employment with the school he suffered a toe injury which subsequently developed complications and led to an amputation below his right knee. The complications were a result of his diabetes a non service-related disability.

An occupation therapist gave evidence that due to this injury the applicant would be slow to carry out the duties he had formerly undertaken and would tire very easily. To gain employment in the future he would need a considerate employer who would be willing to make modifications to equipment.

On appeal, it was claimed that the Tribunal had made the following errors of law:

1. The Tribunal placed an onus of proof upon the applicant to show that an employer would bear the cost of modifications and would tolerate his working at a slower pace.
2. The Tribunal failed to take into account, as a relevant consideration, that there was evidence of a tolerant employer who would assist the applicant in his employment.
3. There was no evidence supporting a conclusion that there were no employers who would be tolerant and make the necessary modifications.

The court rejected these arguments stating:

> [16] The second and third grounds clearly relate to the Tribunal's view of the evidence. The applicant's contention is that there was evidence of a benevolent employer in the school principal. The contention is in any event incorrect. All that the evidence showed was that the principal was prepared to accept some limitations on the applicant, a long-term employee, carrying out his duties caused by the symptoms caused by the stress disorder, particularly the headaches. It does not furnish evidence that there are likely to be employers who would make the necessary modifications, arrange for further assistance to be provided to the applicant in the carrying out of some tasks and who would tolerate the limitations on his ability to carry out work as a groundsman janitor caused by his amputation.
>
> [17] The Tribunal did not impermissibly place an onus of proof on the appellant to disprove a fact. This ground is in reality a challenge to the Tribunal's finding of fact on the issue whether the applicant's non-service-

related disabilities should be seen as affecting his ability to undertake work in his former capacity. The Tribunal was satisfied that these disabilities restricted his ability to undertake that work. It was not satisfied that it was likely that an employer would make the modifications and the concessions necessary to negative this effect. The Tribunal was clearly entitled to come to that conclusion on the evidence. The applicant's argument must be that the Tribunal should not have acted upon the basis that there was no evidence. The starting point for that consideration is not however that some such evidence existed. Faced with the 66 year old veteran with multiple health problems and a disability requiring much more of an employer than might reasonably be expected, the Tribunal was right to require some persuasion as to the scenario the applicant was advancing.

[18] The Tribunal was required by s 24(1)(c) to take into account any factor that plays a part or contributes to a veteran being prevented from continuing to engage in remunerative work: *Repatriation Commission v Hendy* [2002] FCAFC 424 at [37]. At the point where the applicant ceased work it might have been said that his service-related disorder prevented him from continuing, although there was also evidence noted by the Tribunal that his diabetes was even then playing a part in the difficulties he was labouring under. In any event, as the Full Court observed in *Hendy*, when a period of time has elapsed after a veteran ceases remunerative work and before the commencement of the assessment period, factors which have then arisen must be taken into account. That is the approach which was taken by the Tribunal. Once it made the findings that the applicant's amputation would prevent him from undertaking some tasks and restrict his ability to carry out his former work, factors sufficient to displace his case for a pension at a special rate were present.

Formal decision

The court dismissed the appeal and awarded costs against Mr Pritchard.

Repatriation Commission v Robertson

Beaumont J

[2004] FCA 173
5 March 2004

Qualifying service – Gold Card eligibility – member of landing party accepting local Japanese surrenders – whether 'incurred danger from hostile forces of the enemy' at a time veteran was engaged in 'operations against the enemy'

The Commission appealed to the Federal Court against a decision of the AAT that Mr Robertson rendered qualifying service. Mr Robertson had relied upon his seagoing service towards the end of the Second World War outside the coastal waters of Australia, in the Pacific.

The AAT had noted there were three components of s 7A(1)(a)(i): service during the 'period of hostilities'(this was not disputed), that such service took place in operations 'against the enemy' and that the person 'incurred danger from hostile forces' of the enemy.

In accepting that Mr Robertson service was in Military operations 'against the enemy' the AAT noted that he had been in a climate during Operation Talaud where there was no evidence as to if the relevant Japanese forces had accepted direction to surrender and that one organised Japanese Force in British

Borneo had showed no signs that they would surrender.

In turning to the question of whether Mr Robertson had 'incurred danger from hostile forces' the AAT said that 'he was clearly at risk or harm or injury', a risk that the Tribunal considered to be more than 'de minimis'. The fact that no incidents actually took place has no bearing on whether he met the object test of 'incurred danger' and it was concluded that he had satisfied the criteria.

The Commission submitted that the AAT was required to determine whether Mr Robertson was involved in operations 'in hostility or active opposition to' the enemy. The Commission said there was no evidence to support that any activities during Operation Talaud did so because the enemy had already unconditionally surrendered and there was no evidence as to if the Japanese forces where in hostile mode or merely waiting to be formally instructed to surrender. It contended that the AAT had erred in law in accepting that because of the 'climate' (lack of knowledge) in which Operation Talaud took place, the operation met the criteria of being a 'military operation against the enemy'.

The Commission also argued that the Tribunal had focused on the word 'danger' and not whether Mr Robertson had actually 'incurred danger from hostile forces of the enemy'. It was also said just because he had suffered a feeling of 'apprehension' that alone, was not capable of supporting that there was any danger from hostile forces of the enemy. It followed from its previous argument that there was also not any evidence to support the 'incurred danger test'.

Whether engaged in operations against the enemy

The court referred to *Willcocks v Repatriation Commission* (1992) 39 FCR 49, in which it was said:

> 'any Australian soldiers deployed in the region to quell hostile Japanese forces who refused to accept, or were unaware of, the surrender could properly be described as rendering service in military operations against the enemy'

It also referred to the more recent matter of *Mitchell* (2002) 18 *VeRBosity* 81 in which the Court said:

> The section does not require that the veteran be involved in actual personal combat against the enemy. Even the phrase 'actual combat against the enemy' does not require direct and personal engagement with the enemy and it is sufficient that the conduct in question is an integral participation in an activity intended for an encounter with the enemy, whether offensive or defensive in character.

Beaumont J concluded that for the Commission to establish there was no evidence to justify the finding the Tribunal made in answering the question, it would need to demonstrate at least the Tribunal's findings and inferences could not reasonably be made out on the evidence, or reasonably drawn from the primary facts. It was said that the Tribunal had followed the correct approach and that in his opinion, the findings were justified by virtue of at least the primary facts presented to the Tribunal and Mr Robertson had rendered 'operations against the enemy'.

Whether incurred danger from hostile forces of the enemy

The Court referred to the Full Federal Court decision of *Thompson* (1988) 82 ALR 352 in which the Full Court said:

> The words 'incurred danger' therefore provide an objective, not a subjective, test. A serviceman incurs danger when he encounters danger, is in danger or is endangered. He incurs danger from hostile forces when he is at risk or in peril of harm from hostile forces. A

serviceman does not incur danger by merely perceiving or fearing that he may be in danger. The words 'incurred danger' do not encompass a situation where there is mere liability to danger, that is to say, that there is a mere risk of danger. Danger is not incurred unless the serviceman is exposed, at risk of or in peril of harm or injury.

The danger incurred must of course be more than a merely fanciful danger or a danger so minimal that the rule of *de minimis* applies. But to say that is not to give a flavour to the work. Rather it is to use it in its ordinary sense.

The weight, if any, which a Tribunal gives to a particular piece of evidence is a matter for the Tribunal and forms a part of its fact-finding function. Provided that a relevant factor is taken into account, no error is shown should the Tribunal have given less weight to the matter than would the Court.

The Tribunal found, on the evidence that it was satisfied that there were 'enemy forces free to move in the area' and that the respondent was 'exposed to or at risk or in peril of harm or injury from those armed forces'. It was found that the Tribunal had again taken the correct approach and considered the relevant test, and also considered and applied the test in *Thompson* and therefore the Commission's argument could not be accepted.

Delahunty v Repatriation Commission

Tamberlin J

[2004] FCA 309
26 March 2004

Post traumatic stress disorder – veteran believed that sinking of sampan killed a woman and children – 'experiencing a severe stressor' – mixed subjective and objective test

Mr Delahunty claimed he suffered from post traumatic stress disorder (PTSD) caused by an incident off the north coast of Korea in 1953 when the vessel in which he served, sunk a sampan by gunfire. The Tribunal accepted evidence that because such craft were sometimes used as mine layers by the enemy along the coast of Korea, they were destroyed whenever they were seen, and that a large motorised sampan was destroyed by HMAS *Tobruk* on 16 July 1953.

While Mr Delahunty had only seen an outline of the sampan, which was some 7 kilometres from HMAS *Tobruk* when it was shelled, he believed that there might have been a woman and children on board because he had seen families living in sampans in Asian ports.

The 'experiencing a severe stressor' factor is defined in the SoP for PTSD to mean:

> ...the person experienced, witnessed, or was confronted with an event or events that involved actual or threat of death or serious injury, or a threat to the person's or another person's, physical integrity.

The Tribunal said that Mr Delahunty's case was that his belief that a woman and children were killed when the sampan was sunk by gunfire had not been disproved and that he had been confronted with death and observed an atrocity. The Commission's case was that this argument turned on a fantasy given that no persons were observed to be on the sampan and, in particular, there was no evidence that a woman or children were on board the vessel at the time it was blown up.

The Tribunal took into account that the sampan was located in an area where vessels had been laying mines, and found that Mr Delahunty had not experienced a severe stressor because it considered his claim was based on

imagination in circumstances where he had not seen anyone in the sampan. The Tribunal also noted that there were many inconsistencies in his evidence (such as, in his initial claim he had said there were three vessels). The Tribunal therefore concluded that the hypothesis that had been raised was not reasonable.

Tamberlin J considered what the Full Court had said in *Woodward's* case (2003) 19 *VeRBosity* 83, and said:

> [24] In *Woodward*, the Full Court pointed out at [77] that the 'experience' had to be based on an 'event' and that a figment of the imagination such as might arise through 'paranoid ideation' would not be sufficient to meet this requirement. The *Woodward* Full Court took the view that there was no suggestion of any such 'delusion' on the part of Mr Woodward. The Court noted that it was submitted for Mr Woodward that it was his 'experience' which had to be the focus of the AAT deliberation, a point which the AAT appeared not to have appreciated. The Full Court also pointed out at [123] that, as a matter of ordinary usage, to be 'confronted' with something meant to be brought face to face with it either physically, or, perhaps more commonly, in the mind. If the thing being confronted is an event, ordinary usage does not require that the person be present at the event in order that he or she could be said to 'confront' the event. At [136] the Court said:
>
> > 'When the question ultimately in issue involves the effect of an objectively stressful event upon a person's mental health, it is hard to see why the unknown reality of the threat, as contrasted with the appearance of the reality, should be determinative. Examples that bring any such distinction into question come readily to mind: the passenger in an aircraft who overhears another saying that he has an explosive device, or the shopkeeper threatened with a shot gun (in fact unloaded) are just two such examples.'

Tamberlin J noted that the Tribunal had attached importance to the consideration that there was no evidence that there had been a woman and children on the sampan because the veteran had not seen anyone and neither had the ship's gunnery officer, who had the advantage of the use of binoculars. He said:

> [26] In my view, the AAT reasons indicate that there was an incorrect understanding of the relevant principles. On the criteria adopted by the *Woodward* Full Court, it is necessary to ask whether there was an event. In my opinion, there was an objective event, namely the violent destruction of a sampan or junk. This is an objective fact. The next step is to have regard to the point of view of a reasonable person ***in the position of*** and ***with the knowledge of*** the person experiencing those events. This is a mixed objective and subjective test. The question then arises as to what the veteran's position and knowledge was. The answer is that he associated these vessels with families of women and children because of his observations on relation to similar vessels in Asian ports. At that time he had the position of a relatively junior member of the ship's contingent. He had a limited education. He perceived a vessel of a type that he associated with women and children, from a distance in circumstances where similar vessels were suspected of laying mines. He said that if he had believed, contrary to his evidence, that there were men and not women on board, then he would not have regarded the sinking of the vessel as an atrocity, and nor would he have been shocked.

> [27] The term 'stressor' denotes something which leads to stress. It is inherent in the notion of 'stress' that there is a perception on behalf of an individual. The existence or extent of the stress will depend on each particular personality. This concept injects a subjective element into the determination. What will constitute a stressor in a particular set of circumstances can encompass a wide range of reactions among a variety of reasonable observers. As the Full Court in *Woodward* observes, in addition to the requirement that the observation is reasonable, the elements of knowledge of the particular person in the particular circumstances and with the experiences of that person, must be taken into account. It is clearly not a purely objective construct such as is applied in negligence cases. It is not a case of deciding how 'the man on the Clapham omnibus' might react. There is more. The definition incorporates the reactions of persons with particular susceptibilities arising from a broad spectrum of background experiences and cognitive reactions. While one can accept that the perception of the stressor cannot encompass a totally irrational perception or baseless apprehension, it must be borne in mind that the question is whether the stressor is severe and this recognises that there are different degrees of stress which may arise from the incident and give rise to fine questions of fact and degree in any particular circumstances. This indicates that the definition must be approached in a manner which is not unduly restrictive. [His Honour's emphasis]

The Court held that the Tribunal had not correctly applied the 'subjective and individual element' of the test, and thus failed to apply the correct understanding of 'experiencing a severe stressor'. In so doing, the Tribunal made an error of law.

Formal decision

The Court allowed the appeal with costs, and remitted the matter to be reheard by the Tribunal.

Leane v Repatriation Commission

Emmett, Conti, and Selway JJ

[2004] FCAFC 83
31 March 2004

Special rate of pension – whether genuinely seeking to engage in remunerative work – when the test applies – whether the evidence was capable of satisfying the test

This was an appeal from a judgment of Finn J (see (2003) 19 *VeRBosity* 89), which dismissed an appeal from the Tribunal that decided Mr Leane was not entitled to the special rate of pension.

Mr Leane served in the RAAF from 1954 until 1988. He had brief periods of employment with the ACT Education Department, and then from 1989 until 1996 he worked for ACT Electricity and Water. He then worked for a short period on a specific task with the Australian Electoral Commission in 1997, amounting to 20 hours over 3 months, and again in 2001, amounting to 8 days over 2 weeks.

Mr Leane had PTSD accepted as a war-caused disease, and because of that condition, he was incapacitated from undertaking remunerative work for more than 8 hours a week for the purposes of s24(1)(b) of the VEA. However, he also suffers from osteoarthrosis of both hips, which is not war-caused, and the Tribunal found that this also contributed to preventing him from undertaking the kind of work he had been undertaking. Therefore, the 'alone' test in s24(1)(c) could not be met.

The Tribunal then considered s24(2)(b), and found that as there were 'no objective signs of active pursuit of remunerative work', he could not rely on s 24(2)(b) to ameliorating the effect of the 'alone' test.

The Full Court noted

> [28] The primary judge interpreted the word 'seeking' to mean 'attempting to' or 'trying to'. This may be accepted. Such a meaning involves something more than a mere wish or hope. It requires that a claimant 'do' something. On the other hand the word 'genuinely' is used in the sense of 'sincerely' or 'honestly'. It involves an assessment of the subjective intention or purpose of a claimant. What is required is that the claimant honestly be trying to engage in remunerative work.
>
> [29] It may be accepted that, in the ordinary course, a person in the position of the veteran would have difficulty in establishing that he or she was honestly trying to engage in remunerative work unless there were some 'objective signs of active pursuit of remunerative work'. However, it would be wrong to turn the practical issue of how a person might establish his or her case into some legal pre-condition. Assume, for example, that a claimant satisfied the Tribunal that:
>
> - he or she honestly wished to engage in remunerative work;
> - he or she had made a reasonable assessment of his or her disabilities;
> - he or she had reasonably concluded that he or she could only be employed in a particular type of work;
> - he or she was checking employment advertisements on the look out for such employment; but
> - he or she had not yet identified any such employment prospects.
>
> Counsel for the Commission properly conceded that, on these facts, the Tribunal might be satisfied that the claimant was 'genuinely seeking to engage in remunerative work'. This example highlights that the adjectives 'objective' and 'actual' in the redefinition adopted by the Tribunal are at least unhelpful and may be misleading. The proper course was for the Tribunal to ask itself whether, on the evidence before it, it was satisfied that the veteran was 'genuinely seeking to engage in remunerative work' or not, rather then to ask itself the different question that it did ask.
>
> [30] We note, for completeness, that it was unnecessary for the veteran to satisfy the Tribunal that he had been genuinely seeking remunerative employment at all times during the assessment period. Under s 19(5C) of the ... Act the Tribunal was required to assess 'the rate or rates' at which the pension would have been payable 'from time to time' during the assessment period and, 'subject to subsection (6) the rate at which the pension is payable'. ...
>
> [31] The effect of these provisions in this case is that the Tribunal was required to determine whether a special pension was payable at any time during the assessment period, being the period starting, in this case, November, 1996, and ending when the claim for application is ultimately determined: s 19(9) of the ... Act. If a special pension was payable at any time during this period then the Tribunal was required to determine that the special pension was payable from that time, notwithstanding that at some subsequent time the veteran might not have been able to establish that he would be entitled to a special pension.

> [32] As the Commission properly conceded, if the veteran had satisfied the Tribunal that he had, at any time during the assessment period, complied with the requirements of s 24(2)(b) (including the requirement that he had genuinely been seeking to engage in remunerative employment) then, at least from that time, the veteran would have been entitled to a pension at the special rate, notwithstanding that at some later time he may not have established that he was genuinely seeking to engage in remunerative employment.

It was argued on behalf of Mr Leane that the fact that he had actually had employment in 1997 and 2001 was an indication that he had been genuinely seeking to engage in remunerative work during the assessment period. However, the Full Court said that:

> [35] ... the mere fact that a person accepts remunerative work does not mean that he or she is seeking it, much less 'genuinely seeking' it. For example, the relevant employer could have sought out the prospective employee and requested that person's assistance which the employee had reluctantly given even though the employee had not been 'seeking' employment. This does not mean that evidence of employment could never give rise to an inference that the person had been seeking employment. If evidence was given, for example, that a person had been employed by a number of different employers over a relatively short period, there may be an almost overwhelming inference that that result could only have occurred by reason of the person 'genuinely seeking' employment. Of course, that inference could be displaced by other evidence. However, in this case, it would seem to us that the evidence that the veteran had been employed on two different occasions by the same employer was not capable, by itself, of satisfying the Tribunal that the veteran was 'genuinely seeking' remunerative work, even in 1997 or 2001.

Formal decision

The Court dismissed the appeal and ordered Mr Leane to pay the Commission's costs.

Ed: Previously, a number of AAT cases had accepted that provided a person had been genuinely seeking work in the past, then if at some time in the assessment period their incapacity from war-caused injury or disease not only prevented them *continuing to seek* work but was 'the substantial cause' preventing them from *obtaining* work, the provision would be met. *Leane* appears to say this is wrong and that a veteran must also, in the assessment period, have been genuinely seeking work. It is difficult to see how this fits with the apparently contradictory requirement of s 24(2)(b) that, 'he or she would, *but for* that incapacity, be continuing to seek to engage in remunerative work', which seems to require that the veteran be *no longer* seeking work because of incapacity from war-caused injury or disease.

Statements of Principles issued by the Repatriation Medical Authority

January – March 2004

Number of Instrument	Description of Instrument
1 of 2004	Revocation of Statement of Principles (Instrument No. 58 of 2002) and determination of Statement of Principles concerning **malignant neoplasm of the colorectum** and death from malignant neoplasm of the colorectum.
2 of 2004	Revocation of Statement of Principles (Instrument No. 59 of 2002) and determination of Statement of Principles concerning **malignant neoplasm of the colorectum** and death from malignant neoplasm of the colorectum.
3 of 2004	Amendment of Statement of Principles (Instrument No. 35 of 2003) and determination of Statement of Principles concerning **hypertension** and death from hypertension.
4 of 2004	Amendment of Statement of Principles (Instrument No. 36 of 2003) and determination of Statement of Principles concerning **hypertension** and death from hypertension.
5 of 2004	Determination of Statement of Principles concerning **osteomyelitis** and death from osteomyelitis.
6 of 2004	Determination of Statement of Principles concerning **osteomyelitis** and death from osteomyelitis.
7 of 2004	Determination of Statement of Principles concerning **endometriosis** and death from endometriosis.
8 of 2004	Determination of Statement of Principles concerning **endometriosis** and death from endometriosis.
9 of 2004	Amendment of Statement of Principles (Instrument No. 53 of 2003) and determination of Statement of Principles concerning **ischaemic heart disease** and death from ischaemic heart disease.
10 of 2004	Amendment of Statement of Principles (Instrument No. 54 of 2003) and determination of Statement of Principles concerning **ischaemic heart disease** and death from ischaemic heart disease.

Copies of these instruments can be obtained from:

- **Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001**
- **RMA Website: *http://www.rma.gov.au/***

Repatriation Medical Authority

CONDITIONS UNDER INVESTIGATION AS AT 31 MARCH 2004

Description of disease or injury	[*SoPs under consideration*]	Gazetted
Achilles tendonitis or bursitis	[*Instrument Nos. 53/96 & 54/96*]	19-11-03
Acute myeloid leukaemia	[*Instrument Nos 169/96 & 170/96*]	16-07-03
Acute sprains and acute strains	[*Instrument Nos. 50/94 & 51/94*]	19-11-03
Asbestosis	[*Instrument Nos 138/96 & 139/96*]	16-04-03
Bipolar disorder	[*Instrument Nos 128/96 & 129/96*]	24-03-04
Brodie's abscess		5-03-03
Caisson disease	[*Instrument Nos 147/95 & 148/95*]	31-03-04
Chronic bronchitis & emphysema	[*Instrument Nos 73/97 & 74/97*]	16-04-03
Chronic lymphoid leukaemia	[*Instrument Nos 67/01 & 68/01*]	16-07-03 17-12-03
Dermatomyositis		16-07-03
Diabetes mellitus	[*Instrument Nos 82/99 & 83/99 as amended by Nos 9/01, 10/01, 91/01 & 92/01*]	28-11-01
Endometriosis		16-10-02
Epilepsy	[*Instrument Nos 79/96 & 80/96*]	5-03-03
Fracture	[*Instrument Nos. 11/94 & 12/94 as amended by Nos. 219/95 & 220/95*]	19-11-03
Gastro-oesophageal reflux disease	[*Instrument Nos 52/02 & 53/02*]	18-12-02
Haemorrhoids	[*Instrument Nos 13/00 & 14/00*]	13-11-02
Hiatus hernia	[*Instrument Nos 42/99 & 43/99*]	14-08-02
Hodgkin's disease	[*Instrument Nos 25/00 & 26/00*]	20-08-03
Inguinal hernia	[*Instrument Nos 72/98 & 73/98*]	16-04-03
Jakob-Creutzfeldt disease	[*Instrument Nos 63/95 & 64/95 as amended by Nos 190/95, 49/97 & 50/97*]	18-12-02
Lateral epicondylitis		24-03-04
Leptospirosis		5-03-03
Malignant neoplasm of the breast	[*Instrument Nos 53/97 & 54/97*]	16-07-03
Malignant neoplasm of the larynx	[*Instrument Nos 27/95 & 28/95 as amended by Nos 155/95 & 156/95, 151/96 & 152/96, 193/96 & 194/96*]	16-07-03
Malignant neoplasm of the lung	[*Instrument Nos 35/01 & 36/01*]	20-08-03

Description of disease or injury	[*SoPs under consideration*]	Gazetted
Malignant neoplasm of the oral cavity or hypopharynx	[*Instrument Nos 113/96 & 114/96*]	6-03-02
Malignant neoplasm of the pancreas	[*Instrument Nos 55/97 & 56/97 as amended by 20/02 & 21/02*]	20-08-03
Malignant neoplasm of the prostate	[*Instrument Nos 84/99 & 85/99 as amended by Nos 69/02 & 70/02*]	16-07-03
Malignant neoplasm of the salivary gland	[*Instrument Nos 25/97 & 26/97*]	6-03-02
Malignant neoplasm of the small intestine	[*Instrument Nos 153/96 & 154/96 as amended by Nos 7/98 & 8/98*]	16-04-03
Malignant neoplasm of the testis and paratesticular tissues	[*Instrument Nos 3/97 & 4/97*]	14-08-02
Malignant neoplasm of the thyroid gland	[*Instrument Nos 33/98 & 34/98*]	16-07-03
Metastatic carcinoma of unknown primary		19-11-03
Myelodysplastic disorder	[*Instrument Nos 15/00 & 16/00*]	20-08-03
Narcolepsy		28-01-04
Neoplasm of the pituitary gland	[*Instrument Nos 37/97 & 38/97*]	13-11-02
Non melanotic malignant neoplasm of the skin	[*Instrument Nos 43/01 & 44/01 as amended by Nos 51/01 & 52/01*]	8-05-02
Osteoarthrosis	[*Instrument Nos.81/01 & 82/01*]	15-10-03
Osteomyelitis		5-03-03
Paget's disease	[*Instrument Nos.15/96 & 16/96*]	28-01-04
Peripheral neuropathy	[*Instrument Nos 79/01 & 80/01 as amended by 13/03 & 14/03*]	20-08-03
Plantar fasciitis	[*Instrument Nos. 3/00 & 4/00 as amended by Nos. 47/03 & 48/03*]	19-11-03
Pulmonary barotrauma		24-03-04
Rheumatoid arthritis	[*Instrument Nos 126/96 & 127/96*]	13-11-02
Rotator cuff syndrome	[*Instrument Nos. 83/97 & 84/97*]	19-11-03
Seborrhoeic dermatitis	[*Instrument Nos 50/99 & 51/99*]	16-07-03
Seizures	[*Instrument Nos 81/96 & 82/96*]	5-03-03
Sleep apnoea	[*Instrument Nos 39/97 & 40/97*]	11-06-03
Soft tissue sarcoma	[*Instrument Nos 23/01 & 24/01*]	20-08-03
Spondylolisthesis & spondylolysis	[*Instrument Nos 15/97 & 16/97*]	5-03-03
Tinea	[*Instrument Nos 27/94 & 28/94 as amended by Nos 184/95, 185/95, 7/02 & 8/02*]	29-05-02

AAT and Court decisions – January to March 2004

(Note: also includes some cases delivered in 2003)

AATA = Administrative Appeals Tribunal
FCA = Federal Court
FCAFC = Full Court of the Federal Court
FMCA = Federal Magistrates Court

Allowances & benefits

attendant allowance
- whether injury or disease similar in effect or severity to injury or disease of cerebro-spinal system
Thomas, I M
[2004] AATA 5 8 Jan 2004

Application for review

dismissal of VRB application
- whether exercise of dismissal power valid
Johnson, K D
[2004] AATA 242 10 Mar 2004

Carcinoma

rectum
- smoking
Blanch (Navy)
[2004] AATA 243 10 Mar 2004

Circulatory disorder

atrial fibrillation
- salt ingestion
Lockhart, K S (Army)
[2004] AATA 55 23 Jan 2004

atrioventricular block
- ischaemic heart disease
  - smoking
Pursell, M R (Army)
[2004] AATA 158 17 Feb 2004

cerebrovascular accident
- alcohol
Clarke, L M (Army)
[2004] AATA 54 23 Jan 2004
- panic disorder
Gavin, J M (Army)
[2004] AATA 286 18 Mar 2004

hypertension
- alcohol
Snadden, C W R (Navy)
[2004] AATA 111 6 Feb 2004

ischaemic heart disease
- cessation of smoking
Blunden, R C (Army)
[2003] AATA 1340 23 Dec 2003
- hypertension
Lockhart, K S (Army)
[2004] AATA 55 23 Jan 2004
- inability to undertake physical activity
Lockhart, K S (Army)
[2004] AATA 55 23 Jan 2004
- salt ingestion
Lockhart, K S (Army)
[2004] AATA 55 23 Jan 2004
- smoking
Pursell, M R (Army)
[2004] AATA 158 17 Feb 2004

Date of effect

war widow's pension
- further claim successful
  - unable to backdate to earlier date
Ryde, E P
[2004] AATA 274 16 Mar 2004

Death

accidental death
- fall
  - alcohol abuse or dependence
Bell, C (RAAF)
[2004] AATA 88 3 Feb 2004

alcohol abuse or dependence
- experiencing a severe stressor
  - inferred from known events and changed personality
Bell, C (RAAF)
[2004] AATA 88 3 Feb 2004

carcinoma of colon
- alcohol
Elson, J P (Navy)
[2004] AATA 18 14 Jan 2004

carcinoma of lung
- smoking
Bort, B M (Army)
[2004] AATA 292 19 Mar 2004

cerebrovascular accident
- hypertension
  - asthma
Kohler, A (RAAF)
[2004] AATA 142 13 Feb 2004
  - Cushing's syndrome
Kohler, A (RAAF)
[2004] AATA 142 13 Feb 2004
  - obesity
Kohler, A (RAAF)
[2004] AATA 142 13 Feb 2004

- panic disorder
Kohler, A (RAAF)
[2004] AATA 142 13 Feb 2004

cirrhosis of liver
- alcohol
Davies, B A (Navy)
[2004] AATA 63 23 Jan 2004

death certificate
- accuracy doubted
Ritchie, P C (Navy)
[2004] AATA 298 19 Mar 2004

ischaemic heart disease
- hypertension
- anxiety disorder
Porter, I M (Army)
[2004] AATA 51 23 Jan 2004
- panic disorder
Johnson, R P (Army)
[2004] AATA 57 23 Jan 2004
- Japanese air raids on Townsville
Porter, I M (Army)
[2004] AATA 51 23 Jan 2004
- witnessed deaths and atrocities
Berghofer, M P (Army)
[2004] AATA 58 23 Jan 2004
- smoking
Murton, A (Navy)
[2004] AATA 133 12 Feb 2004
Ritchie, P C (Navy)
[2004] AATA 298 19 Mar 2004

renal failure
- hypertension
- inadequate evidence of diagnosis
Hayes, D M (Army)
[2004] AATA 193 27 Feb 2004

secondary cancer
- cannot apply SoP for site of secondary
- must apply SoP for the primary site
Roscoe (*Gray J*)
[2003] FCA 1568 23 Dec 2003

Eligible service

domicile
- whether intention to remain in Australia indefinitely
Vandegraaf, E L (Dutch Air Force)
[2004] AATA 271 16 Mar 2004

operational service
- actual combat against the enemy
- Thursday Island in 1945
Davies, B A (Navy)
[2004] AATA 63 23 Jan 2004
- whether continuous full-time service outside Australia
- 'essential character of service' test
Roscoe (*Gray J*)
[2003] FCA 1568 23 Dec 2003
- passenger on voyage off WA coast
Roscoe (*Gray J*)
[2003] FCA 1568 23 Dec 2003

qualifying service
- Aden
- Radfan in 1964-65
Graham, A (British Army)
[2004] AATA 180 24 Feb 2004
- danger from hostile forces of the enemy
Robertson (*Beaumont J*)
[2004] FCA 173 5 Mar 2004
- operations against the enemy
Robertson (*Beaumont J*)
[2004] FCA 173 5 Mar 2004
- period of hostilities
- associated with an operational area
Graham, A (British Army)
[2004] AATA 180 24 Feb 2004
- Ubon
- exercise Ramasoon
Hunt, G (RAAF)
[2004] AATA 105 6 Feb 2004
- whether warlike service
Hunt, G (RAAF)
[2004] AATA 105 6 Feb 2004

whether a member of a particular unit
- Base Squadron Ubon
Hunt, G (RAAF)
[2004] AATA 105 6 Feb 2004

whether veteran or member of the Forces
- member of Dutch Air Force operating with RAAF
Vandegraaf, E L (Dutch Air Force)
[2004] AATA 271 16 Mar 2004
- whether Commonwealth veteran
- not serving in operational area
Graham, A (British Army)
[2004] AATA 180 24 Feb 2004

Evidence and proof

credibility
- absence of medical records
Stevenson, R (Army)
[2004] AATA 93 4 Feb 2004
- altered smoking history
Blunden, R C (Army)
[2003] AATA 1340 23 Dec 2003

- representative accused of giving false history
Lockhart, K S (Army)
[2004] AATA 55 23 Jan 2004
- differing smoking histories
Murton, A (Navy)
[2004] AATA 133 12 Feb 2004
- inconsistent account of events
Stevenson, R (Army)
[2004] AATA 93 4 Feb 2004

Gastrointestinal disorder

gastro-oseophageal reflux disease
- non-steroidal anti-inflammatory drug
Stevenson, R (Army)
[2004] AATA 93 4 Feb 2004
- smoking
Cole, B W (RAAF)
[2004] AATA 3 6 Jan 2004

hiatus hernia
- diagnosis
Stevenson, R (Army)
[2004] AATA 93 4 Feb 2004

irritable bowel syndrome
- psychiatric disorder
McCutcheon (RAAF)
[2004] AATA 329 31 Mar 2004

peptic ulcer
- smoking
Cole, B W (RAAF)
[2004] AATA 3 6 Jan 2004

General rate, EDA & degree of incapacity

Guide to Assessment (1998 GARP)
- Chapter 4
Tran, M
[2004] AATA 75 29 Jan 2004

Haematological and immunological disorders

autoimmune disease
- chemicals
- herbicides
Findlay, I (RAAF)
[2004] AATA 137 12 Feb 2004
- pesticides
Findlay, I (RAAF)
[2004] AATA 137 12 Feb 2004

Historical material

Army
- 101 Field Battery
- Fire Support Base Discovery - October - November 1969
Campbell, N W (Army)
[2004] AATA 127 11 Feb 2004

Navy
- HMAS *Jeparit*
- September 1971
Crandon, A L (Navy)
[2004] AATA 87 3 Feb 2004

Ubon, Thailand
- Operation Ramasoon
Hunt, G (RAAF)
[2004] AATA 105 6 Feb 2004
- Snow Gum Force
Hunt, G (RAAF)
[2004] AATA 105 6 Feb 2004

Vietnam
- 1969
- Fire Support Base Discovery
Campbell, N W (Army)
[2004] AATA 127 11 Feb 2004
- 1971
- HMAS *Jeparit*
Crandon, A L (Navy)
[2004] AATA 87 3 Feb 2004
- chemical spraying
- herbicides and pesticides
Findlay, I (RAAF)
[2004] AATA 137 12 Feb 2004

Jurisdiction and powers

Administrative Appeals Tribunal
- eligibility for medal
- no jurisdiction
Savage, R
[2004] AATA 67 27 Jan 2004

Neurological disorder

headache
- see migraine
- trauma
Woods, C M (RAAF)
[2004] AATA 132 11 Feb 2004

migraine
- trauma
Woods, C M (RAAF)
[2004] AATA 132 11 Feb 2004

Osteoarthrosis

hip
- arthralgia
  Fitzgerald, T H (RAAF)
  [2004] AATA 333 31 Mar 2004
- cramped, cold conditions
  Fitzgerald, T H (RAAF)
  [2004] AATA 333 31 Mar 2004

Practice and procedure

Administrative Appeals Tribunal
- frivolous or vexatious application
  Johnson, K D
  [2004] AATA 242 10 Mar 2004

Psychiatric disorder

adjustment disorder
- experienced a severe stressor
  - not suffering from PTSD
    Patterson, D S (RAAF)
    [2003] AATA 1156 23 Dec 2003
- personal problems
  Patterson, D S (RAAF)
  [2003] AATA 1156 23 Dec 2003

alcohol abuse or dependence
- aggravation
  Turner, G (Navy)
  [2004] AATA 290 19 Mar 2004
- experiencing a severe stressor
  - civil unrest
    Lipscombe, A (Navy)
    [2004] AATA 79 30 Jan 2004
  - fish mistaken for a grenade
    Youngnickel, T J (Navy)
    [2004] AATA 19 14 Jan 2004
  - locked in boiler room
    Kilmister, D D (Navy)
    [2004] AATA 310 26 Mar 2004
  - log struck by HMAS *Snipe*
    Boyes, J J (Navy)
    [2004] AATA 17 13 Jan 2004
  - scare charges
    Symons, P (Navy)
    [2003] AATA 619 30 Jun 2003
    Todd, G A D (Navy)
    [2004] AATA 81 30 Jan 2004
    Crandon, A L (Navy)
    [2004] AATA 87 3 Feb 2004
  - witnessed begging women with dead babies
    Pippen, B (Army)
    [2004] AATA 65 23 Jan 2004
  - witnessed dead bodies
    Snadden, C W R (Navy)
    [2004] AATA 111 6 Feb 2004
    Kilmister, D D (Navy)
    [2004] AATA 310 26 Mar 2004
    Crandon, A L (Navy)
    [2004] AATA 87 3 Feb 2004
  - witnessed severed head
    Balabouhin, J (Navy)
    [2004] AATA 86 3 Feb 2004
- inability to obtain appropriate clinical management
  Turner, G (Navy)
  [2004] AATA 290 19 Mar 2004
- psychiatric disorder
  - anxiety disorder
    Dickson, K E (Army)
    [2003] AATA 1341 23 Dec 2003

anxiety disorder
- aggravation
  Dickson, K E (Army)
  [2003] AATA 1341 23 Dec 2003
- back pain
  Dickson, K E (Army)
  [2003] AATA 1341 23 Dec 2003
- clinical onset
  - not within 2 years of alleged stressor
    Bedson, F J (Navy)
    [2004] AATA 124 10 Feb 2004
- diagnosis
  - being anxious not itself indicative of anxiety disorder
    Davison, J (Navy)
    [2004] AATA 99 5 Feb 2004
- experiencing a severe stressor
  - helicopter evacuation of wounded soldier
    McCutcheon (RAAF)
    [2004] AATA 329 31 Mar 2004
  - helicopter flights in Vietnam
    Gregory, R L (Army)
    [2004] AATA 254 12 Mar 2004
  - log struck by HMAS *Snipe*
    Boyes, J J (Navy)
    [2004] AATA 17 13 Jan 2004
  - stranded on deck
    Hicks, F J (Navy)
    [2004] AATA 266 10 Mar 2004
  - witnessed dead bodies
    Snadden, C W R (Navy)
    [2004] AATA 111 6 Feb 2004
  - witnessed MP shooting US soldier
    Bedson, F J (Navy)
    [2004] AATA 124 10 Feb 2004

depressive disorder
- experiencing a severe stressor
  - harassment
    Gray, P (RAAF)
    [2004] AATA 61 23 Jan 2004
  - scare charges
    Symons, P (Navy)
    [2003] AATA 619 30 Jun 2003
  - witnessed dead bodies
    Snadden, C W R (Navy)
    [2004] AATA 111 6 Feb 2004
- psychiatric disorder
  - alcohol abuse or dependence
    Symons, P (Navy)
    [2003] AATA 619 30 Jun 2003
    Gray, P (RAAF)
    [2004] AATA 61 23 Jan 2004

diagnosis
- experienced a severe stressor
  - not suffering from PTSD
    Patterson, D S (RAAF)
    [2003] AATA 1156 23 Dec 2003
    McCutcheon (RAAF)
    [2004] AATA 329 31 Mar 2004
- not all diagnostic criteria present
    Davison, J (Navy)
    [2004] AATA 99 5 Feb 2004

panic disorder
- experiencing a severe stressor
  - bus/train accident
    Gavin, J M (Army)
    [2004] AATA 286 18 Mar 2004
  - death of friend
    Gavin, J M (Army)
    [2004] AATA 286 18 Mar 2004
  - expectation of Japanese landing
    Gavin, J M (Army)
    [2004] AATA 286 18 Mar 2004

post traumatic stress disorder
- aggravation
    Turner, G (Navy)
    [2004] AATA 290 19 Mar 2004
- experiencing a severe stressor
  - civil unrest
    Lipscombe, A (Navy)
    [2004] AATA 79 30 Jan 2004
  - locked in boiler room
    Kilmister, D D (Navy)
    [2004] AATA 310 26 Mar 2004
  - helicopter evacuation of wounded soldier
    McCutcheon (RAAF)
    [2004] AATA 329 31 Mar 2004
  - scare charges
    Todd, G A D (Navy)
    [2004] AATA 81 30 Jan 2004
    Crandon, A L (Navy)
    [2004] AATA 87 3 Feb 2004
  - stranded on deck
    Hicks, F J (Navy)
    [2004] AATA 266 10 Mar 2004
  - whether subjective or objective
    Delahunty (*Tamberlin J*)
    [2004] FCA 309 5 Mar 2004
  - witnessed begging women with dead babies
    Pippen, B (Army)
    [2004] AATA 65 23 Jan 2004
  - witnessed dead bodies
    Crandon, A L (Navy)
    [2004] AATA 87 3 Feb 2004
    Kilmister, D D (Navy)
    [2004] AATA 310 26 Mar 2004
  - witnessed severed head
    Balabouhin, J (Navy)
    [2004] AATA 86 3 Feb 2004
- inability to obtain appropriate clinical management
    Turner, G (Navy)
    [2004] AATA 290 19 Mar 2004

specific phobia
- situational
  - collision between oil tanker and SS *New Australia*
    Clements, E (Army)
    [2004] AATA 319 26 Mar 2004
  - engine failure on flight from Perth to Melbourne
    Clements, E (Army)
    [2004] AATA 319 26 Mar 2004
  - exposed to tear gas in training exercise
    Clements, E (Army)
    [2004] AATA 319 26 Mar 2004

Remunerative work & special rate

capacity to undertake remunerative work
- whether incapable of more than part-time work or 20 hour per week
  - subjective view of applicant irrelevant
    Briggs, K W
    [2004] AATA 129 11 Feb 2004

ceased to engage in remunerative work
- reason for ceasing
  - wider than reason for leaving particular job, but still relevant
    Van Ewijk (*Stone J*)
    [2004] FCA 17 30 Jan 2004

employment
- cleaning business
  Norris, J D
  [2003] AATA 1334 17 Nov 2003
  Williams, R D
  [2004] AATA 46 22 Jan 2004
- clerical work
  Johnston, W S
  [2004] AATA 115 6 Feb 2004
- driver
  Briggs, K W
  [2004] AATA 129 11 Feb 2004
- farmer
  Warburton, C
  [2004] AATA 106 6 Feb 2004
- labourer
  Case, N J
  [2004] AATA 45 22 Jan 2004
- security officer
  Davis, T M
  [2004] AATA 126 10 Feb 2004

loss of salary, wages, or earnings
  Waldock, W
  [2004] AATA 263 15 Mar 2004
- business deterioration
  Richardson, R I
  [2004] AATA 295 24 Mar 2004
- continuing to receive wages after ceasing work
  Norris, J D
  [2003] AATA 1334 17 Nov 2003

unable to obtain remunerative work
- the substantial cause test applied
  Case, N J
  [2004] AATA 45 22 Jan 2004
  Johnston, W S
  [2004] AATA 115 6 Feb 2004
  Davis, T M
  [2004] AATA 126 10 Feb 2004
  Giesen, L
  [2004] AATA 282 17 Mar 2004

whether continuing to undertake last paid work
- quality of activity relevant
  Warburton, C
  [2004] AATA 106 6 Feb 2004

whether genuinely seeking to engage in remunerative work
  Case, N J
  [2004] AATA 45 22 Jan 2004
  Youngberry, C J
  [2004] AATA 309 26 Mar 2004
- nature of evidence required
  Leane (*Emmett, Conti, Selway JJ*)
  [2004] FCAFC 83 31 Mar 2004
- state of the labour market
  Austin, C
  [2004] AATA 288 19 Mar 2004
- time at which test to be applied
  Leane (*Emmett, Conti, Selway JJ*)
  [2004] FCAFC 83 31 Mar 2004

whether prevented by war-caused disabilities alone
- age
  Short, J M
  [2003] AATA 1347 30 Dec 2003
  Austin, C
  [2004] AATA 288 19 Mar 2004
  Waldock, W
  [2004] AATA 263 15 Mar 2004
- effect of earnings on service pension
  Short, J M
  [2003] AATA 1347 30 Dec 2003
- effect of non-accepted disabilities
  Matthews, B
  [2004] AATA 314 25 Mar 2004
  Waldock, W
  [2004] AATA 263 15 Mar 2004
- employer required full-time employee
  Youngberry, C J
  [2004] AATA 309 26 Mar 2004
- incapable of carrying out duties when ceased last work
  Clarke, N
  [2004] AATA 353 12 Mar 2004
- labour market
  Austin, C
  [2004] AATA 288 19 Mar 2004
- poor reputation
  Waldock, W
  [2004] AATA 263 15 Mar 2004
- redundancy
  Balabouhin, J
  [2004] AATA 86 3 Feb 2004
- retrenchment
  Case, N J
  [2004] AATA 45 22 Jan 2004
- service pension availability
  Balabouhin, J
  [2004] AATA 86 3 Feb 2004

- workers' compensation
  Williams, R D
  [2004] AATA 46 22 Jan 2004
- workplace modifications required for non service-related disabilities
  Pritchard (*Kiefel J*)
  [2004] FCA 44 3 Feb 2004

Respiratory disorder

bronchitis
- diagnosis
  Bond, S (RAAF)
  [2004] AATA 108 6 Feb 2004
- exposure to gas irritant
  Bond, S (RAAF)
  [2004] AATA 108 6 Feb 2004

Service pension

assets test
- loans
  Miller, J & M
  [2004] AATA 84 3 Feb 2004
- family trust
  Miller, J & M
  [2004] AATA 84 3 Feb 2004

failure to comply with s 54 notice
- income and assets
  Miller, J & M
  [2004] AATA 84 3 Feb 2004

invalidity service pension
- capacity to undertake remunerative work
  - whether solely because of impairment
    Nguyen, T N
    [2003] AATA 1305 19 Dec 2003
- impairment
  - psychiatric disorders
    Nguyen, T N
    [2003] AATA 1305 19 Dec 2003
    Tran, M
    [2004] AATA 75 29 Jan 2004
- permanent impairment
  - meaning of 'permanent'
    Nguyen, T N
    [2003] AATA 1305 19 Dec 2003

Spinal disorder

cervical spondylosis
- trauma
  - hit neck
    Woods, C M (RAAF)
    [2004] AATA 132 11 Feb 2004

lumbar spondylosis
- cramped, cold conditions
  Fitzgerald, T H (RAAF)
  [2004] AATA 333 31 Mar 2004
- trauma
  - fall
    Elliot, L G (Army)
    [2004] AATA 37 20 Jan 2004
    Dawson, R (RAAF)
    [2004] AATA 107 6 Feb 2004
  - lifting
    Stevenson, R (Army)
    [2004] AATA 93 4 Feb 2004

Words and phrases

danger from hostile forces of the enemy
Robertson (*Beaumont J*)
[2004] FCA 173 5 Mar 2004

operations against the enemy
Robertson (*Beaumont J*)
[2004] FCA 173 5 Mar 2004

experiencing a severe stressor
- whether subjective or objective
  Delahunty (*Tamberlin J*)
  [2004] FCA 309 5 Mar 2004

inability to obtain appropriate clinical management
Turner, G (Navy)
[2004] AATA 290 19 Mar 2004

permanent impairment
Nguyen, T N
[2003] AATA 1305 19 Dec 2003