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Contents

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Editor's notes

This edition of *VeRBosity* includes an overview of the *Military Rehabilitation and Compensation Act 2004*. The legislation will provide the VRB with many new challenges as we come to grips with matters the VRB has not had to decide under the VEA, such as rehabilitation and treatment. While other matters will be familiar, it will be important to examine and apply the new legislation according to its particular terms rather than just adopt interpretations of similar provisions in the VEA or SRCA without proper analysis.

This is my last edition as Editor. The VRB has been fortunate to engage the services of James McKay to be the VRB's Director, Legal and Information Services and *VeRBosity* Editor. James has been the General Editor of the CCH *Australian Workers Compensation Guide* and has recently worked for Softlaw Corporation Ltd assisting in the development of the Defcare SRCA claims determining system. This experience combined with his other skills and life experiences (including being the son of a naval officer) will be invaluable in his work for the Board.

Bruce Topperwien
Editor

This edition of *VeRBosity* contains reports of the 6 Federal Court, 1 High Court, and 1 Federal Magistrates Court judgments in veterans' matters received in July to September 2004 as well as selected AAT decisions and a declaration of the SMRC handed down in the same period. There is an index of all AAT and Court cases received in this period and information on recent Statements of Principles determined by, and current investigations of, the Repatriation Medical Authority.

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.

Warlike and non-warlike service

Question: Do the port-to-port provisions apply to warlike and non-warlike service?

Answer: No. Warlike and non-warlike service is set out in s 5C(1) and s 6F of the VEA. The port-to-port provisions are found only in s 6C (which relates to service in the operational areas in Schedule 2) and s 6D (which relates to certain service in Singapore, Malaya, Japan, and North East Thailand). Under the port-to-port provisions a person generally has operational service from their last port of call in Australia to their first port of call on return to Australia after having served in the relevant area.

These provisions do not apply to warlike and non-warlike service. Instead, a person is rendering operational service only while they are rendering the kind of service specified in the relevant instrument determined by the Minister for Defence to be warlike or non-warlike service. For example, one of the instruments of non-warlike service for East Timor provides as follows:

> … service rendered as a member of the ADF assigned for service on or after 18 August 2003 with OPERATION CITADEL in the Area of Operations specified below is non-warlike service for the purposes of subsection 5C(1) of the *Veterans' Entitlements Act 1986*.
>
> The area of operations comprises East Timor and the territorial sea of East Timor.

Under this instrument, non-warlike service (and thus operational service) applies only to service rendered 'in the Area of Operations' while assigned for service with Operation Citadel. Thus the voyage to and from East Timor is not part of operational service. However, liability may still be accepted for events that occur during a voyage to or from the area of operations if those events are 'inseparably bound up with' the rendering of non-warlike service in the area: see *Repatriation Commission v Hawkins* (1993) 9 *VeRBosity* 70 at p 71.

Book Review

The Face of Naval Battle: The Human Experience of Modern War at Sea – Edited by John Reeve and David Stevens, Allen & Unwin, Sydney, 2003, casebound and jacketed, 363pp, RRP $39.95.

Reviewed by
Rear Admiral Gerry Carwardine

This book is a collection of essays drawn largely from papers presented at the RAN's second King-Hall Naval History Conference held in Canberra in 2001. It seeks to show the human factor in warfare. The editors, both noted Australian naval historians and authors, have skilfully coalesced the conference papers into chapters with essentially a human theme, covering the past 100 years or so. That is, the life of the RAN.

The book covers not just Australian experience but includes distant wars and stories of friends and allies and even past enemies. It looks at most dimensions of war at sea including surface, air and sub-

surface warfare and touches on joint service activities. Its contributors are both Australian and international and it is pitched at the local and international market. The inclusion of a few more chapters reflecting RAN experience might have been useful, but more of that later.

A first impression is that the theme wanders from its aim in some chapters with historical narrative stories and no analysis, and a few topics covering roles and capabilities; strategy and tactics; and even technical matters. Nevertheless most chapters with such an initial lean return to the theme and bring out the human factor.

Part One opens the book with 'Setting the Scene', two superb chapters by John Reeve and Andrew Gordon. The former considers the anatomy of the face of naval battle against an historical background and the latter operational command at sea. Both are worthy of expansion into books in their own right. Parts Two and Three address aspects of the face of naval battle and the warrior and his foe respectively. Many are quite excellent.

The chapter by Peter Overlack on Admiral Graf Von Spee and the German Cruiser Squadron in the Pacific in 1914 vividly shows the loneliness of command and the effect of the lack of clear, indeed largely any, strategic direction from his superiors. David Parkin writes of amphibious matters and joint operations in defence of Australia starting with our first military operation as a nation, the capture of German radio stations in New Guinea by the Naval and Military Expeditionary Force in September 1914. Michael Dowsett tells of the compassion and care extended to *Emden* survivors by *Sydney* and her medical team after the battle at Cocos Island. This aspect is also mentioned by David Stevens in his interesting chapter on the faceless foe. After *Voyager* recovered survivors from an Italian submarine they 'were pleased to find the Australians did not kill without mercy'. Similar acts of kindness (following the custom of the sea) in the Mediterranean included leaving boats with provisions and oars at the scene of actions and even making plain language signals to the enemy advising of the position of survivors. However such care was not without considerable hazard, and Admiral Cunningham, the C-in-C, directed that as distasteful as it is to leave survivors. COs must harden their hearts, for the operations in hand and the security of their ships and crew, take precedence.

Guy Griffiths provides a personal perspective on naval battle based on his 43 years in the Navy and experience in three wars. He was a midshipman in the battle cruiser *Repulse* in World War II in the chase for the *Bismarck* and a survivor of the former when sunk by the Japanese off Malaya. He served in the cruiser *Shropshire* at the Battles of Leyte Gulf and Lingayen Gulf. In the Korean War he had two tours as a gunnery officer, first, in the carrier *Sydney* and then the destroyer *Anzac*. As CO of the guided missile destroyer *Hobart* his final war was Vietnam. His experiences are fascinating and he brings out the critical human aspects including lack of information, exposure, boredom, stress and fear particularly during suicide air attacks. The importance of mail, food, air conditioning, training, motivation and confidence in weapon systems is also emphasised, not least the improvement evident in many of these areas during command of *Hobart*.

The story of 'The Gunner', J E Macdonnel, whose books were required reading in the mess decks of HMA ships in the 1940s and 1950s, is told by Peter Stanley. Excerpts of turret action are among the best descriptions of naval war one can read. And the story of 'Joe the Cook', as perceptively noted by Stanley, shows the mutual bonds of support and obligation that criss-cross the ship, making individuals part of a wider and stronger whole. It matters not if one is a gunner, steward or a stoker, or the chaplain or the dentist because the crew of a warship are 'all of one company'.

Each has a job to do in war and the whole is no stronger than the individual.

The chapters by Lee Cordner and Michael Whitby look to sea command. The former relates to experience in command in war and peace. The author, who commanded two guided missile frigates, gives account of command in the 1991 Gulf War and of a second deployment to undertake maritime intercept operations in the Red Sea. It provides keen insight into the demands of command and the author is frank in analysing what he perceives as his own shortcomings. Whitby provides possibly the best chapter in the book. It tells by way of the diaries of Commander Layard, a World War 2 Escort Group Commander, of the 'strain of the bridge' during the Battle of the Atlantic. His personal thoughts are brutally honest. He writes of self-doubts, lack of confidence and indecision. He agonises over past decisions and those yet to be made. He was nonetheless an admired and highly decorated successful war at sea commander. Most COs with courage to do so would no doubt have admitted similar concerns.

Most of the remaining chapters also provide good coverage of their topics. Though in truth one or two are well removed from the human face of battle.

To return to the Australian content, some further inclusions may have been worthwhile. It could be argued that it is difficult to reconcile an Australian book about the human face of warfare with that subject when the book excludes some notable Australian figures. These could include for example our two treble DSCs, Stan Darling and K R Hudspeth (both alive at the time of the Conference); our four mine disposal George Crosses; our sung heroes such as Hec Waller and Teddy Sheean; our unsung heroes such as H Henty-Creer, the CO of the third X-craft to reach the *Tirpitz* (the other two COs, Place and Cameron received the VC); and perhaps Rankin, the CO of *Yarra*, whose engagement of a vastly superior enemy was not dissimilar to that of Fogarty Fegan, the CO of *Jervis Bay*, or G B Roope, the CO of *Gloworm*, both the latter received the VC.

As for the human factors of life at sea in peace and war, most are covered except perhaps one critical aspect. That is belief. The need to 'throw themselves on the mouth of the cannon' or go in harm's way, whilst seldom demanded of sailors is never more than a heartbeat away. Sailors must have complete trust in their superiors particularly their CO and belief in the cause in which they are involved to accept willingly the rigours and dangers of the enemy and indeed the sea. This is mentioned but briefly. Gordon Johnson in writing of *Hobart* saw two factors as contributing to her miraculous survival in the war. One was the extraordinary skill of the 'revered Captain Harry Howden' who 'undoubtedly saved our lives'. Cordner also mentions the belief, trust and respect that a CO must engender in his crew.

Having said that, the book is an enjoyable and interesting read. In short it achieves its aim. The editors are to be commended. It is educative and many chapters are good 'Boys Own' yarns. It gives excellent background reading for those interested in the Navy and for all students of naval history. It also provides good insight into the ways of the Navy for members of the other services. And just as this reviewer was issued with Volumes I and II of the *Admiralty Manual of Seamanship* 50 years ago on entering the Naval College, today's midshipmen entering the Naval College and ADFA should be provided with *The Face of Naval Battle*.

The final paragraph by Peter Jones fittingly concludes the book, 'Historically, the best-trained and led sailors have invariably won the war at sea, and the maritime war of the future is unlikely to be significantly different'.

Military Rehabilitation & Compensation Legislation

Bruce Topperwien

The *Military Rehabilitation and Compensation Act 2004* (MRCA) and its companion Act, the *Military Rehabilitation and Compensation* (*Consequential and Transitional Provisions*) *Act 2004* (MRC(CTP)A), commenced operation on 1 July 2004.

This legislation represents a major change to the previous schemes of compensation applicable to members of the Defence Force (the VEA and the *Safety, Rehabilitation and Compensation Act 1988* (SRCA)).

Eligibility

The MRCA applies to 'members' and 'former members' of the Australian Defence Force (ADF), including cadets and certain civilians closely associated with ADF operations ('declared members').

The Act applies only in relation to service rendered on or after 1 July 2004. Injury, disease or death said to arise out of any earlier service must be claimed under either the SRCA or the VEA.

The MRCA calls all eligible service 'defence service', which is further divided in three types of service: 'peacetime service', 'non-warlike service', and 'warlike service'. Non-warlike service, and warlike service are determined by an instrument made by the Minister for Defence. Peacetime service is any other defence service.

Liability

The concepts of 'injury' and 'disease' are identical to those in the VEA (and thus *different* from those in the SRCA).

The basic liability provisions that give rise to a 'service injury, disease or death' are the same as those in the VEA, namely, 'occurrence', 'arose out of, or was attributable to', travelling to or from undertaking duty, 'but for' having rendered service or changes in environment, and material contribution or aggravation.

The same standards of proof that apply under the VEA also apply under the MRCA. That is, the 'reasonable satisfaction' standard applies to peacetime service and the 'reasonable hypothesis / beyond reasonable doubt' standard applies to non-warlike and warlike service.

It is because of the commonality between the VEA and the MRCA in all these matters that the Statements of Principles (SoPs) made under the VEA can be applied under the MRCA. One aspect of the application of SoPs that is different from the law under the VEA is that the concept of having an accrued right to have an earlier SoP apply if the SoP changes during the appeal process is expressly removed. Under the MRCA, only the most recent SoP can be applied.

The same sort of exclusions from liability that apply under the VEA also apply under the MRCA, such as 'resulted from serious default or wilful act', 'arose out of serious breach of discipline', delays or interruptions to a journey that substantially increases the risk of injury, and use of tobacco products (in the VEA this applies to tobacco use after 1997).

In addition, the MRCA excludes liability if the injury or disease resulted from consuming alcohol or a drug not legally administered, or if it resulted from reasonable counselling concerning service matters, or failure to get a promotion or benefit, or if the person made a false statement or

misrepresentation in connection with their service relating to the existence of the injury or disease.

A number of the exclusions do not apply if the injury or disease resulted in serious and permanent impairment or death.

There are also some additional means of acceptance of liability that do not apply under the VEA. For these, the SoPs do not apply. They include accepting liability if the injury or disease was the unintended consequence of medical treatment received under the Act or the Defence Regulations, or if there is material contribution or aggravation of a sign or symptom of an injury or disease.

Administration

The MRCA is administered by the Military Rehabilitation and Compensation Commission (MRCC), which is made up of the 3 members of the Repatriation Commission, a nominee of the Minister for Defence, and a nominee of the Minister who administers the SRCA.

As well as administering the MRCA, the MRCC is charged with the management of claims from members and former members of the ADF under the SRCA.

For most purposes, the powers of the MRCC are exercised by officers of the Department of Veterans' Affairs acting as delegates of the MRCC.

Rehabilitation for current members of the ADF is the responsibility of the relevant service chief (Army, Navy or RAAF). It is only if a person is a 'former member' or is in the process of being discharged that the MRCC is responsible for their rehabilitation.

Permanent impairment compensation

The MRCC provides for compensation for permanent impairment, assessed using a modified version of the VEA GARP. Unlike GARP, the MRCA version (called GARP V(M)) is used to determine combined impairment in 1 point intervals rather than 5 point intervals. Instead of the impairment and lifestyle ratings being combined to provide a degree of incapacity, it combines to determine a compensation 'factor' that is used to calculate the rate or amount of compensation payable.

Compensation can be payable either as a weekly pension, a lump sum, or in some circumstances a combination of both.

Under the SRCA lump sums were payable separately for each injury. Under the VEA, disability pension is payable for the combined incapacity from all accepted injuries and diseases. Under the MRCA, while a lump sum is payable if a new disability is accepted, only the increase, if any, in the combined impairment due to that new disability is payable.

The amount or rate of compensation payable is greater if the impairment is due to a non-warlike or warlike injury or disease rather than a peacetime injury or disease. Where there is a combination of peacetime and warlike or non-warlike disabilities, this is taken account of in determining the compensation factor for the calculation of the payments.

Incapacity payments

Like the SRCA, the MRCA provides for compensation by way of weekly incapacity payments for lost wages or allowances due to 'incapacity for service' or 'incapacity for work'.

The rate of weekly compensation is determined by deducting 'actual earnings for the week' from 'normal earnings for the week'.

However, these two terms are defined differently depending on the nature of service being rendered at the time of the injury. That is, different rules apply depending on whether the person is a permanent forces member, a continuous full-time reservist, a part-time reservist, a part-time reservist who was previously a permanent forces member, a part-time

reservist who was previously a continuous full-time reservist, a cadet, declared member, or a former member. This enables account to be taken of loss of civilian earnings and other factors peculiar to the different categories of defence personnel.

The 'able to earn' provisions (similar to those that apply under the SRCA to reduce weekly compensation if the person is able to earn in suitable employment but is not doing so) apply only to potential civilian earnings and not to potential earnings from the Defence Force.

The maximum rate of weekly incapacity payments applies while ever the person is 'incapacitated for service' while they remain in the ADF, and for the first 45 weeks of 'incapacity for work' after leaving the ADF. It then reduces in similar fashion to that under the SRCA depending on the number of hours a week the person is actually working.

Special rate disability pension

The MRCA provides for a payment called the 'special rate disability pension'. It has very different criteria from the special rate of pension under the VEA, but it is paid at the same rate as that pension.

It is an ongoing payment made to former members, if they choose to take it, instead of the payment of weekly incapacity payments. It may be taken if the person is in receipt of incapacity payments, has an impairment of at least 50 points, is incapable of working for more than 10 hours a week in remunerative work, and rehabilitation is unlikely to improve their capacity for work.

Before choosing to take this payment, the person must obtain independent financial advice. The Act provides for payments towards obtaining such financial advice.

Rehabilitation

Section 38 of the MRCA provides that:

> The aim of rehabilitation is to maximise the potential to restore a person who has an impairment, or an incapacity for service or work, as a result of a service injury or disease to at least the same physical and psychological state, and at least the same social, vocational and educational status, as he or she had before the injury or disease.

If a person is a 'member', the rehabilitation authority responsible for their rehabilitation is their service chief. If the person is a 'former member', the rehabilitation authority is the MRCC.

The rehabilitation authority can carry out an assessment for rehabilitation of its own initiative or at the request of a person who has had liability accepted for a service injury or disease.

In assessing whether a rehabilitation program should be undertaken, the authority must have regard to advice from rehabilitation and medical experts, any reduction in the future liability of the Commonwealth to pay or provide compensation if the program is undertaken, the cost of the program, any improvement in the person's opportunity to be engaged in work after completing the program, the person's attitude to the program, the relative merits of any alternative and appropriate rehabilitation program, and any other matter the rehabilitation authority considers relevant.

If a person fails to undergo a rehabilitation assessment, their right to compensation (other than treatment) may be suspended. While a decision to suspend compensation in such circumstances is not reviewable, all other decisions relating to rehabilitation, including the content of a rehabilitation program, is reviewable.

A rehabilitation authority may, on its own initiative or on written application by the person, vary or cease a program. But

before doing so, it must first undertake an assessment and consult with the person.

Medical treatment

Three different treatment regimes apply:

- The service chief is responsible for health care management and treatment while a person is a member of the ADF. This is provided under regulation 58F of the Defence Force Regulations 1952.
- For former members, or members identified for discharge, with acute treatment needs or who require intensive case management, a reimbursement regime applies, which provides reimbursement of reasonable costs for reasonable treatment. This is provided under Part 2 of Chapter 6 of the MRCA. While this is primarily a reimbursement regime, by arrangement with the MRCC, in many cases treatment costs may be paid directly to the health service provider rather than requiring the person to pay the costs before being reimbursed.
- For former members, or members identified for discharge, with chronic health care needs, the DVA white and gold card system applies whereby treatment is provided through DVA contracted health service providers. This is provided under Part 3 of Chapter 6 of the MRCA.

Only determinations made under Part 2 of Chapter 6 of the MRCA are reviewable.

Whether a person's treatment regime comes under Part 2 or Part 3 is a matter for the MRCC to determine, and it is a non-reviewable determination.

If a person is eligible for a gold card, their treatment will be under Part 3. To be eligible for a gold card, the person must have a combined impairment of at least 60 points or meet the eligibility requirements for the special rate disability pension under the MRCA.

The white card is for persons whose condition has stabilised and only requires periodic treatment or intermittent periods of acute treatment, and whose combined impairment is less than 60 points. Persons with white cards may be monitored or reviewed from time to time and changed to Part 2 treatment instead.

Death benefits

Benefits are paid to certain dependants of members or former members whose death has been determined to be a 'service death'.

Unlike the VEA, the degree of dependency is important in determining certain benefits. However, there are provisions that deem a person to have been 'wholly dependent' in certain circumstances (even if they weren't).

A wholly dependent partner of a deceased member for whom liability for death has been accepted, or who satisfied the eligibility criteria for the special rate disability pension at some time during their lifetime, or whose permanent impairment had been assessed at 80 or more points can receive a tax-free periodic payment equivalent to the rate of the VEA war widows pension, or its lump sum equivalent.

A lump sum additional death benefit is payable up to $103,000 to a wholly dependent partner if liability for the death has been accepted. The lump sum is age-adjusted and calculated by reference to actuarial tables, such that maximum benefits are payable if the partner is aged under 42 at the time of the member's death.

Other death benefits for wholly dependent partners include gold treatment card, pharmaceutical allowance and telephone allowance.

Death benefits are also payable to eligible young persons on a similar basis

for which they are payable for wholly dependent partners. Each eligible young person is entitled to a tax free lump sum payment of $63,283.20 and if the eligible young person was wholly or mainly dependent on the member or former member, an additional payment of $69.61 per week is payable. They are also eligible for the gold treatment card, pharmaceutical allowance and education assistance.

A maximum tax-free lump sum payment of up to $200,396.80 is available for distribution among all other eligible dependants if liability has been accepted for the member or former member's death, or if the member or former member satisfied the eligibility criteria for the special rate disability pension at some time during his or her lifetime, or if his or her permanent impairment had been assessed at 80 or more points. The maximum payable to any individual who was wholly dependent on the member or former member is $62,683.20. A person who was only partially dependent on the member or former member can receive only a portion of that amount.

In distributing such compensation the only matters the MRCC can have regard to are the financial losses suffered by each person as a consequence of the member's or former member's death, the person's degree of dependency, and the length of time the dependant would have been dependent on the member or former member.

Other compensation

Other compensation under the MRCA includes funeral assistance, special assistance, motor vehicle compensation scheme, and household and attendant care services.

Transitional provisions

If a person has an injury or disease accepted under the VEA or SRCA, any MRCA assessment of a new injury or disease must take those conditions into account in deciding whether any permanent impairment compensation is payable under the MRCA for the new MRCA injury or disease. Impairments from the VEA or SRCA injuries are combined with those of the MRCA injury under GARP V(M) to decide whether there is a compensable increase in overall impairment (of at least 5 points). Different methods apply depending on whether the old injury is a VEA or SRCA injury.

If a new claim is made under the VEA or SRCA for a different injury after a MRCA injury has been accepted, there is no combining of impairments or lifestyle under the VEA or SRCA. The two conditions are treated as separate. But if a person received compensation for a MRCA injury, then for a different VEA or SRCA injury, and then for a further MRCA injury, impairments and lifestyle would be combined for all conditions when calculating compensation under the MRCA.

Sections 6 and 7 of the MRC(CTP)A provide that eligible 'defence service' is extended backwards to prior to 1 July 2004 if (and only for the purpose of that claim) circumstances of that service, when taken together with circumstances of defence service on or after 1 July 2004, would give rise to liability for the injury, disease or death that is the subject of that claim.

Sections 9A and 70A have been inserted into the VEA to bring to an end liability for war-caused and defence-caused injuries, diseases and death for any service rendered on or after 1 July 2004. These sections also have a complementary effect to that of ss 6 & 7 of the MRC(CTP)A: if circumstances of service before 1 July 2004, when taken together with circumstances of service on and after that date, would give rise to liability for the injury, disease or death that is the subject of the claim, that pre-1 July 2004 service does not count as eligible service under the VEA for the purposes of that

claim. That injury, disease or death must instead be claimed under the MRCA.

If a person has a VEA war-caused or defence-caused injury or disease and he or she claims it has been aggravated by MRCA service, or lodges an application for increase (AFI) under VEA and there is evidence it has been aggravated by MRCA service, the MRCC must give the person a notice requiring them to choose between making a claim under the MRCA or an AFI under the VEA.

A person who has a benefit or entitlement under the VEA or SRCA that is equivalent to a similar benefit or entitlement they are entitled to under the MRCA is entitled only to the MRCA benefit or entitlement. The particular benefits and entitlements affected by this provision are listed in s 15 of the MRC(CTP)A.

If a person is undertaking a rehabilitation program under the VEA or SRCA and their rehabilitation authority determines that the person is to undertake a rehabilitation program under the MRCA, that rehabilitation authority may determine that the old program stops being provided under the VEA or SRCA, but may incorporate all or part of the old program in designing or providing the new program.

Subsection 19(1) of the MRC(CTP)A provides that any SoPs made by the RMA under the VEA prior to 1 July 2004 and still in force on that date are taken to have been made on 1 July 2004 for the purposes of the MRCA: s 19(2) deems s196B(2) VEA SoPs to have been made for the purposes of warlike and non-warlike service; s 19(3) deems s196B(3) VEA SoPs to have been made for the purposes of peacetime service.

Given the great difficulty encountered in the interpretation and application of the transitional provisions in the SRCA (some questions are still unresolved after more than 15 years of litigation!), it was decided to insert a retrospective regulation-making power so that unanticipated transitional matters could be dealt with by the policy-making processes of the Executive (with Parliamentary oversight) rather than by the Judiciary. This is provided for in s 24 of the MRC(CTP)A.

Determining system

No compensation or benefits can be granted without a claim being lodged with the MRCC. Once lodged, the claim is investigated and a 'needs assessment' is conducted by the MRCC before determining the claim.

If a claimant is dissatisfied with a determination of the MRCC (or a service chief concerning rehabilitation), he or she has a choice of review paths. A claimant has the choice of applying to the VRB for a review (within 12 months, with no extension of time permitted) or seeking a 'reconsideration' by another MRCC delegate (within 30 days, but may seek an extension of time to apply). If the claimant asks for a 'reconsideration', he or she cannot then seek review by the VRB. If, instead, the claimant applies to the VRB he or she cannot then seek a 'reconsideration'. But the MRCC, on its own initiative, may choose to reconsider a matter that is the subject of a VRB application.

There is a right of appeal to the AAT from a VRB or a 'reconsideration' decision, but different time limits apply. There is a 3 month time limit for appeals from the VRB (which can be extended up to 12 months by the AAT), and a 60 day time limit to apply from a reconsideration decision (but can be extended by the AAT).

If the claimant had sought VRB review and he or she has rendered non-warlike or warlike service he or she will be eligible for consideration under the War Veterans Legal Aid Scheme for legal assistance with the AAT appeal.

If the claimant sought reconsideration rather than VRB review, he or she is not

eligible for assistance under the War Veterans Legal Aid Scheme at the AAT. But, if successful in the AAT appeal, the AAT can award the claimant legal costs.

A person who had sought VRB review rather than reconsideration cannot obtain an award of legal costs at the AAT even if ineligible for the War Veterans Legal Aid Scheme.

Reviewable determinations

The following table sets out the matters under the MRCA that are reviewable by a reconsideration delegate or the VRB (and then by the AAT). The first column indicates the section of the Act in which the relevant matter is provided for or described. The second column indicates the section of the Act that gives the power to determine that matter.

While the table attempts to include all the relevant provisions, it is possible that some reviewable matters have not been identified, or there might be some matters in the list that are not the subject of 'original determinations' and thus would not be reviewable. The range and scope of reviewable decisions will undoubtedly be clarified through litigation.

Section concerning the matter	Determining section	Matter
Chapter 2		***Accepting liability***
23	333	Liability for service injury or disease
24	333	Liability for service death
Chapter 3		***Rehabilitation***
44	44	Whether to carry out an assessment for rehabilitation
45	45	Require a person to undergo an examination
48	48	Payment of costs reasonably incurred in connection with an examination
51	51	Whether the person is to undertake a rehabilitation program
51	51	Content of a rehabilitation program
53	53	Cessation or variation of a rehabilitation program
58	333	Whether an alteration, aid or appliance is reasonably required
58	333	Amount of compensation for alteration, aid or appliance
61	61	Assist the person in finding suitable work
64	64	Appointment of a case manager
Chapter 4		***Compensation for members and former members***
68	333	Whether the person suffers an impairment that is permanent and stabilised
68	333	Degree of impairment
68	333	Date on which the person became entitled to compensation under s68
71	333	Additional compensation
74	333	The effect on lifestyle
75	333	Interim compensation
78	78	Whether to extend the choice period
82	333	Amount of compensation for financial advice
89	333	Amount of compensation for incapacity for service or work for members
118	333	Amount of compensation for incapacity for service or work for former members
201	201	Whether to extend the choice period
203	333	Whether to receive special rate disability pension
206	333	Amount of compensation for financial advice
214	333	Compensation for household services
217	333	Compensation for attendant care services
221	333	Telephone allowance
226	333	Compensation for loss of, or damage to, medical aids

Section concerning the matter	Determining section	Matter
Chapter 5		***Compensation for dependants***
233	333	Compensation for wholly dependent partners re death
236	236	Whether to extend the choice period
240	333	Amount of compensation for financial advice
242	333	Compensation for wholly dependent partners re permanent impairment and incapacity
244	333	Directions re payment if 2 or more partners entitled to compensation
245	333	Telephone allowance
251	333	Compensation for eligible young person re death
255	333	Compensation for eligible young person re permanent impairment and incapacity
257	333	Directions re payment if 2 or more eligible young persons entitled to compensation
263	333	Compensation for other dependants
267	333	Funeral compensation
Chapter 6		***Treatment***
271	276	Compensation for cost of treatment under Part 2
273	276	Compensation for cost of treatment before determination of entitlement under Part 3
291	333	Compensation for cost of accommodation relating to treatment
291	291	Approval of an attendant to accompany the patient
293	333	Compensation for cost of journey relating to treatment
297	333	Compensation for transportation of another person to hospital or mortuary
300	333	Pharmaceutical allowance
315	315	Amount of overpayment to be recovered
316	316	Amount of interest to be recovered
317	317	Reduction of payment because of previous overpayment
Chapter 7		***Claims***
320	320	Approval of person to make claim on behalf of a person
325	325	Needs assessment
328	328	Requiring a medical examination
329	329	Suspension of compensation for failure to undergo medical examination
330	330	Refusal to deal with a claim for failure to comply with obligation notice
333	333	Determination of claim for compensation
340	340	Determination overriding RMA decision concerning a SoP
342	342	Onset date of incapacity for service or work
343	343	Date of death
Chapter 10		***Liabilities apart from the Act***
397	397	Suspension of compensation for failure to comply with reasonable requirement for purposes of claim against a third party
398	398	Deductions from an award of damages for compensation paid and costs incidental to claim
Chapter 11		***Miscellaneous***
424	333	Special assistance
428	428	Amount of debt that should be written off
429	429	Amount of debt that should be waived

Administrative Appeals Tribunal

Re Stonehouse and Repatriation Commission

McCabe, Stein

[2004] AATA 707
2 July 2004

Psychiatric diagnosis – detail in medical opinions required to satisfy tribunal – nature of stressor for anxiety disorder

Mr Stonehouse claimed his anxiety disorder and alcohol dependence were caused by an experience at Da Nang harbour aboard HMAS *Vendetta*. In a statement he said:

> The most terrifying incident that really affected me was the one in relation to Scare Charge. In October 1969 a scare charge was dropped very, very close to the ship and while I was in the gun magazine on the lower deck below the water line and was unaware that charges were even going to be dropped. After the initial shock of the explosion against the ship's hull I was sure we had been mined. The lights went out and the memory of drowning in a sinking ship came back to me. I felt absolutely trapped in a darkened area surrounded by ammunition and I did not know what to do next. I thought I was going to die.
>
> The ship speakers called 'Hand to Emergency Station Forward'. This incident really frightened me at that time as I was well below the water line and in this condition all water hatches are closed and you have to get out before they are shut on you. As it happened they were being shut as we were trying to get out ...

Severe psychosocial stressor

The Tribunal considered the anxiety disorder SoP (No 1 of 2000), which required a 'severe psychosocial stressor', which is defined in the SoP as follows:

> an identifiable occurrence that evokes feelings of substantial distress in an individual, for example, being shot at, death or serious injury of a close friend or relative, assault (including sexual assault), major illness or injury, experiencing a loss such as divorce or separation, loss of employment, major financial problems or legal problems

The Tribunal referred to *White's* case ((2004) 20 *VeRBosity* 49) in which Spender J said:

> the definition of severe psychosocial stressor concerns an occurrence that, objectively, is an occurrence the nature of which is such as to evoke feelings of a particular kind in a person exposed to that occurrence and which, subjectively, evokes feelings of substantial distress in the particular person concerned. Both aspects are relevant and necessary.

The Tribunal then looked at the meaning of the term 'psychosocial' and noted that the *Oxford English Dictionary* defines it as 'pertaining to the influence of social factors on an individual's mind or behaviour, and to the interrelation of behavioural and social factors'. The Tribunal noted that this definition was consistent with the kinds of examples given in the SoP. The Tribunal then said:

> [18] The events described in the definition are stressful – but not simply because they are frightening or unusual. Many of the events described, like a divorce or unemployment, are common events that do not ordinarily

> engender fear. They do cause distress, however, and almost everyone can relate to the pressure and tension one experiences in those situations. Even events that involve violence (eg, being shot at) are psychosocial stressors because the victim is likely to be distressed by the motivation of the aggressor ('What have I done to deserve this? Why me? How could someone do such a thing?') rather than simply being frightened or fearing for his or her bodily integrity. An event that was merely dangerous or frightening – particularly an event that happened quickly, and which passed – does not amount to a psychosocial stressor without that additional dimension. The term was not intended to include all kinds of stressful and terrifying events – the social element makes it quite distinct from the concept of a severe stressor for the purposes of the SoP regulating post-traumatic stress disorder.
>
> [19] A severe psychosocial stressor must be a stressor that is both severe and psychosocial in nature, and cause the requisite level of distress to the individual. To satisfy the SoP the individual must have experienced an identifiable occurrence, which has social factors that affected his or her mind or behaviour, causing the requisite level of distress.

The Tribunal referred to Mr Stonehouse's evidence and said:

> [21] The applicant's account of the incident cannot satisfy the definition of severe psychosocial stressor. While his account suggests it was certainly frightening, the incident lacks the necessary social element. It is more akin to a severe stressor within the meaning of various other SoPs.
>
> [22] Even if we are wrong in our conclusions with respect to the absence of a social dimension to the incident, the event cannot fit the definition of severe psychosocial stressor because it is not an occurrence that could evoke feelings of the necessary kind in an ordinary person (or Mr Stonehouse himself, to the extent that he was not an ordinary person) exposed to that occurrence. In other words it fails on the objective element of the White test. This incident occurred very quickly. As soon as Mr Stonehouse heard the explosion his training kicked in and he dashed to the upper decks where he quickly discovered the reality of the situation. His misapprehension of fear of death was very brief. He was not unable to function. We are not satisfied the feelings of distress Mr Stonehouse says he felt satisfy the test.

The Tribunal then referred to the evidence regarding clinical onset and found that it could be satisfied beyond reasonable doubt that it did not occur within 2 years of the alleged stressor.

Medical opinions

In the course of examining the medical evidence, the Tribunal criticised a particular doctor's report and gave some useful advice in relation to expert medical opinions. The Tribunal said:

> [33] It is for the Tribunal to determine whether an individual satisfies the SoP, assisted by the opinions and diagnoses of doctors. …
>
> [34] … Dr Carter said that in this case the SoP and DSM-IV are … very similar in their relevant definitions. That may be true, but we remain concerned by her approach to diagnosis.
>
> [35] Our impression from her report … is that her diagnoses were perfunctory. The report does not explain how the applicant suffers from the conditions or give evidence of their symptoms. It seems to be a mechanical exercise that simply states the symptoms of anxiety disorder and alcohol abuse or

dependence. For example, in her first report … she writes:

> The veteran experienced a series of stressful events not more than two years before the clinical onset of generalised anxiety disorder. Following the stressors already described, the veteran developed excessive anxiety and worry, with apprehensive expectation, which occurred on more days than not, for more than six months, about a number of activities, such as his work. He found it difficult to control. It was associated with the following symptoms. He felt restless and keyed up, and on edge. He was easily fatigued. He had concentration difficulties and his mind went blank. He was irritable. His muscles became tight. He had sleep disturbance, with difficulty falling asleep and staying asleep, and he had restless, unsatisfying sleep. The focus of this was not any other Axis I disorder ... the anxiety and the worry caused him clinically significant distress and impairment in his social, occupational and other areas of functioning ...

[36] There is no detail given about how or when the applicant experienced these symptoms. The report provides no objective evidence upon which the diagnosis was based. It would be far more persuasive if it did so.

Alcohol dependence

In relation to the alcohol dependence claim, the Tribunal found that the 'experiencing a severe stressor' factor was not met. The Tribunal said:

> [43] We accept Mr Stonehouse was frightened momentarily by the incident. He heard an explosion, and dashed up to the deck of the ship. But the true state of affairs was soon apparent. The event could not evoke intense fear, helplessness or horror in someone of Mr Stonehouse's background or experience. He was not an inexperienced youth, and there was nothing in the evidence to suggest his experience in the Navy or elsewhere made such a reaction reasonable …
>
> [44] Commodore Wilson was a gunnery officer on the *Vendetta* at the time of the incident. At the hearing he said of the incident:
>
> > ... this is the sort of thing that we practiced a great deal. The ship went to action stations and that's just part of the routine of the ship ... I concede that some people may have got a fright ... [but] at the time there was no suggestion there was any panic anywhere on the ship. [It was] not an extraordinary event, just a pretty ordinary event that did occur a fair few times.
>
> [45] In other words, the applicant did exactly what he was supposed to do in the circumstances, notwithstanding his fright.

Formal decision

The Tribunal affirmed the decision under review.

Editor: In *Understanding Common Law Legislation: Drafting and Interpretation*, Oxford University Press, 2001, Francis Bennion said at p 66: 'A definition may be qualified by what is known as *the potency of the term defined*. Whatever meaning may be expressly attached to a term, it is important to realize that its ordinary dictionary meaning is likely to exercise some influence over the way the definition will be understood by a court. As has been said, it is impossible to cancel the ingrained emotion of a word merely by an announcement.' The Tribunal's application of the ordinary meaning of 'psychosocial' appears consistent with that approach. The word 'severe' would also influence the meaning of 'severe psychosocial stressor'.

Re Benjamin and Repatriation Commission

DP Handley, Thorpe

[2004] AATA 738
13 July 2004

Nature of psychiatric problems – whether experienced relevant stressors

This matter was heard by the Tribunal following remittal from the Federal Court, see (2001) 17 *VeRBosity* 52 & 119. The Court had held that the previous Tribunal had erred by not considering whether Mr Benjamin suffered from some other psychiatric disorder that might be war-caused after it had found he did not suffer from post traumatic stress disorder. The Tribunal referred to the evidence given at the previous hearing and said:

> [15] Mr Benjamin described being 'very confused and very, very scared' as a result of an incident in Kham Ranh Bay when they were unloading tanks and there was an alert because it was thought that enemy scuba divers were trying to attach limpet mines to the *Jeparit*. Mr Benjamin also recalled other incidents: being in Vung Tau Harbour when the Tet Offensive was in progress and hearing rifle fire and the noise of the bombardment of the mountain-side; hearing scare charges exploding close by; and seeing the effects of bombing when they were unloading tanks. Unlike Australian warships, the *Jeparit* had no escort and was not armed.
>
> [16] Following the previous hearing, the Tribunal found that external stimuli, in particular two incidents – the issuing of the alert in Kham Ranh Bay and the rifle fire and bombardment during the Tet Offensive – caused Mr Benjamin 'psychological stress, resulting in the applicant feeling subjective symptoms of increased stress'. The Tribunal found that Mr Benjamin was drinking very heavily towards the end of the Jeparit voyages and concluded that 'there was a stressful event prior to the clinical onset of alcohol dependence': 'psychoactive substance abuse is accepted as a war-caused condition'. The Tribunal's decision in respect of psychoactive substance above was not challenged in the Federal Court and the Respondent now accepts this as being a war-caused condition.

Evidence given at the rehearing indicated that a diagnosis of generalised anxiety disorder was appropriate. The Tribunal noted there were two relevant SoPs, the one in force at the time of the hearing (No 1 of 2000) and the one in force at the time of the Commission's decision (No 48 of 1994 as amended by No 275 of 1995). The Tribunal considered that the material before it raised a reasonable hypothesis consistent with either SoP and there was no evidence that would disprove the hypothesis beyond reasonable doubt.

Formal decision

The Tribunal set aside the decision under review and decided that Mr Benjamin suffers from generalised anxiety disorder, which is war-caused.

Re Burton and Repatriation Commission

Ettinger

[2004] AATA 784
26 July 2004

Psoriasis – streptococcal infection during service – whether arose out of, or was attributable to service – 'but for' change of environment or circumstances of service

From March to July 1942 Mr Burton served in the Army. From 1944 until 1946

he served in the RAAF. None of his eligible war service was operational service. Mr Burton claimed his psoriasis was related to his service in the Army.

In May 1942, Mr Burton spent 3 weeks in hospital with tonsillitis caused by a streptococcal infection. While there, he developed a spotty rash on his back, hips and chest. He gave evidence that the rash came and went over the years, and that in 1950 it was diagnosed as psoriasis.

A dermatologist gave evidence that it was possible that Mr Burton had suffered from guttate psoriasis at the time of the streptococcal throat infection.

Factor 5(f) in SoP No 57 of 2002 concerning psoriasis provides:

> suffering from streptococcal pharyngitis or streptococcal tonsillitis within the 30 days immediately before the clinical onset of guttate psoriasis

It was argued for Mr Burton that he met this factor because he was serving when he became ill and he may not have contracted a streptococcal throat infection in civilian life. It was said that a slight causal connection was sufficient and that the 'but for' test in s 9(2) could be applied.

In rejecting those arguments, the Tribunal said:

> [57] I did not have evidence of how Mr Burton contracted the streptococcal infection or any evidence that it had any causal relationship to his rendering of eligible war service. The fact that he became ill with the streptococcal infection during service satisfied the temporal connection but did not satisfy me as to any causal connection in that the infection may have been contracted while on leave, or off duty during the Veteran's own private activities.
>
> [58] I was mindful also of Ms McConnell's reference to the case of *Roncevich v Repatriation Commission* [2003] FCAFC 146, where I noted that the majority in the Full Court dismissed the further appeal of Mr Roncevich, upholding the primary judge who held that the AAT had not erred in its finding that Mr Roncevich's attendance at a function was not compulsory, and that he had not been required to partake in the drinking session after which he was injured. The Court held that his excessive drinking did not arise out of any task he had to do as a soldier, and that accordingly the knee injury which arose out of his fall, did not have the relevant nexus to his defence service.
>
> [59] I noted that neither section 9(1)(c) nor (e) of the Act applied to Mr Burton in that it was not a journey claim, neither a case of aggravation, nor any of the other considerations in section 9(1)(e) of the Act.
>
> [60] I moved then to consider Mr Burton's claim pursuant to sections 9(1)(d) and 9(2) of the Act. …
>
> [61] Mr Vincent argued that but for Mr Burton being in the Army, he may not have contracted the streptococcal throat infection out of which arose his guttate psoriasis.
>
> [62] Ms McConnell relied on the following passages from Pincus J's judgment in *Repatriation Commission v Keenan* (1989) where I noted his Honour stated at paragraphs 29 and 30 as follows:
>
> > '[29] That leaves for consideration s 9(2), quoted in part above. Obviously if A would not have happened but for B, there is a causal connection between the two, but the contrary is not necessarily so. An established lawyer may be able to date his interest in the law from a visit to Court in his youth and say that his ultimately becoming a lawyer was contributed to by that visit; it is

> another thing altogether to say that but for the visit he would not have become a lawyer.
>
> [30] Therefore, the test imposed under s 9(2) seems more difficult for a veteran to satisfy than does that under s 9(1)(b). It is clear from s 9(1)(d) that the two are alternatives. The only possible advantage for Mr Keenan of reliance on s 9(2) that I can discern is that it refers to changes in "environment" as a possible cause of disease and that may encompass the social and other attributes of the Heidelberg Military Hospital. Nevertheless, it appears that the easiest path to success for Mr Keenan is under the "attributable to" branch of the s 9(1)(b) test, for *Law's* case shows that war service need not be the sole or dominant cause and that it is enough that it be a contributing cause.'

[63] I preferred the submissions of the Respondent, in that from the evidence before me, I could not be satisfied that there were changes in Mr Burton's environment which might have caused or acted as a contributing cause to the Veteran's illness. On the evidence before me, Mr Burton could as easily have contracted the streptococcal infection at home or elsewhere, and I could not be satisfied that the "but for" argument could be sustained. I have applied the legislation mindfully, and relied on other decided cases. Mr Burton's situation does not come within the parameters of section 9(1)(d) or 9(2) of the Act. His illness cannot be found to have arisen out of, or be attributable to any eligible war service rendered by him.

[64] Regrettably I must find therefore find that Mr Burton's illness arose during his war service, thus satisfying a temporal test, but not the causal one.

Formal decision

The Tribunal affirmed the decision under review.

Editor: This case emphasises the requirement of a causal contribution from service for both the tests in s 9(1)(b) and (d).

The VEA envisages that some injuries and diseases may arise during or in the course of service but not arise *out of* that service. Such disabilities will not be compensable unless there is some other subsequent connection to service, for example if the injury or disease was aggravated by service (see s 9(1)(e)).

In order for Mr Burton to have succeeded, the evidence would have had to have shown that the streptococcal infection was caused by some aspect of his service, or that he was serving in circumstances that made the likelihood of infection greater than it would have been in civilian life.

The 'occurrence' provision, which contains a temporal element ('happened while … rendering') as well as a causal one ('resulted from an occurrence') did not apply in Mr Burton's case because he had not rendered operational service.

It should also be noted that the aggravation provisions would not have applied in Mr Burton's case because he had not rendered 6 months eligible war service and had not rendered operational service.

Re Lecole and Repatriation Commission

Christie

[2004] AATA 997
24 September 2004

Death from colorectal cancer – alcohol – need for psychiatric evidence to link alcohol consumption to stress of service – direction by Tribunal to obtain posthumous psychiatric evaluation

Mr Lecole died from metastatic carcinoma of the rectum. His widow sought to relate his death to his consumption of alcohol. The relevant SoP (No 1 of 2004) provided in factor (c):

> drinking at least 250 kilograms of alcohol within a 25 year period within the 40 years immediately before the clinical onset of malignant neoplasm of the colorectum

The veteran rendered operational service in World War 2 as RAAF ground crew at Morotai and Borneo. Mrs Lecole, who met her husband in 1946, gave evidence that her husband did not drink before his service in World War 2, but drank a lot after service. She said he always had problems with his 'nerves'.

For Mrs Lecole it was argued that the factual evidence supported a reasonable hypothesis of a connection to service. The Commission argued that there was merely a temporal connection between alcohol consumption and service. It was argued that alcohol consumption was discretionary and without some causative factor connecting alcohol consumption in the 40 years before onset of rectal cancer, such as alcohol abuse or alcohol dependence, or evidence of a service-related psychiatric problem causing alcohol consumption, the claim could not succeed.

The Commission was also critical of the second hand evidence of conditions of service, indicating that there was no reliable evidence of a severe stressor that could be relied upon to raise a causal connection for a psychiatric disorder.

After considering the evidence and discussing *Borrett's* case ([2000] FCA 1829, (2000) 16 *VeRBosity* 113), the Tribunal said:

> [79] … in order to establish a connection between operational service, alcohol consumption (particularly in the post-service period) and death from colorectal cancer, the Tribunal concludes that an additional step is necessary before undertaking Step 1 of *Deledio*. That is, there is a need to identify the kind of psychiatric injury that may have been suffered by the late veteran in the post-service period. …
>
> [80] Turning to *Borrett's* case, there was expert evidence before the Tribunal that the late veteran had become nervous as a result of his war-time experiences. In addition, that his anxiety may well have become chronic and alcohol become a form of self-medication. Furthermore, that there was a pattern of anxiety after the war related to alcohol consumption; and that the late veteran experienced nervous psychological disturbances in the period after the war that contributed to his drinking pattern.
>
> [81] Whilst there may have been intervening causes affecting the alcohol consumption by Mr Lecole in the post-operational service period, this does not preclude the late veteran's war service from being a cause of his alcohol intake pattern.
>
> [82] *Borrett's* case had the advantage of psychiatric opinion. This application for review has none whatsoever. *Borrett's* case had

evidence, for example, of psychological disturbance in the late veteran in the six month period after service, including recurrent nightmares, restless sleep, nervous anxiety (which continued for years after the war), which 'forcefully pointed to a conclusion of a connection with war service' (see paragraph 35, *Borrett*).

[83] The application of lay opinion and expert opinion in areas of medical uncertainty, and legal decision-making, have been addressed by our Courts. For example, where there was 'uncertainty' whether expert medical evidence was able to advance any hypothesis linking aggravation of the veteran's back condition to his war service, the Full Federal Court stated in *McLean v Repatriation Commission* [2001] FCA 1505 [(2001) 17 *VeRBosity* 110]:

> 'In the absence of this expert opinion it may have been permissible, at least, for the purpose of assessing the reasonableness of the hypothesis to infer a causal link between the veteran's post war symptoms and his heavy duties during war service. However, given that the medical practitioners were apparently unable to establish the possibility of such a link, lay opinion could hardly be relied upon to establish it.'

Formal decision

The Tribunal directed the Repatriation Commission to arrange for a posthumous psychiatric evaluation of the kind of injury Mr Lecole may have suffered in the immediate post-war period as well as in the later part of the post-war period, and that the standard of proof in this regard is 'reasonable satisfaction'.

Editor: The direction that the standard of proof is 'reasonable satisfaction' appears inconsistent with the Federal Magistrates Court judgment of *Smith v Repatriation Commission* [2004] FMCA 368, (2004) 20 *VeRBosity* 60. *Smith's* case indicates that the existence and onset of a disease that is not the direct subject of the claim, but is part of the causal chain (a 'sub-hypothesis') connecting service to the claimed condition or the condition that caused death, is *not* to be determined on the balance of probabilities. Instead, what is required is material *pointing* to its existence and the time of its onset.

High Court of Australia

Sleep v Repatriation Commission

Hayne & Heydon JJ

[2004] HCATrans 298
12 August 2004

Two applications for special leave to appeal to High Court – attendant allowance – service pension – assets test – valuation of property

Mr Sleep applied for special leave to appeal two matters to the High Court. The first matter concerned the valuation of property for service pension assets test purposes. The AAT had assessed the value of the particular property on the basis of a valuation by an officer of the Australian Valuation Office. Mr Sleep disputed the method and fairness of the valuation. The Tribunal's decision had been upheld by the Federal Magistrates Court and on appeal by the Federal Court (*Sleep v Repatriation Commission* [2002] FCA 1471). In each instance the relevant Court had held that the valuation was a question of fact and so did not raise a question of law. The second matter concerned an application for attendant allowance. The refusal to grant the attendant allowance was affirmed by the Board and the AAT. An appeal was dismissed by the Federal Magistrates Court ((2002) 18 *VeRBosity* 119) and a further appeal by the Full Federal Court ((2003) 19 *VeRBosity* 126).

The High Court heard both applications together. Justice Hayne delivered the judgment of the Court and said:

In matter A185 the applicant disputed the value of freehold property which he owned and which the Repatriation Commission had used in assessing the amount of his pension. The Administrative Appeals Tribunal on reviewing the matter reduced the value originally fixed by the Commission but set that value at a level higher than the applicant contended and contends was correct. A federal magistrate dismissed an appeal against that decision and a single judge of the Federal Court, exercising the appellate jurisdiction of that court, also dismissed the applicant's appeal. There is in our opinion no reason to doubt the correctness of the order of the Federal Court of Australia and it follows that special leave to appeal must be refused.

In matter A5 the applicant sought the grant under section 98 of the *Veterans' Entitlements Act 1986* (Cth) of an attendant allowance. He contended that he suffered a war-caused disease that has caused a condition similar in effect or severity to an injury or disease affecting the cerebrospinal system. His condition, a rare blood disorder, has reduced his immune system such that he is the target for opportunistic infection. His application for the attendant's allowance failed.

His appeals, first to the Administrative Appeals Tribunal, then to the Federal Magistrates Court and finally to a Full Court of the Federal Court of Australia, all alleged that the decision to refuse the allowance was so unreasonable that no unreasonable decision-maker could reach it. All his appeals have failed. An appeal to this Court would enjoy no prospect of success, and it follows that special leave must be refused.

Formal decision

The Court refused both applications for special leave to appeal and ordered Mr Sleep to pay the Commission's costs.

Federal Court of Australia

Hill, C D v Repatriation Commission

Mansfield J

[2004] FCA 832
1 July 2004

Invalidity service pension – meaning of 'incapacity for work'

Mr Hill sought invalidity service pension on the basis that he was permanently incapacitated for work. The Tribunal has affirmed the rejection of his claim, concluding that:

> The fact that the Applicant drives the school bus, does the mowing, mops the floor now and again, takes the children to the shops and helps with serving meals, indicates that he can at least work for a few hours per day. The Tribunal finds that the Applicant is capable of working more than eight hours per week. He does not qualify for the service pension.

The Court considered that, in light of the evidence given in the case, this statement by the Tribunal indicated a misunderstanding of the meaning of the phrase 'incapacity for work'. The Court said:

> [45] … the purpose of the Veterans' Entitlements Act is, in the circumstances to which it applies, to the same general effect as the compensatory provisions of that of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) and of the worker's compensation enactments of the various States and Territories. … Those enactments, and their predecessors, take their source from the *Workmen's Compensation Act 1906* (UK). A common thread through those enactments has been the entitlement to compensation for 'incapacity for work' as a result of work related injury or disease. In certain of those enactments, provision was made in certain circumstances for the entitlement to compensation based upon total incapacity for work where the incapacity for work was partial only. There have been a range of legislative devices to determine when that should be the case. Sections 37 and 37AA do not adopt any of those devices. They deal in a different way with the identification of circumstances in which an entitlement to an invalidity service pension exists. The rate of an invalidity service pension is worked out in accordance with the Rate Calculator: s 37N and Pt IIIB.
>
> [46]In my view, there is no reason why, given the legislative genealogy of provisions such as s 37 of the Veterans' Entitlements Act, the words 'permanently incapacitated for work' used in ss 37(1)(c), 37AA and in s 5 of Determination 1999 and the words 'permanently unable to do work' for a certain period or periods in s 5(2)(b) of Determination 1999 should not be given the meaning which they have traditionally been given in similar legislation.
>
> [47] In context, moreover, in my view the words in s 5(2)(b) should be given that meaning. The context is the provision of an invalidity service pension where there is an 'incapacity for work' of a certain character. The pension is intended to be provided where the veteran is unable to work in employment. It would not be consistent with the purposes of the Veterans' Entitlements Act, and Pt III Div 4 in particular, that the word 'work' in Determination 1999 should refer to non-employment activity. Short of

being bedridden, a person may be able to attend to daily personal or domestic chores which involve activity of a few hours a day or more than eight hours a week. The capacity to engage in such activity does not necessarily equate with the capacity to engage in meaningful employment for such periods. There is no reason to think that the word 'work' is used in Determination 1999 in any way differently from its use in ss 37(1) and 37AA(1). The contrary is the case. Determination 1999 is a disallowable instrument for the purposes of s 46A of the *Acts Interpretation Act 1901* (Cth): s 37AA(3) of the Veterans' Entitlements Act. It is intended to specify the circumstances in which persons are permanently incapacitated for work for the purposes of s 37(1)(c). Its adoption of the concept of 'work' suggests, to the contrary, that the word has been chosen to tie in with, rather than differentiate from, the expression 'incapacity for work' in s 37(1)(c). Had some different factual qualification been intended, the drafter of the instrument would have selected a different word.

[48] The expression 'incapacity for work' means incapacity to earn wages: *Thompson v Armstrong & Royse Pty Ltd* (1950) 81 CLR 585 per Latham CJ at 595, per McTiernan J at 602, per Williams J at 608, per Webb J at 615, and per Kitto J at 623. It is the physical inability to provide labour in the open labour market. See also *Ball v William Hunt & Sons Ltd* [1912] AC 496 at 499 – 500.

[49] It is also plain that whether a person has a residual capacity to work is determined by reference to labour markets reasonably available to that person: *Ruiz v Canberra Rex Hotel Pty Ltd* (1974) 5 ACTR 1; *Asioty v Canberra Abattoir Pty Ltd* (1989) 167 CLR 533; *Tok Carpentry and Partitioning Pty Ltd v Watts* (1993) 113 FLR 368; *Woden Valley Glass v Psaila* (1993) 44 FCR 140.

[50] Hence, there are cases where the residual capacity to work of a particular claimant for compensation has been treated as so confined that, in reality, there is total incapacity for work. In *Foster v Wharncliffe Woodmore Colliery Co Pty Ltd* [1922] 2 KB 701, Lord Sterndale MR at 709 referred with approval to the observations of Fletcher Moulton LJ in *Cardiff Corporation v Hall* [1911] 1 KB 1009 at 1020 where his Lordship said:

> '... if in other words the capacities for work left to [a worker] fit him only for special uses and do not, so to speak, make his powers of labour a merchantable article in some of the well-known lines of the labour market, I think it is incumbent on the employer to show that such special employment can in fact be obtained by him ... I should say that if the accident leaves the workman's labour in the position of an 'odd lot' in the labour market, the employer must show that a customer can be found who will take it.'

In that case Scrutton LJ at 715 explained that the term 'odd lot' relates to the work capacity of a person who is so impaired that the person is 'only able to do certain very special jobs, depending on finding a very special employer who, either through compassion or because he has a special job, is able to give him employment, but any ordinary class of work he is not able to do ...'.

[51] Illustrations of cases where a very substantially impaired person has been regarded as having no real residual capacity to work, although not medically described as totally incapacitated for work, are provided by *Wemyss Coal Co Ltd v Walker* (1929) 22 BWCC 366; *Fletcher v*

Douglas [1934] WCR 88 and *Schulz v BHP Co Ltd* [1934] WCR 389. In *Wicks v Union Steamship Co of New Zealand* (1933) 50 CLR 328, the High Court (Gavan Duffy CJ, Rich, Starke, Dixon, Evatt and McTiernan JJ) remitted a determination for reconsideration because the decision-maker had not clearly addressed whether the worker was:

> '... physically incapacitated from ever earning by work any part of his livelihood. This condition [their Honours said] is satisfied when capacity for earning has gone except for the chance of obtaining special employment of an unusual kind.' (at 338)

See also *Bavcevic v Commonwealth* (1957) 98 CLR 296 at 303-304, *Hamiltons Ewell Vineyards Pty Ltd v Holmes* (1985) 38 SASR 153 and *Anderson v Australian Postal Commission* (1981) 39 ALR 94 at 100-101.

[52] In this matter, I do not consider the Tribunal did recognise the distinction between doing 'work' or the capacity to do work on the one hand, and doing some day to day activities of routine existence. The particular circumstances of the applicant may have diverted its attention from that distinction. But, in my view, it was one it was required to address.

[53] The evidence (none of which it appears to have rejected) indicates that the applicant does certain tasks intermittently and at his own election and in his own time, which (when performed) may assist his wife in providing services to the children who she looks after. But he does not do so in any organised or structured or reliable way. He is not remunerated for what he does; he receives weekly pocket money irrespective of how much or how little he does. His contribution is not one upon which his wife relies, but rather (it seems from her evidence) is one which she accommodates. The medical evidence categorises the applicant as unable to work notwithstanding what he does. Had the Tribunal addressed the question it was required to address, it would have considered whether he is in fact permanently unable to do work in the sense I have referred to for periods adding up to more than 8 hours per week. It might have decided that he has no residual capacity to work at all. It might have decided that his residual capacity for work is so small that he is only able to undertake special employment which he does not have available to him, so that his capacity to work is an odd lot which is in practical terms no capacity at all. In that event it would have addressed whether what he does to assist his wife is really 'work' so that in fact he has special employment. Or it might have decided that he has a residual capacity to work so that he is not permanently unable to do work for periods adding up to more than 8 hours per week.

Formal decision

The Court allowed the appeal, remitted the matter to the Tribunal to be reheard, and ordered the Commission to pay Mr Hill's costs.

Editor: While this case concerns 'incapacity for work' for invalidity service pension, it has implications for similar phrases used in the special rate tests in sections 24 and 28. An implication is that while one can have regard to non-work activities and skills for the purpose of determining the questions in section 28 (see, for example, *Chambers' case* (1995) 11 *VeRBosity* 24), they must be considered in the context of capacity to undertake remunerative work in the real world, not merely a capacity to perform some work in a very general sense. The Commission has appealed this matter to the Full Federal Court.

Hill, K N v Repatriation Commission

Mansfield J

[2004] FCA 851
1 July 2004

***Post traumatic stress disorder – alcohol abuse – aircraft crash off HMAS* Melbourne**

This first Tribunal hearing in this matter was reported in (2000) 16 *VeRBosity* 101. From that decision was an appeal to the Federal Court (2001) 17 *VeRBosity* 116, and then the Full Federal Court (2002) 18 *VeRBosity* 53. The rehearing by the Tribunal on remittal was reported in (2003) 19 *VeRBosity* 112.

Mr Hill claimed that his PTSD and alcohol abuse were related to an incident in which a Sea Venom aircraft crashed into the sea in an aborted landing on HMAS *Melbourne* in 1966. The Tribunal rejected any connection with his eligible service because it was satisfied beyond reasonable doubt that he had confused the Venom incident with an incident involving a Gannet aircraft during a non-eligible period of his service.

Mr Hill argued that in rejecting his claims the Tribunal had failed to follow the steps set out in *Deledio's* case, and had thereby made an error of law. Mansfield J noted:

> [26] The Tribunal did not expressly take those steps. It identified the hypothesis put forward by the applicant connecting his diseases with the circumstances of his operational service in the manner above. It did not consider the issues of whether he suffered a stressor by witnessing the Sea Venom incident and whether that experience had led to his current conditions of PTSD and alcohol abuse in the manner prescribed by s 120(1) and (3) as explained in *Deledio*. It simply proceeded to find what had happened in the Sea Venom incident, including that the actual events differed in significant respects from the evidence given by the applicant about it. Its next step was to conclude, beyond reasonable doubt, that the applicant did not see the Sea Venom incident as he claimed, and to explain why nevertheless the applicant may have believed that he saw what he described. From that finding, the Tribunal returned to the hypothesis, which it first identified and concluded the hypothesis is not reasonable …
>
> [43] The Tribunal's reasons are not satisfactory. It did address the hypothesis put forward by the applicant under s 120(3), having regard to the two SoPs identified. It found the hypothesis was not reasonable, on the basis of findings of fact. That was erroneous. But, immediately before its conclusion in relation to the SoPs, it made a finding of fact. It was satisfied beyond reasonable doubt that the applicant 'did not see the Sea Venom incident'. It noted the medical evidence was that his recollection of the incident is 'probably a compilation of his traumatic dreams and reality'. If the hypothesis the applicant put forward was (as he said) that he saw the Sea Venom incident then, even if his recollection about its details were erroneous, a fact upon which the hypothesis was based would have been disproved beyond reasonable doubt. The essence of the claim was that he saw a person unable to escape and unable to avoid drowning in the incident, and that he was affected by what he saw. In my view, the Tribunal has found beyond reasonable doubt that the applicant did not see what he now recalls having seen in that essential respect.
>
> [44] I confess to some unease in coming to that conclusion about what the Tribunal found. The Tribunal noted the medical evidence that the

applicant's memory is probably partly a compilation of reality, as well as his dreams. It does not, however, explain what it understood by that evidence. Whilst rejecting the applicant's evidence about the details of what he saw, it does not expressly eliminate beyond reasonable doubt that he saw or experienced some part of the incident, even if he was physically unable to have seen the aircraft run off the deck. The Tribunal does not explore where he might have gone in the 30 seconds or so whilst (on its findings) the ship passed the aircraft then in the sea, or what might then have been seen of the crew member who had only (it found) belatedly ejected and was about to drown.

[45] However, such matters are matters for the Tribunal. Its reasons for decision are to be read sensibly and not with an eye attuned to the perception of error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272. I think its general finding, beyond reasonable doubt, that the applicant did not see the Sea Venom incident is a finding that the applicant did not, as he claimed, see the pilot or a crew member of the aircraft somehow struggling unsuccessfully to survive. That is not a matter of detail. Taking the hypothesis as broadly as possible, it involves the applicant claiming to have seen something like that and feeling both horror and helplessness at his inability to assist. The Tribunal's finding, in my judgment, is that he did not see something like that. As its finding was made beyond reasonable doubt, s 120(1) means there was no sufficient ground for making the determination.

It was then argued that the Tribunal's finding was 'perverse'. Mansfield J dealt with that submission saying:

[53] Even though another decision-maker may not, on the whole of the material, have been persuaded beyond reasonable doubt that the applicant did not see the Sea Venom incident as he described, and in particular did not see that which, taken broadly, I have identified as the hypothesis raised by the material he presented, I am unable to conclude (as counsel for the applicant urged) that the Tribunal's satisfaction beyond reasonable doubt that the applicant did not see the Sea Venom incident was 'perverse'. The weight the Tribunal gave to particular evidence was a matter for it. It has not been shown to have misapprehended the reverse criminal onus of proof imposed by s 120(1) of the VE Act. In my judgment, it has not reached a conclusion which was not reasonably open to it on the evidence.

[54] The question the Tribunal answered involved addressing whether a fact upon which the applicant's claim was made was disproved beyond reasonable doubt. The fact that it erred in addressing the decision-making steps does not mean that, within its process, it has not happened to address the ultimate question. In my judgment, it has done so.

[55] Accordingly, notwithstanding the errors of law in the Tribunal's approach to which I have referred, it has in a way which is adversely decisive of the applicant's claim addressed a final step in the process in a correct manner. That is sufficient for the application to fail.

Formal decision

The Court dismissed the appeal.

Editor: Mr Hill has lodged an appeal to the Full Federal Court from this judgment.

Ward v Repatriation Commission

Lee J

[2004] FCA 1163
2 September 2004

Backdating of pension – leave to appeal refused

Mr Ward sought to appeal to the Full Federal Court from the judgment of French J (see (2004) 20 *VeRBosity* 53), which had dismissed an appeal from a decision refusing to backdate disability pension to a date related to an earlier, rejected, claim. However, his application to the Court was outside the 21 day appeal period (provided for in Order 52 rule 15(1)(a) of the Federal Court Rules) and so leave to appeal was required.

In considering whether to grant leave to appeal, Lee J said:

> [8] … the Court must have regard to the overriding principle that the interests of justice be served and a grant of leave should not be made if it is plain that the ensuing appeal would have no chance of success. There is no injustice in refusing leave to bring an appeal that is doomed to fail.
>
> [9] Unfortunately for the applicant, the proposed appeal in this matter would be such a proceeding.

Formal decision

The Court refused leave to appeal. The Commission did not appear and so there was no order as to costs.

Schmidt v Repatriation Commission

Spender J

[2004] FCA 1158
8 September 2004

PTSD and alcohol dependence and psoriasis – severe stressor – application of Stoddart *and* Woodward

Mr Schmidt claimed that three incidents that occurred during his service at Ubon, Thailand, caused him to suffer from post traumatic stress disorder (PTSD), alcohol dependence and psoriasis. The first incident was when he was confronted at gunpoint by a Thai guard; the second when he attended the local police station to obtain a licence for a bicycle and was held by the police in a cell for a number of hours, and the third incident related to a Red Alert that occurred while on patrol at his base. The Tribunal affirmed the decision of the Repatriation Commission that his disabilities were not war-caused.

Counsel for Mr Schmidt referred to *Stoddart* (2003) 19 *VeRBosity* 125 and *Woodward* (2003) 19 *VeRBosity* 83 and submitted that the AAT had taken an incorrect approach when considering whether Mr Schmidt had experienced a 'severe stressor' as required by the relevant Statements of Principles (No 3 of 1999 and No 76 of 1998). It was argued that the Tribunal failed to consider the events as judged by an objective observer in the position of, and with the knowledge of, the veteran.

In upholding the Tribunal's decision, Spender J stated:

> [36] … the reason for the AAT's finding that it was satisfied beyond reasonable doubt that the applicant did not experience a severe stressor in terms of the relevant SoPs was that, in respect of the incident with the guard and the push-bike, the

> applicant did not feel 'in fear for his life or of injury, as required by the definition of experiencing a severe stressor as set out in the relevant SoPs'. In respect of the Red Alert incident, the reason for the AAT's finding is that 'the applicant did not fear for his life or safety as required by the definition of experiencing a severe stressor as required by the relevant SoPs during this incident'.
>
> A subjective fear for one's life or safety is a necessary integer of the requirement of 'experiencing a severe stressor'. The AAT found that no such integer existed in this case. That finding was a finding of fact, and open to the AAT on the evidence.

Spender J noted that while there was evidence on which the Tribunal could have found the existence of a 'severe stressor', it did not do so, and such a failure is not an error of law.

Formal decision

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

Repatriation Commission v Turner

Spender J

[2004] FCA 1184
10 September 2004

Whether the* Deledio *steps were applied to defence service matter – PTSD – inability to obtain appropriate clinical management – cultural factors against seeking treatment

The Repatriation Commission appealed the decision of the Tribunal that Mr Turner's post traumatic stress disorder (PTSD) was 'defence-caused'.

Mr Turner's PTSD arose from an incident that occurred while he was serving in HMAS *Melbourne*. He witnessed the collision of HMAS *Melbourne* with USS *Frank E Evans* and assisted in the recovery of the bodies of American sailors. This incident had occurred during non-eligible service and therefore the material had to show that Mr Turner's condition was worsened by an 'inability to obtain appropriate clinical management for post traumatic stress disorder'.

Mr Turner claimed he had been unable to obtain appropriate clinical management as a direct result of his PTSD symptoms, which are characteristically kept secret or denied. He also argued he had not obtained treatment because the naval ethos at the time was against seeking treatment for mental illness.

The Tribunal found that Mr Turner's PTSD had been aggravated during his defence service on patrol boats and that he had been unable to obtain appropriate clinical management for his illness. The Tribunal stated:

> [24] … I accept Dr Rogers' explanation that the applicant's PTSD made him reluctant to seek help for a condition he did not understand … Even if the applicant's condition could not be considered to be the source of an inability to obtain management, I am satisfied cultural factors were capable in their own right of creating an inability to seek assistance.

On appeal to the Federal Court, the Commission argued that as the Tribunal had referred to *Deledio's case* the Tribunal had applied an incorrect standard of proof. The Court held that the Tribunal's reference to *Deledio* was 'totally misconceived' and stated:

> [37] Notwithstanding the reference to *Deledio*, in my opinion, on a fair reading of the entirety of the decision of the AAT, the AAT did not apply *Deledio* …

> [40] … the AAT applied the correct standard of proof, and addressed the requirements of the Act in relation to entitlement in the context of 'defence service'.

In relation to the Tribunal's finding that Mr Turner had been unable to obtain appropriate clinical management Spender J said:

> [35] … it is not sufficient merely to find, as the AAT did … that cultural factors were *capable* in their own right of creating an inability to seek assistance … Similarly in my opinion, it is not sufficient to establish the 'inability' referred to in factor 5(c) of the SoP, to find that it is possible that cultural factors on their own *could* be the source of an inability to obtain appropriate clinical management of the condition …
>
> [41] The AAT found as a fact that the condition of PTSD was aggravated while the respondent was performing duties on patrol boats in and after 972, during his defence service. The AAT also found that the respondent's condition 'constituted an inability to seek appropriate clinical management of his illness.' This language, though loose and imprecise, I take plainly to mean that the respondent felt unable to, and was unable to seek appropriate clinical management of his illness, and that the reason for that inability was the respondent's PTSD. (emphasis added)

Formal decision

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

Editor: This judgment gives a most unsatisfactory explanation of how the 'inability to obtain appropriate clinical management' factor can be applied. Appropriately, the Court indicated that the AAT had wrongly sought to apply the 'cultural factors' when the Tribunal merely indicated that they 'were capable … of creating' or 'could be the source' of the 'inability to obtain appropriate clinical management' in Mr Turner's case (see para [35]). But the Court accepted that it was open for the AAT to find that having a non-defence-caused PTSD during defence service that caused Mr Turner to be unable to seek treatment meant that the factor was met. Neither the Court nor the AAT explained how that 'inability' was related to Mr Turner's *defence* service. It might have been related to his previous service in the Navy, but such previous service is not the subject of the legislation and is just as irrelevant as if the PTSD had arisen from civilian employment prior to rendering defence service. With the greatest respect, this judgment must be considered doubtful as it appears inconsistent with the Full Federal Court in *Roncevich*, which requires a causal relationship with defence service not merely a temporal one. Nevertheless, the Commission has not appealed this judgment.

Hardman v Repatriation Commission

Hill J

[2004] FCA 1174
14 September 2004

Application of* Deledio *steps – whether must have regard to all the material or only some material at steps 1-3 – whether fact-finding at step 3

This case concerns the nature of the process of decision-making in steps 1 to 3 of the *Deledio* process. The particular legal question raised was whether the decision-maker must have regard to *all* the material in deciding whether a reasonable hypothesis is raised (as the

Commission argued), or whether only that material favourable to the claimant need be considered at that stage (as Counsel for Mr Hardman argued).

The Tribunal had found that a reasonable hypothesis connecting Mr Hardman's depressive disorder with his operational service was not raised after a consideration of all the material. The Tribunal had said:

> [148] Mr Colborne indicated the raised facts … as supporting depression as a disease assailing Mr Hardman soon after this alleged incident. The tribunal finds it difficult to see that in the raised facts …
>
> [149] This material overwhelmingly suggests a clinical onset of depression no earlier than 1969. This is more than two years after the alleged severe psychosocial stressor. The hypothesis does not, therefore, conform to the SoP template and cannot be a reasonable hypothesis.
>
> [150] Factor 5(c), 'having a clinically significant psychiatric condition within the two years immediately before the clinical onset of depressive disorder', might appear relevant, given that Mr Hardman appeared to suffer from alcohol abuse or dependence from 1966. However, for such a condition to be 'clinically significant', clause 8 of the SoP requires that the disease was sufficient to warrant ongoing management. In Mr Hardman's case he appeared on the available material to receive ongoing management only from 1996, and certainly not from 1967 as the SoP would require.

The Court set out the opposing legal arguments as follows:

> [14] On behalf of Mr Hardman it is submitted that s 120(3) requires the Commission or in the event of a review, the Tribunal to consider the material before it and determine whether to be found in that material there is a reasonable hypothesis. Where the material may indicate matters that are both for and against a claimant, the Tribunal is confined in its consideration only to the matters favourable to the claimant to determine whether there is a reasonable hypothesis. It is only when it comes to the 4th step referred to in *Deledio* that the Tribunal is required to resolve factual matters which may lead it to accept or reject the hypothesis that the illness is war-caused.
>
> [15] For the Commission on the other hand, it is submitted that the Tribunal must consider at step 3 the whole of the material before it, whether that material is adverse to or favourable to the claimant. Then, having regard to the whole of the material, but without considering what the actual facts are, the Tribunal formulates the hypothesis.
>
> [16] The difference in the two views is perhaps best seen by reference to the facts in the present case. For Mr Hardman it is submitted that the relevant 'raised facts' are that Mr Hardman was happy and relaxed when he joined the ship but that when he returned to the ship following his operation he was withdrawn and depressed. Matters such as the fact that the alcohol questionnaire made no reference to depression or that the reports of Dr Lumley made no record of depression should be disregarded, it is submitted, in considering whether it is possible to formulate an hypothesis of the connection between the disease (depression) and operational service. For the Commission however it is submitted that the requirement that the Commission or in its place, on review, the Tribunal consider 'the whole of the material before it' means that all factual matters, whether true or false have to be taken into account in the

> formulation of the hypothesis, it being for this purpose accepted that the material before the Tribunal is correct. Whether the material before the Tribunal is actually true is, it is agreed, to await step 4.

The Court discussed the history of the case law surrounding the concept of 'reasonable hypothesis' in the legislation and accepted the Commission's position on the application of *Deledio*. The Court said:

> [39] It follows from the above authorities that the Tribunal is required, in determining whether the material before it raises a reasonable hypothesis, to consider all of the relevant material before it, whether or not that material is favourable or not to the hypothesis. Secondly, it is clear that the Tribunal is not to determine the correctness or otherwise of facts raised whether those facts are in favour of or contrary to the hypothesis. Thirdly, in determining whether an hypothesis is reasonable the Tribunal makes a finding of fact which this Court may not overrule unless the finding is so unreasonable that it could not properly be made.
>
> [40] In the present case the raised facts were that Mr Hardman did not display depressive symptoms until after he was removed from his ship for the purposes of the operation. He did upon his return to the ship. From these raised facts it may be inferred, it was said, that the depressive symptoms which he thereafter suffered arose from the removal and subsequent operation which took place while he was on operational service.
>
> [41] The fact, if it be a fact, that Mr Hardman, at the time he joined the ship, was happy and relaxed but that after he returned from the operation he was withdrawn, may both be said to be raised facts relevant to the hypothesis. However, in the material which was before the Tribunal there were other matters which if true, might go to disproving the hypothesis, namely that the alcohol questionnaire and subsequent medical reports made no reference to depression. It was not for the Tribunal to determine whether these matters were or were not correct as a matter of fact. However, with respect to the submissions, it is not at all clear from the Tribunal's reasons that it did so. It was required to determine, whether on the basis of all the material before it there was raised the relevant hypothesis claimed to be reasonable. It was for the Tribunal to determine whether the raised facts did indeed ground the hypothesis that there was a connection between the depressive disorder from which Mr Hardman claimed to suffer and his operational service. In my view, it was open to the Tribunal to determine by reference to all the material before it, including the reports, that the raised material did not ground the hypothesis (and this was particularly the case because the Tribunal found that there was nothing in the available material which suggested that Mr Hardman received or required 'ongoing management' by 1967 which was a requisite component of the Statement of Principles). …

Formal decision

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

Editor: Mr Hardman has lodged an appeal to the Full Federal Court from this judgment.

Federal Magistrates Court

James v Repatriation Commission

Phipps FM

[2004] FMCA 548
3 September 2004

Special rate – over age 65 – meaning of 'continuous period of at least 10 years'

Mr James retired from government employment aged 58 years. Five months later he commenced working for a private company doing related work. He continued that work until he was 66 years of age. At that time he was asked to sign a new form required by government regulation, which contained the question, 'Do you, or have you suffered from a mental illness?'. Upon answering the question affirmatively by saying he suffered from post traumatic stress disorder, his licence was not renewed and he was unable to continue in that employment.

The Tribunal found that Mr James met all the requirements for the special rate of pension except 24(2A)(g). He had worked continuously for the same company for over 8 years, but this did not meet the requirement of s24(2A)(g) that the veteran had to have 'been working for that person, or for that person and any predecessor or predecessors of that person … for a continuous period of at least 10 years'.

Mr James argued that his employment with the government doing related work could be taken into account in order to meet the 10 year test.

After considering the Federal Court cases of *Carter* [2001] FCA 992, 17 *VeRBosity* 80, *Thomson* [2000] FCA 204, (2000) 16 *VeRBosity* 12 and *White* [2001] FCA 1585, (2001) 17 *VeRBosity* 112, the Court rejected Mr James' argument and said:

> [18] The explanatory memorandum and the decisions referred to make it clear that for a veteran to meet the requirements of s 24(2A)(g) he must have been employed by the same employer (or its predecessor) continuously for the 10 year period, or must have been self-employed for a continuous period of 10 years. A period of 10 years with different employers or comprised partly of self-employment and partly of employment will not satisfy s 24(2A)(g). The argument for the applicant that employment in similar occupations will satisfy the subsection is contrary to the explanation in the explanatory memorandum and to the authorities. The applicant's employment with the [government] cannot be taken into account.

The Court also considered the situation even if the government employment could be taken into account and said:

> [19] … The period of approximately five months when he had no employment meant that he did not have a 'continuous period' of 10 years employment.

Formal decision

The Court dismissed the appeal.

Specialist Medical Review Council

Osteoporosis

Phillips (Convenor),
Guest, Eisman, Sambrook (Councillors)

2003/1
15 July 2004

Statement of Principles No. 67 of 2002 – altered dietary pattern – decrease in dietary calcium

The SMRC conducted a review of the Statement of Principles (SoP) concerning osteoporosis at the request of an applicant who contended that the dietary calcium factors (paras 5(p) and (zf)) should not be restricted to a maximum of 4 years latency period between the calcium deficient diet and the clinical onset or worsening of osteoporosis.

Paragraph 5(p) of SoP No 67 of 2002 provided:

> (p) having an altered dietary pattern resulting in a decrease in average daily calcium intake to 600 mg/day or less for a period of two years within the four years immediately before the clinical onset of osteoporosis …

Paragraph 5(zf) was in the same terms, except that it applied to 'worsening' rather than 'onset'.

Both the applicant's expert, Professor Hopper, and the Repatriation Commission submitted that there was insufficient evidence for any maximum latency period and they also agreed that the evidence better supported a decrease of 400mg/day rather than 600mg/day. The Commission also submitted that the evidence supported a differential based on the age at which the decreased dietary intake occurred. It submitted that the age at which 90% of peak bone mass is achieved is 20 years and that this age should be used as a determinant. The idea that calcium deposition was more important in the early years was supported by the NIH Consensus Conference in 2001, which stated, 'The bone mass attained early in life is perhaps the most important determinant of lifelong skeletal health.' The SMRC agreed with the idea that there should be a distinction between dietary deficiency before age 20 and after age 20.

In relation to the duration of the calcium-deficient diet, the SMRC said:

> [137] The Council's initial view was that prior to the attainment of peak bone mass, the period of exposure should be 2 years, and thereafter, it should be 10 years. The Council considered that a shorter period than 2 years prior to the attainment of peak bone mass would not have a sustained effect, ie, an effect that could not subsequently be reversed by a diet with an adequate calcium intake.
>
> [138] With respect to the period of exposure after the attainment of peak bone mass, the Council took into account the Repatriation Commission's comments that the proposed 10-year period was 'possibly a bit harsh', and closer to the (more stringent) 'on-balance standard of proof'. The Council's final decision was that the period of exposure after the attainment of peak bone mass should be set at 7 years.

The Repatriation Commission made submissions concerning the problem of persons whose deficiency starts before age 20 but does not last 2 years and continues past age 20 but does not last 7

years. The SMRC addressed that problem by using an equivalent combination method whereby one year before age 20 is equivalent to 3.5 years after age 20.

The SMRC then considered the definition of osteoporosis in the SoP. Paragraph (i) of the definition provided:

> (i) bone mineral density is 2.5 standard deviations below the mean bone density of young adult sex-matched controls, and bone mineral density is 1.0 standard deviation below the mean bone mineral density of age-matched and sex-matched controls

The SMRC said:

> [145] … In the Council's view, the correct definition (for this segment of the two-part definition, the other relating to fracture) should be internationally accepted, and so consistent with that used by the WHO and the National Institutes of Health (2001) (NIH).
>
> [146] The NIH Consensus Conference (2001) expressed this as 'bone density 2.5 standard deviations below the mean for young white adult women'. …
>
> [147] The Council noted that the Repatriation Commission … favoured retention of the existing osteoporosis definition. The Commission noted that bone mass falls gradually with age and to remove from the definition any reference to bone mineral density in comparison to age-matched and sex-matched controls may make compensation available to a person simply on the basis of age.
>
> [148] The Council understood the Repatriation Commission's concerns, and that the bone mineral density component of the definition may have been inserted into the Statement of Principles to adapt the WHO definition for compensation purposes because of the frequency of osteoporosis in the elderly.
>
> [149] However, the Council considered that the reference in the bone mineral density component of the definition to '1.0 standard deviation below the mean bone mineral density of age-matched and sex-matched controls' 'was new, and not supported by sound medical-scientific evidence in the pool of information (or at all). It does not comprise any part of the WHO or NIH definitions.
>
> [150] The Council remained of the view that the bone mineral density component of the definition should accord with that which was internationally accepted, and supported by sound medical-scientific evidence. Accordingly, the Council decided that the bone mineral density component of the definition should be changed.

Formal decision

The SMRC directed the RMA to amend SoP No 67 of 2002 to replace factors 5(p) and (zf) with the following:

> having an altered dietary pattern resulting in a decrease in average daily calcium intake to 400mg/day or less, for a period of 2 years before age 20 years, or for a period of 7 years after that age, or the equivalent combination thereof, before the clinical [onset/worsening] of osteoporosis

'Equivalent combination' was to be defined as 'a calculation where one year of exposure before age 20 years is equivalent to 3.5 years of exposure after age 20.'

Paragraph (i) of the definition was to be replaced with:

> Bone mineral density is more than 2.5 standard deviations below the mean bone mineral density of young adult sex-matched controls.

Statements of Principles issued by the Repatriation Medical Authority

July – September 2004

Number of Instrument	Description of Instrument
25 of 2004	Amendment of Statement of Principles (Instrument No. 67 of 2002) concerning **osteoporosis** and death from osteoporosis.

Copies of this instrument can be obtained from:
- **Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001**
- **RMA Website: *http://www.rma.gov.au/***

Conditions under Investigation by the Repatriation Medical Authority

as at 30 September 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
Anxiety disorder	[*Instrument Nos. 1/00 & 2/00*]	1-09-04
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
Cervical spondylosis	[*Instrument Nos 50/02 & 51/02 as amended by 64/02, 81/02 & 82/02*]	25-02-04
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
Depressive disorder	[*Instrument Nos. 58/98 & 59/98*]	1-09-04
Dental caries	[*Instrument Nos. 366/95 & 367/95*]	1-09-04
Dermatomyositis	—	16-07-03
Epilepsy	[*Instrument Nos 79/96 & 80/96*]	5-03-03
External burns	[*Instrument Nos 37/94 & 38/94 as amended by 195/95 & 196/95*]	25-02-04

Description of disease or injury	[*SoPs under consideration*]	Gazetted
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
Hodgkin's disease	[*Instrument Nos 25/00 & 26/00*]	20-08-03
Inguinal hernia	[*Instrument Nos 72/98 & 73/98*]	16-04-03
Intervertebral disc prolapse	[*Instrument Nos 130/96 & 131/96 as amended by 92/97 & 93/97*]	23-06-04
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
Lumbar spondylosis	[*Instrument Nos 46/02 & 47/02 as amended by 77/02 & 78/02*]	25-02-04
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
Malignant neoplasm of the oesophagus	[*Instrument Nos. 115/96 & 116/96 as amended by 11/98 & 12/98*]	1-09-04
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 penis	[*Instrument Nos. 340/95 & 341/95 as amended by 27/96 & 28/96*]	14-07-04
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 thyroid gland	[*Instrument Nos 33/98 & 34/98*]	16-07-03
Meniere's disease	[*Instrument Nos 77/01 & 78/01*]	5-05-04
Metastatic carcinoma of unknown primary	—	19-11-03
Motor neuron disease	[*Instrument Nos 65/01 & 66/01*]	5-05-04
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

Description of disease or injury	**[*SoPs under consideration*]**	**Gazetted**
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
Osteoporosis	[*Instrument Nos. 67/02 & 68/02 as amended by 25/04*]	1-09-04
Osteomyelitis	—	5-03-03
Paget's disease	[*Instrument Nos.15/96 & 16/96*]	28-01-04
Peptic ulcer disease	[*Instrument Nos 21/99 & 22/99*]	23-06-04
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
Post traumatic stress disorder	[*Instrument Nos. 3/99 & 4/99 as amended by 54/99 & 55/99*]	1-09-04
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
Steatohepatitis	—	25-02-04
Sudden unexplained death	[*Instrument Nos 99/96 & 100/96 as amended by 185/96, 186/96, 18/02, 19/02, 49/03 & 50/03*]	25-02-04
Thoracic spondylosis	[*Instrument Nos 48/02 & 49/02 as amended by 79/02 & 80/02*]	25-02-04
Toxic encephalopathy	—	25-02-04
Tuberculosis	[*Instrument Nos. 81/97 & 82/97*]	1-09-04

AAT and Court decisions – July to September 2004

AATA = Administrative Appeals Tribunal
FCA = Federal Court
FCAFC = Full Court of the Federal Court
FMCA = Federal Magistrates Court
HCATrans = High Court special leave hearing
SRCA = decided under the *Safety, Rehabilitation and Compensation Act 1988* and in which the MRCC was a party

Allowances & benefits

attendant allowance
- whether injury or disease similar in effect or severity to injury or disease of cerebro-spinal system
Sleep, K J (*Hayne*, *Heydon* JJ)
[2004] HCATrans 298 12 Aug 2004

loss of earnings allowance
- date of effect
Johnston, J
[2004] AATA 1042 24 Sep 2004

Carcinoma

acute myeloid leukaemia
- smoking
Hillier, R A (Navy)
[2004] AATA 897 26 Aug 2004

non melanotic malignant neoplasm of the skin
- UV radiation exposure
- application of UV risk factor
Flux, C B (Navy)
[2004] AATA 834 10 Aug 2004

Circulatory disorder

hypertension
- alcohol
Ahrens, D (Navy)
[2004] AATA 943 10 Sep 2004

ischaemic heart disease
- alcohol
Ahrens, D (Navy)
[2004] AATA 943 10 Sep 2004
- diagnosis
- no disease present
Kerr, A (Army)
[2004] AATA 848 16 Aug 2004
- smoking
Smith, N F (Navy)
[2004] AATA 733 12 Jul 2004
Hillier, R A (Navy)
[2004] AATA 897 26 Aug 2004

Date of effect

disability pension
- further claim successful
- unable to backdate to earlier claim
Ward, G (*Lee* J)
[2004] FCA 1163 2 Sep 2004

loss of earnings allowance
Johnston, J
[2004] AATA 1042 24 Sep 2004

Death

accidental death
- train collision
- lack of concentration due to anxiety disorder
Codd, K M (Army)
[2004] AATA 876 20 Aug 2004

carcinoma of colorectum
- alcohol
Lecole, D (RAAF)
[2004] AATA 997 24 Sep 2004

carcinoma of jejunum
- inability to obtain appropriate clinical management
- misdiagnosis
Creffield, C (RAAF)
[2004] AATA 826 6 Aug 2004

chronic airways limitation
- mustard gas
Coates, E (RAAF)
[2004] AATA 970 17 Sep 2004

Eligible service

Australian mariner
- travel on merchant ship attending stock
- not Australian mariner
Luckwald, N (Merchant Navy)
[2004] AATA 714 6 Jul 2004

qualifying service
- civilian
- crew member of MV *Jeparit*
McCoy, J V
[2004] AATA 904 27 Aug 2004
[*This matter was appealed to the Federal Court and, by consent, the AAT's decision was set aside. The applicant then, on legal advice, discontinued the AAT application.*]

- whether incurred danger from hostile forces of the enemy
  - Northern Territory in 1944
    Langley, J (RAAF)
    [2004] AATA 983 21 Sep 2004
- whether member of the Forces
  - civilian crew member of MV *Jeparit*
    McCoy, J V
    [2004] AATA 904 27 Aug 2004
    [*This matter was appealed to the Federal Court and, by consent, the AAT's decision was set aside. The applicant then, on legal advice, discontinued the AAT application.*

Endocrine and metabolic disorders

diabetes mellitus
- pancreatitis
  Wright, K (Navy)
  [2004] AATA 803 2 Aug 2004

gout
- see under **Musculo-skeletal disorder**

Entitlement & liability

arose out of, or was attributable to
- temporal connection insufficient
  Luckwald, N (Merchant Navy)
  [2004] AATA 714 6 Jul 2004
  Burton, J A (Army)
  [2004] AATA 784 26 Jul 2004

but for conditions of service
- temporal connection insufficient
  Burton, J A (Army)
  [2004] AATA 784 26 Jul 2004

cessation of liability
- effects of injury ceased
  - no power to cease liability
    Thomsen, T (SRCA)
    [2004] AATA 930 7 Sep 2004

unintended consequence of medical treatment
- osteomyelitis
  Penny, E (SRCA)
  [2004] AATA 1004 24 Sep 2004

whether impairment permanent before 1 December 1988
- post traumatic stress disorder
  Barnes, P (SRCA)
  [2004] AATA 984 21 Sep 2004

Evidence and proof

application of *Deledio* steps
- assessment of the material
  Hardman (*Hill* J)
  [2004] FCA 1174 14 Sep 2004
- mechanical step-by-step approach not required
  Hill, K N (*Mansfield* J)
  [2004] FCA 851 1 Jul 2004
- rejection of evidence beyond reasonable doubt at step 4
  Hill, K N (*Mansfield* J)
  [2004] FCA 851 1 Jul 2004

credibility
- altered smoking history
  Smith, N F (Navy)
  [2004] AATA 733 12 Jul 2004
- prepared to tailor evidence to suit SoP
  McKerlie, T D (Navy)
  [2004] AATA 736 13 Jul 2004

expert
- explanation of opinion required
  Stonehouse, D (Navy)
  [2004] AATA 707 2 Jul 2004
- opinion on ultimate issue
  - must be based on correct legal test and facts
    Harrison, K J J
    [2004] AATA 774 22 Jul 2004

Gastrointestinal disorder

gastro-oesophageal reflux disease
- smoking
  Dunne, J (Navy)
  [2004] AATA 827 6 Aug 2004

pancreatitis
- alcohol
  Wright, K (Navy)
  [2004] AATA 803 2 Aug 2004

General rate, EDA, degree of incapacity & impairment

extreme disablement adjustment
- lifestyle rating
  Quinn, J
  [2004] AATA 925 3 Sep 2004

Genitourinary disorder

impotence
- alcohol
  Ahrens, D (Navy)
  [2004] AATA 943 10 Sep 2004

- post traumatic stress disorder
  Smith, W (Navy)
  [2004] AATA 869 19 Aug 2004

Haematological and immunological disorders

sarcoidosis
- inability to obtain appropriate clinical management
  Linton, G A (Navy)
  [2004] AATA 924 3 Sep 2004

Historical material

Army
- 2 Advanced Ordnance Depot
  - February 1970
    Laird, R J (Army)
    [2004] AATA 723 7 Jul 2004
- APC hit by enemy fire
  - 18 February 1970
    Laird, R J (Army)
    [2004] AATA 723 7 Jul 2004

Navy
- HMAS *Ibis*
  - 2 June 1978
    Skene, N V (Navy)
    [2004] AATA 782 23 Jul 2004
- HMAS *Melbourne*
  - May 1960
    Farmer, J (Navy)
    [2004] AATA 781 23 Jul 2004
- HMAS *Swan*
  - October 1971
    McKerlie, T D (Navy)
    [2004] AATA 736 13 Jul 2004
  - December 1971
    McKerlie, T D (Navy)
    [2004] AATA 736 13 Jul 2004
- HMAS *Sydney*
  - October 1971
    McKerlie, T D (Navy)
    [2004] AATA 736 13 Jul 2004
- HMAS *Voyager*
  - May 1960
    Farmer, J (Navy)
    [2004] AATA 781 23 Jul 2004

Infection

streptococcal infection
- temporal connection
  Burton, J A (Army)
  [2004] AATA 784 26 Jul 2004

osteomyelitis
- infection following fractured tibia
  Penny, E (SRCA)
  [2004] AATA 1004 24 Sep 2004
- whether unintended consequence of medical treatment
  Penny, E (SRCA)
  [2004] AATA 1004 24 Sep 2004

Jurisdiction & powers

Administrative Appeals Tribunal
- application of Repatriation Commission policy
  Gingis, Y
  [2004] AATA 841 11 Aug 2004

Musculo-skeletal disorder

gout
- alcohol
  Dunne, J (Navy)
  [2004] AATA 827 6 Aug 2004

osteomyelitis
- infection following fractured tibia
  Penny, E (SRCA)
  [2004] AATA 1004 24 Sep 2004
- whether unintended consequence of medical treatment
  Penny, E (SRCA)
  [2004] AATA 1004 24 Sep 2004

Practice and procedure

Administrative Appeals Tribunal
- investigation directed
  - posthumous psychiatric evaluation
    Lecole, D
    [2004] AATA 997 24 Sep 2004
- reviewable decision a nullity
  - no power to remit
    Thomsen, T (SRCA)
    [2004] AATA 930 7 Sep 2004
- ex gratia payment recommended
  Johnston, J
  [2004] AATA 1042 24 Sep 2004

Psychiatric disorder

alcohol abuse or dependence
- aggravation
  Turner (*Spender* J)
  [2004] FCA 1184 10 Sep 2004
- clinical onset
  Ahrens, D (Navy)
  [2004] AATA 943 10 Sep 2004

- experiencing a severe stressor
  - aircraft approaching ship
    Noble, P D (Navy)
    [2004] AATA 954 14 Sep 2004
  - hearing stories of atrocities
    Hillier, R A (Navy)
    [2004] AATA 897 26 Aug 2004
  - scare charges
    Davis, B (Navy)
    [2004] AATA 980 21 Sep 2004
  - sentry duty in HMAS *Sydney*
    Hillier, R A (Navy)
    [2004] AATA 897 26 Aug 2004
- tinnitus
  Robertson, R M (Navy)
  [2004] AATA 866 19 Aug 2004

diagnosis
- failure to diagnose psychiatric disease
  Murphy, P G (Army)
  [2004] AATA 703 1 Jul 2004
  Hartshorn, J (RAAF)
  [2004] AATA 824 9 Aug 2004
  Anderson, G (Army)
  [2004] AATA 950 14 Sep 2004

drug dependence or abuse
- alcohol
  Wright, K (Navy)
  [2004] AATA 803 2 Aug 2004

post traumatic stress disorder
- aggravation
  Turner (*Spender* J)
  [2004] FCA 1184 10 Sep 2004
- experiencing a severe stressor
  - artillery fire
    Heard, M (Army)
    [2004] AATA 773 23 Jul 2004
  - boiler room incident
    Gibson, B W (Navy)
    [2004] AATA 870 18 Aug 2004
  - crashlanding on aircraft carrier
    Hill, K N (*Mansfield* J)
    [2004] FCA 851 1 Jul 2004
  - death of friend
    Heard, M (Army)
    [2004] AATA 773 23 Jul 2004
  - diving incident
    McKerlie, T D (Navy)
    [2004] AATA 736 13 Jul 2004
    Smith, W (Navy)
    [2004] AATA 869 19 Aug 2004
  - oil leak in HMAS *Perth*
    Sly, R (Navy)
    [2004] AATA 958 15 Sep 2004
  - picket duty
    Heard, M (Army)
    [2004] AATA 773 23 Jul 2004
  - red alert at Ubon
    Schmidt (*Spender* J)
    [2004] FCA 1158 8 Sep 2004
  - witnessed dead bodies
    Fielden, P J (Army)
    [2004] AATA 862 18 Aug 2004
  - witnessed prisoners on deck of HMAS *Perth*
    Sly, R (Navy)
    [2004] AATA 958 15 Sep 2004
  - witnessed shooting
    Fielden, P J (Army)
    [2004] AATA 862 18 Aug 2004
  - wreckage of vehicle
    Laird, R J (Army)
    [2004] AATA 723 7 Jul 2004
- inability to obtain appropriate clinical management
  Turner (*Spender* J)
  [2004] FCA 1184 10 Sep 2004
- whether impairment permanent before 1 December 1988
  Barnes, P (SRCA)
  [2004] AATA 984 21 Sep 2004

Remunerative work & special rate

ceased to engage in remunerative work
- reason for ceasing
  - home detention
    Kelly, L J
    [2004] AATA 1000 24 Sep 2004
  - partner's ill health
    Wischusen, I
    [2004] AATA 899 27 Aug 2004
- redundancy
  Williams, R L
  [2004] AATA 968 10 Sep 2004

employment
- manual labourer
  Oliphant, T
  [2004] AATA 969 17 Sep 2004
- motor mechanic
  Summerhill, M
  [2004] AATA 883 24 Aug 2004
  Williams, R L
  [2004] AATA 968 10 Sep 2004
- plant operator
  Harrison, K J J
  [2004] AATA 774 22 Jul 2004

Respiratory disorder

Service pension

Skin disorder

non melanotic malignant neoplasm of the skin
- UV radiation exposure
  - application of UV risk factor
    Flux, C B (Navy)
    [2004] AATA 834 10 Aug 2004

psoriasis
- streptococcal infection
  Burton, J A (Army)
  [2004] AATA 784 26 Jul 2004

Spinal disorder

cervical spondylosis
- trauma
  - falling rock
    Walker, R J (Army)
    [2004] AATA 915 1 Sep 2004
  - parachute fall
    Walker, R J (Army)
    [2004] AATA 915 1 Sep 2004
  - unarmed combat training
    Walker, R J (Army)
    [2004] AATA 915 1 Sep 2004

lumbar spondylosis
- permanent ligamentous instability
  Broad, R C (Army)
  [2004] AATA 880 20 Aug 2004
- trauma
  - lifting
    Hansen, C (Army)
    [2004] AATA 951 14 Sep 2004

Visual disorder

astigmatism
- pterygium
  Flux, C B (Navy)
  [2004] AATA 834 10 Aug 2004

pterygium
- UV radiation exposure
  - application of UV risk factor
    Flux, C B (Navy)
    [2004] AATA 834 10 Aug 2004

Words and phrases

appointed
McCoy, J V
[2004] AATA 904 27 Aug 2004
[*This matter was appealed to the Federal Court and, by consent, the AAT's decision was set aside. The applicant then, on legal advice, discontinued the AAT application.*

chronic pain
Robertson, R M (Navy)
[2004] AATA 866 19 Aug 2004

continuous period of at least 10 years
James (*Phipps* J)
[2004] FMCA 548 3 Sep 2004

inability to obtain appropriate clinical management
Creffield, C (RAAF)
[2004] AATA 826 6 Aug 2004
Linton, G A (Navy)
[2004] AATA 924 3 Sep 2004
Turner (*Spender* J)
[2004] FCA 1184 10 Sep 2004

incapacity for work
Hill, C D (*Mansfield* J)
[2004] FCA 832 1 Jul 2004

major illness or injury
- meaning of seriously disabling
  Carroll, J (Navy)
  [2004] AATA 836 12 Aug 2004

seriously disabling
Carroll, J (Navy)
[2004] AATA 836 12 Aug 2004

with
McCoy, J V
[2004] AATA 904 27 Aug 2004
[*This matter was appealed to the Federal Court and, by consent, the AAT's decision was set aside. The applicant then, on legal advice, discontinued the AAT application.*