VeRBosity

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Contents

Editor's notes

The six months covered by this edition of *VeRBosity* saw the departure of Bill Rolfe as Principal Member upon being appointed as Repatriation Commissioner, and the appointment of a new Principal Member, Michael Griffin.

A number of amendments of the VEA and MRCA are described in an article in this edition.

Also included is an article on the effects of sections 9A and 70A of the VEA. These provisions were inserted into the VEA upon the introduction of the MRCA on 1 July 2004 to bring to an end liability under the VEA for certain injuries and diseases related to service rendered on or after that date. It is important that practitioners are familiar with the effects of these sections.

Another article concerns the liability provisions in the VEA and MRCA, indicating the various ways in which injury, disease or death may be related to service under those Acts.

Collins Fagan, a VRB Services Member, writes of his reflections on military matters while on a recent private holiday.

Trina McConnell
Editor

Bill Rolfe appointed Repatriation Commissioner

Brigadier Bill Rolfe (Rtd) has retired from his role as the Principal Member of the Veterans' Review Board after nearly a decade of exceptional service that was characterised by commitment and conscientiousness.

Brigadier Rolfe graduated from the Royal Military College, Duntroon, in 1968 and served with distinction in South Vietnam with the 2nd Battalion Royal Australian Regiment. Subsequently Bill retrained as a legal officer and became the Director General, Defence Force Legal Services. He retired from the Army in 1992. Bill then worked in the Attorney-General's Department before being appointed as the Principal Member of the VRB on 8 April 1997.

In this position, Bill served the VRB with distinction, working very long hours. He travelled far and wide to talk to veterans' groups, and always made himself available, often at considerable personal cost. Board Members were encouraged to change their approach during hearings: to be more enquiring and less confrontational, and to ensure that veterans, widows and families got a fair hearing. Bill would often review tapes of hearings to make a full assessment of any complaints.

The high regard in which the VRB is held today by the ex-service community reflect credit on Bill's tenure – his strong leadership ability, sound legal skills and deep understanding of military service. Bill left the VRB with relationships with the ex-service community on a very sound footing, thanks to his continual availability to all veterans and the sympathetic culture at the Board he has promoted.

The appointment of Bill Rolfe to the position of Repatriation Commissioner, on 26 January 2007 to serve on both the Repatriation and the Military Rehabilitation & Compensation Commissions, where he will continue to provide very able leadership, was possibly the most significant event affecting the Veterans' Review Board this year.

Bill has left his mark on the VRB. The way in which we do our work has significantly improved and we are better placed to meet the demands of the future. His unfailing enthusiasm, sense of humour, together with his leadership ability, personal integrity, and most importantly, he was an example, guiding the VRB through the last ten years. Thankyou Bill.

VRB welcomes new Principal Member

One of Australia's most highly regarded military legal officers, **Michael Griffin**, has been appointed Principal Member of the Veterans' Review Board, the Minister for Veterans' Affairs, Bruce Billson, announced on 22 June 2007.

Mr Billson said Michael Griffin had shown experience, judgment, diligence and integrity in his careers in both the army and the law.

'Mr Griffin is the right man to ensure the Veterans' Review Board's traditions of independence and integrity are upheld in the years to come,' Mr Billson said.

Michael Griffin (centre) with Nick and Mrs Helyar, President Sydney Legacy, Mr Kevin and Mrs Humphreys, President Bathurst Legacy, and Dick and Mrs Crossing, Secretary, Bathurst Legacy

'His ability to build enduring relationships will ensure the Veterans' Review Board continues its ongoing high standard of interaction with the ex-service community. His professional achievements indicate that he will bring expertise, thoroughness and empathy to his functions as Principal Member of the Board.'

Michael Griffin has a Bachelor and a Masters Degree in Law from the University of New South Wales and has filled demanding roles as a Member on the Migration Review Tribunal, the Refugee Review Tribunal and the Administrative Appeals Tribunal. He joined the Army in 1975 as a private and served in the 3rd Battalion Royal Australian Regiment. He had service as a section commander and as a recruiting Sergeant before qualifying as a lawyer. He was commissioned in the Australian Army Legal Corps and retired from full time service with the rank of Lieutenant Colonel in 1997. He has continued his service as a Colonel in the Active Army Reserve while developing a private legal practice and working as a member of administrative tribunals.

'I am confident that Mr Griffin's extensive experience across many high-profile administrative review tribunals and expertise in Defence Force administrative law demonstrates his dedication and capacity to undertake the vital role of Principal Member,' Mr Billson said.

The Governor-General has approved Mr Griffin's appointment for a five year term, effective from 26 June 2007.

'I congratulate Mr Griffin on his appointment as Principal Member of the Veterans' Review Board,' Mr Billson said.

Recent legislative amendments

The ***Social Security and Veterans' Affairs Legislation Amendment (One-off Payments and Other 2007 Budget Measures) Act 2007*** (the Amending Act) was assented to on 11 May 2007 and came into force on that date.

Compensation for POWs (Europe)

Schedule 5 of the Amending Act provides for $25,000 ex gratia compensation payments in respect of persons who were interned in World War 2 in the European theatre of war.

About 2,200 eligible veterans and widows are set to receive the payment as part of a $57.2 million initiative under the 2007-08 Federal Budget. This follows ex-gratia payments of $25,000 to Japanese PoWs or their widows in June, 2001 and to North Korean PoWs or their widows in June 2003.

If a person is dissatisfied with a determination in respect of a claim for one of these payments, they can apply for review to the Administrative Appeals Tribunal.

Backdating of war widow's pensions

Part II of the VEA has been amended with respect to claims for 'War Widow's claims'. The amendments particularly relate to the earliest date of effect for successful claims.

As is well known section 20 of the Act provides that the earliest date of effect of a determination of a claim under section 14 of the Act is a date not earlier than 3 months before the date on which the claim under section 14 was received at an office of the Department in Australia. War Widow's claims are made under section 14 of the Act.

Schedule 8 of the amending Act provides for an extended time in which to lodge a claim for pension under section 14 in the case of the widow of a deceased veteran. These amendments insert new subsections 20(2A) and 20(2B) of the VEA, which are the substantive provisions.

Item 6 of the schedule, which will not appear in the VEA, but which is a substantive provision of the amending Act, provides that the amendments apply only to deaths that occur on or after 1 July 2007.

The basic effect of the legislation is that if a veteran's death occurs on or after 1 July 2007 and a claim for pension under s 14 of the Act is received at an office of the Department of Veterans' Affairs in Australia within 6 months of the veteran's death, pension can be backdated to the day after the veteran's death.

If a claim is made later than 6 months after the veteran's death, the earliest date of effect will be 3 months before the claim was made.

The following are some examples showing how the legislation will operate.

Example

The veteran dies on 30 June 2007. The widow lodges a claim for pension on 30 October 2007. The claim is successful. The earliest date of effect 30 July 2007.

Reasoning

The veteran died before 1 July 2007 and the claim was received at an office of the department in Australia 4 months after the death of the veteran. Under s 20(1), the earliest date of effect is a date that is not earlier than 3 months before the claim was received at an office of the Department in Australia.

Example

The veteran dies on 2 July 2007 and the claim is lodged on 4 October 2007. The claim is successful. The earliest date of effect is 3 July 2007.

Reasoning

Although the death of the veteran occurred after 1 July 2007, the widow, who is a dependent, is not eligible for a pension until after the death of the veteran by virtue of section 13 of the Act.

Example

The veteran dies on 2 July 2007 and the widow lodges a claim with the Department on 2 January 2008, the date of effect will be 3 July 2007.

Reasoning

Prior to the amendment the earliest date of effect would have been 2 October 2007. Even though the widow lodged her claim with the Department less than 6 months after the date of the veteran's death, she is still not eligible for a pension until the day after the date of the death of the veteran, by virtue of section 13 of the Act.

Example

The veteran dies on 2 July 2007. The widow lodges a claim with department on 3 January 2008. Date of effect is 3 October 2007.

Reasoning

The claim was lodged by the widow 6 months and 1 day after the veteran died, therefore the provisions of s 20(2A) cannot apply and the provisions of s 20(1) apply, that is that the earliest date of effect is a date not earlier than 3 months before the claim was received at an office of the Department in Australia.

Further Discussion

The same provisions apply to widowers.

Section 13 gives eligibility to claim for a pension to 'dependants' of the deceased veteran. A dependant of veteran includes a 'child' as defined in s 5F of the Act. However the amending Act limits the extension of backdating to dependants who are widows or widowers. It does not extend to children of veterans who claim after 3 months but before 6 months after the veteran's death.

Veterans' Affairs Legislation Amendment (2007 Measures No. 1) Act 2007

The *Veterans' Affairs Legislation Amendment (2007 Measures No. 1) Act 2007* commenced on 22 June 2007. The Act made amendments of the VEA in relation to a number of matters concerning the income and assets tests. It also aligned the compensation recovery provisions relating to income support pensions with those of the Social Security legislation.

The Act also provided that a person is not entitled to treatment under the VEA if their income support payment is suspended because they are in gaol (the State or Territory is responsible for health care while the person is in gaol).

Travel expenses for treatment

The Act amended s 112, to extend the time in which a person could claim travel expenses connected with obtaining treatment from 3 months to 12 months.

MRCA amendments

The Act also made two amendments of the *Military Rehabilitation and Compensation Act 2004* (the MRCA).

Consequence of treatment

The first amendment concerned section 29 of the MRCA, which concerns the consequences of treatment.

The effect of the amendment is that an injury or disease that is a consequence of the treatment paid for or provided by the Commonwealth of an already accepted service injury or disease need not have been an *unintended* consequence of the treatment.

The requirement for a claimed injury or disease to be the unintended consequence still applies if the injury or disease being treated is not a service injury or disease and it is being treated under Defence Regulations.

The *Langley/McKenna*[1] requirement to re-determine whether there is a link between service and the treated disability does not apply as there is no requirement in section 29 to connect the treated injury or disease with the person's service.

It is important to note that the claimed injury or disease must have been caused by the treatment, and not merely have been caused by the disability that was being treated.

Statements of Principles do not apply to a connection based on section 29 of the MRCA (see s 23(1) of the MRCA).

The new section 29 applies to an injury or disease sustained or contracted before, on, or after 22 June 2007. See Part 2, item 3 of the *Veterans' Affairs Legislation Amendment (2007 Measures No. 1) Act 2007*.

Onus of proof

The second amendment was to the provision concerning onus of proof (section 337). The former section 337 provided that there was no onus of proof on any party in relation to claims for compensation. The amendment makes it clear that there is also no onus of proof in relation to claims for acceptance of liability.

[1] *Langley v Repatriation Commission* (1993) 43 FCR 194, 115 ALR 51, 30 ALD 8, 9 *VeRBosity* 40; *McKenna v Repatriation Commission* [1999] FCA 323, (1999) 29 AAR 70, 15 *VeRBosity* 22.

Liability under the VEA & MRCA

'Liability' in the context of the VEA is about whether the Commonwealth is responsible for paying pension for the veteran's or member's death, injury or disease.[2]

Under the MRCA, claiming for the acceptance of liability for an injury, disease or death, can be a separate but necessary preliminary process from that of claiming for compensation or other benefits.[3]

In deciding liability for incapacity from injury or disease, the decision-maker must be satisfied that the claimed disability is either an 'injury' or a 'disease' as defined by the VEA or MRCA.

Liability may be accepted only for properly diagnosed injuries or diseases. Vague terms such as 'sore back' or 'injured elbow' are not sufficient for acceptance of liability, nor are symptoms (for example, pain alone) without a diagnosed injury or disease.

Sections 8, 9, and 70 of the VEA, and sections 27 to 30 of the MRCA are the 'liability provisions'. They set out the kinds of connections that must exist before a hypothesis or contention of connection with service can be raised between the person's injury, disease or death and the eligible service rendered for the purposes of the relevant Act.

The kinds of connections set out in the liability provisions are as follows:

Liability connection	VEA service	MRCA service
Resulted from an **occurrence** that happened while rendering service	Operational service or peacekeeping service only	All types
Arose out of, or was **attributable to** service	All types	All types
Resulted from an **accident** that occurred while the person was **travelling to or from duty**	All types	Peacetime service only
Due to an **accident** or **disease** that would not have happened **but for** having rendered service or but for changes in the person's environment consequent upon having rendered service	All types	All types
Contributed to in a **material degree**, or was **aggravated** by service, provided that the disease or injury occurred prior to or during that service	All types (with some limitations)	All types
Died from a previously **accepted injury or disease**	Disability previously related to any type of service	Disability previously related to any type of service
Injury or disease as an **unintended consequence**, or death as a consequence of **medical treatment**	Not applicable	Treatment obtained during any type of service
Aggravation or **material contribution** to a **sign or symptom** of an injury or disease	Not applicable	All types

[2] Subsection 13(1), VEA.

[3] Sections 23, 24, and 319, MRCA.

Occurrence

Veterans who have rendered operational service and members of a Peacekeeping Force can have a claim accepted if the condition claimed resulted from 'an occurrence' that happened while the person was rendering such service.

Veterans who were allotted for duty outside Australia in an operational area under s 6C of the VEA, or who were 'assigned for service under s 6D of the VEA, are taken to be 'rendering operational service' for the entire period of that operational service. This means they are covered for injuries or diseases that resulted from any occurrence that happened at any time during that period, even if they were off duty or on leave.

However, the VEA does not provide such 24 hour a day coverage for any other service. In each case it will be question of fact whether the person was 'rendering' operational service at the time of the occurrence.

Under the MRCA, the occurrence provision applies to all types of service, but only while the person is 'rendering service'.

A person is taken to be rendering service while engaged in an activity that the person was reasonably expected or authorised to undertake in order to carry out the person's duties. It also includes activities that were reasonably incidental to the performance of duty.[4]

An occurrence is an event. It needs to happen or take place. The establishment of a habit (such as smoking or drinking) is not an occurrence. In *Law v Repatriation Commission*,[5] Toohey J said that 'occurrence' means:

> … an event or incident, something that happens or takes place. It does not require the quality of unexpectedness, of chance or misfortune that tends to accompany the term accident.

He considered that the formation of a smoking habit was not an occurrence because it lacked 'the sense of an event or incident or for that matter a series of events or incidents.'

In *Repatriation Commission v Law*,[6] the Full Federal Court said:

> The word 'occurrence' is not defined by the Act. The *Oxford English Dictionary* defines the word 'occurrence', so far as relevant, as 'something that occurs, happens, or takes place; an event, incident.'
>
> In our opinion, the word 'occurrence', in the context of para (a), refers to the event, incident or mishap causing incapacity or death: … It is an event, incident or mishap which is susceptible of differentiation from the course of events which constitute the ordinary course of life.

The occurrence test does not require a causal connection to service. The relationship that is required between the 'occurrence' and service is a temporal one, that is, the occurrence must have occurred at some point in time during the rendering of operational or peacekeeping

[4] *Roncevich v Repatriation Commission* [2005] HCA 40 (2005) 222 CLR 115, 21 *VeRBosity* 105.

[5] *Law v Repatriation Commission* (1980) 29 ALR 64.

[6] *Repatriation Commission v Law* (1980) 31 ALR 140

service. It is not necessary that service caused or contributed to the occurrence.

An example of such a circumstance was considered in *Brennan v Repatriation Commission*,[7] in which Selway J said:

> [21] … The death of a relative is specifically referred to in the definition of 'severe psycho social stressor' within the SoP. Nevertheless, that receipt of the news of that death must be related to the applicant's war service. In this case it was suggested that the relevant 'relationship' was established by s 196B(14) of the Act which provides:
>
> > A factor causing, or contributing to, an injury, disease or death is related to service rendered by a person if:
> >
> > (a) it resulted from an occurrence that happened while the person was rendering that service.
>
> [22] … If, for example, there was evidence that the news of his brother's death was received during the applicant's war service, that this caused him stress and anxiety, that that stress or anxiety, resulted in a generalised anxiety disorder and that he suffered from that generalised anxiety disorder within two years of that stress or anxiety then this might well be the basis for identifying a relevant hypothesis which was consistent with the SoP.

Mr Anderson suffered an attack of gastritis during his operational service in Korea. There was no evidence to suggest that the gastritis was caused by his service, but the AAT found that this attack of gastritis amounted to an occurrence that happened while he was rendering operational service.

This episode of gastritis was said to have resulted in malignant neoplasm of the stomach, which caused his death. It was thus suggested that the veteran's death resulted from an occurrence that happened while he was rendering operational service: ***Re Anderson*** (1991) 7 *VeRBosity* 108.

Events, treatment regimes, drug treatments, and surgical procedures might qualify as 'occurrences' depending on whether they are outside the course of events that constitute the ordinary course of life.

The injury, disease or death must have 'resulted from' the occurrence. The 'resulted from' connection was examined in *Commonwealth v Butler*,[8] where Windeyer J said that there is no point in adding glosses to the ordinary words by paraphrasing it. Nevertheless, in *Ilsley v Wattyl Australia Pty Ltd*,[9] the Federal Court said the 'resulted from' test is not limited to the immediate proximate cause. It is no different from the 'common sense' evaluation required for causation in common law negligence cases. If a chain of causation is involved, the suggested cause must remain an effective or operative cause.

The 'occurrence' provision applies only when considering the cause of an injury or disease. It does not apply to the aggravation of a pre-existing injury or disease.

[7] *Brennan v Repatriation Commission* [2004] FCA 1431

[8] *Commonwealth v Butler* (1958) 102 CLR 465 at pp 479-480

[9] *Ilsley v Wattyl Australia Pty Ltd* [1997] 427 FCA

Arose out of, or was attributable to, service

In *Repatriation Commission v Law*,[10] the Full Federal Court said in relation to the **'arose out of'** test:

> … the words 'arising out of' require a consequential relationship of the incapacity or death with the service out of which it is said to arise. It is not useful to attempt to put a gloss upon the words of the Act by saying that the causal relationship must be 'immediate', 'direct' or 'proximate' or by saying it connotes a 'real', 'sole' or 'dominant' cause.
>
> The Act does not say death which is 'caused by' or 'results from' his war service - phrases which might connote a proximate causal relationship. The expression 'arisen out of' is satisfied if some less proximate causal relationship is established. Of course, a suggested relationship which is fanciful is not sufficient; and a suggested relationship may be so tenuous as to preclude its consideration as answering the description 'arising out of'. …
>
> It seems clear that the expression 'attributable to' … involves an element of causation. The cause need not be the sole or dominant cause: it is sufficient to show 'attributability' if the cause is one of a number of causes provided it is a contributing cause.

Mr Bendy suffered solar skin damage. He ordinarily lived in Sydney, but served for 2 years in Darwin. The Court held that 'Exposure to sunlight is, in itself, a natural feature of life and, though all servicemen suffer some exposure to sunlight during their service, that exposure is not a matter which, in the ordinary case, is attributable to … service. … [It is] a factor which can be connected causally to war service only if the war service placed the veteran in a position of special risk as to its occurrence'. If it were shown that his service in Darwin created such a special risk the claim could succeed: ***Bendy*** (1989) 18 ALD 144.

For the 'arose out of, or attributable to' connections to apply, the relevant circumstance of service must have contributed to the cause but need not be the sole, dominant, direct or proximate cause of the injury, disease or death.[11] Service must have caused the relevant circumstance and not merely be the setting in which the circumstance occurred.[12]

If the causal factor is something that occurs in everyday life, as well as in a service context, such as solar exposure, the circumstances of service must have made a special contribution over and above that of the person's everyday life.[13]

The acceleration of the onset of a disease can fall within the 'arose out of, or was attributable to' test:[14]

> [42] … a veteran may contract a disease which on the medical evidence he would be likely to have contracted in any event; and it may be that because of his war service the contraction of the disease has been accelerated. The period of the acceleration may be little or considerable. … [T]he veteran [would be] entitled to assert successfully that his contraction of the disease arose out of or was attributable to his … service.

[10] *Repatriation Commission v Law* (1980) 31 ALR 140.

[11] *Repatriation Commission v Law* (1980) 31 ALR 140.

[12] *Repatriation Commission v Tuite* (1993) 29 ALD 609.

[13] *Repatriation Commission v Bendy* (1989) 18 ALD 144.

[14] *Langley v Repatriation Commission* (1993) 30 ALD 8, 9 *VeRBosity* 40; also see *Doolette v Repatriation Commission* (1990) 21 ALD 489, 6 *VeRBosity* 66.

But for

Injury, disease or death is taken to be service-related if it was due to an accident that would not have occurred or a disease that would not have been contracted but for the veteran or member having rendered eligible service, or but for changes in the veteran's or member's environment consequent upon having rendered such service.

The 'but for' provision was inserted into Repatriation legislation in 1943 for the purpose of clarifying eligibility in 'doubtful' cases. At least this was the view of the Attorney-General at the time, the Hon H V Evatt QC. He indicated that the 'but for' provision was probably no more generous than the 'arisen out of or was attributable to' test, but it served the purpose of making clearer the intention of the attributability test.[15] This provision extends the circumstances under which a causal connection to service can be established.

The 'but for' test is a causal test, requiring a connection between the incident giving rise to the injury or disease and circumstances of service. It is not sufficient if service was merely the environment in which the incident occurred.[16]

The causal connection in the 'but for' test is a more direct causal link than the 'attributable to' test. The 'changes in environment' referred to in the provision could refer to social and other attributes of the situation in which the person was placed during service.[17]

In *Holthouse v Repatriation Commission*,[18] Davies J held that the 'but for' test does no more than remove any distinction between an immediate cause or last link in a chain of causation and some preceding link but for which the immediate cause would not have become operative. The test does not abrogate the ordinary principles of causality or dispense with the requirement that defence service be a contributing cause of the incapacity or death.

Mr Burton claimed psoriasis due to a streptococcal infection he suffered during his service in Australia in the Army during World War 2.

The AAT considered the 'but for' test and found that there was no 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 any causal connection in that the infection may have been contracted while on leave, or off duty during the veteran's own private activities.

If there had been evidence that living in barracks led to a higher risk of infection, the case might have succeeded on the 'but for' test: ***Re Burton*** [2004] AATA 784, (2004) 20 *VeRBosity* 92.

[15] W D Rolfe & B N Topperwien, '*Roncevich* and the MRCA: changing causal principles?', paper given at 2006 Veterans Law Conference.

[16] *Holthouse v Repatriation Commission* (1982) 1 RPD 287.

[17] *Repatriation Commission v Keenan* (1989) 19 ALD 509.

[18] *Holthouse v Repatriation Commission* (1982) 1 RPD 287.

Travelling to or from duty

Whether a particular journey is covered by this provision depends on the purpose of the journey. It is not sufficient that the person was going to or from the place of duty. If the accident occurred while travelling to the place of duty, the question is whether the person was going there to commence duty or merely going there for some other reason such as that was where he or she was residing.

When considering a journey when travelling away from the person's place of duty, it is necessary to determine whether the person left that place upon ceasing duty.

It is also necessary to identify the start and end points of the particular journey. A journey is not completed until its final destination is reached whether this be a few minutes after commencement or many days such as occurs for example, if a member drives interstate for leave.

Travelling back to barracks accommodation on a Friday night after going out for recreation was not considered to be travelling 'to a place for the purpose of performing duty' as the member was not required to be on duty until the Monday morning. ***Re Hopper*** (1988) 14 ALD 20.

Issues to be considered may include:

- if the journey was to a place for the purpose of performing duty or away from a place upon having ceased to perform duty;
- if the member did not delay commencing the journey for a considerable period after ceasing to perform duty;
- if the nature of the risk of sustaining injury or contracting a disease was not substantially changed or the nature of the risk was not substantially increased by the delay;
- if the journey was by a route that was reasonably direct;
- if the nature of the risk of sustaining injury or contracting a disease was not substantially changed or the nature of the risk was not substantially increased by that route;
- if there was no substantial interruption in the journey; and
- if the nature of the risk of sustaining injury or contracting a disease was not substantially changed or the nature of the risk was not substantially increased by that interruption.

Substantially increased risk of injury in journeys

Substantial delay

If there is a substantial delay before commencing the journey during which the accident happened, it must be assessed whether there was a substantially increased risk due to the delay in commencing the journey. An example of this might be where the traffic conditions were substantially worse at the time the journey occurred than they would have been had the journey occurred immediately upon ceasing duty.

Route that is not reasonably direct

If the route that is taken is not reasonably direct, it is necessary to assess:

- whether there was an increased risk of the injury, disease or death; and
- the extent of that risk,

by comparing the direct route with the route that was actually taken or proposed to be taken (if it was not completed due to the accident). In making that assessment the overall risk of the entirety of each journey is to be considered rather than an average of the risk per kilometre. Any uncompleted portion of the proposed journey is also to be taken into account in the assessment.

Mr Alcock ceased duty at 3.15pm on Friday. He planned to drive to his parent's home (about 2 hours drive by direct route) . He left his barracks at 10am on Saturday morning and then detoured by a route that added 3 hours to the journey. He stopped for lunch and resumed the journey in the late afternoon. At 6pm he was involved in an accident. It was dark at the time.

The AAT held that the substantial delay and the particular route chosen did not substantially alter the risk.

However, the AAT held that the fact that the journey during which the accident occurred took place in darkness did substantially increase the risk of injury, and so the claim was refused.

Re Alcock (1992) 28 ALD 73.

Substantial interruption to the journey

If there is a substantial interruption to a journey the question to be asked is whether by reason of the interruption the nature of the risk of injury on the part of the journey remaining after the interruption was substantially changed and the extent of that risk was substantially increased. The assessment of the risk must be made at the conclusion of the interruption and before the resumption of the journey.

Exclusions apply to specific journeys

Under the VEA, the exclusions relating to travel apply only for the purpose of the specific journey provisions referred to in s 8(1)(c), s 9(1)(c), s 70(5)(b), and s 70(5A)(b)—that is, travelling to or from duty. These exclusions do not apply to any other journeys that might be related to service.

Under the MRCA, the exclusions relating to travel apply not only to the specific travelling provisions in s 27(e) and s 28(1)(f), which concern travelling to or from a place for the purpose of undertaking duty, but also to any other provision in sections 27, 28, or 30 that, in a particular case, raises a connection between a peacetime service-related journey and injury, disease or death. The Note to s 35(1) of the MRCA says:

> This section applies if the injury, disease or death is a service injury, disease or death because of the application of any of sections 27, 28, and 30 (not only paragraphs 27(e) and 28(1)(f)).

These exclusions apply only to peacetime service. Neither the journey provisions nor the specific journey-related exclusions apply to warlike or non-warlike service under the MRCA.

Aggravation or material contribution

In the VEA and MRCA, an aggravation of an injury or disease is not a separate injury or disease in its own right. Instead, if an injury or disease has been aggravated by service, that injury or disease is treated as 'war-caused' or 'defence-caused'. Aggravation is specifically excluded from the definition of 'injury' and 'disease' in s 5D(1) of the VEA and s 5 of the MRCA. This means that, unlike under the SRCA, the aggravation of an injury or disease is not to be regarded as an injury or disease in itself.

In *Repatriation Commission v Yates*,[19] the Federal Court recognised that if an injury or disease is accepted under the VEA on the basis of aggravation, the entire injury or disease becomes war-caused or defence-caused and the entire incapacity from that injury or disease is pensionable (not merely the effects of the aggravation). The Court held that this implies that the aggravation must be of a permanent nature and it must worsen the injury or disease itself rather than merely worsen its symptoms or have only a temporary worsening effect on the injury or disease.

The Note to s 27(d) of the MRCA (the main aggravation provision in that Act) refers to *Yates'* case, indicating that it also applies to aggravation under the MRCA.

In Statements of Principles, the only factors that relate to aggravation or material contribution are those that concern the 'clinical worsening' of the injury or disease, or the 'inability to obtain appropriate clinical management' factor.

Paragraph 9(1)(e) of the VEA provides that an injury or disease is 'war-caused' if 'the injury suffered, or disease contracted, by the veteran … was contributed to in a material degree by, or was aggravated by, any eligible was service rendered by the veteran, being service rendered after the veteran suffered that injury or contracted that disease.' In situations in which aggravation is claimed, it must be established that the injury or disease existed and did not arise out of war service. Rather, the condition must have existed prior to service or have arisen during service but not out of it, and the veteran's claim is based on aggravation by eligible service of that non–service caused condition.

Aggravation must relate to a pre-existing injury or disease; it is not sufficient to show a pre-disposition or susceptibility to an injury or disease which injury or disease later develops following a period of service. The aggravation must manifest as a permanent worsening of a pre-existing injury or disease by some factor in the veteran's eligible service. The whole of the disease is then accepted as service related, not just the aggravation component.

The condition must actually be made worse by war service and not simply be worse. Generally, a condition cannot be said to be aggravated simply because its symptoms appear to be worse. The underlying pathology of the disease must be shown to be worse for the claim to succeed.

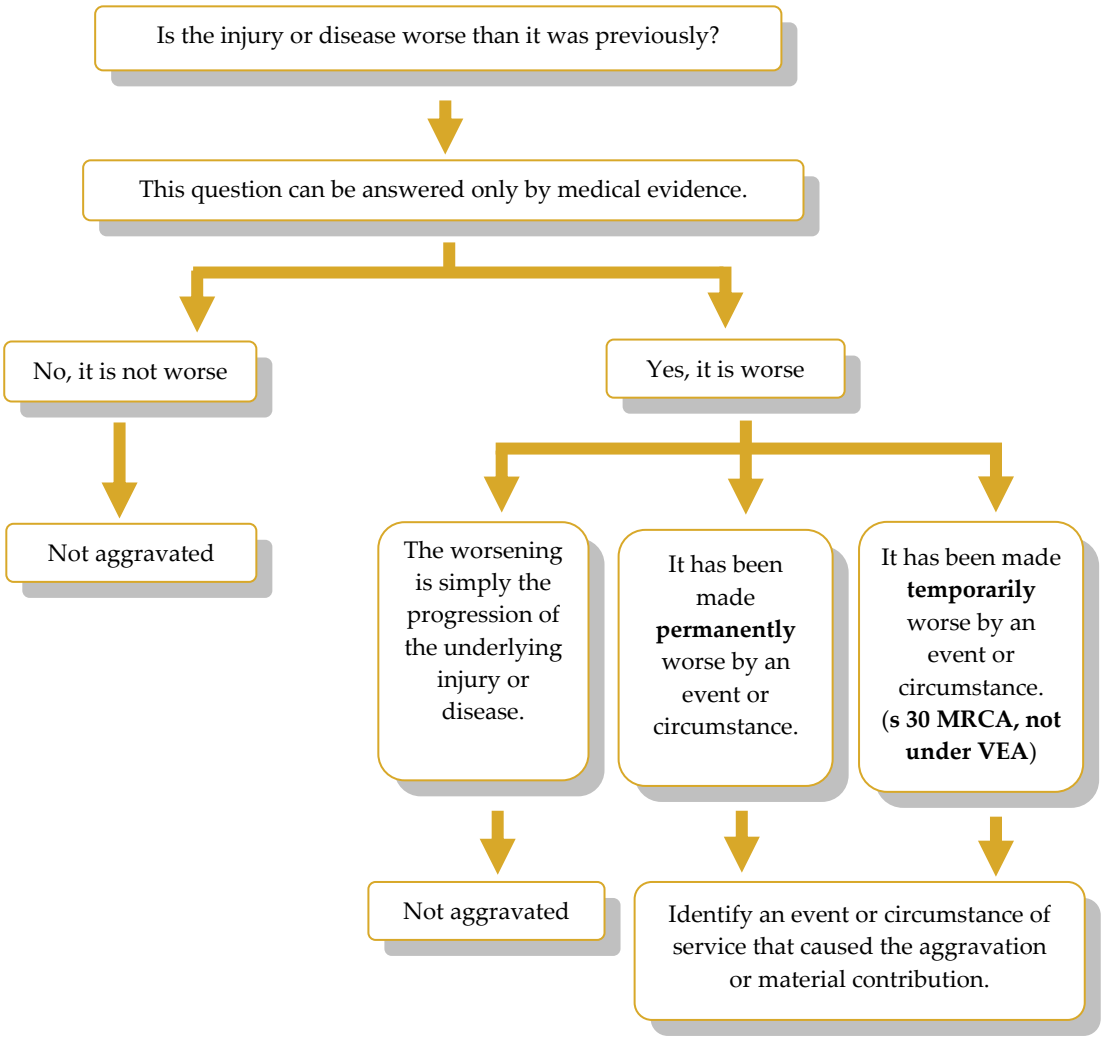
[19] *Repatriation Commission v Yates* (1995) 38 ALD 80, 21 AAR 331.

Under the MRCA, there is no 6 months minimum period of service before the aggravation or material contribution provision applies.

Unlike the VEA, the MRCA restricts most forms of compensation only to the impairment resulting from the effects of the aggravation rather than to impairment from the injury or disease itself (eg, s 70 and s 72 of the MRCA).

Some compensation and benefits under the MRCA are provided for an aggravated injury or disease without regard to the effects of the aggravation (eg, s 43, s 61, and s 62 of the MRCA), and in other cases, the persistence of the effects of the aggravation is merely a preliminary requirement before the effects of the entire injury or disease are compensated (eg, s 8, s 119 and s 283 of the MRCA).

Identifying 'aggravation' and whether an injury or disease is related by aggravation to service



Aggravation of a sign or symptom

Aggravation or material contribution to a **sign** or **symptom** of an injury or disease is one of the additional liability provisions under the MRCA.

If a part-time member of the ADF twists their ankle, aggravating a pre-existing ankle condition, the effects of this might only last a few days or weeks, but the member might have been incapacitated for their civilian work and need compensation for lost earnings. This might be able to be provided under s 30 of the MRCA, which concerns aggravation or material contribution to a sign or symptom of an injury or disease. There is no equivalent to this in the VEA.

The purpose of section 30 of the MRCA is to cover temporary aggravation or temporary material contribution by the aggravation of a sign or symptom of a disability. This is because temporary aggravation and temporary material contribution are not covered by s 27(d) of the MRCA.

A sign or symptom may be **aggravated** by service if it is worse than it previously was.

A sign or symptom may be **contributed to** in a material degree if the sign or symptom is worse or if the sign or symptom develops due to service.

Aggravation under s 27(d) of the MRCA will apply only if the underlying injury or disease itself is made worse, but section 30 will apply if it is merely a sign or symptom of the injury or disease that is affected by service.

An injury or disease that is accepted on the basis of an aggravation of a sign or symptom is just as much a 'service injury or disease' as one that is accepted under s 27(d) of the MRCA. The type and extent of compensation available will generally be limited by the extent of the persistence of the effects of the aggravation.

Permanent impairment payments are not paid for a service injury or disease that has been accepted on the basis of an aggravation of a sign or symptom because the signs and symptoms would be only temporary and the underlying condition has not been made worse.

A sign or symptom that persists or is much more severe than on previous occasions might indicate the aggravation of the underlying condition rather than just a sign or symptom. In that case liability would be considered under s 27(d) rather than s 30.

The reasonable satisfaction standard of proof applies to this connection peacetime service, and the reasonable hypothesis/beyond reasonable doubt standard applies in relation to warlike and non-warlike service.

As section 30 is not concerned with the cause or aggravation of the injury or disease itself, but merely of a sign or symptom of the injury or disease, the Statements of Principles are not relevant and so do not need to be met.

Death from an accepted disability

If a person dies from an injury or disease that has already been accepted under the VEA or MRCA, there is no need to link that death to service. The death will be deemed to be a service death.

The kind of connection between the accepted injury or disease and the death must be a reasonably proximate and direct cause.[1]

A similar phrase, 'incapacity from which he died', appeared in s 24(2)(a) of the Repatriation Act 1920, and was examined in detail by the Federal Court in *Repatriation Commission v Hayes*.[2] In that case, Keely J held that the Repatriation Review Tribunal had erred when it decided that the test was satisfied by finding that the incapacity 'played some material part' in the veteran's death.

Keely J held that it could be satisfied where 'the ordinary answer of an ordinary man … would be that the death has "resulted" from incapacity'. This indicates that 'from which the veteran died' is a more direct causal test than 'arose out of, or was attributable to', and requires a reasonably proximate relationship between the accepted disability and the veteran's death. It appears to be similar to the causation test the High Court said applies in negligence cases. In *March v Stramare*,[3] Mason CJ said:

> The common law tradition is that what was the cause of a particular occurrence is a question of fact which must be determined by applying commonsense to the facts of each particular case.

Liability for the death cannot be accepted under this provision if the injury or disease had been accepted on the basis of it being aggravated by service, and immediately before the death, that injury or disease was no longer aggravated or contributed to in a material degree.

> The cause of Mr Shaw's death was respiratory failure brought on by an acute interstitial lung disease complicated by a biopsy procedure that went wrong, leading to a continuing pneumothorax, a continuing debility, a continuing respiratory failure and ultimately his death. This was on a background of a previously accepted chronic obstructive airways disease.
>
> Medical evidence was that Mr Shaw's chronic obstructive airways disease played an indirect part, but was not a direct cause of Mr Shaw's death. As the accepted disease was not a direct cause, it could not be said that he 'died from' a previously accepted disease, and so liability for the death could not be accepted on that basis: ***Re Shaw*** [2005] AATA 354.

[1] *Re Shaw and Repatriation Commission* [2005] AATA 354.

[2] *Repatriation Commission v Hayes* (1982) 43 ALR 216, 64 FLR 423, 5 ALD 8, 1 RPD 281.

[3] *March v Stramare* (1991) 171 CLR 506.

Unintended consequence of treatment

Under s 29, liability can be accepted for an injury or disease that is the 'unintended consequence' of medical treatment obtained under the Defence Regulations. The reasonable satisfaction standard of proof applies to this connection for all types of service, not only peacetime service.

Certain members of the ADF are entitled to treatment for any injury or disease, whether a service injury or disease or not, under regulation 58F of the *Defence Force Regulations 1952*. Section 29 applies to treatment for any condition under these Regulations.

Section 29 also covers any injury or disease that was a consequence of treatment obtained under the MRCA, even if it was not 'unintended'.

Former members who have a Gold Card for treatment under the MRCA are entitled to be treated for any injury or disease, whether it is a service injury or disease or not. Section 29 does not apply to treatment for a non service injury or disease under the MRCA.

Mr Parker suffered from a retinal vein occlusion in the right eye. It was recommended that he undergo a surgical procedure called a chorioretinal laser shunt. The surgeon said that the procedure was successful in only 30-40% of cases and there was risk of significant complications. Another specialist said that the prospect of serious complications was as low as 5-10%.

Mr Parker underwent the procedure under reg. 58F of the Defence Force Regulations. Mr Parker suffered a major vitreous haemorrhage and fibrovascular proliferation. This required a further procedure. This procedure did not work, and Mr Parker became blind in his right eye. The AAT found the blindness to be an unintended consequence of the surgery. ***Re Parker*** [2005] AATA 440.

Comcare v Houghton[4] indicated that an 'unintended consequence' case involves a number of steps:

Step 1 Identify the injury or disease that is said to have resulted from the treatment

Step 2 Decide whether that injury or disease was caused by the treatment and was not merely associated with the treatment.

Step 3 Decide whether the injury or disease was 'unintended'.

An 'unintended consequence' of medical treatment is a consequence of the treatment that is both:

- not desired nor aimed for by the provider of the treatment; and
- not a likely consequence of the medical treatment.

It is not an unintended consequence if it was known to be an unavoidable outcome of the treatment even though not desired. 'Treatment' is defined in section 5 of the MRCA.

The reasonable satisfaction standard of proof applies to the provision for all claims, not merely for peacetime service. Statements of Principles do not apply.

[4] *Comcare v Houghton* [2003] FCA 332

Effects of s 9A and s 70A of the VEA

When enacted in 1986, the VEA provided that eligibility for 'defence service' under the VEA would continue only until the establishment of a Military Compensation Scheme. In 1994, ADF-specific amendments were made to the SRCA to establish a Military Compensation Scheme.

The Review of the Military Compensation Scheme (the Tanzer Review) was initiated after the Government had made interim adjustments to compensation benefits for ADF members as a result of the Black Hawk helicopter accident. The Tanzer Review recommended the introduction of a self-contained safety, compensation and rehabilitation scheme for the ADF based on the distinct nature and needs of military service.

The new scheme is administered by the MRCC through DVA and is a military-specific compensation scheme. The MRCA provides rehabilitation, treatment, compensation and a range of other entitlements for members and former members of the ADF in respect of injury, disease or death related to service rendered on or after 1 July 2004. It also provides for their dependants and other eligible persons.

Purpose of the transitional provisions

At the same time as the MRCA was enacted, the *Military Rehabilitation and Compensation* (*Consequential and Transitional Provisions*) *Act 2004* (CTPA) was also enacted.

The purpose of the transitional provisions is to clarify which Act compensation can be paid under, and to provide for the smooth transition from eligibility under the VEA and SRCA to commencement of eligibility under the MRCA for injuries and diseases related to service on or after 1 July 2004. They address the possibility of anomalies where several injuries may be assessed under different schemes using different procedures and with different trigger points for additional payments.

The transitional provisions do not have any effect for those people who have eligible service only under the VEA or have eligible service only under the MRCA.

As part of the transitional provisions, s 9A and s 70A of the VEA (the 'closing-off' provisions) were enacted to close off liability under the VEA if the injury, disease or death is related to service rendered on or after 1 July 2004.

Generally, the scheme applies to all military service and for all injuries occurring after 1 July 2004, with current arrangements continuing for those injured before that date.

Generally entitlements are available under one Act and not two. Such things as travel allowance, aids and appliances, attendant care, funeral benefits and rehabilitation are payable only under one Act.

Generally, under the MRCA only that aggravated portion due to service is compensated. This is important when dealing with the cessation of coverage under one Act and the transfer to the MRCA. Where relevant, claimants retain the right to pursue their claim under the VEA and not to claim under the MRCA.

Section 7 CTPA—MRCA coverage for service on or after 1 July 2004

Section 7 of the CTPA provides that the MRCA applies to:

- injury, disease or death that was sustained, contracted, or occurred on or after 1 July 2004, and that was related to service on or after that date (s 7(1)); and
- the aggravation or material contribution to an injury or disease or to a sign or symptom of an injury or disease if the aggravation or material contribution occurs on or after 1 July 2004 and relates to service on or after that date (s 7(2)).

Notes to s 7(1) and s 7(2) state that benefits 'stop being provided under the VEA' for such matters. The ending of liability under the VEA in relation to service rendered on or after 1 July 2004 is achieved through sections 9A and 70A of the VEA.

The second Note to s 7(2) says that the MRCA does not apply for aggravations by service on or after 1 July 2004 if the person makes an application for increase (AFI) in pension under the VEA rather than claiming under the MRCA.

Section 9 CTPA—MRCA not to apply to aggravation if person chose VEA AFI

Section 9 of the CTPA provides that the MRCA does not apply to a person's aggravation or material contribution if:

- the person is given a s 12 notice under the CTPA; and
- chooses to apply for an increase in VEA disability pension instead of claiming under the MRCA.

Section 12 CTPA—Choice of MRCA claim or VEA AFI

Section 12 of the CTPA gives the person a choice of continuing to be compensated for an injury or disease under the VEA, or instead to make a claim under the MRCA in relation to the aggravation of the injury or disease.

The section applies only to VEA-accepted disabilities that have been aggravated by service on or after 1 July 2004. If there has been no such aggravation (ie, no event related to service that has worsened the disability) it remains to be assessed under the VEA.

The section applies only if either a MRCA claim or a VEA application for increase in pension (AFI) has been made.

If a person has:

- made a claim under the MRCA alleging aggravation by service on or after 1 July 2004 of a previously been disability under the VEA; or
- made an AFI under the VEA on the basis that an accepted disability has been aggravated by service on or after 1 July 2004,

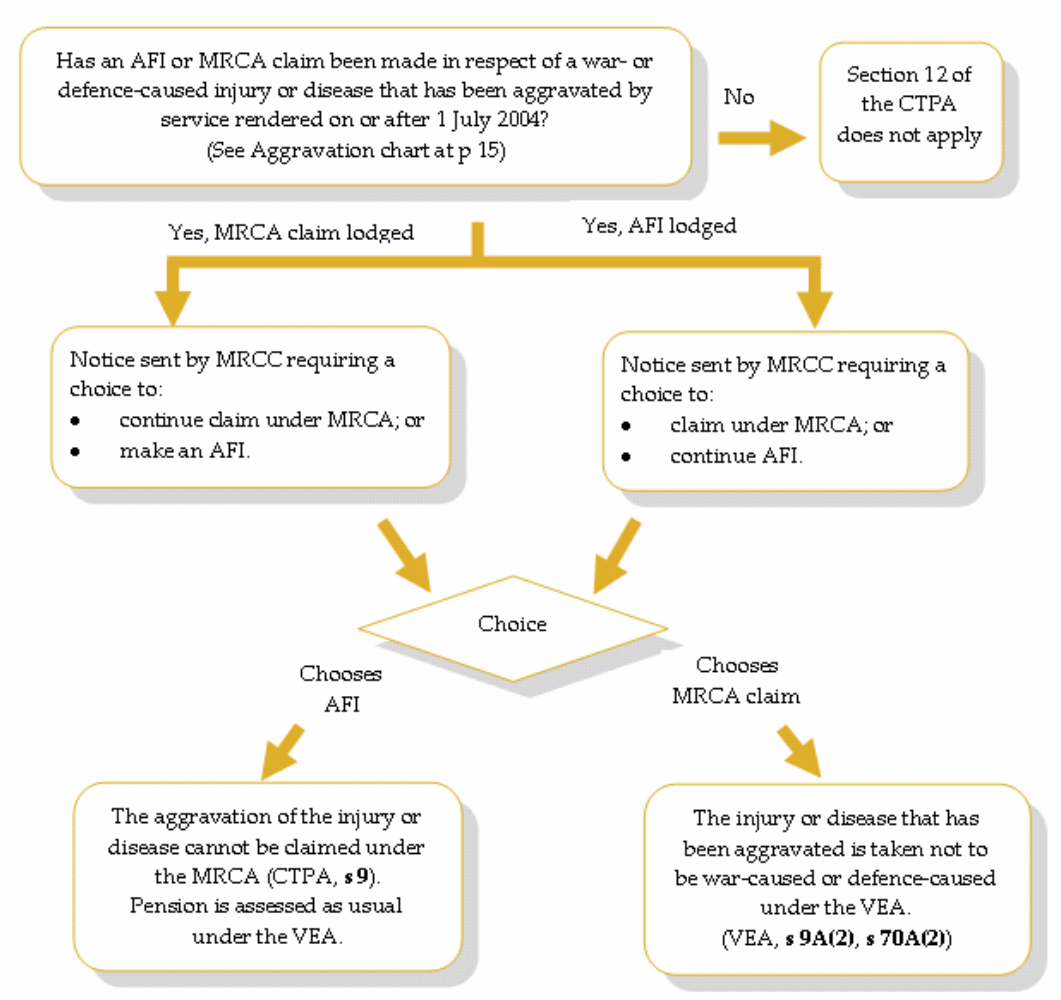
section 12 of the CTPA provides that the MRCC must give the person a notice to choose between making a claim under the MRCA or applying, or continuing to apply, for an increase in pension under the VEA.

The notice can be given only if the person has already:

- made a claim under the MRCA; or
- made an AFI under the VEA.

Once a choice has been made in relation to an aggravation, the person is committed to that choice. From that time, the aggravated injury will be covered by only one Act – either the VEA or the MRCA, whichever was chosen. Subsection 15(1A) of the VEA provides that a person who has made a MRCA claim in relation to the aggravation of an injury or disease cannot also make an application for increase in respect of that injury or disease.

Effect of s 12 of the CTPA – choice of VEA or MRCA



Subsections 9A(1) and 70A(1)

Subsections 9A(1) and s 70A(1) refer to injury, disease and death that:

- were suffered, contracted or occurred on or after 1 July 2004; and
- are related to service rendered on or after that date.

These two requirements must both be met for the subsection to prevent an injury, disease or death being taken to be war-caused or defence-caused. The disability or death must have been sustained, contracted or occurred on or after 1 July 2004 ***and*** it must be related to service rendered on or after that date. A disability or death that is suffered, contracted or occurred on or after 1 July 2004 cannot be taken to be war-caused or defence-caused if it is related to MRCA service (on or after 1 July 2004) and also related to VEA service (before 1 July 2004).

Subsections 9A(1) and 70A(1) only apply to claims for disability pension made on or after 1 July 2004.

Subsections 9A(2) and 70A(2)

Subsections 9A(2) and 70A(2) concern injury or disease aggravated by service rendered on or after 1 July 2004.

An injury or disease that has been aggravated by service on or after 1 July 2004 is taken not to be war-caused or defence-caused unless the person has chosen (following receipt of a s 12 notice) not to claim that injury or disease under the MRCA.

Subsections 9A(2) and 70A(2) can apply whether a notice under a s 12 CTPA notice has been sent or not. If it appears that the subsection will apply, the person would be given the opportunity to make a choice under s 12 of the CTPA.

If a s 12 notice has been sent, s 9A(2) or s 70A(2) does not apply if the person chooses not to make a claim under the MRCA and, instead, makes an AFI under the VEA.

If a person makes a claim under the MRCA for an injury that has already been accepted under the VEA, a s 12 CTPA notice will be sent to the person.

If the person chooses to continue with the claim under the MRCA, then s 9A and s 70A provide that the aggravated injury or disease is taken not to be war-caused or defence-caused.

What cases might be affected?

If an injury or disease that has been accepted under the VEA is aggravated or materially contributed to by service rendered on or after 1 July 2004, it may be affected by s 9A(2) or s 70A(2).

Usually under the VEA, if an accepted disability worsens, any increase in incapacity from that disability is pensionable even if the worsening is caused by something unrelated to service covered by the VEA.

Since 1 July 2004, it must first be determined whether the worsening of an accepted disability is related to service rendered on or after that date. This is so whether the person has served part-time or full time after that date.

If an accepted disability has been made worse, or there is other evidence that it is worse, this must be investigated before proceeding.

Medical evidence would need to be obtained to show whether the worsening is just the natural progression of the injury or disease, or if the underlying injury or disease has been made permanently worse by an event or circumstance related to service on or after 1 July 2004.

If the VRB finds that an accepted injury or disease has been aggravated or materially contributed to by service on or after 1 July 2004, and the person has not been sent a s 12 CTPA notice, the VRB cannot proceed with its review. In that situation, the VRB would ask the Secretary of DVA to invite the MRCC to send the applicant a s 12 CTPA notice requiring the applicant to choose either:

- to claim under the MRCA; or
- to continue with their AFI on the basis that incapacity from the entire injury or disease is pensionable under the VEA.

The VRB would have to await advice from DVA of the person's response before proceeding with its review.

Do sections 9A and 70A apply to the aggravation or material contribution of a sign or symptom of an injury or disease (see s 30 MRCA)?

No. Subsections 9A(2) and 70A(2) prevent an injury or disease being accepted under the VEA if it was aggravated or materially contributed to by service rendered on or after 1 July 2004 unless the person chooses, under s 12 CTPA, not to claim under the MRCA.

The aggravation or material contribution referred to in these sections has the same meaning as it has in sections 9 and 70. That is, it means the underlying injury or disease must have been made permanently worse and not merely that a sign or symptom of the injury or disease has been made worse (see *Yates'* case[24]).

If only a sign or symptom has been aggravated or materially contributed to by service since 1 July 2004, sections 9A and 70A do not apply to deny liability.

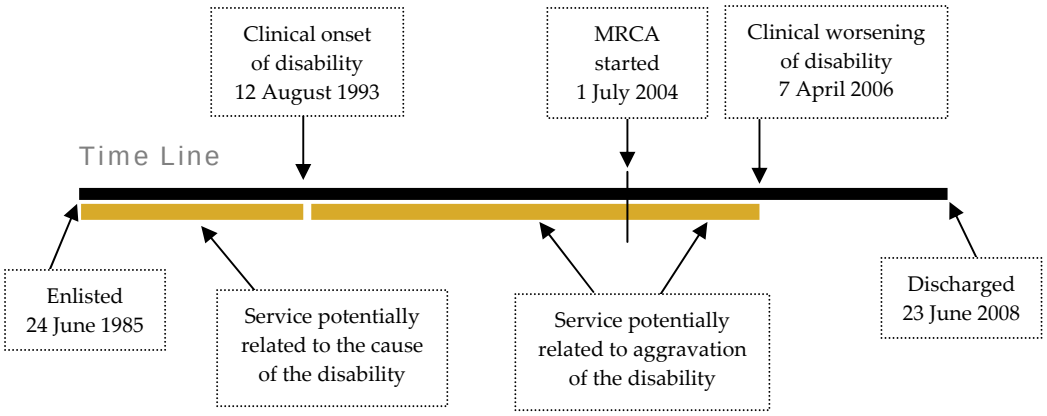
Does this mean that a person can apply for an increase under the VEA as well as claim the aggravation of a sign or symptom under the MRCA?

Yes. If a person's VEA disability has been temporarily worsened by the aggravation of, or material contribution to, a sign or symptom but the underlying injury or disease has not been made worse in a permanent kind of way, then the person may claim under s 319 of the MRCA to have liability accepted for the injury or disease on the basis of the aggravation of, or material contribution to, a sign or symptom of that injury or disease (s 30, MRCA).

This enables the person to receive incapacity for work payments but only for the period of incapacity for work resulting from the aggravation of the sign or symptoms of the injury or disease (s 88, MRCA). They would be offset against any disability pension paid for that period for the same disability.

[24] *Repatriation Commission v Yates* (1995) 38 ALD 80, 21 AAR 331.

Example



In this example, the member enlisted in 1985 and had the clinical onset of the disability in 1993. This disability was accepted under the VEA as defence-caused as it was found to be related to service rendered between 1985 and the time of onset of the disability.

The member continued to serve, and in 2006 there was a clinical worsening of the disability. Without the introduction of the MRCA, the fact that there had been a clinical worsening would mean that the person would have been entitled to make an application for an increase in pension (an AFI), whether that worsening was due to service or not.

With the introduction of the MRCA, the CTPA, and sections 9A and 70A of the VEA, it is necessary to determine whether the worsening of the disability is due to service rendered on or after 1 July 2004.

If it was made worse by service before 1 July 2004, and not by any service since that date, the AFI can proceed under the VEA and no claim can be made under the MRCA.

If it has been made worse by service rendered on or after 1 July 2004 (either on its own or in conjunction with prior service), and the member makes an AFI, the member must be given the choice to make a claim in respect of the aggravation of the disability under the MRCA or continue with the AFI.

If the member chooses to continue the AFI, the member cannot later claim in respect of that aggravation under the MRCA. The entire incapacity from the disability, including the effects of the aggravation, is then assessed and is pensionable under the VEA.

If the member chooses to claim under the MRCA, the member cannot later choose to make an AFI. The disability is no longer taken to be a defence-caused injury or disease under the VEA, and if liability is accepted under the MRCA, compensation is payable under that Act in respect of the effects of the aggravation of the disability.

Changes to eligibility

Vietnam, 1966 – 1971

On 26 October 2006 and 2 November 2006, the Vice Chief of the Defence Force, Lieutenant General Gillespie AO DSC CSM, issued instruments of allotment for duty under s 5B(2)(a) of the VEA in relation to service in South Vietnam. The first instrument provided eligibility to members of the crew of AS3051 *John Monash*, and the second to members of Clearance Diving Team 1.

Somalia, 1992 – 1994

On 15 February 2007, the Vice Chief of the Defence Force, Lieutenant General Gillespie AO DSC CSM, issued an instrument of allotment for duty under s 5B(2)(b) of the VEA in relation to service in Somalia. This instrument provided eligibility to a number of RAAF personnel who had not previously been included in an instrument of allotment.

Sierra Leone, 2001 – 2003

On 22 March 2007, the Minister for Veterans' Affairs, on behalf of the Minister for Defence revoked an instrument of non-warlike service and determined an instrument of warlike service for members of the ADF assigned for service with the International Military Advisory Training Team in Sierra Leone on Operation Husky. Service in that role between 15 January 2001 and 28 February 2003 has now been upgraded from non-warlike to warlike service.

Afghanistan, from 1991

On 24 May 2007, the Minister for Veterans' Affairs revoked an instrument and made a new instrument under s 120(7) of the VEA to clarify the commencement of hazardous service in Afghanistan on and from 8 June 1991 for members of the United Nations Office for Co-ordinating Assistance to Afghanistan (UNOCA) and the United Nations Mine Clearing Training Team (UNMCTT).

Malaya and Singapore, 1960 – 1963

On 6 May 2007, the Vice Chief of the Defence Force, Lieutenant General Gillespie AO DSC CSM, issued an instrument under s 6D(1)(b) of the VEA in relation to service in Malaya and Singapore between 1 August 1960 and 27 May 1963. While this instrument sets out all the units that have such eligibility, its particular purpose was to clarify the eleven separate periods of operational service for members of the crew of HMAS *Quiberon*.

Sarawak, Sabah, and Brunei, 1962

On 6 May 2007, the Vice Chief of the Defence Force, Lieutenant General Gillespie AO DSC CSM, issued an instrument of allotment for duty under s 5B(2)(a) of the VEA in relation to service in Sarawak, Sabah, and Brunei. This instrument provided eligibility to members of No. 36 Squadron RAAF on and from 8 December 1962 to 23 December 1962.

Operation Vigilance, 2006 – ongoing

On 20 June 2007, the Minister for Defence made instruments of non-warlike service under the MRCA and VEA concerning service on and from 1 July 2006 in Operation Vigilance, the nature of which is 'to enhance international peace and security'.

It's a Long Way to Tipperary

Collins Fagan (Services Member)
11 April 2007, Papette, Tahiti

It was mid-morning on 9 March 2007 and I was enjoying a nice cup of tea and a freshly baked muffin. George Orwell wrote to the *Daily Express* in 1942 that those that use the comforting phrase 'a nice cup of tea' means that they are drinking their tea unsweetened and without milk and the tea would be of Indian origin. I was not in the mood to analyse my tea and if there was anything unusual about it, it was that I was taking it in the front lounge of the Uplands Goose Hotel in Stanley, the capital of the Falkland Islands. I had just transited from Melbourne in a bruising journey of 42 hours elapsed time with lay-overs of seven hours each at Santiago de Chile and Punta Arenas and a non-scheduled stop at Punta Delgada to pick-up a 14 strong party of Argentinian journalists and film crews who had flown down from Buenos Aires. This was my first indication that the 25th Anniversary of the conflict between Argentine and Britain was gathering momentum and this was the reason for my visit. Needless to say, my body clock was in ruins.

The Union Jack stood proud and rigid in the courtyard, as though it had been starched, against the white flag pole. Flags seldom flutter here in the Falklands, after all we are in the South Atlantic. The strains of 'It's a Long Way to Tipperary' from the local radio station seeped from under the lounge door.

During the flight to Latin America, a not unattractive female fellow-traveller of fifty something declared that she had come to learn the tango in Buenos Aires, and doubtless capture some of the spirit of the tango that in the late nineteenth century roamed the streets like a lost soul. My mind fell on the character of Ellen, in the movie *Heading South*, splendidly played by Charlotte Rampling which has frank observations on tourism, ageing, poverty and desire. The window of what followed the tango was opaque, at least to me. When asked my reason for travel, I said that I was on a private military history trip with emphasis on the 25th anniversary of the Argentine/Britain conflict. She gave me a look that I am sure she reserved for those she pitied and chirped 'Oh, my goodness'. During the ensuing weeks, as my feet sank into the black ooze of the peat bogs, ever mindful of the many signs warning of the presence of land-mines and stumbling over the knotted clumps of gorse, the tango seemed like a better deal.

The international airport of my destination is collocated with a huge military base of some 2,500 personnel that spreads over the surrounding low hills like khaki-green lava. Outside the passenger lounge is a sign proclaiming that this is the British Forces South Atlantic Islands Mount Pleasant Complex, against which a Phantom aircraft stands sentinel. The complex is stated to be able to accommodate some 5000 personnel and is reputed to have cost 2 billion pounds. At the time of the invasion in 1982 the regular garrison in Stanley consisted of 40 Royal Marines. On the ground were a C-130 Hercules, a Nimrod, a couple of Tornados and a couple of Wessex helicopters. Troops

spend about 12 to 15 months on tour. Fighter pilots rotate every 5 weeks. That short stay attracts some flak such as 'Penguin Fatigue' and crude comments not meant for this article. I noted this with a wry smile as I was in Darwin during Confrontation and the officers' mess had a sign at the entrance: 'Fighter pilots not admitted unless with their parents'. This sort of jest is the same the world over.

Lan Chile operates a weekly A320 Airbus to Mount Pleasant from Santiago de Chile. Following the conflict, this was all Argentina would allow and would not agree to any more overflights over its territory. The Royal Air Force did operate an airbridge from Brize Norton, UK three times a fortnight with a Tristar service but commitments in the Middle East caused the withdrawal of those aircraft and the service is now provided on exactly the same basis by an Icelandic charter company with 747-400's. The flight takes 18 hours with one refueling stop at Ascension Island.

It was then off to Stanley some 50 miles distant over a ribbon of road, part sealed and part gravel. The present road system is a product of the post-conflict activity in the Islands. I eventually caught up with my guide Gerald Cheek, the recently retired Director of Civil Aviation. He is a fifth generation Falklander and was present during the occupation and at that time he was Stanley airport manager. Soon after the occupation by Argentine in 1982, he was taken by Puma helicopter to an adjacent island and held for 13 days. He had extensive knowledge of the small grass strips and the general conditions around the Islands. I then prepared for my 'Yomp' around the islands. 'Yomp' in Royal Marines slang for a non-mechanised march.

Prior to my arrival he had taken Carol Thatcher around the battlefields in preparation for her documentary 'Mummy's War'. This could well have gone to air in the UK by now. She undertook to speak to the mothers who lost sons and the widows of servicemen . When I was in Buenos Aires two weeks ago, CNN reported that she had a hard time which was to be expected. Argentina is still very bitter at the loss of life of her service personnel, particularly the 323 lost in the 13,645 ton cruiser *General Belgrano*[25] in the single deadliest incident of the war. Daily in Buenos Aires in Plaza San Martin at the north end where there is an eternal flame to those who fell in the Falklands/Malvinas war of 1982, the Army conducts a remembrance service.

The Stanley library has about two metres of histories on the Falklands War so I will just raise the points of interest I visited and a few of the exploits of the SAS and 2 Parachute Regiment who did everything expected of them and more .The civilians in the UK perceived the absurdity in a struggle some 8,000 miles from home for a relic of empire. That is not to suggest they opposed the war but they were moved by the courage and bravery of the troops rather than by the cause.

As an aside irrelevant to the capture of the Falklands, the Argentinians had occupied South Georgia 800 miles to the south beyond the primary objective. As the SAS

[25] The *General Belgrano* had previously been the USS *Phoenix*, which had survived the attack on Pearl Harbor in 1941, and was sold to Argentina in 1946.

admits to no limits to what determined men can achieve, a party of SAS members was inserted high on the Fortuna Glacier from which they could move down on the Argentinian position. They descended into the howling gale and snow-clad misery of the glacier. The party could only advance 4/500 metres pulling 200lb sleds in 4 or 5 hours. They faced katabatic winds of 100 mph and their condition deteriorated and they had to be withdrawn. A Wessex V made an approach and was hit by a white-out and crashed on the ice-cap. A second Wessex V came in, picked up all personnel and it too within seconds of takeoff was hit by a white-out and crashed. Finally a Wessex 111 was put down on the glacier and all 17 members who had survived this extraordinary ordeal were packed into a grossly overloaded helicopter and returned to Antrim. Miraculously there was no loss of life.

One could not fail to be impressed by the SAS operation at Pebble Island carried out on 11 May 1982. I stood in the area where this happened and there were still aircraft fragments in the ground. The Argentinians had a number of aircraft on the grass airstrip mainly Pucaras and helicopters protected by a 100 man garrison about a half-mile down the slope in the farm buildings. Under cover of darkness an 8 man team from D company landed on an adjacent island with canoes and laid up until the weather improved and paddled to Pebble Island. Again they laid up awaiting darkness. Having marked a landing zone they awaited two Sea Kings from *Hermes* with a further 45 men from D company. Fire was called down from supporting naval frigates on the Argentinian position while the SAS moved among the aircraft placing demolition charges. Amidst the explosions of the enemy facilities and the aircraft, the party retired at 29 knots in a Force 9 gale without losing a man and 11 aircraft were destroyed. This was a classic SAS operation of a type that had not been carried out since 1945 as not even Suez allowed the SAS to demonstrate their special abilities.

I also visited the position where Lt Col H Jones VC, OBE, CO of 2 Para was cut down. Having made their way from the San Carlos anchorage, 2 Para ran into heavy Argentinian resistance in the Darwin Goose Green area. 'H 'as he was called broke away as he had pinpointed a machine gun, he believed he could take out. Clutching a Sterling he dashed up a gully failing to notice a camouflaged Argentinian position higher up on the other side of the gully. He was shot in the neck and died soon after. I stood in the Argentinian position, still scooped out but grassed over. The position where Jones fell is marked by a stone monument with a highly polished plaque. Gerald Cheek pointed out to me a stainless steel box affixed to the rear of the monument containing a tin of Brasso and a soft cloth and it is the responsibility of those passing to ensure the plaque is clean and so it is for every monument on the Islands. Jones was awarded a posthumous VC.

I visited the British Cemetery which sits in one of the most beautiful positions in the Islands. It is located on a grassed slope that slips down into the placid San Carlos Waters. There was a small ceremony being held by family members who had lost a son on Goose Green and who had specially made the trip from UK. A lone bugler played the Last Post. To have heard the

Last Post played and to have stood where the CO of 2 Para was cut down in that unbelievably quiet, tranquil and remote location in the South Atlantic was extremely moving. There is a deep strand of sentimentality that runs through all that have had service.

My task completed in the Falklands, I headed for Uruguay to pick-up as much of the story of the 'Battle of the River Plate' as I could find. I was blessed again with the selection of my guide, Lt Col Hector Rodriguez who had recently retired from the Uruguay Army and had served with the UN in Timor and had visited Darwin a couple of times. There was instant rapport. He could not believe that someone from Australia had come all the way to Montevideo in search of the *Graf Spee* story. Little did he realize that I had been weaned on that saga and this was an important occasion for me. I was booked into the Palladium Hotel, Puerto del Buceo just off the sea-front road, the Rambla, within easy access to where most of the items removed from the *Graf Spee* can be seen.

For those who may not know the story of the *Graf Spee* I will cover it briefly. Germany's *Graf Spee*, a pocket battleship equipped with 11-inch guns and a prototype diesel engine, including the first embryonic radar antennae installed on a warship was one of the most advanced vessels of its time. It was smaller and faster than a traditional battleship and caused serious unease in the Royal Navy. It sank nine commercial vessels in the Atlantic in 1939, always allowing the crew time to abandon ship. It engaged the British cruisers *Ajax* and *Exeter* and the New Zealand cruiser *Achille* and was damaged with many of her crew dead and running low on ammunition. Captain Hans Langsdorf decided to make port in neutral Uruguay but intense diplomatic pressure from Britain restricted the stay to 72 hours. Rumour was circulated by the British Embassy that considerable naval forces had been assembled in the South Atlantic off the coast of Argentina, which was not the case. Langsdorf buried his dead refusing to give the Nazi salute at the ceremony and then communicated with Admiral Erich Raeder as to a course of action. Langsdorf was directed to completely destroy the *Graf Spee*. The ship was scuttled eight kilometres off Montevideo in the Rio de La Plata on 17 December 1939. Two days later in Buenos Aires, Langsdorf, wrapped in the Imperial German Flag, committed suicide. To find Langsdorf's grave I had to go to Buenos Aires and the bonus in looking through cemeteries was that I located, in the Cemetery of the Recoleta, the Duartes family mausoleum where Evita Peron is buried. There were large quantities of fresh flowers and letters simply addressed to 'Evita'.

At the Museo Naval on the Rambla, a 150 mm gun from the *Graf Spee* is mounted on the front lawn. In that museum is a display devoted to the *Graf Spee*. Further around the Rambla in the docks area there is an open-air museum where the anchor and rangefinder from the *Graf Spee* have been specially mounted together with the ship's bell from *Ajax*. Currently there is considerable interest in a huge three metre brass tailpiece, an eagle sitting atop a swastika, removed last year from the stern of the ship .This is the only eagle of its type to remain. There is said to be some concern that neo-Nazi groups are anxious to

acquire this. Hector Rodriguez said that it has 'gone missing' possibly to take the heat out of the situation. Offers have been said to have been made of US$15 million by collectors in America. Meantime, the syndicate that seems determined to raise the *Graf Spee* is only held up by the cost of 24 million Euros.

A services member would be very remiss to visit Uruguay and not see the 'Shrine to Tinned Corned Beef'' (sometimes called bully beef) at Fray Bentos where the production over a long period has nourished and sustained Commonwealth Forces. So I set out westwards on Route 2 and traveled close to 200 kms from Montevideo. The original plant known as El Anglo has been restored as the Museo de La Revolucion Industrial. An office block has been preserved and there are many machines from the original production line. The Australian production was to the same recipe and the product canned in the original type of can with double seamed ends, side soldered and tapered as was the case for meats. As I pondered on the Gauchos herding the Pampas fattened beef cattle into those small tins, so to speak, I realized that this much maligned product is little understood. One senior member always asserted that 'bully beef' was SPAM, the acronym for Specially Prepared American Meats which is the main product of the American pork-packing industry. A member held, by convoluted means that she understood that 'bully beef' was a sort of 'ham'd light luncheon meat'. Learning material by rote creates a foundation on which an edifice of flawed knowledge is often built.

My odyssey continued to Valparaiso in Chile and to complete a small personal connection I had with Capt P G Taylor's (Sir Gordon) historic flight in a Catalina which was to become *Frigate Bird 11* (VH-ASA) to South America as I had been privileged to meet this legendary pioneer who had flown with Sir Charles Kingsford Smith. I was stationed at RAAF Rathmines in late 1950 after he was commissioned by the Government to navigate a route to South America and one of the remaining RAAF Catalinas was made available. The aircraft was extensively worked on at Rose Bay and, meantime, I was posted. By sheer chance I was driving to Queensland on leave and the buzz in Grafton when I passed through was about the 'Catalina on the river'. I managed to sight *Frigate Bird 11*, moored on the river and it departed the next day on 13 March 1951 for Valparaiso via Noumea, Suva, Satapaula Bay (Samoa), and Papette (Tahiti), Pitcairn Island and Easter Island before arriving at the Quintero Air Base on 28 August 1951. [*Frigate Bird 11* is now an exhibit at Power House, Sydney]. I visited the Museo Naval next to the Naval Academy at Valparaiso and after asking about *Frigate Bird 11*, I was taken to the rear of the building and met a guard who was present when *Frigate Bird 11* arrived in South America. He recalled the celebration when Capt Taylor was awarded the Order of Bernardo O'Higgins (Yes, an Irishman helped set up the Chilean Services), the highest order that can be awarded to a foreigner. My return to Australia allowed some days at Easter Island and Papette.

Administrative Appeals Tribunal

Re Roper and Repatriation Commission

Forgie, Deputy President

[2007] AATA 1130
14 March 2007

Operational service – whether rendered continuous full-time service outside Australia – flights to Middleton Reef

Mr Roper served in the RAAF in World War 2 from April 1944 to October 1945. His widow sought a war widow's pension and sought to rely on the more beneficial standard of proof that applies to veterans who have rendered operational service. The AAT held a preliminary hearing to decide whether the veteran had, in fact, rendered operational service.

The Tribunal described the nature of his service as follows:

> [4.]Mr Roper qualified as an Air Gunner on 23 November 1944 while he was at the Air Gunnery School. While he was at No 7 Operational Training Unit (7OTU), between 20 February 1945 and 14 May 1945, he took part in the No 10 Liberator O/T Course. The purpose of that course was to train aircrews on the B-24 Liberator (Liberator). That aircraft was a long range American bomber with a defence of .50 calibre machine guns. The aircrews' training included long-range navigation, formation flying, gunnery, crew teamwork, fighter attacks and coastal patrol in preparation for their being posted to an active combat squadron. The Liberators that they flew during training were armed and, at times, carried a light bomb load of practice bombs for designated bombing ranges and remote practice targets. A normal heavy bomb load for a Liberator was made up of 250lb and 500lb bombs. Practice bombs, which were smoke bombs, weighed 8.5lbs, 11.25lbs or 12.25lbs. When they struck their targets, the smoke bombs emitted white smoke so enabling the aircrew to assess the accuracy of their bombing. The Liberators did not carry depth charges.
>
> [5] Mr Roper flew in the Liberators as an Air Gunner. He fired the .50 calibre machine guns, which were armed. After embarking on a flight, he would often fire them to check them as well as on practice shoots both at air to air targets and into the water. Firing into the water enabled the aircrew to see the splashes and so allowed them to determine the accuracy of the Air Gunner over a considerable distance.
>
> [6] The aircrew was expected to be observant during each flight on the Liberator. They were expected to report anything unusual that they saw during a flight and especially if they saw it over water. The Radio Operator maintained radio contact with Australia. He was expected to report any such things as well as identified and unidentified shipping.

[7] If the aircrew suspected that they had sighted, bombed and/or fired at a submarine or midget submarine, they were expected to report the sighting by radio and on their return to base. Following a report of a suspected sighting, bombing and/or firing at a submarine a general alert would have been issued to all ships in the area and RAAF aircraft and Navy ships would have been sent to investigate. There is no record of a suspected sighting, bombing and/or firing in the 7OTU diary, in other Australian records or subsequent Japanese and Australian history books of the era. …

[10] While at 7 OTU, Mr Roper's flew in the Liberator from Tocumwal and over or near the ocean on seven occasions:

Date	Flight Time Day/Night	Results (including results of bombing, gunnery, exercises etc)
9 March 1945	4 hours and 15 minutes (Day)	Splash gunnery – 110 rds fired right hand gun U/S sighted two freighters 5-6000 tons off Cape Otway
14 March 1945	3 hours and 35 minutes (Day)	Night flying French Is ->Snake Is ->base
19 March 1945	4 hours and 35 minutes (Night)	Night flying sketched. Sheperton [sic], Ballerat [sic], Cape Nelson
28 March 1945	4 hours and 20 minutes (Night)	Night flying. Geelong – sea leg – base
11 April 1945	8 hours and 5 minutes (Day) and 3 hours and 55 minutes (Night)	Middleton Reef. Nav, Bombing 10,000'
16 April 1945	1st flight: 20 minutes (Day) 2nd flight: 5 hours and 30 minutes (Day) and 5 hours and 30 minutes (Night)	Nav' Radar Bombing 'Pyrimid [sic] Rock. Creeping line ahead search. Radius of action return to base. Pyrimid [sic] Rc – Sydney – base
23 April 1945	1st flight: 20 minutes (Day) 2nd flight: 9 hours and 35 minutes (Day) and 40 minutes (Night)	Middleton Reef. Mission abandoned engine trouble No 2 Engine returned base.

Apart from the flight on 9 March 1945, the pilot on each flight was Flight Lieutenant Stevens.

[11] While at 102 Squadron, Mr Roper made the following flight over water with Flight Lieutenant Stevens as pilot:

Date	Flight Time Day/Night	Results (including results of bombing, gunnery, exercises etc)
29 August 1945	3 hours and 35 minutes (Day)	Amberley – sea leg – Fraser Is – base nav' and radar exercise – ships sighted - cloudy

[12] Middleton Reef is located approximately 1,000 kilometres north east of Sydney, 200 kilometres north of Lord Howe Island and 650 kilometres off the east coast of Australia. The flights to or towards Middleton Reef took Mr Roper outside the Australian Territorial Zone.

In light of this service, the AAT then considered whether or not the veteran had rendered 'continuous full-time service outside Australia' as that phrase is used in the definition of operational service for World War 2 in section 6A of the VEA.

The AAT noted that there were no known enemy forces on sea, land or air in the areas and at the time Mr Roper was flying.

After surveying the relevant Court cases on the subject,[26] the AAT said:

> [43] It seems to me that the Federal Court authorities have set out several principles that guide the Tribunal in making a decision. They are that the Tribunal must consider:
>
> 1. the nature of the veteran's service overall;
> 2. the essential character of the veteran's service during the period spent outside Australia when that essential character is determined by reference to matters such as:
>
> (1) the period of time for which the veteran is outside Australia;
>
> (2) the purpose for which the veteran was outside Australia;
>
> (3) events that occurred during the period in which the veteran was outside Australia including enemy activity, or likelihood of, enemy activity in the relevant area;
>
> (4) the veteran's activities during the period outside Australia; and
>
> (5) the veteran's activities both before and after the period of service outside Australia; and
>
> 3. whether, having regard to its conclusions on the first two matters, the veteran's service in the particular period can be seen to be treated as operational service.

The AAT then applied this analysis of the law to the facts of the case as follows:

> [44] Mr Roper flew beyond Australia's shoreline on eight occasions. Two of his flights took him beyond Australia's territorial limits however they are defined. They did so on 11 and 23 April 1945 with the flights taking 12 hours and 9 hours 35 minutes respectively. In light of both the length of the Liberator course Mr Roper was attending in the period from 20 February 1945 and 14 May 1945 and Mr Stephen Roper's evidence that his father was on 'an active patrol albeit part of a broad familiarisation process with the new aircraft prior to overseas posting', I am satisfied that the flights were taken as part of training. Also on the basis of Mr Stephen Roper's evidence of what his father had told him, I find that the training was in preparation for his being posted overseas. That posting did not eventuate before Mr Roper was discharge from the RAAF. The aircrew were expected to, and no doubt did, undertake surveillance in relation to, for example, unidentified shipping. Certainly, activities such as surveillance might well have had relevance to operations beyond their relevance to the aircrew's training. That they might well have had a dual purpose, does not detract from the fact that the flights were for the purpose of training aircrew and familiarising them with the Liberator.
>
> [45] During those flights, Mr Roper fired the Liberator's .50 calibre machine

[26] *Repatriation Commission v Kohn* (1989) 87 ALR 511, 5 *VeRBosity* 108; *Repatriation Commission v Proctor* [1998] FCA 609, 14 *VeRBosity* 48; *Proctor v Repatriation Commission* (1999) 54 ALD 343, 15 *VeRBosity* 13; and *Roscoe v Repatriation Commission* [2003] FCA 1568, 20 *VeRBosity* 15.

guns and dropped bombs. I accept the evidence of Mrs Roper and Mr Stephen Roper that Mr Roper told them of diving a firing a number of bursts of machine gun fire as well as dropping several bombs on something that the aircrew thought at the time to be a submarine starting to dive. I also accept that, at a later time, Mr Proctor thought that the submarine might well have been a whale. In view of the historical evidence that is incorporated in the parties' Agreed Statement of Facts, I am satisfied that, on the balance of probabilities, there were no enemy submarines in the waters off the east coast of Australia. The level of the risk that Mr Roper would be exposed to enemy contact was low.

[46] Before the two flights, Mr Roper had been in the RAAF for about a year. After the two flights, Mr Roper returned to other duties that did not take him outside Australia. He was discharged almost six months later and at a time when many were being demobilised.

[47] Having regard to all of these matters, I am satisfied that the essential character of Mr Roper's service during the periods he was outside Australia was one of training and familiarisation with the Liberator. It was not one of his being on operational service of a kind referred to in Item 1(a) or (b). That is to say, their essential character was not that of continuous full-time service outside Australia during World War II or service in the relevant geographical areas in the Northern Territory and at the times specified in Item 1(b). Therefore, Mr Roper did not have operational service and Mrs Roper must establish her claim to the reasonable satisfaction of the Tribunal rather than the more liberal reasonable hypothesis test.

Formal decision

The AAT decided that Mr Roper had not rendered operational service and so the standard of proof that would be applied to his claim is that in s120(4) of the VEA, namely, reasonable satisfaction.

Editor: What this case means

Kohn's case, in 1989, first set out the 'characterisation of service' test for deciding whether a person has rendered 'continuous full-time service outside Australia' for the purpose of operational service in World War 2. For some time, that case was used to exclude nearly all voyages between Australian ports. When *Proctor's* case, ten years later, qualified the effect of *Kohn's* case, the law became less certain.

In para [43] of her reasons in this case, Deputy President Forgie has usefully summarised the matters to which a decision-maker must have regard in determining whether a person has rendered 'continuous full-time service outside Australia' for the purpose of determining whether a person rendered operational service in World War 2. Setting out the matters in this form provides a useful guide or check-list for both advocates and decision-makers.

Federal Court of Australia

Repatriation Commission v Butcher

Tamberlin, Nicholson and Tracey JJ
[2007] FCAFC 36
22 March 2007

Special rate – nature of remunerative work – fact finding by Federal Court

The facts of this case were set out in (2006) 22 *Verbosity* 62. The issues in this case were:

(a) the interpretation of s 24(1)(c), in particular the phrase 'prevented from continuing to undertake the remunerative work that the veteran was undertaking'; and
(b) the power of the Court to make findings of fact and finally determine the matter.

With respect to the first issue the Court agreed with the findings in the Federal Court, which found 'the characterisation of the type of remunerative work the veteran was undertaking, is … a decision which must be made with an eye to reality, and as a matter in respect of which common sense is the proper guide.' It went on further, saying that '… in this case a more general characterisation of the type of work or field of remunerative activity, the respondent was undertaking is appropriate, rather than one which includes all six previous forms of employment.'

With respect to the second issue, the Full Court found that the primary Judge had made an error of law when finding facts. The Full Court found the error of law occurred by the primary Judge's characterising the types of remunerative work that the veteran had engaged in inconsistently with the characterisation given by the Tribunal. The Full Court said:

> [18] His Honour's approach and finding as to 'remunerative work' within s 24(1)(c) was different to that of the Tribunal because he characterised the work as general labouring duties involving unskilled work, process work and general driving duties excluding fork lift driving. Adopting a different approach which we have found to be incorrect, the Tribunal made a finding that the veteran could also use a fork lift if the truck he was driving were equipped with lifting devices. In our view, there is an inconsistency between the actual finding made by his Honour and that made by the Tribunal. Section 44(7) provides that the Court may make findings of fact on an appeal to the Federal Court if the findings of fact are not inconsistent with findings of fact made by the Tribunal. In these circumstances, it is appropriate that there should be a further investigation by the Tribunal as to whether, having regard to the types of work that the veteran was undertaking as correctly interpreted, the war-caused injury alone prevented him from engaging in the work which he previously undertaking.

Section 44(7) of the *Administrative Appeals Tribunal Act, 1974*, provides as follows:

> *Federal Court may make findings of fact*
>
> (7) If a party to a proceeding before the Tribunal appeals to the Federal Court of Australia under subsection (1), the Court may make findings of fact if:
>
> (a) the findings of fact are not inconsistent with findings of fact made by the Tribunal (other than findings made by the Tribunal as the result of an error of law); and
>
> (b) it appears to the Court that it is convenient for the Court to make the findings of fact, having regard to:
>
> (i) the extent (if any) to which it is necessary for facts to be found; and
>
> (ii) the means by which those facts might be established; and
>
> (iii) the expeditious and efficient resolution of the whole of the matter to which the proceeding before the Tribunal relates; and
>
> (iv) the relative expense to the parties of the Court, rather than the Tribunal, making the findings of fact; and
>
> (v) the relative delay to the parties of the Court, rather than the Tribunal, making the findings of fact; and
>
> (vi) whether any of the parties considers that it is appropriate for the Court, rather than the Tribunal, to make the findings of fact; and
>
> (vii) such other matters (if any) as the Court considers relevant.

What this case means

The essential issue in this case concerned the fact that the Court could not make finding of facts that were inconsistent with those made by the Tribunal. Nevertheless, this judgment also reinforced the primary judge's findings on the section 24 issues (see *Repatriation Commission v Butcher* [2006] FCA 811 (2006) 22 *Verbosity* 62). An important point made by the Court was that the type of work that a person had been undertaking for the purposes of s 24(1)(c) is usually better characterised in general terms rather than by reference to specific tasks or particular types of jobs undertaken by the person.

Wooding v Repatriation Commission

Finn J
[2007] FCA 318
13 March 2007

Whether a veteran – meaning of 'representative' of AFOF in Ministerial Determination

Mr Wooding was a member of concert party entertaining Australian forces in Vietnam as a member of the South Australian Concert Party. He presented concerts for the troops on two occasions in 1969 and 1970.

The South Australian Concert Parties were 'arranged' and 'sponsored' by the Australian Forces Overseas Fund (AFOF). AFOF was established on 26 January 1966 and tasked with coordinating a program for the provision of amenities and concert parties for troops serving in the South East Asia Region. While initially established in NSW, it soon became a national organisation on the establishment

of the RSL National Council. To assist in the management and coordination of the concert parties, the Minister for Defence established The Forces Advisory Committee on Entertainment (FACE) in 1966 as a joint venture involving Defence, the RSL, and the Australian Broadcasting Commission. FACE acted as a planning committee to organise entertainment for Australian forces in Vietnam, thus removing any direct Ministerial involvement with the music industry. AFOF had accredited members who had completed an accreditation process administered by the Army. They were allotted a service number, have a service record and were issued with approved identification cards.

There was no evidence that Mr Wooding was formally attached to the Defence Force; he did not recall being a 'member' of AFOF; and did not recall undergoing an 'accreditation process'. As part of the preparations for the tours, he underwent some training in basic military matters, including weapons handling and firing. There was no evidence that he was allocated with a service number or had service record. He was provided with a 'military identification card', which he returned to the officer in charge of the concert party on completion of the tour. He was paid $33 per week, which was given to him by Army officials. He also received a military payment certificate.

The law

Section 5R of the VEA provides that the Minister may make an instrument deeming a person to be a member of the Forces for the purposes of particular provisions of the Act. In 1987, the Minister made a determination under former s 5(13) of the VEA[27]:

> I, BENJAMIN CHARLES HUMPHREYS, Minister of State for Veterans' Affairs, pursuant, hereby determine that paragraph 5(13)(a) of the *Veterans' Entitlements Act 1986* shall apply to, and in relation to, a person included in the *Veterans' Entitlements Act 1986* following classes of person, as if that person, while rendering service of a kind specified in this determination, in an operational area described in Items 4, 5, 6, 7 or 8 of Column 1 of Schedule 2 to this Act, during a period specified in column 2 of that Schedule opposite to the descriptions of the area in Column 1, was a member of the Defence Force who was rendering continuous full-time service for the purposes of this Act:
>
> (1) persons employed by the Commonwealth of Australia who were attached to the Defence Force and who provided services as personnel belonging to field broadcasting units, as telegraphists, as war correspondents, as photographers or as cinematographers; or
>
> (2) persons who, as representatives of an approved philanthropic organisation provided welfare services to the Defence Force.
>
> For the purposes of this Determination –
>
> 'approved philanthropic organisation' means: …
>
> (f) the Australian Forces Overseas Fund.

[27] In 1991 s 5(13) was replaced by s 5R in the re-write of Parts I and III of the VEA. Section 8 of the *Veterans' Entitlements* (*Rewrite*) *Transition Act 1991* provided that instruments made under s 5(13) were continued in force as if they had been made under s 5R.

The Application

The Court outlined the applicant's submission as follows:

> [10] To put the applicant's submission shortly, it is that, having regard to the context and purpose of the Determination, the word 'representative' comprehends a person who provides the relevant service under the aegis of, as an emissary of, or in association with, one of the defined philanthropic organisations….'

The Court outlined the Commission's case as follows:

> [11] The respondent's case is that the view taken by the Tribunal, that 'representative' connotes an entitlement to act on behalf of another, was one that was open to it. It could not be an error of law for it to have taken that view. …

Consideration

On the issue of interpretation of the Ministerial instrument, the Court said:

> [14] The clear object of the Ministerial Determination was to extend to designated classes of person who were not members of the Defence Force the same entitlements they would have had as an actual member of the Force who was rendering continuous full-time service, for the purposes of the Veterans' Entitlements Act, provided (for present purposes) three requirements were met. These were (i) the person provided welfare services to the Defence Force; (ii) in a prescribed operational area (here Vietnam); and (iii) as a representative of any one of six 'approved philanthropic organisation[s]' …
>
> [16] The third condition (in the 'as representative' requirement) would appear to be a channelling or control device regulating who actually will be equated with a member of the Defence Force. The relevant organisation is required to be 'approved' and the presupposition is that in some manner it provides or procures the provision of welfare services to the Defence Force. The question posed by the condition is what is the nature of the connection that must exist between the actual service provider and the approved organisation before the service provider will have his or her service recognised for the purpose of the Act.
>
> [17] While the third condition controls access to the benefits of the Act, there is nothing in the beneficial policy that appears to animate the Ministerial Determination, which would warrant a restrictive interpretation of the required connection. For reasons I give below, I consider that both the Veterans Review Board and the Tribunal have given the Determination such an interpretation, in their respective imposition of an 'agency' like role on the service provider. This is best illustrated in observations of the Board in reaching its decision. …
>
> [20] Given that the object of the Determination is to identify the classes of persons who will benefit from the Determination, it is understandable that, in form, its focus is on the relationship of the relevant person to the approved philanthropic organisation (ie, 'who, as representatives of …'). This said, the apparent policy and purpose of the Determination is manifest in the relationship of the philanthropic organisation to the person providing the service and, especially, to its role in the provision of that service.

[21] In construing the 'representative' requirement of the Determination in a way that effectuates the purpose of the Determination, the correct prism through which to evaluate the relevant relationship of the service provider and the philanthropic organisation is through that of the organisation, not of the service provider. If the philanthropic activity being engaged in by the organisation extends, as in the present case, to organising, funding and sponsoring the provision of a welfare service, especially if (again, as in the present matter) the organisation relies on public subscription to help fund and facilitate its provision, no misuse of language is involved saying that those who actually provide those services are representatives of the organisation in that they represent that organisation's activities to the Defence Force beneficiaries of those services. To put the matter colloquially (as the Review Board did) 'they operate under the [organisation's] banner'.

Editor: What this case means

The Federal Court had made a previous decision relating to this issue in *Iverson v Repatriation Commission* [2006] FCA 942 (2006) 22 *VeRBosity* 119, which upheld the approach applied by the Tribunal in the present case. Finn J said of *Iverson's* case:

[25] … While it is distinguishable given its facts, the Tribunal's reasoning and the submissions made to the Court, I obviously do not agree with some of the very brief observations made by his Honour in that case. I do not regard it as a case which falls within the category that I ought follow as a matter of comity.

Given the more detailed discussion of the issues in *Wooding's* case, it is likely that decision-makers will follow *Wooding* rather than *Iverson*, but the matter is far from certain. The facts of each case will have to be carefully considered in order to decide whether one or other of these cases determines the issue of whether a particular entertainer is a 'veteran'.

Repatriation Commission v Codd

Gordon J
[2007] FCA 877
15 June 2007

Kind of death

The late veteran died as a result of collision between a truck he was driving and a train. At post mortem the cause of death was found to be 'multiple injuries including brain damage'

The Tribunal found that the kind of death the veteran suffered was 'death by road accident'.

The Tribunal then went on to find that as the kind of death was not the subject of a Statement of principles, any sub-hypothesis, eg alcohol dependence or abuse, was not to be investigated as if subject to the Statement of Principles.

The Court's consideration

The Court said:

[23] In the present matter then, it was necessary:

(1) to establish the pre-conditions for the claim other than causation on

the balance of probabilities. (For example, in the present case, it was necessary for Mrs Codd to show that her husband was a veteran; that Mr Codd had died and that Mrs Codd was a widow. None of these pre-conditions was in dispute here); and

(2) in order to ascertain whether a SoP applies, to determine on the balance of probabilities the 'kind of death' suffered by the veteran: s 120A (2) and (4) of the VE Act.

The Court did not accept that in the circumstances the cause of death was 'death by road accident'. It said:

> [30] The respondent contended that the Tribunal's finding of the 'kind of death' as death by road accident was a finding of fact which was 'unimpeachable'. That submission should be rejected. For the reasons that follow, it is apparent that in making that finding, the Tribunal erred in the proper construction of ss 120, 120A(3) and 120A(4) of the VE Act and, in particular, the meaning of the phrase 'kind of death' in s 120A(4) of the VE Act. That is an error of law: …
>
> [39] On the proper construction of the VE Act, consistent with its evident statutory purpose and existing authority, the 'kind of death met by the [veteran]' that is to be considered is the question of medical causation or the kind of death, being a medical cause of death, including the contributing or underlying medical cause of death.
>
> [40] In the present case, the kind of death met by the veteran was not death by road accident but death from (in the sense of arose out of, or was attributable to) alcohol dependence or alcohol abuse.

With respect to the 'kind of death' as used in s 120A (4), the Court said:

> [31] The phrase 'kind of death met by the person' in s 120A(4) asks a causative question. It is not a question about whether the death was slow, fast or the like. It asks 'questions of medical causation' about the cause of death and does so in a particular context – the VE Act and, in particular, Part VIII of the VE Act:…
>
> [33] The answer to the question of causation posed by s 120A (4) of the VE Act (the 'kind of death met by the person') requires identification and examination of the purpose for which the question is being asked. The purpose or reason for asking the question is not at large. The nature and scope of the purpose for asking the question is to be found in the VE Act. Under Part VIII of the VE Act, the nature and scope of the purpose or, to put the matter another way, the purpose for which the question in s 120A(4) is being asked, is to be found in s 120A(3) of the VE Act. Since s 120A (4) qualifies s 120A (3) of the VE Act, one identifies the nature and purpose of the causal question in s 120A (4) (the 'kind of death met by the person') by reference to the matters identified in s 120A (3) - a hypothesis connecting a veteran's death with the circumstances of that veteran's service. …
>
> [36] … The 'kind of death met by the [veteran]' that is to be identified requires examination of the causal connection between the death and the circumstances of the service. In particular, it requires examination of the relevant hypothesis that is said to provide the causal link between death and service. In the present case, the

> hypothesis was that the death was war-caused and that the cause, or at least one of the causes of death, was the veteran's 'service related alcohol habit[,] the effects of which [had] impaired his concentration and contributed to the fatal collision'.

The Court determined that the Tribunal had not addressed the question of the 'kind of death' and remitted the case to the Tribunal to be reheard.

Having found that the kind of death was the subject of a Statement of Principles, the Court went on to address the application of *McKenna's* case if the contention that the kind of death was 'death by road accident' was correct.

At para 47 the Court said that (given the contended cause of death, death by road accident with antecedent causes of alcohol abuse or dependence) 'the Tribunal was bound to apply the *McKenna* principle.

Counsel for the widow contended that 'even if the Tribunal had applied the *McKenna* principle to the SoP, it would have reached the same conclusion on the basis that there was no SoP which covered the hypothesis that the veteran was a heavy drinker (see para [48])

The Court said of this submission:

> [49] Mr Green's submission that there is no SoP relevant to the veteran's alcohol habit because there is a difference between 'a heavy drinker' and a person who suffered from 'alcohol abuse' or 'alcohol dependence' as defined in the SoP should be rejected on at least two bases. First, it is well established that a SoP covers the field: see *Woodward v Repatriation Commission* (2003) 131 FCR 473 at [100] and the Explanatory Memorandum to the Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Bill 1994 (Cth) which provided that the RMA will prepare SoPs based on 'sound medical-scientific evidence' that will exclusively state what factors related to service must exist to establish a causal connection between particular diseases, injuries or death and service.

In order to emphasise its opinion, the Court said:

> [50] Secondly, the threshold question posed by s 120(3) is whether the whole of the material before the decision-maker raises a reasonable hypothesis connecting the veteran's death with the circumstances of his service. This branch of the respondent's argument seeks to rely on only part of the material before the Tribunal.

Editor: What this case means

The Court has emphatically stated that the kind of death contemplated by all of the Statements of Principles is the medical condition bringing about the death; in this case the veteran's drinking habits causing his loss of concentration and ultimate collision with the train.

With respect to the *McKenna* principle, the Court seemed to imply that even where there is a medical 'kind of death' that is not covered by a SoP and there is reliance on another disease or injury which is covered by a SoP then the SoP for the sub-hypothesis must be satisfied before it can be said that the 'kind of death' is war caused. This opinion appears inconsistent with the decision of Emmett J in *Spencer v Repatriation Commission* (2002) 118 FCR 453. In that

case it was held that if there is no SoP for the 'kind of death' and the hypothesis raised is reliant on a sub-hypothesis that is subject to a SoP, the matter, including the sub-hypothesis is to be determined without reference to the SoP for the sub-hypothesis.

It would seem that there are now two views of the application of *McKenna* in non- SoP death cases.

It appears that the attention of the Court might not have been drawn to the decision in *Spencer*.

Repatriation Commission v Warren

Kiefel J
[2007] FCA 866
8 June 2007

Kind of injury or disease

This veteran, who rendered operational service in Vietnam between 1971 and 1972, made a disability claim for stress, depression and anxiety. He claimed to be diagnosed as suffering PTSD and major depression. His claim was rejected by the Repatriation Commission and the Veteran's Review Board.

On review by the Tribunal, the diagnosis of post traumatic stress disorder was conceded by the Repatriation Commission. As a result, the Tribunal was of the view that the evidence pointed to a hypothesis that was supported by the relevant Statement of Principles.

Further, the Tribunal found, even in the face of some opposing opinion, that the veteran suffered from alcohol dependence. The Tribunal pointed to the findings of stress in relation to the PTSD and found that the alcohol dependence was war-caused.

The Court's consideration

Broadly speaking the Court found that the characterisation of a psychiatric disease – that is, the diagnosis of the psychiatric disease – is to be based on the descriptions of psychiatric diseases in DSM-IV. Kiefel J noted that:

> [13] The source for the diagnostic criteria for each of the SoP is stated to be DSM-IV, which is defined to mean the fourth edition of the *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders*. A reference to DSM-IV disclose that the criteria listed in each of the SoP in question reflect those identified in DSM-IV as necessary to a diagnosis, albeit in a summary form. In the introduction to DSM-IV (at xxxii) reference is made to the 'Use of Clinical Judgment':
>
> > 'DSM-IV is a classification of mental disorders that was developed for use in clinical, educational and research settings. The diagnostic categories, criteria, and textual descriptions are meant to be employed by individuals with appropriate clinical training and experience in diagnosis. It is important that DSM-IV not be applied mechanically by untrained individuals. The specific diagnostic criteria included in DSM-IV are meant to serve as guidelines to be informed by clinical judgment and

> are not meant to be used in a cookbook fashion. For example the exercise of clinical judgment may justify giving a certain diagnosis to an individual even though the clinical presentation falls just short of meeting the full criteria for the diagnosis as long as the symptoms that are present are persistent and severe. On the other hand, lack of familiarity with DSM-IV or excessively flexible and idiosyncratic application of DSM-IV criteria or conventions substantially reduces its utility as a common language for communication.'

The Court then proceeded to discuss the application of DSM IV in the characterisation of the psychiatric condition, saying:

> [23] The question that the appeal raises is whether it is necessary that the Tribunal make its findings, as to the existence of the disease claimed, expressly and in detail, by reference to the criteria in the SoP. The applicant relies upon cases which hold that it is necessary for the decision-maker to have regard to the definition of injury or disease in the applicable SoP: see *Repatriation Commission v Codd* [2005] FCA 888 at [48] and *Gosewinckel* 59 ALD at [55]. Those cases however also make plain that it may be expected that the Tribunal will act upon medical opinion as to diagnosis. The point made by Weinberg J in *Gosewinckel* 59 ALD at [55], is that the Tribunal is not in a position to accept a doctor's opinion as to the existence of a disorder without knowledge of the criteria essential to its diagnosis.
>
> [27] It may be inferred that the SoPs were written upon an assumption that if a veteran was found to be suffering from a condition classified by DSM-IV, a diagnosis in accordance with that Manual would have been made. It was intended that the SoP apply where such a diagnosis was made. This assumption, of correspondence, might suggest the application of the SoP criteria in relation to the finding of the existence of the condition. There is however one difficulty with that approach. It is DSM-IV as a whole which will inform a clinical diagnosis, upon which a finding will be based. The Manual itself explains that there is more to a diagnosis than the application of the criteria in a 'cookbook' fashion. A person having symptoms which fall short of meeting the stated criteria may nevertheless be diagnosed as suffering from the condition. DSM-IV refers to the need to exercise clinical judgment, which I take to include the application of experience. In some cases the SoP criteria may not therefore be met.
>
> [28] It cannot be inferred that the SoPs were drawn on the basis of some misunderstanding as to the application of DSM-IV. They were drawn by reference to it. It could not therefore have been intended that the strict application of the criteria summarised in the SoP definition was to be a requirement of, or a substitute for, a proper clinical diagnosis. The threshold question in each case will be whether the diagnosis was one properly made, having regard to DSM-IV. Because clinical judgment is involved, differences of opinion may arise. They

> will need to be resolved by the Tribunal on the materials before it.
>
> [29] Once the Tribunal has made its finding the VEA does not require the diagnosis to be assessed against the SoP definition, as if the latter were a check list. The purpose of the definition must be borne in mind. It is to identify which condition or disorder in DSM-IV it refers to. If the Tribunal or other decision-maker has accepted a diagnosis of a DSM-IV classified disorder, the SoP will apply to it. It may have been sufficient to refer to the description of the disorder, but the SoP have gone further and summarised the relevant criteria. This may have been intended as a useful guide for decision-makers. That is not important for present purposes. There is nothing in the operation of the relevant provisions of the VEA which requires the SoP definition to be utilised by the decision-maker in determining the existence and nature of the DSM-IV classified condition. The possibility of a lack of correspondence should not arise.

Editor: What this case means

This case reaffirms that the standard of proof for characterisation of a disease or injury is that found in section 120(4) i.e., the balance of probabilities. However, the Court revisited cases such as *Gosewinckel* and *Codd*.

In *Gosewinckel*, the veteran was diagnosed as suffering from generalised anxiety disorder. The point at issue was whether the Tribunal had made an error of law because it had failed to consider whether all of the necessary indicia for generalised anxiety disorder were present in the veteran's case. The Commission argued that the Tribunal should ask itself the question, 'Are we reasonably satisfied that the diagnostic criteria prescribed by the SOP as essential for a diagnosis of generalised anxiety disorder have occurred more days than not for at least six months.'

The Court in that case said there was no error of law when the Tribunal did not refer to each and every criterion in the definition of generalised anxiety disorder in the SoP. The Court said that it was implicit in the report provided by the psychiatrist that the veteran met each of the requisite criteria for generalised anxiety disorder as set out in the SoP. In this case the Court said that if the doctor presenting the diagnosis refers to DSM-IV it can be assumed that he or she has reviewed all of the criteria.

However it was another matter when considering the causation factors in the SoP. The Court was of the opinion that before it can be said that there has been a clinical onset of a disease the full definition of the disease must be met explicitly.

In the present case the discussion of clinical onset is perfunctory but the Court was satisfied that the Tribunal had correctly considered the issue of clinical onset.

Wodianicky-Heiler v Repatriation Commission

Madgwick J
[2007] FCA 834
31 May 2007

Special rate – prevention from undertaking work – 'epilepsy' accepted as war-caused – Tribunal found incapacity due to 'epileptic' aspects of disability not war-caused

In April 2002, Mr Wodianicky-Heiler suffered what was presumed to be a grand mal epileptic seizure. Shortly afterwards he made a claim for pension in respect of epilepsy, which was granted on the basis that it was a consequence of cerebral malaria that he suffered in Vietnam in 1968. At the time of the delegate's decision there was no evidence that he had ceased work. However, upon receiving the decision assessing pension at 100% of the general rate, his wife contacted the Department to advise of this fact. He then applied to the Board for review, seeking the special rate of pension. The Board affirmed the decision to assess pension at 100% of the general rate.

The veteran died shortly afterwards and an appeal was made to the Tribunal by the veteran's wife as his legal personal representative.

Medical evidence obtained after the delegate's decision indicated that the veteran's seizure was, in fact, caused by a glioma tumour in his brain, and was not the result of cerebral malaria suffered in Vietnam.

The Court noted:

> [19] The Tribunal observed that 'epilepsy' was a generic term and may have many causes. The Tribunal recognised that the late veteran's epilepsy had been 'accepted on the basis of having suffered falciparum malaria whilst in South Vietnam' but said that 'in reality it is clear from the medical evidence that the epileptic attack which he suffered on 11 April 2002 and led to the claim was a symptom of a glioma.' The Tribunal therefore affirmed the decision under review. Its basis for so doing was that the attack suffered by the late veteran was a result of the glioma and that it was the latter condition which caused him to cease work as a truck driver. The Tribunal was, therefore, not satisfied that the applicant's loss of earnings was due to war-caused incapacity alone.

Applicant's case

In the Federal Court, the appellant argued that the Tribunal erred in law by finding, contrary to the decision of the delegate, that the epilepsy suffered by the veteran was not war-caused. It was argued that it was not open to the Tribunal to look behind the acceptance of that condition. In *Re Cotterell*,[28] Deputy President Blow of the AAT had said:

> The structure of the Act is such that any claim to have a medical condition accepted as war-caused must be considered on its merits, free of the

[28] *Re Cotterell and Repatriation Commission* (2000) 31 AAR 184.

> fetters of any earlier determination in respect of any related medical condition, whereas the structure of s.19 makes it abundantly clear that, in assessing the rate of pension payable in respect of a war-caused condition, no decision-maker at any level has the freedom to reconsider, ignore or reverse the determination that that condition is war-caused.

Respondent's case

The Commission argued that the Tribunal had merely found that the 'alone' test in s 24(1)(c) was not met because there was a non war-caused disability (the glioma) that had contributed to the veteran being prevented from continuing to undertake his work as a truck driver.

In addition the Commission argued that, in any event, it was open to the Tribunal to look behind the acceptance of the epilepsy as it was part of the decision under review. This was based on the Full Federal Court case of *Fitzmaurice*,[29] in which it was held that the decision under review is the whole of the decision reviewed by the Board, which included both entitlement and assessment matters.

Court's consideration

The Court agreed with both arguments put by the Commission. In relation to the first argument, the Court said:

> [33] … The Tribunal took the view that it was symptoms stemming from the glioma that caused the veteran to be unable to perform that work. The Tribunal, it seems to me, considered that, albeit that such symptoms were epileptic in nature, the glioma and the accepted epilepsy were different diseases, and the glioma was not a war-service-caused disease. …

In relation to the argument about going behind the acceptance of the epilepsy, the Court said that even if the statement in *Re Cotterell* is correct,

> [37] … the Tribunal was not, in Blow DP's language, reconsidering, ignoring or reversing any determination that the condition relied on was war-caused. The Tribunal simply found that there was incapacity from a different condition not war-caused.

Decision

The Court dismissed the appeal and awarded costs to the Repatriation Commission.

Fenner v Repatriation Commission

Mansfield J
[2007] FCA 406
22 March 2007

Whether Tribunal properly applied s 120(1) of VEA

Mr Fenner had claimed that being exposed to the sounds and vibrations of scare charges and an incident in which HMAS Sydney went 'full steam ahead' were stressors that gave rise to his alcohol abuse and post traumatic stress disorder (PTSD).

[29] *Fitzmaurice v Repatriation Commission* (1989) 19 ALD 279.

The Tribunal had accepted that the evidence pointed to these events having occurred and constituting severe stressors for the purpose of a raising a hypothesis in relation to alcohol abuse. However, the Tribunal found, beyond reasonable doubt, that Mr Fenner was not, in fact, affected by these events, and had not feared or felt helpless as a result of these episodes. It said that it had reached that view on the objective evidence before it and not on Mr Fenner's demeanour when giving evidence.

In relation to PTSD, the Tribunal found, on the balance of probabilities, that the applicant did not suffer from that disorder. The Court noted in that regard:

> [26] After discussing the evidence of the three psychiatrists who addressed the diagnosis, the Tribunal accepted as preferable the one medical opinion which said Mr Fenner did not suffer from PTSD. … The first reason was that the psychiatrist whose evidence was preferred had access to a greater range of information, including contemporary information, than the other psychiatrists. It noted that Mr Fenner had not remarked upon the claimed traumatic experiences to any of the psychologists, the psychiatrist, the social work student or the parole officer he had seen in 1970 and 1971. The second reason followed from the first. The further range of information enabled the psychiatrist whose evidence was preferred to more critically analyse Mr Fenner's account; an illustration was Mr Fenner's claim (which that psychiatrist, and the AAT rejected) that he sought a discharge from HMAS Sydney after his first trip to Vietnam. Thirdly, the AAT shared the concern of that psychiatrist about the veracity of Mr Fenner's account of those traumatic events

The Court found that there was no error of law in the approach the Tribunal had taken in relation to the PTSD claim as it reflected the approach in *Mines'* case.[30]

However, in relation to the alcohol abuse claim, the Court found that the Tribunal had erred in law in finding that it was satisfied beyond reasonable doubt that Mr Fenner was not actually affected by the events as he claimed.

The Court found that the Tribunal had drawn inferences from the evidence that were not logically available, but noted that want of logic in fact-finding, of itself, did not constitute an error of law.

However, the Court concluded that a failure to refer to particular evidence, the fact that others gave evidence of being stressed by these events, demonstrated that the Tribunal had equated being satisfied beyond reasonable doubt that Mr Fenner was an unreliable witness and that no weight could be placed on his evidence with a conclusion that he had not in fact been scared by the events. The Court held that this amounted to an error of law. The Court said:

> [60] The AAT could have been satisfied, or satisfied beyond reasonable doubt, that Mr Fenner's reporting of his past experiences was exaggerated or that the details which he gave of those experiences (such as dates) were unreliable. Such a conclusion could rationally inform the

[30] *Mines v Repatriation Commission* (2004) 20 *VeRBosity* 139.

view that he had not in fact been afraid when he experienced the scare charges or the full steam ahead incident. But the fact of his evidence being exaggerated or even fabricated does not necessarily mean that he was not in fact afraid when he experienced the stressors. The stressors, as the AAT accepted, had the capacity to generate intense fear or helplessness. A finding by the AAT that Mr Fenner's evidence was unreliable does not necessarily lead to the conclusion, beyond reasonable doubt, that he had not suffered fear or helplessness when experiencing the stressors. The AAT has not referred to unchallenged evidence adduced by Mr Fenner confirmatory of the extent to which the scare charges and the full steam ahead incident generated, or were capable of generating, feelings of intense fear and helplessness. There were six witness statements … to that effect. They did not all necessarily relate to specific occasions when Mr Fenner was present … but they all confirm the extent to which in particular the scare charges generated fear or were capable of generating fear amongst those in the boiler room.

[61] That unchallenged evidence from other seamen described the scare charges as 'terrifying', with an instant panic that the ship had been hit, although familiarity apparently lessened the level of panic to some degree; as 'frightening if heard unexpectedly'; as 'extremely frightening' as those in the boiler room could not know whether the ship had been hit or it was only a scare charge; as leading to the immediate fear of the ship having been hit (one witness said it took a few seconds before he could 'scrape myself off the ceiling and settle down again'); and as events which could easily frighten a young sailor momentarily. Commodore Mulcare in his report of 12 June 2003 said the scare charges could be 'frightening loud' if exploded close alongside the ship.

[62] The other evidence also in part addressed incidents such as the full steam ahead incident. It included that such an event occurred only in an emergency when the person in command thought there was a threat to the integrity of the ship; and as a concern about a submarine attack on the ship. …

[64] Given the findings of the AAT about Mr Fenner's exposure to the scare charges and to the full steam ahead incident, it is instructive to note the conclusions of the psychiatrist whose evidence the AAT accepted about the connection between Mr Fenner's disease of alcohol abuse and his operational service. Professor Goldney said:

> It is a reasonable hypothesis that Mr Fenner's alcohol abuse is related to the stressors he alleges ... it is pertinent that often alcohol dependence is associated with anti-social personality disorders, and it is not necessary to invoke the specific stressors to explain Mr Fenner's alcohol dependence. Nevertheless, if in fact the alleged stressors did occur, then one could state it is a reasonable hypothesis that they, at the very least, contributed to his alcohol abuse.

[65] As that evidence shows, those or many of those who experienced scare charges had the concern that the ship

may have been under attack and so felt frightened. In my view that evidence was relevant not just to whether the scare charges and the full ahead incident were severe stressors, but also to whether the AAT was satisfied beyond reasonable doubt that Mr Fenner uniquely, or almost uniquely, did not in fact react as would have been expected and as others did. It also shows that the medical evidence preferred by the AAT also recognised the potential role of the stressors in Mr Fenner's disease. The AAT has not referred to that evidence. Senior counsel for the Commission contended that it was unnecessary that it should do so. But I think, in the circumstances, the absence of any reference to that material demonstrates more than illogicality upon the part of the AAT in the respects I have mentioned. I think it demonstrates that the AAT has equated a satisfaction beyond reasonable doubt that Mr Fenner was not a reliable witness and that no weight could be placed on his own evidence with a conclusion beyond reasonable doubt that he was not in fact scared by the two stressors. In my view that amounts to an error of law on the part of the AAT. I conclude that it has therefore erred in law by failing to apply the clear direction of s 120(1) to the facts. The absence of reference to relevant evidence on that topic tends to confirm that conclusion.

Decision

The Court set aside the decision of the Tribunal and remitted the matter to be reheard, but only in relation to the alcohol abuse claim.

Jakab v Repatriation Commission

Greenwood J
[2007] FCA 898
13 June 2007

Meniere's disease – application of Statement of Principles – whether inability to obtain appropriate clinical management – time of clinical onset

Mr Jakab claimed that his Meniere's disease was related to his defence service. The claim was rejected and that decision was affirmed by the Board and the Tribunal.

Mr Jakab claimed that he contracted the disease during his defence service; because it was not diagnosed at that time he was unable to obtain appropriate clinical management of the effects of the disease; and the inability to obtain proper clinical management contributed to the effects of the disease in a material way or aggravated the disease.

The only factor in the relevant Statement of Principles is 'inability to obtain appropriate clinical management'.

The Court noted that:

> [21] … The AAT considered what it described as Mr Jakab's lengthy history of symptoms the subject of his evidence before the Tribunal and concluded that the failure on the part of the medical practitioners to record important aspects of the symptoms identified by Mr Jakab, in their reports, was not

> simply a function of those doctors failing to ask the relevant questions of Mr Jakab that would have revealed the detailed sequence of clinical effects symptomatic of Meniere's disease but rather that Mr Jakab did not manifest all the necessary symptoms (the constellation of symptoms) that, manifest upon presentation now, would enable a diagnosis of Meniere's disease to be made …
>
> [27] … Although some features associated with or consistent with Meniere's disease were reported by Mr Jakab to the medical officers from time to time, during the period of Mr Jakab's service, the AAT has relied upon the body of medical evidence so as to find that the necessary collection of symptoms were not present; those symptoms which were consistent with Meniere's disease were explained by the medical conditions at the time; and that no connection was demonstrated between Meniere's disease and the viral episodes relied upon by Mr Jakab. Accordingly, Mr Jakab failed to establish that he suffered or contracted a disease during a period of defence service or prior to the last period of that service and that the disease was contributed to in a material degree or was aggravated by defence service.
>
> [28] In conducting an analysis of the factual matters, the AAT applied the correct statutory tests, addressed the correct questions and acted according to law. The factual findings made were open to the Tribunal.

Mr Jakab argued that even if the AAT took the view that Mr Jakab's memory may have been unreliable as to any aspect of the symptoms, it could nevertheless have relied upon s 119(1)(h) of the VEA as a basis for reaching a conclusion that Mr Jakab suffered symptoms emblematic of Meniere's disease during his service. He argued that the AAT ought not to have given weight and emphasis to the relatively short history of symptoms recorded by the medical practitioners in their reports, and that if the AAT was undecided as to the role or accuracy of Mr Jakab's memory of the events, it failed to give weight to the 'effects of the passage of time' as required by s119(1)(h).

The Court rejected that argument, saying:

> [34] First, Mr Jakab had access to the outpatient medical records which contain a record of the complaints he made to the medical officers at the time evidencing the symptoms apparent to the medical officers at the time.
>
> [35] Secondly, as to other complaints of symptoms, Mr Jakab gave detailed evidence of his recollection of the symptoms, the severity of the symptoms and the combination of symptoms which he said demonstrated the onset of Meniere's disease. Accordingly, this is not a case where Mr Jakab has poor recollection and was not able to obtain documents in support of his contentions. Accordingly, Mr Jakab was not presented with any identified 'difficulties' concerning any identified fact, matter or circumstance attributable to the effects of the passage of time.
>
> [36] Thirdly, … a provision such as s119(1)(h) does not make out a case by enabling the decision-maker to reach a finding not supported by the evidence. In this case, the medical evidence did not support the proposition that the necessary conjunction of symptoms

were present in order to lead the decision-maker to a proper conclusion that Mr Jakab had contracted the disease at the relevant time.

[37] Fourthly, Mr Jakab was able to articulate to the medical practitioners and to the Tribunal his precise recollection of the collection of symptoms he says he suffered at the various dates. Mr Jakab was also able to place the history of those symptoms in a proper chronology by reference to the relevant documents. Mr Jakab was in a position to engage with the medical practitioners, both general practitioners and medical practitioners experienced in the disciplines relevant to the disease and discuss the extent of the symptoms and their onset. It is clear from the reasoning of the Tribunal, that the AAT had regard to the engagement between Mr Jakab and the medical practitioners, the chronology of the symptoms recounted by Mr Jakab to the medical practitioners and the weight and emphasis to be given to the chronology of clinical events in making findings as to the onset of the disease. It is clear therefore that the Tribunal had regard to and took account of the effects of the passage of time.

[38] Fifthly, the fundamental criticism Mr Jakab makes of the AAT is that it preferred a view of the evidence which led it to find an onset of symptoms and thus the contraction of Meniere's Disease at a much later date than Mr Jakab contends for. The AAT reached that conclusion in part in reliance upon matters going to recollection. In other words, the AAT was simply not satisfied as to the contended primary facts that symptoms of Meniere's disease were manifest during the period of service, on all the evidence. Mr Jakab did not fail to establish his contention because of the effects of the passage of time with the result that the AAT ought to have called in aid s 119(1)(h) of the V E Act. Mr Jakab failed in discharging the standard of proof because the weight of evidence, in the view of the AAT, was inconsistent with a conclusion that the necessary symptoms of Meniere's disease were present during the period of service. That conclusion was open to the AAT.

[39] Importantly, the section does not operate so as to strengthen the case or a contention of an applicant by lowering the threshold or standard of proof required by s 120 of the V E Act for establishing the clinical onset of the effects of Meniere's disease especially in circumstances where the applicant contends for a demonstrated good recollection of each facet of the symptoms suffered over the period under examination. An appeal is not simply a process by which an alternative view of the evidence might be established. This is not a case where there is no evidence to support the conclusions of the AAT and no error of law is demonstrated.

Decision

The Court dismissed the appeal and awarded costs to the Repatriation Commission.

What this case means

For the purpose of applying the 'inability to obtain appropriate clinical management' factor, the relevant disease must have existed before the end of the service that is said to have caused the

inability to obtain appropriate clinical management.

A disease cannot be said to have been contracted until the time when sufficient signs and symptoms of the disease were present such that a medical practitioner could have diagnosed it.

Section 119 (and s138(1) the equivalent provision that applies to the VRB) does not lower the standard of proof or take the place of missing evidence.

Repatriation Commission v Tsourounakis

Spender, Dowsett and Edmonds JJ
[2007] FCAFC 29
15 March 2007

Service pension – assets test – value of beneficial interest in real property

This case concerned the value, for the purposes of the service pension assets test, of any interest that Mr and Mrs Tsourounakis had in a house at West End, Qld. Their son, Michael, and his wife, Mary, moved into the house in 1991, and have resided there ever since.

The parents claimed that, as a result of the circumstances in which their son and his wife came to reside in the house, and the expenditure by his son and daughter-in-law on improvements to the property since they first came to live in it, the parents are estopped from denying that the property is now beneficially owned by their son.

The Commission argued that Mr and Mrs Tsourounakis are the legal and beneficial owners of the property.

History of the litigation

In 2004 the AAT found that in 1992, the beneficial ownership of the property had passed to the son. On appeal, the Full Federal Court[31] held that there was no evidence capable of supporting that finding. At para [45] their Honours observed that:

> Counsel for Mr and Mrs Tsourounakis, quite properly, made no concerted effort to support the decision of the Tribunal. The real debate concerned the extent to which it would have been open to the Tribunal to conclude that the value of the interest of Mr and Mrs Tsourounakis in the property should be treated as diminished by reason of the contribution made by Michael and Mary to the renovation and improvement of the property. In essence, the question is whether Mr and Mrs Tsourounakis are free to dispose of the property and to retain the whole of the proceeds of sale for their own benefit or whether, by reason of their conduct, their freedom to deal with the property as their own has been severely constrained.

The Court remitted matter to the AAT for its consideration of that question, the Full Court observed at para [53]:

> The task of the Tribunal on reconsideration of the matter according to law would be to examine the extent to which a court of equity would require Mr and Mrs Tsourounakis to

[31] *Repatriation Commission v Tsourounakis* [2004] FCAFC 332, (2004) 20 *VeRBosity* 146.

> compensate Michael as a term of being permitted to dispossess him and his family and to sell the property. That is to say, it would be necessary to enquire whether the assurances that were given by Mr Tsourounakis in 1992 and the conduct of Mr and Mrs Tsourounakis since that time have given rise to an estoppel against their assertion of full beneficial ownership in the property. At one end of the spectrum, a court of equity may impose a constructive trust, if that is the only way in which equity can be done as between Mr and Mrs Tsourounakis on the one hand and Michael on the other. However, a court must first decide whether there is an appropriate equitable remedy that falls short of the imposition of a trust.

The Full Court suggested that an alternative remedy might be to require Mr and Mrs Tsourounakis to pay some amount to Michael.

On remittal, the AAT found that a court of equity would declare that Michael had a beneficial interest in the property to the extent of one half and remitted the matter to the Commission for assessment of service pension. The Commission appealed from that decision and Mr and Mrs Tsourounakis cross-appealed.

Facts

Before 1991 Michael had an interest in a business which failed. He had guaranteed certain of the business debts and in attempting to meet his obligations, he sold his home. At that time, Mr Tsourounakis (the veteran) told Michael that as the property would, in any event, be left to him, there was no reason why he should not have it now. He invited Michael to move into the property and to 'consider it as his own to do with as he wished'. The property needed substantial repair. They agreed, or understood, that the property would not, at that time, be transferred to Michael because of the risk that his creditors would have recourse to it, leaving his family without a place to live. Michael claimed that his parents were to retain title to the property until he emerged from his financial difficulties. Michael and his family moved into the property in 1991 and have resided there ever since, save when building works have compelled them to vacate it. They have not paid rent, but Michael has paid all rates and other outgoings. He and his wife have also incurred substantial renovation costs. In December 1994 Michael became bankrupt on his own petition. He did not disclose any interest in the property as an asset in his statement of affairs. He was discharged from bankruptcy in 1997.

In 2000 Michael and his wife wished to carry out further renovations. A bank was prepared to lend the necessary funds, but it required a mortgage over the property as security. The property was still registered in the names of Mr and Mrs Tsourounakis, and they were unwilling to give such security. They said that the property belonged to Michael, and that the proposed renovations were none of their concern. They were not willing to act as guarantors. Mary's father, Mr Carter, borrowed $100,000 in July 2001 and a further $30,000 in December 2001. Those funds were applied to the renovations. Michael and Mary agreed with Mr Carter that they would pay the interest and

repay the principal. Mr and Mrs Tsourounakis had no involvement in that arrangement. The property is insured in the veteran's name. The contents are insured in Michael's name. Michael pays both premiums. Since 1991 he has considered the property to be his home. He said that he would not otherwise have spent time, energy and money in renovating it and living in it.

In 2001 Mr and Mrs Tsourounakis made mutual wills in favour of each other, with the property going to Michael.

The AAT's finding

The AAT said:

> [158] I consider that in this case a court of equity would more likely apply the maxim 'equity is equality'. 'It has long been a principle of equity that in the absence of sufficient reasons for any division, those who are entitled to property should have the certainty and fairness of equal division; for equity did delight in equality' … .

As a consequence of that finding, it found that Michael had a beneficial interest in the property to the extent of one half.

Questions of law

The Court identified the following questions of law:

- whether the AAT misunderstood, and therefore wrongly applied the equitable maxim 'equity is equality'; and
- whether any estoppel arising in favour of Michael (or his trustee in bankruptcy) and against Mr and Mrs Tsourounakis constitutes a charge or encumbrance for the purposes of s 52C of the VEA.

In their joint judgment, Dowsett and Edmonds JJ said:

> [114] … In the present case, equity will impose upon Mr and Mrs Emmanouil Tsourounakis an obligation not to act, with regard to the property, in a way which would be inconsistent with any equity held by Michael as a result of detriment arising, or likely to arise, from his having acted in reliance upon his father's statements. Such an obligation would be a clear limitation upon Mr and Mrs Tsourounakis' proprietary rights over the property, lessening its value to them. We consider that to be an encumbrance upon the property for the purposes of s 52C. In concluding to the contrary, the Senior Member misconstrued the expression 'charge or encumbrance'. …
>
> [116] In seeking to identify the order which a court of equity might make to vindicate Michael's equity, the Senior Member relied upon the maxim 'equity is equality'. This led him to the somewhat arbitrary conclusion that Michael was entitled to a half interest in the property. The Commission and Mr and Mrs Tsourounakis appeal and cross-appeal respectively against his application of the maxim. …
>
> [119] … the maxim should only be applied when it is otherwise not possible to determine the respective equities. …
>
> [122] In a case which depends upon demonstrated detriment, avoidance of that detriment will be the primary basis for the determination of respective equities. If the primary detriment is the payment of money or investment of

> time, then the remedy will focus on those aspects. The Senior Member seems to have thought that Michael had suffered some additional detriment. In para [155], the Senior Member identified the following aspects:
>
> - his emotional investment;
> - the increase in value of the house; and
> - his continuing obligation to Mr Carter.
>
> [123] If these are aspects of detriment, then they must be remedied. However such aspects must be evaluated in order to ascertain the appropriate way in which Michael's equity can be protected. Recourse to the maxim 'equity is equality' will not achieve that result. We conclude that the Senior Member's reliance on the maxim was based on a misunderstanding of its meaning.

Their Honours then set out some of the matters the AAT would need to consider on remittal:

> [153] … In our view the value of Mr and Mrs Tsourounakis' interest in the property should be valued by ascertaining the market value and deducting from it the value of any equitable right now vested in Michael. Some adjustment should be made for the value of the interest vested in the trustee, but it is presently difficult to value that interest.
>
> [154] In performing that exercise it is necessary to decide how a court of equity would vindicate Michael's right. The Senior Member found that since Michael's discharge he has spent approximately $160 000 on renovations. Presumably, there have also been other outgoings such as rates and insurance. If there is evidence of those amounts, they should also be included in the calculation. There should be some allowance for Michael's labour in connection with the renovations, but it seems that there is no evidence in that regard. Since his discharge from bankruptcy Michael and his family have continued to live, rent-free, in the property. In calculating detriment the commercial rental payable for that period should go in reduction of the amount of his overall investment in the property.
>
> [155] Michael has been paying interest on borrowings since 2001. The Tribunal found that such interest amounted to about $20,000. To the extent that Michael met outgoings in connection with the property, he also lost the benefit of earning interest on the amounts paid. On the other hand, to the extent that he paid no rental, he had the opportunity of earning interest on the amounts saved. It will be necessary to strike a balance between interest incurred or lost on the one hand, and interest saved on the other. This may be a quite complex exercise, but perhaps the parties will be able to agree.

Their Honours then considered the value of the emotional investment Michael had made in the property, and said:

> [156] … The Senior Member considered that it was not possible to '… place a value on that emotional investment'. He appears to have treated such emotional investment as a reason for awarding Michael a half interest in the property. However such an order would almost certainly result in sale and division of the proceeds. It would

not vindicate Michael's emotional investment. Dispossession might be avoided by recognizing Michael as beneficial owner of the property or by an order recognizing a right to occupation. Money would not help. The question, then, is whether Michael's emotional investment, taken with the other facts of the case, should lead to an order that he be permitted to reside permanently in the property or to an order that the property be held on trust for him.

[157] … Michael … refers to his childhood association with the house, which association is not presently relevant. Nor should his occupation of the house prior to his discharge from bankruptcy be taken into account.. No doubt Michael has a degree of attachment to the property, and no doubt part of that attachment is attributable to his family's occupation of it. The question is whether disruption of such attachment should be recognized as a detriment to be avoided by depriving his parents of their proprietary and associated rights.

Their Honours then considered the value of renovations, and said:

[159] … Michael claimed to have performed renovation works to a total value of $350 000 over the period from 1991 until 2002. As the difference in value between the property in poor condition and as it was in 2002 is only $150 000, we infer that the renovations did not produce a proportionate increase in the value of the property. That was also the position in 2005. We infer that most, if not all, of the renovations had been completed by September 2002, and that the subsequent increase in value reflected an upward trend in property values. We are unable to see any evidence of a significance increase in value as a result of the renovations beyond the cost of effecting them. If Michael were compensated for such cost there would be no warrant for making any further allowance to represent associated capital gain, assuming that such allowance could otherwise properly be made in order to avoid detriment.

Decision

The Court allowed both the appeal and the cross appeal but awarded costs against the Repatriation Commission.

Sleep v Repatriation Commission

Besanko J
[2007] FCA 859
6 June 2007

Service pension – assets test – disregarded assets – motor vehicle – whether designed for use by disabled person – whether payment of recreation transport allowance inconsistent with motor vehicle and trailer being included in assets test

Mr Sleep appealed from a decision of the AAT that had found that the value of his Toyota Prado motor vehicle and camper trailer were to be taken into account as assets for the purposes of the service pension assets test.

Mr Sleep suffers from war-caused disabilities including anxiety disorder and a rare blood disorder that renders

him particularly susceptible to infection. He avoids public places and public transport and finds that his anxiety is helped by regular trips to the Australian outback. The AAT found that Mr Sleep had purchased the vehicle and trailer for the purpose of undertaking regular trips into the outback. The vehicle was not specifically designed for a disabled person and had not been modified in any way related to Mr Sleep's disabilities.

The AAT held that the vehicle and trailer did not fall within the concept of specific aids for the disabled as is referred to in paragraphs 52(1)(k) and (l) of the VEA, which provides that items designed, or modified, for use by a disabled person are to be disregarded as assets for the purpose of the assets test.

Besanko J said:

> [10] There can be no doubt that the motor vehicle and camper trailer are 'assets' within the definition of that word in s 5L of the VE Act.
>
> [11] I think the Tribunal's interpretation of s 52(1)(k) and (l) is the correct one. Personal property falls within the terms of s 52(1)(k) if there is a feature or features of the design that indicates that it was designed for use by a disabled person. Assets designed for use by persons who are not disabled, such as the motor vehicle or camper trailer in this case, do not become assets designed for use by a disabled person because of the intention of the owner or disabled person or the particular way in which it is used by a person. If there is any doubt about the proper interpretation of s 52(1)(k) (and I do think that there is), it is removed by the provisions of s 52(1)(l), which deal with modifications made so that personal property can be used by a disabled person. In those circumstances, only that part of the value of the personal property that is attributable to the modifications is to be disregarded under s 52(1). As I understood the applicant's submission, it was that Parliament intended to exclude from the assets taken into account for the purposes of determining the rate of pension assets which a disabled person needed because of his or her disability and what was needed was a question of fact to be determined in each case. That is not the test laid down by the clear words in s 52(1)(k) and (l). Those paragraphs focus attention on the purpose for which personal property was designed or the reason it was modified.

The Court then dealt with another argument put by Mr Sleep related to the fact that he receives a recreation transport allowance under s 104 of the VEA in relation to his vehicle, and that treatment is defined in section 80 of the VEA to include transport. Besanko J said:

> [12] The applicant sought to raise a number of matters on the appeal that appear not to have been raised before the Tribunal. First, he submits that he is receiving a recreation transport allowance and that it is inconsistent for the respondent to pay such an allowance and, at the same time, fail to disregard as assets the motor vehicle and the camper trailer. He submits that the Tribunal overlooked or, at least placed no weight on, the fact that he was receiving a recreation transport allowance. This submission must be rejected. In its reasons, the Tribunal

referred to the fact that the applicant asserted that he received a recreation transport allowance as it had been previously accepted that his ability to move from one place to another was affected by his illness. In any event, the receipt of the recreation transport allowance under s 104 of the VE Act is not inconsistent with the decisions that the motor vehicle and camper trailer should not be disregarded in calculating the value of the applicant's assets. As counsel for the respondent submitted, the Act provides for a range of pensions and the recreation transport allowance is, relevantly, a different allowance from the service pension. Secondly, the applicant refers to the fact that in s 80, which appears in Part V of the VE Act, there is a definition of treatment which includes the provision of social or domestic 'transport'. In my opinion, the provisions of s 80 cannot affect the proper interpretation of s 52(1)(k) and (l). Thirdly, the applicant submits that the Tribunal may have misunderstood whether or not his service pension was taxable. He refers to a record of the respondent which appears in the appeal book and which suggests, in his submission, that his pension was taxable when, in fact, his pension was not taxable. In my opinion, the respondent's submission to the effect that whether or not the service pension is taxable is irrelevant should be accepted.

Decision

The Court dismissed the appeal.

Military Rehabilitation and Compensation Commission v Roberts

Madgwick J
[2007] FCA 1
8 January 2007

SRCA – 'but for' test in the extended definition of 'injury' – whether injury 'arose out of' employment – post traumatic stress disorder – alleged sexual assault at RAAF base after duty hours

Ms Roberts was a member of the RAAF. In 2000 she was working with the Defence Signals Directorate in Canberra and was living, with the permission of the RAAF, at Fairbairn Air Base in the ACT. One night after attending a function at the Airmen's club at Fairbairn she was allegedly indecently assaulted in her bedroom on the base.

As a result of this incident Ms Roberts suffered from a psychiatric condition and was medically discharged from the RAAF in 2003. At the time of the hearing she no longer suffered from the psychiatric condition and was back in full-time work.

The AAT had found the MRCC liable for the injury on two grounds: first, that the injury 'arose out of' Ms Roberts' employment; and secondly, that it was the result of an act of violence that would not have occurred 'but for' her employment. The MRCC appealed this decision to the Federal Court.

The Law

Paragraph 6(1)(a) of the *Safety, Rehabilitation and Compensation Act 1988* provides:

> Without limiting the circumstances in which an injury to an employee may be treated as having arisen out of, or in the course of, his or her employment, an injury shall, for the purposes of this Act, be treated as having so arisen if it was sustained:
>
> (a) as a result of an act of violence that would not have occurred but for the employee's employment or the performance by the employee of the duties or functions of his or her employment. …'.

Arguments

The parties agreed that the expression 'arising out of' poses a test that is not satisfied by a merely temporal connection. Rather, a causal connection is necessary

MRCC's argument

The MRCC argued that the Tribunal had treated merely temporal factors as sufficient to establish causation; causal connection existed between the respondent's injury and her employment; a causal connection between 'employment' and 'injury' can only exist when some aspect of the employment can properly be said to have increased the risk of the injury being sustained. Temporal factors which merely secure the presence of the claimant at the place where, or at the time when, he or she is injured are not enough to forge a causal connection with the injury without that increase in risk.

It was argued that it was incumbent upon the Tribunal to ask itself, and answer, the following question: did any of the four factors identified by the Tribunal separately, or in combination, increase the risk of the respondent being injured? The Tribunal identified temporal factors that merely secured the presence of the respondent at the place where, and at the time when, she was injured; however broad an interpretation is given to the words 'arising out of', they still pose a test of causation which is not satisfied by merely temporal connections.

Ms Roberts' argument

For Ms Roberts it was argued that it is sufficient if a causal nexus does in fact exist between the work and the injury, regardless of whether or not it increased the risk of the injury; the phrase 'arose out of' is a formula importing the notion of causation, but findings as to causation involve questions of fact, rather than questions of law.

While living on base she was 'no doubt' subject to military discipline. This element and the fact that the injury occurred on the base, were factors identified by the High Court in *Roncevich* as relevant to the finding of a causal nexus.

The Court's reasons for judgment

Justice Madgwick dismissed the appeal, saying:

> [55] … I am … inclined, on a tentative basis, to think that the requirement asserted by the applicant that the employee must show some elevation of the risk of the injury sustained, which elevation must result from the employment, is mistaken and that it is enough that there can be shown, as a

matter of common sense, some substantial link or connection with the employment which is causal and not merely temporal. Among other things, some of the matters regarded by the High Court in *Roncevich* as relevant to the 'arising out of … test' were not, it would seem, of any notable relevance to a restricted view of causation, such as that urged by the applicant, but were relevant to the less restrictive view I am inclined to favour. Questions might, however, possibly arise as to whether the test so stated could, as a matter of law, be satisfied by the matters to which the Senior Member referred. …

[58] … many potentially relevant facts appear not to have been elucidated, for example: How long was Ms Roberts' posting in Canberra? To what extent was there any real advantage to the military in having her quartered where she was? What was the extent of any encouragement by the RAAF for her to live on the Base as distinct from elsewhere? Had her assailant become drunk at the Base 'Club'? Was the 'Club' organised by the Air Force? Were personnel smiled on, as in Roncevich, for drinking heartily or even more than that? Was the assailant, on that account, affected by liquor? Did disinhibition by liquor account for his behaviour? Was the respondent, on account of a RAAF-tolerated drinking culture, so affected? If so, did the influence of alcohol lead to any lack of care by her as to providing, unwittingly, the opportunity for her assailant to intrude upon her by leaving her window open on a May night in Canberra? Was she, at the time, subject to military discipline? Why was the matter solely investigated in a military context without calling in the civilian police? The answers to questions like these may have assisted one party or the other notwithstanding that, apparently, they were not forensically elucidated by either party for the Tribunal's benefit.

[61] … to my mind, as I infer to the Senior Member's, it is clear that s 6(1)(a) was intended to have a generous application where a Commonwealth employee is injured by a violent act. That is shown, apart from the very use of the wide test notoriously inherent in the expression 'but for', by the apparently exhaustive inclusion of the ways of conceiving what might be the original and crucial, employment-related circumstance: the 'employee's employment', his/her performance of the 'duties', or the 'functions' of the employment. It remains true that the concept of 'but for' implies, indeed is synonymous with, some kind of causal connection.

[62] … It is to be inferred that, at least to some extent, it was in the interests of both the respondent and the military that she reside at the Base provided by the latter. The RAAF provided quarters there for young service men and women in close proximity. The Air Force provided living quarters for a female officer which could be entered, according to the filed material, by an intruder apparently simply removing a fly screen. It is certainly true that, 'but for' these and the other specific matters mentioned by the Tribunal, Ms Roberts would not have been injured. Some degree of causal connection exists. Moreover, I am unable to think that Parliament could not have intended that in such circumstances a female employee, sexually assaulted by a fellow employee, should be regarded

as falling within the protection of s 6(1)(a). Parliament has clearly used language that could encompass that result. There is an evident generosity of approach towards employees injured by violent acts.

[63] If, which I doubt, it is necessary to distinguish the example given by the applicant of Ms Roberts' circumstances, and an injury occurring then and there in the course of a private dispute, it is not, in my opinion, difficult to do so. The employer has no interest in an injured employee engaging in a private dispute. The employer who subsidises convenient accommodation does however, have an interest in the employee ordinarily utilising such accommodation and in being securely and comfortably accommodated there, from the enjoyment of which accommodation the employee will be suitably re-invigorated, to perform his or her actual duties. All Ms Roberts was doing was sleeping and enjoying the benefits of the accommodation which the employee had made it financially advantageous for her to use. She was doing what her employer envisaged and expected she would do. She was in no sense behaving in such a way that it would be anomalous to say that ensuing violence would not have recurred 'but-for' the employment.

What this case means

The concepts under consideration in this case occur in the SRCA, the MRCA as well as the VEA. The general comments of the court indicate that the concept of 'arising out of' the relevant eligible service is very wide indeed but there still must be found a connection with the person's service.

In this case, Madgwick J placed emphasis on the 'but for' provision in section 6(1)(a). The 'but for' tests in the VEA and MRCA are of much more general application[32] than the 'but for' test in the SRCA, which is limited only to violent acts. Whether the breadth of application given in *Roberts'* case will be extended to the more general 'but for' test in the VEA and MRCA, or a more proximate cause will be required is a matter for speculation. There is currently very little recent case law,[33] but given the convergence of the SRCA and VEA case law this might be what happens.

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[32] For example, s70(7) of the VEA provides:

> (7) Where, in the opinion of the Commission, the incapacity of a member of the Forces or member of a Peacekeeping Force was due to an **accident that would not have occurred**, or to a **disease that would not have been contracted**, ***but for*** his or her **having rendered defence service or peacekeeping service**, as the case may be, or ***but for*** **changes in the member's environment consequent upon his or her having rendered any such service**:
>
> (a) if the incapacity of the member was due to an accident—that incapacity shall be deemed to have arisen out of the injury suffered by the member as a result of the accident and the injury so suffered shall be deemed to be a defence-caused injury suffered by the member; or
>
> (b) if the incapacity was due to a disease—the incapacity shall be deemed to have arisen out of that disease and that disease shall be deemed to be a defence-caused disease contracted by the member, for the purposes of this Act.

[33] The High Court expressly refused to deal with the 'but for' test in *Roncevich v Repatriation Commission*—see paras [20]-[21] of the joint judgment.

Federal Magistrates Court of Australia

Gittins v Repatriation Commission

Riley FM
[2007] FMCA 167
21 February 2007

Death – reasonable hypothesis – inability to obtain appropriate clinical management

The veteran, died in 1997 from a low grade non-Hodgkin's lymphoma. The veteran served in the Australian Army from 1949 until 1971. He had operational service in Japan from 1953 until 1955. During his period of operational service in Japan the veteran spent two periods in British Commonwealth Hospital in Japan. The first was for 13 days in 1954 for seborrhoeic dermatitis. The second was for 14 days in 1955 for an upper respiratory tract infection and hookworm.

In 1976, the veteran, at the insistence of his employer, sought medical advice regarding a mass on the left side of his neck. A surgeon diagnosed the mass as a branchial cyst and advised that the matter be reviewed. The veteran did not seek review of the cyst.

In April 1997, the veteran developed lethargy. On 10 July 1997, he was admitted to hospital having lost three stone in three months. Non-Hodgkin's lymphoma was diagnosed and chemotherapy commenced on 17 July 1997.

The hospital admission notes recorded that the veteran had a phobia of medical treatment and hospitalisation. The phobia was said to be due to a loss of control and the possible need for sedation. Numerous lumps were described in the notes as progressive lymphadenopathy over a period of months and the past history of a left branchial cyst was noted. The veteran died on 25 July 1997.

Prior to this, the veteran had seen doctors on two or three occasions in 1957 and 1959 and was hospitalised twice in 1959.

The Tribunal's decision

It was argued that the veteran had a phobia of doctors and hospitals as a result of his experiences in hospital during his operational service in 1954 and 1955. There were two hypotheses suggested:

1. The veteran was unable to obtain appropriate clinical management for non-Hodgkin's lymphoma;
2. As a result of his hospitalisation in Japan, the veteran developed a phobia relating to hospitals and the medical profession; and this phobia resulted in his delay in seeking medical treatment until his condition was life threatening and shortly thereafter resulted in his death in 1997.

With respect to the first hypothesis the Tribunal found that there was no evidence before it that the veteran had contracted non-Hodgkin's lymphoma prior to or during his eligible service, and so it could not have been aggravated by that service.

The Court's decision

In the Federal Magistrates court the applicant argued with respect to the first hypothesis that the Tribunal erred in finding at Step 3 of the *Deledio* process that the hypothesis was not reasonable because it did not fit the template in that there was no evidence of the veteran suffering from non-Hodgkin's lymphoma prior to eligible service or during eligible service which could give rise to an inability to obtain appropriate clinical management of the disease. The applicant submitted that in fact this was fact finding to be applied at step 4 of the process where the standard or proof was 'beyond reasonable doubt'. The Court did not accept this, saying:

> [58] In proceeding in that way, the Tribunal directly applied step 3 of *Deledio*. As stated by the Full Court at the end of its exposition of step 3 in *Deledio*:
>
> > If the hypothesis fails to fit within the template, it will be deemed not to be 'reasonable' and the claim will fail.
>
> [59] In my view, the Tribunal correctly applied the first three *Deledio* steps. Because the first hypothesis did not fit within the template, it was unnecessary for the Tribunal to consider step 4. Accordingly, the Tribunal did not make the errors alleged in relation to the first hypothesis.

With respect to the second hypothesis the Commission submitted that as the Tribunal had already found that the kind of death suffered by the veteran was non-Hodgkin's lymphoma, it could not proceed as if another cause of death was 'phobia'. As the SoP for non-Hodgkin's lymphoma had to be applied and there was no factor relating to 'phobia', the claim had to fail. The Court said:

> [51] As there was only one kind of death, or cause of death, found by the Tribunal to have existed in this case, the claim had to fit within the template provided by the SoP for that kind of death for the claim to succeed. The claim did not fit within that template, so it necessarily failed. The Tribunal should not have looked at any alternative hypothesis because the SoP for non-Hodgkin's lymphoma set out the matters that needed to exist for a claim based on the relevant kind of death to succeed. Accordingly, the Tribunal should not have looked at the second hypothesis. Any errors in the Tribunal's consideration of the second hypothesis were immaterial to the result.
>
> [52] Sub-section 120A(4) of the Act does not assist the applicant. The Authority has made a SoP in relation to the veteran's kind of death, namely, non-Hodgkin's lymphoma. Accordingly, s120A(4) of the Act does not apply. Similarly, *Repatriation Commission v Law* (1980) 31 ALR 140 does not assist the applicant. That case predates the statutory regime that introduced the system of SoPs. Where there is only one cause of death, and a SoP that applies to that kind of death, that SoP governs the determination of whether the hypothesis that the death arose from relevant service is reasonable.

What this case means

This case consistent with *Repatriation Commission v Owens* (1996) 70 ALJR 904, 12 *VeRBosity* 55, in which the High Court said that whether a hypothesis is reasonable is a finding of fact. However, it is not a finding of fact that *Deledio* said would be an error of law to make at step 3. *Deledio* said it is an error to make findings about the facts that raise a hypothesis, but it is not an error to decide whether or not a hypothesis is reasonable or whether it fits the template of a SoP.

The facts to be disproved beyond reasonable doubt are the 'raised facts'. Findings of fact that would be adverse to a claim (other than the kind of injury, disease or death claimed; the nature and extent of the service that the person has rendered; whether the claimant is a veteran, member or dependent; or whether an exclusion of liability applies) must be decided at step 4 of the *Deledio* process rather than in the course of deciding whether the hypothesis is raised (step1) or is reasonable (step 3).

This case also highlights the fact that an injury or disease cannot be aggravated or materially contributed to for the purposes of the VEA if it did not exist during the person's eligible service. The 'inability to obtain appropriate clinical management' factor applies only to the aggravation to or material contribution of an injury or disease that existed during the person's service.

Statements of Principles issued by the Repatriation Medical Authority

January to June 2007

Number of Instrument	Description of Instrument
1 & 2 of 2007	Revocation of Statements of Principles (Instruments Nos 19 & 20 of 1995) and determination of Statements of Principles concerning **alpha-1 antitrypsin deficiency** and death from alpha-1 antitrypsin deficiency.
3 & 4 of 2007	Revocation of Statements of Principles (Instruments Nos 21 & 22 of 1995) and determination of Statements of Principles concerning **Gaucher's disease** and death from Gaucher's disease.
5 & 6 of 2007	Revocation of Statements of Principles (Instruments Nos 107 & 108 of 1995) and determination of Statements of Principles concerning **Huntington's chorea** and death from Huntington's chorea.
7 & 8 of 2007	Revocation of Statements of Principles (Instruments Nos 15 & 16 of 1995) and determination of Statements of Principles concerning **Wilson's disease** and death from Wilson's disease.
9 & 10 of 2007	Revocation of Statements of Principles (Instruments Nos 51 & 52 of 1995) and determination of Statements of Principles concerning **Charcot-Marie-Tooth disease** and death from Charcot-Marie-Tooth disease.
11 & 12 of 2007	Revocation of Statements of Principles (Instruments Nos 1 & 2 of 1999) and determination of Statements of Principles concerning **multiple osteochondromatosis** and death from multiple osteochondromatosis.
13 & 14 of 2007	Revocation of Statements of Principles (Instruments Nos 57 & 58 of 1995) and determination of Statements of Principles concerning **hereditary spherocytosis** and death from hereditary spherocytosis.
15 & 16 of 2007	Revocation of Statements of Principles (Instruments Nos 263 & 264 of 1995) and determination of Statements of Principles concerning **myasthenia gravis** and death from myasthenia gravis.
17 & 18 of 2007	Revocation of Statements of Principles (Instruments Nos 58 & 59 of 1998) and determination of Statements of Principles concerning **depressive disorder** and death from depressive disorder.
19 & 20 of 2007	Revocation of Statements of Principles (Instruments Nos 3 & 4 of 2000 as amended by Nos 47 & 48 of 2003) and determination of Statements of Principles concerning **plantar fasciitis** and death from plantar fasciitis.
21 & 22 of 2007	Revocation of Statements of Principles (Instruments Nos 17 & 18 of 2000) and determination of Statements of Principles concerning **malignant neoplasm of the bile duct** and death from malignant neoplasm of the bile duct.

23 & 24 of 2007	Revocation of Statements of Principles (Instruments Nos 19 & 20 of 1998 as amended by Nos 22 & 23 of 2002) and determination of Statements of Principles concerning **cardiomyopathy** and death from cardiomyopathy.
25 & 26 of 2007	Revocation of Statements of Principles (Instruments Nos 58 & 59 of 1994 as amended by Nos 186 & 187 of 1995) and determination of Statements of Principles concerning **chicken pox** and death from chicken pox.
27 & 28 of 2007	Revocation of Statements of Principles (Instruments Nos 60 & 61 of 1994) and determination of Statements of Principles concerning **herpes zoster** and death from herpes zoster.
29 & 30 of 2007	Revocation of Statements of Principles (Instruments Nos 41 & 42 of 1994) and determination of Statements of Principles concerning **hepatitis A** and death from hepatitis A.
31 & 32 of 2007	Revocation of Statements of Principles (Instruments Nos 46 & 47 of 1994) and determination of Statements of Principles concerning **hepatitis E** and death from hepatitis E.
33 & 34 of 2007	Revocation of Statements of Principles (Instruments Nos 11 & 12 of 2006) and determination of Statements of Principles concerning **acute stress disorder** and death from acute stress disorder.
35 & 36 of 2007	Determination of Statements of Principles concerning **familial hypertrophic cardiomyopathy** and death from familial hypertrophic cardiomyopathy.
37 & 38 of 2007	Revocation of Statements of Principles (Instruments Nos 53 & 54 of 1996) and determination of Statements of Principles concerning **Achilles tendinopathy and bursitis** and death from Achilles tendinopathy and bursitis.
39 & 40 of 2007	Revocation of Statements of Principles (Instruments Nos 130 & 131 of 1996 as amended by Nos 92 & 93 of 1997) and determination of Statements of Principles concerning **intervertebral disc prolapse** and death from intervertebral disc prolapse.
41 & 42 of 2007	Revocation of Statements of Principles (Instruments Nos 115 & 116 of 1996 as amended by Nos 11 & 12 of 1998) and determination of Statements of Principles concerning **malignant neoplasm of the oesophagus** and death from malignant neoplasm of the oesophagus.
43 & 44 of 2007	Revocation of Statements of Principles (Instruments Nos 81 & 82 of 1997) and determination of Statements of Principles concerning **tuberculosis** and death from tuberculosis.
45 & 46 of 2007	Revocation of Statements of Principles (Instruments Nos 49 & 50 of 1995) and determination of Statements of Principles concerning **albinism** and death from albinism.
47 & 48 of 2007	Revocation of Statements of Principles (Instruments Nos 13 & 14 of 1995 as amended by Nos 188 & 189 of 1995) and determination of Statements of Principles concerning **alkaptonuria** and death from alkaptonuria.

49 & 50 of 2007	Revocation of Statements of Principles (Instruments Nos 237 & 238 of 1995 as amended by Nos 12 & 13 of 2002) and determination of Statements of Principles concerning **congenital cataract** and death from congenital cataract.
51 & 52 of 2007	Revocation of Statements of Principles (Instruments Nos 17 & 18 of 1995) and determination of Statements of Principles concerning **horseshoe kidney** and death from horseshoe kidney.
53 & 54 of 2007	Revocation of Statements of Principles (Instruments Nos 9 & 10 of 1995) and determination of Statements of Principles concerning **Marfan syndrome** and death from Marfan syndrome.
55 & 56 of 2007	Revocation of Statements of Principles (Instruments Nos 55 & 56 of 1995) and determination of Statements of Principles concerning **autosomal dominant polycystic kidney disease** and death from autosomal dominant polycystic kidney disease.
57 & 58 of 2007	Revocation of Statements of Principles (Instruments Nos 61 & 62 of 1995) and determination of Statements of Principles concerning **von Willebrand's disease** and death from von Willebrand's disease.
59 & 60 of 2007	Revocation of Statements of Principles (Instruments Nos 11 & 12 of 1995) and determination of Statements of Principles concerning **osteogenesis imperfecta** and death from osteogenesis imperfecta.
61 & 62 of 2007	Revocation of Statements of Principles (Instruments Nos 59 & 60 of 1995) and determination of Statements of Principles concerning **spina bifida** and death from spina bifida.
63 & 64 of 2007	Revocation of Statements of Principles (Instruments Nos 53 & 54 of 1995 as amended by Nos 215 & 216 of 1995) and determination of Statements of Principles concerning **haemophilia** and death from haemophilia.
65 & 66 of 2007	Revocation of Statements of Principles (Instruments Nos 36, 37, 38 & 39 of 2002) and determination of Statements of Principles concerning **Parkinson's disease and parkinsonism** and death from Parkinson's disease and parkinsonism.
67 & 68 of 2007	Revocation of Statements of Principles (Instruments Nos 36 & 37 of 1999) and determination of Statements of Principles concerning **malignant neoplasm of the gallbladder** and death from malignant neoplasm of the gallbladder.
69 & 70 of 2007	Revocation of Statements of Principles (Instruments Nos 23 & 24 of 1999) and determination of Statements of Principles concerning **myopia, hypermetropia and astigmatism** and death from myopia, hypermetropia and astigmatism.
69 & 70 of 2007	Revocation of Statements of Principles (Instruments Nos 23 & 24 of 1999) and determination of Statements of Principles concerning **myopia, hypermetropia and astigmatism** and death from myopia, hypermetropia and astigmatism.
71 & 72 of 2007	Revocation of Statements of Principles (Instruments Nos 366 & 367 of 1995) and determination of Statements of Principles concerning **dental caries** and death from dental caries.

73 & 74 of 2007	Revocation of Statements of Principles (Instruments Nos 5 & 6 of 2003) and determination of Statements of Principles concerning **loss of teeth** and death from loss of teeth.
75 & 76 of 2007	Revocation of Statements of Principles (Instruments Nos 45 & 46 of 2001 as amended by Nos 53 & 54 of 2001) and determination of Statements of Principles concerning **pterygium** and death from pterygium.
77 & 78 of 2007	Revocation of Statements of Principles (Instruments Nos 251 & 252 of 1995) and determination of Statements of Principles concerning **pinguecula** and death from pinguecula.
79 & 80 of 2007	Revocation of Statements of Principles (Instruments Nos 39 & 40 of 2001) and determination of Statements of Principles concerning **malignant melanoma of the skin** and death from malignant melanoma of the skin.
81 & 82 of 2007	Revocation of Statements of Principles (Instruments Nos 15 & 16 of 2006, and Nos 41 & 42 of 2001 as amended by Nos 49 & 50 of 2001) and determination of Statements of Principles concerning **non-melanotic malignant neoplasm of the skin** and death from non-melanotic malignant neoplasm of the skin.
83 & 84 of 2007	Revocation of Statements of Principles (Instruments Nos 52 & 53 of 1994 as amended by Nos 199 & 200 of 1995) and determination of Statements of Principles concerning **mesothelioma** and death from mesothelioma.
85 & 86 of 2007	Determination of Statements of Principles concerning **systemic lupus erythematosus** and death from systemic lupus erythematosus.
87 & 88 of 2007	Amendment of Statements of Principles (Instruments Nos 17 & 18 of 2006) concerning **malignant neoplasm of the lung** and death from malignant neoplasm of the lung.

Copies of these instruments can be obtained from Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001 or at *http://www.rma.gov.au/*

Conditions under Investigation by the Repatriation Medical Authority

as at 30 June 2007

Description of disease or injury	*SoPs under consideration*	Gazetted
Accidental hypothermia	*Instrument Nos. 376/95 & 377/95*	27-06-07
Accommodation disorder	*Instrument Nos. 296/95 & 297/95*	2-05-07
Acute sinusitis	*Instrument Nos. 209/95 & 210/95 as amended by 328/95 & 329/95*	27-06-07
Addison's disease	—	20-12-06
Adjustment disorder	*Instrument Nos. 57/96 & 58/96*	8-12-06
Alcohol dependence or alcohol abuse	*Instrument Nos. 76/98 & 77/98*	8-11-06
Analgesic nephropathy	*Instrument Nos. 56/94 & 57/94 as amended by 277/95 & 278/95*	28-06-06
Ancylostomiasis	*Instrument Nos. 137/95 & 138/95*	2-05-07
Animal envenomation	*Instrument Nos. 162/95 & 163/95*	2-05-07
Anxiety disorder	*Instrument Nos. 1/00 & 2/00*	1-09-04
Ascariasis	*Instrument Nos. 135/95 & 136/95*	2-05-07
Benign neoplasm of the eye	*Instrument Nos. 1825/95 & 183/95*	28-06-06
Benign prostatic hypertrophy	*Instrument Nos. 133/95 & 134/95*	28-06-06
Binge eating disorder	—	15-06-05
Bipolar disorder	*Instrument Nos 128/96 & 129/96*	24-03-04
Bronchiectasis	*Instrument Nos. 59/01 & 60/01*	20-12-06
Buerger's disease	*Instrument Nos. 73/95 & 74/95*	2-05-06
Cardiac myxoma	*Instrument Nos. 13/98 & 14/98*	28-06-06
Cataract, acquired	*Instrument Nos. 37 & 38 of 2001 as amended by 32/02 & 33/02*	1-03-06
Cataract, congenital	*Instrument Nos 237/95 & 238/95 as amended by 12/03 & 13/03*	15-06-05
Cerebral meningioma	*Instrument Nos. 207/95 & 208/95*	2-05-07
Chilblains	*Instrument Nos. 265/95 & 266/95*	2-05-07
Cholelithiasis	*Instrument Nos 33/94 & 34/94 as amended by 223/95 & 224/95 and 9/02 & 10/02*	28-06-06
Cirrhosis of the liver	*Instrument Nos 35/98 and 36/98*	02-11-05
Clonorchiasis	*Instrument Nos. 7/95 & 8/95*	28-06-06
Cushing's syndrome	*Instrument Nos. 249/95 & 250/95*	2-05-07
Cuts, stabs, abrasions and lacerations	*Instrument Nos. 54/94 & 55/94*	28-06-06
Deep vein thrombosis	*Instrument Nos. 5/01 & 6/01 as amended by 38/04 & 39/04*	8-11-06
Dental malocclusion	*Instrument Nos. 372/95 & 373/95*	27-06-07
Diabetes mellitus	*Instrument Nos. 11/04 & 12/04*	2-05-07
Dislocation	*Instrument Nos. 290/95 & 291/95*	2-05-07
Diverticular disease of the colon	*Instrument Nos. 67/94 & 68/94 as amended by 87/97 & 281/95*	28-06-06
Drug dependence or drug abuse	*Instrument Nos. 78/98 & 79/98*	8-11-06

Description of disease or injury	*SoPs under consideration*	Gazetted
Effects of electric shock and electrocution	*Instrument Nos 149/95 & 150/95*	2-05-07
Effects of lightning	*Instrument Nos 151/95 & 152/95 as amended by 197/95 & 198/95*	2-05-07
External bruises and contusions	*Instrument Nos 43/94 & 44/94*	28-06-06
Fibromuscular dysplasia	*Instrument Nos. 51/97 & 52/97*	28-06-06
Frostbite	*Instrument Nos. 166/95 & 167/95*	2-05-07
Haemorrhoids	*Instrument Nos. 26/04 & 27/04*	20-12-06
Hallux valgus, acquired	*Instrument Nos. 47/98 & 48/98*	15-06-05
Hallux valgus, congenital	*Instrument Nos. 300/95 & 301/95*	15-06-05
Hepatitis B	*Instrument Nos 11/99 & 12/99*	8-11-06
Hepatitis C	*Instrument Nos 43/95 & 44/95 as amended by 9/97 & 10/97*	8-11-06
Hepatitis D	*Instrument Nos 45/95 & 46/95*	8-11-06
Herpes simplex	*Instrument Nos 342/95 & 343/95*	27-06-07
Idiopathic fibrosing alveolitis	*Instrument Nos 15/98 & 16/98*	15-06-05
Idiopathic thrombocytopaenic purpura	*Instrument Nos. 19/97 & 20/97*	28-06-06
Immersion foot	*Instrument Nos. 168/95 & 169/95*	2-05-07
Influenza	*Instrument Nos. 267/95 & 268/95*	2-05-07
Ingrown toenail	*Instrument Nos 13/94 & 14/94 as amended by 221/95 & 222/95*	28-06-06
Ischaemic heart disease	*Instrument Nos 53/03 & 54/03 as amended by 9/04 & 10/04*	15-06-05
Lipoma	*Instrument Nos. 69/95 & 70/95 as amended by 191/95 & 192/95*	28-06-06
Macular degeneration	*Instrument Nos. 25 and 26 of 2003*	1-03-06
Malaria	*Instrument Nos. 172/95 & 173/95*	2-05-07
Malignant neoplasm of the bladder	*Instrument Nos 23/00 & 24/00*	28-12-05
Malignant neoplasm of the brain	*Instrument Nos 17/03 & 18/03*	8-11-06
Malignant neoplasm of the cerebral meninges	*Instrument Nos 205/95 & 206/95*	2-05-07
Malignant neoplasm of the endometrium	*Instrument Nos 129/95 & 130/95 as amended by 183/96 & 184/96 and 45/03 & 46/03*	02-11-05
Malignant neoplasm of the liver	*Instrument Nos 171/96 & 172/96*	8-11-06
Malignant neoplasm of the ovary	*Instrument Nos 43/97 & 44/97*	27-06-07
Malignant neoplasm of the renal pelvis	*Instrument Nos 155/95 & 156/95*	27-06-07
Malignant neoplasm of the ureter	*Instrument Nos 155/95 & 156/95*	27-06-07
Malignant neoplasm of the urethra	*Instrument Nos. 233/95 & 234/95*	28-06-06
Mesothelioma	*Instrument Nos 52/94 & 53/94 as amended by 199/95 & 200/95*	28-06-06
Methaemoglobinaemia	*Instrument Nos. 284/95 & 285/95*	2-05-07
Migraine	*Instrument Nos. 74/99 & 75/99*	30-08-06
Nephrolithiasis	*Instrument Nos. 178/95 & 179/95*	2-05-07
Non-Hodgkin's lymphoma	*Instrument Nos. 37/03 & 38/03*	20-12-06
Opisthorchiasis	*Instrument Nos. 5/95 & 6/95 as amended by 125/95*	28-06-06
Osteoarthrosis	*Instrument Nos. 31/05 & 32/05*	20-12-06

Description of disease or injury	*SoPs under consideration*	Gazetted
Otosclerosis	*Instrument Nos. 13/96 & 14/96*	28-06-06
Panic disorder	*Instrument Nos. 9/99 & 10/99 as amended by 58/99 & 59/99*	8-11-06
Peritoneal adhesions	—	1-03-06
Personality disorder	*Instrument Nos. 143/95 & 144/95 as amended by 13/97 & 14/97*	8-11-06
Pilonidal sinus	*Instrument Nos. 176/95 & 177/95 as amended by 312/95 & 313/95*	2-05-07
Pinguecula	*Instrument Nos. 251/95 & 252/95*	28-06-06
Poisoning and toxic reaction from plants	*Instrument Nos. 164/95 & 165/95*	2-05-07
Polymyalgia rheumatica	*Instrument Nos. 89/96 & 90/96*	28-06-06
Post traumatic stress disorder	*Instrument Nos. 3/99 & 4/99 as amended by 54/99 & 55/99*	1-09-04
Presbyopia	*Instrument Nos. 314/95 & 315/95*	28-06-06
Relapsing polychondritis	*Instrument Nos. 1/97 & 2/97*	28-06-06
Rheumatic heart disease	*Instrument Nos. 93/95 & 94/95*	2-05-07
Rheumatoid arthritis	*Instrument Nos. 32/04 & 33/04*	30-08-06
Sarcoidosis	*Instrument Nos. 288/95 & 289/95*	28-06-06
Schistosomiasis	*Instrument Nos. 255/95 & 256/95*	2-05-07
Schizophrenia	*Instrument Nos. 132/96 & 133/96*	8-11-06
Scrub typhus	*Instrument Nos. 25/95 & 26/95*	27-06-07
Shin splints	*Instrument Nos. 49/06 & 50/06*	27-06-07
Sickle-cell disease	*Instrument Nos. 109/95 & 110/95 as amended by 193/95 & 194/95*	28-06-06
Sinus barotrauma	*Instrument Nos. 316/95 & 317/95*	2-05-07
Smallpox	*Instrument Nos. 141/95 & 142/95*	8-11-06
Spasmodic torticollis	*Instrument Nos. 33/97 & 34/97*	28-06-06
Strongyloidiasis	*Instrument Nos. 282/95 & 283/95*	2-05-07
Substance induced mood disorder	—	28-02-07
Suicide or attempted suicide	*Instrument Nos. 71/96 & 72/96 as amended by 177/96 & 178/96*	8-11-06
Trigeminal neuralgia	*Instrument Nos. 23/95 & 24/95*	28-06-06
Ureteric calculus	*Instrument Nos. 180/95 & 181/95*	2-05-07

AAT and Court decisions – January to June 2007

AATA = Administrative Appeals Tribunal
HCA = High Court of Australia
FCA = Federal Court
FCAFC = Full Court of the Federal Court
FMCA = Federal Magistrates Court
SRCA = *Safety, Rehabilitation and Compensation Act 1988*
Seafarers RCA = *Seafarers Rehabilitation and Compensation Act 1992*

Allowances and benefits

travelling expenses
- claim made outside 3 month claim period
Morison, M
[2007] AATA 1273 1 May 2007
- review rights
Morison, M
[2007] AATA 1273 1 May 2007

treatment
- review rights
Francis, R W
[2006] AATA 1131 20 October 2006

Application for review

validity of application
- letter from claimant not specifically seeking review by Board
- accompanied by letter from representative seeking only s 31 review
Cater, R
[2006] AATA 1087 15 December 2006

Carcinoma

brain tumour
- solvent
Turner, R
[2007] AATA 1446 20 June 2007

colon
- alcohol
McGovern, P M (RAAF) (death)
[2006] AATA 1108 21 December 2006
Baldock, G (Army) (death)
[2007] AATA 51 7 February 2007
- obesity
Hunt, V (RAAF) (death)
[2007] AATA 1404 6 June 2007

prostate
- high fat diet
Vesperman, P (RAAF) (death)
[2007] AATA 1350 22 May 2007
Tunks, V (Navy) (death)
[2007] AATA 1416 8 June 2007

Circulatory disorder

aortic stenosis
- alcohol
Aitken, P (Army)
[2007] AATA 4 5 January 2007

atrial fibrillation
- alcohol
Aitken, P (Army)
[2007] AATA 4 5 January 2007
Noud, K D (Army)
[2007] AATA 1408 6 June 2007
Beaumont, A E R (RAAF)
[2007] AATA 1475 27 June 2007

cardiomyopathy
- alcohol
Noud, K D (Army)
[2007] AATA 1408 6 June 2007

cerebrovascular accident
- alcohol
Markham, B (Navy) (death)
[2007] AATA 1422 8 June 2007
- hypertension
Sergeant, J (RAAF) (death)
[2007] AATA 1150 21 March 2007
- smoking
Humphris, D J (RAAF) (death)
[2007] AATA 1316 14 May 2007
Markham, B (Navy) (death)
[2007] AATA 1422 8 June 2007

hypertension
- alcohol
Aitken, P (Army)
[2007] AATA 4 5 January 2007
McKenzie, J (Army) (death)
[2007] AATA 81 14 March 2007
McPherson, F (Navy)
[2007] AATA 1148 20 March 2007
Greene, R W (Army)
[2007] AATA 1381 29 May 2007

Death

Dependant

Disability pension – assessment of incapacity

Eligible service

- continuous full-time service outside Australia
  Stanbury, J E (RAAF)
  [2007] AATA 1115 9 March 2007
  Roper, C S (RAAF)
  [2007] AATA 1130 14 March 2007
- Horn Island
  Stanbury, J E (RAAF)
  [2007] AATA 1115 9 March 2007
- Middleton Reef
  Roper, C S (RAAF)
  [2007] AATA 1130 14 March 2007
- supernumerary member of crew in flight to Vietnam
  Sinclair, P Q (RAAF)
  [2007] AATA 6 5 January 2007

qualifying service
- whether allotted for duty in an operational area
  Kirk, R P
  [2007] AATA 1364 25 May 2007
- whether incurred danger from hostile forces of the enemy
  - Cowra breakout
    Leplaw, N (Army)
    [2006] AATA 936 3 November 2006

standard of proof for determining eligibility
- reasonable satisfaction (balance of probabilities)
  Sinclair, P Q (RAAF)
  [2007] AATA 6 5 January 2007

whether a veteran or member of the Forces
- entertainer in Vietnam
  - Ministerial determination
    Wooding (Finn J)
    [2007] FCA 318 13 March 2007
  - whether a representative of AFOF
    Wooding (Finn J)
    [2007] FCA 318 13 March 2007

Entitlement and liability

arose out of or was attributable to
- experiencing Cyclone Tracey while off duty
  Woodward, G (Navy)
  [2006] AATA 1099 20 December 2006

but for conditions of service
- experiencing Cyclone Tracey while off duty
  Woodward, G (Navy)
  [2006] AATA 1099 20 December 2006
- services-provided accommodation
  Roberts (Madgwick J) (SRCA case)
  [2007] FCA 1 8 January 2007

events occurring when off duty
- Cyclone Tracey
  Woodward, G (Navy)
  [2006] AATA 1099 20 December 2006

Evidence and proof

credibility
  Fenner (Mansfield J)
  [2007] FCA 406 22 March 2007
- exaggeration
  Manson, S (Navy)
  [2007] AATA 66 27 February 2007
- inconsistent evidence
  Sinclair, P Q (RAAF)
  [2007] AATA 6 5 January 2007
  Green, P J (Army)
  [2007] AATA 40 30 January 2007
- no corroboration
  Sunderland, R J (Navy)
  [2006] AATA 1104 20 December 2006
  Helion, T (Navy)
  [2007] AATA 1081 22 February 2007

standard of proof for determining death from accepted disability
- reasonable satisfaction (balance of probabilities)
  Willman, M
  [2007] AATA 1480 28 June 2007

standard of proof for determining eligibility
- reasonable satisfaction (balance of probabilities)
  Sinclair, P Q (RAAF)
  [2007] AATA 6 5 January 2007

standard of proof for determining kind of injury or disease
- reasonable satisfaction (balance of probabilities)
  Warren (Kiefel J)
  [2007] FCA 866 8 June 2007

Gastrointestinal disorder

gastro-oesophageal reflux disease
- alcohol
  Owens, F J (Army)
  [2007] AATA 1169 26 March 2007

Neurological disorder

Practice and procedure

Psychiatric disorder

- experiencing a severe stressor
  - casualties observed
    Young, R G (Army)
    [2007] AATA 55 9 February 2007
  - civilians affected by militia violence
    Keep, K M (Army)
    [2007] AATA 1409 6 June 2007
  - danger from mines
    Press, J W (RAAF)
    [2007] AATA 1457 22 June 2007
  - drills and exercises
    Press, J W (RAAF)
    [2007] AATA 1457 22 June 2007
  - guard duty
    Young, R G (Army)
    [2007] AATA 55 9 February 2007
  - gun fire
    Young, R G (Army)
    [2007] AATA 55 9 February 2007
  - learning of death of father
    Venables, G (Army)
    [2007] AATA 1326 16 May 2007
  - mortar attack
    Venables, G (Army)
    [2007] AATA 1326 16 May 2007
  - murder scene visit
    Keep, K M (Army)
    [2007] AATA 1409 6 June 2007
  - patrolling in East Timor
    Keep, K M (Army)
    [2007] AATA 1409 6 June 2007
  - sampan blown up
    Rushworth, K M (Navy)
    [2007] AATA 1466 25 June 2007
  - threat of air attack
    Press, J W (RAAF)
    [2007] AATA 1457 22 June 2007
  - threatened by soldier with gun
    Baker, J (Army)
    [2007] AATA 1370 28 May 2007
  - video of casualties
    Press, J W (RAAF)
    [2007] AATA 1457 22 June 2007
- psychiatric disorder
  - post traumatic stress disorder
    Robertson, P (Navy)
    [2007] AATA 1103 7 March 2007

pathological gambling
  - psychiatric disorder
    - anxiety disorder
      Keep, K M (Army)
      [2007] AATA 1409 6 June 2007
    - depressive disorder
      Keep, K M (Army)
      [2007] AATA 1409 6 June 2007

post traumatic stress disorder
  - diagnosis
    Sunderland, R J (Navy)
    [2006] AATA 1104 20 December 2006
    Dunne, J (Navy)
    [2007] AATA 43 2 February 2007
    Young, R G (Army)
    [2007] AATA 55 9 February 2007
    Gillen, M J (Navy)
    [2007] AATA 1254 24 April 2007
  - experiencing a severe stressor
    - bus trip from Saigon in 1963
      Bean, M (Navy)
      [2007] AATA 1193 30 March 2007
    - collision with kumpit
      Lea, R (Navy)
      [2007] AATA 1358 24 May 2007
    - Cyclone Tracey, December 1974
      Woodward, G (Navy)
      [2006] AATA 1099 20 December 2006
      Robertson, P (Navy)
      [2007] AATA 1103 7 March 2007
    - diving after had dived following the Evans-Melbourne collision
      Robertson, P (Navy)
      [2007] AATA 1103 7 March 2007
    - drowning of crew member
      Robertson, P (Navy)
      [2007] AATA 1103 7 March 2007
    - fire aboard HMAS Supply
      Robertson, P (Navy)
      [2007] AATA 1103 7 March 2007
    - gun misfire
      Lea, R (Navy)
      [2007] AATA 1358 24 May 2007
    - sentry duty
      Lea, R (Navy)
      [2007] AATA 1358 24 May 2007
    - shooting by White Mice in Vietnam
      Noud, K D (Army)
      [2007] AATA 1408 6 June 2007

- warning of incoming missile
Smith, G (Navy)
[2007] AATA 1511 30 May 2007

Remunerative work & special rate of pension

capacity to undertake remunerative work
- not incapacitated from working
Harbridge, L
[2007] AATA 30 22 January 2007
Peacock, G R
[2007] AATA 1208 5 April 2007

ceased to engage in remunerative work
- age
Aitken, P
[2007] AATA 4 5 January 2007
Peacock, G R
[2007] AATA 1208 5 April 2007
- difficulty in operating a business
Aitken, P
[2007] AATA 4 5 January 2007
- dissatisfied with the work
Harbridge, L
[2007] AATA 30 22 January 2007
- dissatisfied with management
Webb, F J
[2007] AATA 1049 7 February 2007
- effects of non-accepted disabilities
Moore, A R
[2007] AATA 1142 16 March 2007
- lack of future in the business
Webb, F J
[2007] AATA 1049 7 February 2007

kind of work the person was undertaking
- automotive industry
- motor mechanic
Blackwell, J W
[2007] AATA 1042 2 February 2007
- computing
- computer repairer
Mooi, P
[2007] AATA 18 15 January 2007
- hospitality / personal services
- cook
Aitken, P
[2007] AATA 4 5 January 2007
- police officer
Armitt, I F
[2007] AATA 1390 30 May 2007
- transport industry
- truck driver
Dobson, K L
[2007] AATA 1414 7 June 2007

last paid work (aged over 65)
- did not work after age 65
Henderson, R
[2007] AATA 52 22 January 2007

remunerative work
- general characterisation rather than specific
Butcher (Tamberlin, Nicholson, Tracey JJ)
[2007] FCAFC 36 22 March 2007
- whether real or substantive
Morris, J R
[2007] AATA 1445 20 June 2007

time at which criteria are met
- new disability accepted after start of assessment period
- eligibility tested as at date of new claim
Boxsell, A
[2007] AATA 1215 13 April 2007
- law applied as at date of new claim
Boxsell, A
[2007] AATA 1215 13 April 2007

whether genuinely seeking to engage in remunerative work
- domestic arrangement rather than genuine attempt
Neilsen, N
[2007] AATA 1451 21 June 2007

whether prevented by war-caused disabilities alone
- business environment
Blackwell, J W
[2007] AATA 1042 2 February 2007
- damage to business by cyclones
Mooi, P
[2007] AATA 18 15 January 2007
- effects of non-accepted disabilities
Barry, R
[2006] AATA 834 28 September 2006
Blackwell, J W
[2007] AATA 1042 2 February 2007
Ford, R F
[2007] AATA 1109 8 March 2007
Godfrey, B J
[2007] AATA 79 7 March 2007
Bilsby, R
[2007] AATA 1124 9 March 2007

Respiratory disorder

Service pension

Words and phrases