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Editor's notes

This edition of *VeRBosity* contains reports and commentary on eight Federal Court decisions relating to veterans' matters handed down in the period from January to June 2008. There is also a report and commentary on a decision of the Federal Magistrates Court.

Our new look *VeRBosity* highlights further reading and references in the case commentary sections to assist you when conducting research. Also, we have short helpful guides to "tools of the trade" – this edition looks at where and how to find service determinations.

In addition, this issue contains a detailed article on the Statements of Principles with helpful diagrams and case highlights.

We would also like to extend a warm invitation to all of our readers to attend the biennial Veterans' Law Conference in Canberra on 5 & 6 November 2008. This year the conference theme will be 'Mental Health Issues in Veterans' Law'. Please see the article on page 3 for more details.

Trina McConnell and Katrina Harry

Editors

VRB welcomes new members

The Minister for Veterans' Affairs, Alan Griffin, announced the appointment of members to the Veterans' Review Board. The new Board Members are:

Mr Christopher Keher

Mr Keher is a solicitor in private practice and is a part-time Member of the Consumer Trader and Tenancy Tribunal. He has previously been a part-time advocate for the Department of Veterans' Affairs and was a member of the Refugee Review Tribunal from 1997 to 2004.

Ms Ann Graham

Ms Graham has a Master of Laws from Monash University. She has previously been a member of the Migration Review Tribunal and Refugee Review Tribunal and has been an Australian Federal Police officer.

Brigadier Terry Nolan AM (Ret)

Brigadier Terry Nolan retired from the Australian Army in 1996 after a career spanning 34 years. His Army service commenced in 1962 when he enlisted as a soldier in the CMF, but in 1965 he transferred to the Regular Army where he served for the remainder of his career. He saw active service in South Vietnam as a junior officer. He left the Army in 1996 to join Royal Dutch Shell as the Regional Security Manager for South-East Asia / Pacific. He retired from that position in March 2008.

Major Warwick Young

Major Young is an Army Officer in the Australian Defence Force and has been since 1992. Major Young saw active service in Iraq in 2006.

Those re-appointed to the Board are:

Senior Members – Ms Jennifer D'Arcy, Ms Sylvia Winters and Dr Andrea Treble

Services Members – Group Captain Collins Fagan (Ret), Wing Commander Stuart Bryce (Ret), Major Gregory Mawkes MBE, Colonel Robin Regan CSC (Ret), Mr Frank Benfield, Major General Murray Blake AO MC (Ret), Lieutenant Colonel Frank Brown (Ret) and Captain Allan Farquhar RAN (Ret).

Members – Ms Jackie Fristacky, Ms Zita Antonios, Mrs Janet Hartmann and Ms Kerrie Laurence.

• Full Member biographies are available www.vrb.gov.au

Veterans' Law Conference 5 & 6 November 2008

The Veterans' Review Board will hold its biennial Veterans' Law Conference in Canberra on 5 & 6 November 2008. This year the conference theme will be 'Mental Health Issues in Veterans' Law'. Key Speakers include:

- **Justice Richard Tracey**, Judge Advocate General of the Australian Defence Force and as a Justice of the Federal Court;
- **Prof Alexander McFarlane**, an international expert in the field of post traumatic stress disorder. His professional responsibilities include Senior Adviser in psychiatry to the Australian Defence Force and Senior Psychiatric Adviser Australian Centre for Posttraumatic Mental Health.

The conference fee is \$495.00 and includes:

- Participation in 1 ½ day conference
- Morning tea, lunch and afternoon tea
- Beating Retreat by Federation Guard
- Tour of the Australian War Memorial
- Cocktails, conference dinner and trivia quiz

For further information and registration details please go to our website:

<http://lawconference.vrb.gov.au/>

Ministerial determinations of service

The following determinations of service under the *Veterans' Entitlements Act 1986* (VEA) were recently tabled in the House of Representatives and the Senate.

Each of the Determinations took effect on and from 16 April 2007. They have retrospective application to ensure no ADF member is disadvantaged if claiming for death, injury or disease that occurred between the period when they commenced duty on the relevant operation and the date that the instruments were registered.

The determinations include:

- **'Operation provide comfort'** – this determination declares service with the United States elements of the coalition force operation to patrol the Iraq No-Fly-Zones on Operation PROVIDE COMFORT as warlike service for the purpose of the VEA in Iraq.
- **'Operation Bolton'** – this determination revokes a previous declaration of non-warlike service and now declares that service with the United Kingdom elements of the coalition force operation to patrol the Iraq No-Fly-Zones on Operation BOLTON, as non-warlike service for the purpose of the VEA in an amended area of operations by removing Iraq and inserting Incirlik airbase in Turkey and inserting warlike service for the purpose of the VEA in Iraq.

- **'Operation Southern Watch'** – this determination revoked a previous declaration of non-warlike service and now declares that service with the United States elements of the coalition force operation to patrol the Iraq No-Fly-Zones on Operation SOUTHERN WATCH, as non-warlike service for the purpose of the VEA in an amended area of operations by removing Iraq and inserting Incirlik airbase in Turkey and inserting warlike service for the purpose of the VEA in Iraq.
- **'Operation Jural'** – this determination declares service with the United Kingdom elements of the coalition force operation to patrol the Iraq No-Fly-Zones on Operation JURAL as warlike service for the purpose of the VEA in Iraq.
- **'Operation Northern Watch'** – this determination declares service with the United States elements of the coalition force operation to patrol the Iraq No-Fly-Zones on Operation NORTHERN WATCH as warlike service for the purpose of the VEA in Iraq.

The Military Rehabilitation and Compensation (Non-warlike Service) Determination 2007/2 was also recently tabled in the House of Representatives and the Senate.

This Determination revokes and replaces the Military Rehabilitation and Compensation (Non-warlike Service) Determination 2006/2.

It replaces the existing list of eleven operations referred to in the 2006/2 Determination and adds a twelfth operation which determines that service with the ADF in support of the ADF mission in Fiji, on Operation QUICKSTEP, is non-warlike service for the purpose of the *Military Compensation and Rehabilitation Act 2004*.

The Determination took effect on and from 31 October 2006. The retrospective commencement date ensures that no ADF member is disadvantaged if claiming for death, injury or disease that occurred between the period when they commenced duty on a relevant operation and the date that this instrument was registered.



Tools of the trade tips

Q. Where can I find determinations?

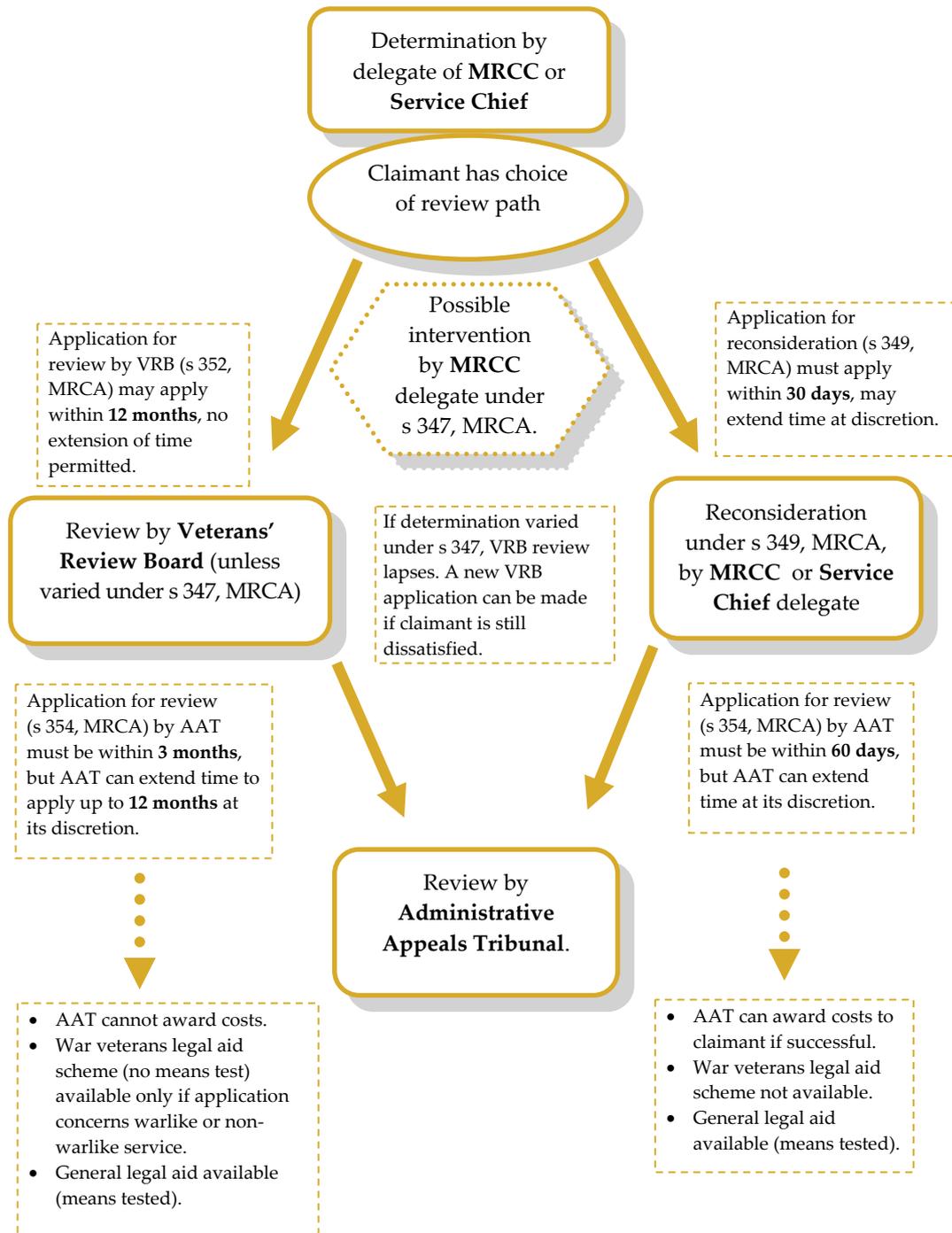
A. Determinations are available on the Comlaw website: www.comlaw.gov.au

When you log onto the Comlaw home page you will see a Quick search box.

➤ To find a determination under the VEA you can enter a phrase such as *'service determination and veteran'* in the Quick Search box.

➤ To find a determination under the MRCA you can enter a phrase such as *'service determination and military'* in the Quick Search box.

MRCA determining system



Original Determinations

Any determination under the MRCA, except those listed in s 345(2), are 'original determinations'. All original determinations are reviewable.

Review System

Under the MRCA, the claimant has a choice of first level merits review, either:

- to seek a 'reconsideration' under s 349 of the MRCA by a another delegate of the MRCC; or
- to seek a 'review' by the VRB under s 352 of the Act.

If a person applies for reconsideration under s 349 the person cannot apply to the VRB. If a person applies to the VRB, the person cannot apply for reconsideration under s 349.

VRB Review

Time limits for review by VRB

There is a strict 12-month time limit under the MRCA for the lodging of applications for review.

Reasons for review

Under s 352, an application for review must set out a statement of the reasons for the application.

Reconsideration under s 347

Once an application is made to the VRB, an MRCC delegate examines the case to decide whether to do a 'reconsideration' under s 347 of the MRCA. If no reconsideration is done or the reconsideration does not change the original determination, the matter will proceed to the VRB.

If the determination is revoked or varied under s 347 to the extent that there is a

completely different determination from the original determination, the VRB application lapses.

If the applicant is dissatisfied with a s 347 reconsideration determination that varied the original determination, a fresh application must be made to the VRB (or, instead, to a reconsideration delegate under s 349). A reconsideration under s 347 is regarded as a new 'original determination' for which there is a new appeal right, and another choice of appeal path.

If the original determination is varied under s 347 but there is still an aspect of that determination that was unaltered, the VRB application may continue and the VRB will review that part of the determination that was not changed.

VEA applied to MRCA cases

When the VRB reviews original determinations under the MRCA, it uses the procedures and powers under the VEA 'as applied' by s 353 of the MRCA. Section 353 of the MRCA modifies the VRB's procedural and review powers in the VEA for the purpose of the VRB's review under the MRCA. In this way the VEA provisions apply for the purposes of the VRB's review under the MRCA.

Application to AAT Following VRB Review

An application for review of the VRB determination may be made to the AAT by lodging a written application at the AAT within 3 months of receiving notice of the VRB's determination and reasons. The AAT has the discretion to grant an extension of time to apply for review, but only up to 12 months.

Statements of Principles

Trina McConnell

What are SoPs?

SoPs are legislative instruments that set out the factors that can cause certain injuries, diseases, or deaths.

SoPs alone determine what factors can be said to cause, aggravate, or contribute to a medical condition that is the subject of a claim. They are generally used in determining liability for injuries and diseases under both the VEA and the MRCA. A hypothesis or contention of a connection between service and the claimed injury, disease or death cannot be accepted as reasonable unless it is upheld by a factor in a SoP.

In *VVAA(NSW) v Cohen*,¹ Tamberlin J explained how SoPs relate to the standard of proof as follows:

The purpose of the Statements, in broad terms, is to provide the medical-scientific frame of reference when a claim is made for a pension or allowance for an injury, disease or death connected with service in the armed forces. If the claimed injury, disease or death is of a kind that is the subject of a Statement then, where subs120(3) applies, a hypothesis of causation by service will be reasonable for the purpose of that subsection only if the Statement upholds that hypothesis. Similarly, where

subs120(4) applies the Commission can be reasonably satisfied that the injury, disease or death was war-caused or defence-caused, only if the Statement relating to that kind of injury, disease or death, upholds the contention that the injury, disease or death is on the balance of probabilities connected with the person's service.

In *Deledio v Repatriation Commission*,² Heerey J said:

The SoPs function is limited to prescribing a medical-scientific standard with which a hypothesis must be consistent—so that the SoP can 'uphold' the hypothesis. In the words of the Minister (*Hansard*, 9 June 1994, at 1808) the SoPs were intended to 'provide the template within which the individual claims will be determined'. Put another way, the SoP is a subset of proved (*Bushell* at 414) or known (*Byrnes* at 571) scientific fact. Where an SoP is applicable, it is a statute-backed declaration of what is proved or known scientific fact.

Role and function of the RMA

The Repatriation Medical Authority (RMA) is a statutory authority whose role is to determine Statements of Principles (SoPs). The RMA is comprised of five medical practitioners or medical scientists, one of whom must have expertise in epidemiology (the study of the incidence and distribution of diseases in populations).

The RMA monitors the conditions for which it has issued SOPs to ensure any changes in medical-scientific knowledge

¹ *VVAA(NSW) v Cohen* [1996] FCA 981

² (1997) 47 ALD 261

are reflected in the statements. It is possible that a condition not accepted at present may be accepted in the future due to advances in sound medical-scientific evidence. Conversely, a contention that has some support at present may eventually be shown to be wrong. The statements will reflect these changes. However, if a condition has been accepted as war-caused and a disability pension awarded, the pension will not be rescinded even if the SoPs changes.

The RMA cannot conduct its own research, but carries out investigations into the current scientific literature concerning causation of injury and disease in order to determine whether there is sound medical-scientific evidence to enable it to determine that particular factors can be included in a SoP as having a causal role in particular kinds of injury, disease or death, or a role in the aggravation of the particular kind of injury or disease.

Veterans and their organisations are able to initiate action by the RMA to formulate or review the contents of SOPs, and can make written submissions to the RMA.

Determinations under S180A, VEA, and S340, MRCA

Under s 180A of the VEA and s 340 of the MRCA, the relevant Commission can make a determination that has the same effect as a SoP for a particular class of person. These determinations operate in addition to the relevant SoPs made by the RMA such that a claim can succeed if a factor is met in either the RMA's SoP or in the Commission's Determination, if the claimant is in the class of persons to whom the determination applies.

This can only occur in exceptional circumstances and only if the relevant Commission were of the opinion that:

- a SOP made by the RMA; or
- the decision of the RMA not to make a SOP,

would disadvantage specific categories of veterans and that a beneficial determination should be made. At the time of writing, the Repatriation Commission had made only four such determinations. They all apply only to, 'Veterans who rendered operational service in the area described in item 4 of Schedule 2 to the Act (Vietnam (Southern Zone)', and concern exposure to herbicides and the four major types of leukaemia.³

Role and functions of the SMRC

The Specialist Medical Review Council (SMRC) was created to review determinations of the RMA. The SMRC is effectively a 'peer review' body rather than a full merits review tribunal. The SMRC's role is to consider only the same material that the RMA considered. It cannot consider any other material. It does not have the power to remake a SoP, but may make recommendations to the RMA or require the RMA to amend a SoP. If the RMA revokes or amends a SoP that is under review by the SMRC, the SMRC is no longer able to review that SoP.⁴

³ Acute myeloid leukaemia, acute lymphoid leukaemia, chronic myeloid leukaemia, and chronic lymphoid leukaemia.

⁴ *Vietnam Veterans Association (NSW Branch) v Specialist Medical Review Council* [2002] FCAFC 439.

Statements of Principles

Structure of SoPs

For every kind of injury or disease, the RMA makes two SoPs:

- a SoP for the purposes of the ‘beyond reasonable doubt/ reasonable hypothesis’ standard of proof (under s 196B(2) of the VEA); and

- a SoP for the purposes of the ‘reasonable satisfaction’ standard of proof (under s 196B(3) of the VEA).

Since 1994, the RMA has made some minor changes in the structure and style of SoPs. The following relates to the structure of the RMA’s more recent SoPs.

Clause name	Description
Title	This is the ‘Title’ clause. It states how the SoP may be cited.
Determination	This is the ‘Determination’ clause, stating that the RMA has determined the SoP under either s 196B(2) or (3) of the VEA.
Kind of injury, disease or death	This clause defines the kind of injury, disease or death to which the SoP relates.
Basis for determining the factors	This clause sets out the basis on which the RMA determined the SoP. In this clause the RMA states that it has formed the view that there is sound medical-scientific evidence that indicates that the particular kind of injury or disease can be related to service.
Factors that must be related to service	This clause provides that at least one of the factors in the next clause must be related to a person’s service.
Factors	This clause sets out the factors that must exist in a particular case for a claim to succeed. Most SoPs contain factors relating to the ‘clinical onset’ of an injury or disease as well as factors relating to the ‘clinical worsening’ of the injury or disease. If a factor concerns the ‘ clinical onset ’ it relates to <i>cause</i> . If a factor relates to ‘ clinical worsening ’, it relates to <i>material contribution</i> or <i>aggravation</i> of a pre-existing injury or disease.
Factors that apply only to material contribution or aggravation	This makes it clear that those factors that concern clinical worsening (including the ‘inability to obtain appropriate clinical management’ factor), apply only to material contribution to, or aggravation of, the injury or disease if the injury or disease pre-existed the relevant service.
Inclusion of Statements of Principles	This clause incorporates the terms of another SoP if the injury or disease in that other SoP is referred to in a factor in the SoP under consideration.
Other definitions	This clause contains definition of words and phrases used elsewhere in the SoP. All the elements in a definition must be met for a factor to apply: <i>Connors</i> [2000] FCA 783.
Application	This clause indicates to which matters the SoP applies.
Date of effect	This clause states the date on which the SoP came into effect.

Why a factor might be in a 'reasonable hypothesis' SoP but not in the other SoP

The 'reasonable hypothesis' SoP for hypertension effectively says there is sound medical scientific evidence that hypertension can be connected to service through 'suffering from a clinically significant anxiety disorder ...'. In the 'balance of probabilities' SoP, no such factor exists. One might wonder why, if there is sound medical evidence that anxiety can cause hypertension, then that should be the end of it, and presumably it should also apply to both SoPs.

Section 196B(2) says that if the RMA thinks that there is sound medical-scientific evidence indicating that a condition can be related to operational service then it must determine a SoP setting out the factors that must as a minimum exist and which of those factors must be related to service rendered before it can be said that a reasonable hypothesis is raised connecting that condition with the service.

Section 196B(3) says that if the RMA is of the view that on the sound medical-scientific evidence available it is more probable than not that a service condition can be related to service other than operational service then it must determine a SoP setting out the factors that must exist and which of those factors must be related to service rendered before it can be said, on the balance of probabilities, that the condition is connected with that service.

The RMA is saying (in relation to 196B(2)) that, as a general proposition, there is sound medical-scientific evidence that a reasonable hypothesis of connection between hypertension and relevant service can be raised where a person has been suffering a clinically significant anxiety disorder for the 6 months immediately preceding the clinical onset of hypertension.

By implication (in relation to 196B(3)), the RMA says, and notwithstanding that there is sound medical-scientific evidence that hypertension can be related to service, they are not satisfied on the balance of probabilities that an anxiety disorder will give rise to hypertension in the circumstances of relevant (non-operational) service.

In other words the RMA is applying differing standards of proof to the same evidence. Sound medical-scientific evidence is defined in section 5AB(2), principally in terms of information and knowledge and, in the case of information as to causation, how it meets the Bradford Hill criteria for assessing causation in the field of epidemiology.

Broadly speaking, epidemiology is the study of the distribution and determinants of disease in the general population. There are many different ways of conducting such studies, depending on the purpose and manner of the study. The Bradford Hill criteria are widely accepted and involve strength of association, dose response effect, consistency of findings, time relationship, biological plausibility, specificity of association and coherence of evidence.

The information available must all be assessed for the relative potential of a factor to be causal factor according to the two differing standards of proof. A factor cannot be included in a SoP if there is no sound evidence to support its inclusion. A factor may be included in a SoP on the basis of an indication that a reasonable hypothesis of connection may be raised, but not be included in the other on the balance of probabilities.

ICD Codes in SoPs

A paragraph in the definition clause of SoPs usually indicates that the relevant kind of injury or disease 'attracts' an ICD-9-CM or ICD-10-AM code number.

- ICD-9-CM refers to the *International Classification of Diseases, 9th Revision, Clinical Modification*.

- ICD-10-AM refers to the *International Statistical Classification of Diseases and Related Health Problems, 10th Revision, Australian Modification*.

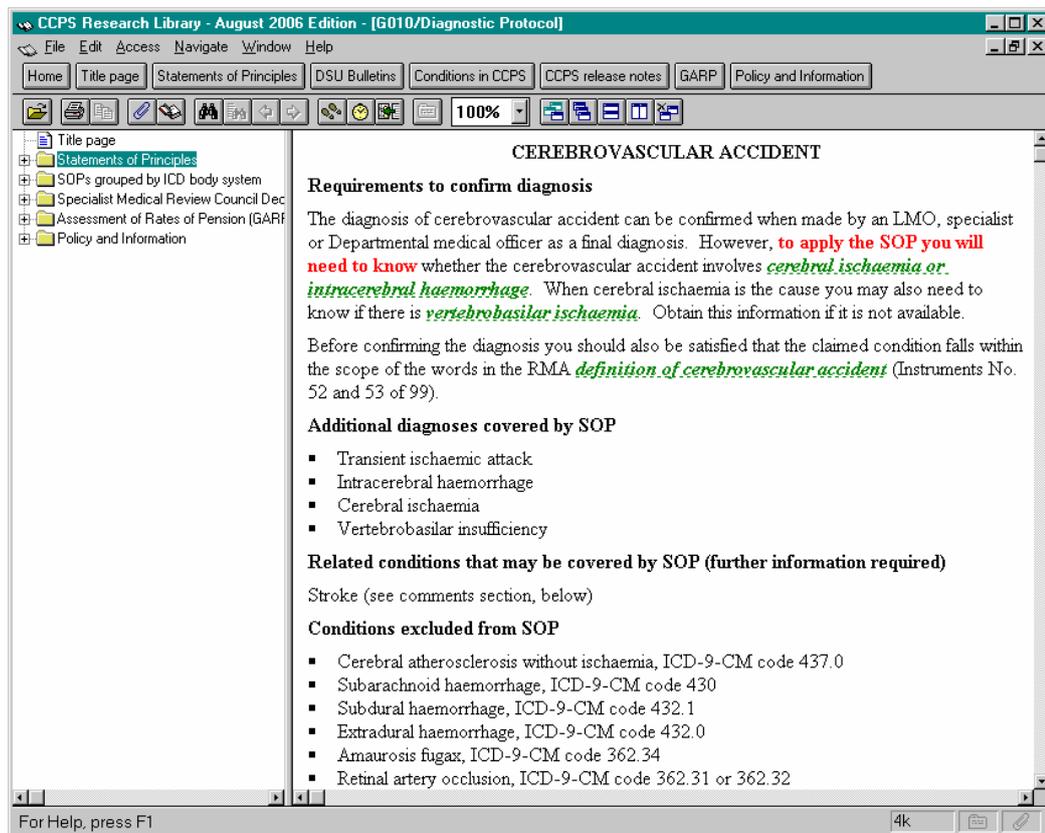
When determining whether an injury or disease is covered by a SoP, the description of the injury or disease given in the SoP defines the kind of injury or disease, not the ICD code referred to in that definition. The fact that an injury or disease may be within an ICD code does not mean that the injury or disease is covered by the SoP. The scope of the ICD code might be broader than the description given by the RMA in its definition of the injury or disease.

This means that ICD-9-CM or ICD-10-AM should be referred to *only* to decide whether an injury or disease is *not* covered by the SoP rather than to confirm that an injury or disease *is* covered by a SoP. That is, if an injury or disease has an ICD code *other* than that given by the SoP it cannot be said to be covered by the SoP.

The CCPS Research Library part of CLIK provides assistance in determining whether a particular condition is or is not covered by a SoP.

Statements of Principles

Clicking on the dialog protocol puts commentary on diagnostic issues into the CLIK window:



If there is doubt about whether or not a claimed injury or disease is covered by a SoP, medical opinion should be obtained to clarify the matter.

Which SoP applies?

Current SoP always applied

The RMA often amends, or revokes and determines a new SoP. This means that throughout a claim’s history a number of different SoPs may have been in force. The following is an example of a SoP’s history:

Revision History

Reasonable hypothesis		
31/03/2004	9 of 2004	Amendment
19/11/2003	53 of 2003	Revocation and determination
12/05/1999	38 of 1999	Revocation and determination
9/12/1998	80 of 1998	Revocation and determination
10/06/1998	37 of 1998	Amendment
17/09/1997	77 of 1997	Amendment
30/09/1996	140 of 1996	Revocation and Determination
31/05/1996	77 of 1996	Revocation and determination
19/04/1996	63 of 1996	Amendment
20/10/1995	360 of 1995	Amendment
11/03/1995	85 of 1995	New SOP

The Board must apply the SoPs currently in force, but if the applicant cannot succeed under those SoPs, the applicant may have an accrued right to have the SoPs apply that were in force at

the time of the decision under review.⁵ A SoP does not come into force until the date of commencement stated in the instrument. This is usually a week or more after the RMA determined the SoP. This delay enables DVA delegates and VRB members to be advised in sufficient time for the correct SoP to be applied.

Example: Walter claimed in June 1998. The primary decision was made on 23 December 1998 (used SoP No. 80 of 1998 –see chart opposite), VRB decides application in June 2004.

The VRB must first consider SoP No. 53 of 2003 as amended by No. 9 of 2004. If cannot succeed it must consider No. 80 of 1998. It cannot consider any SoPs as in force between those dates.

What are accrued rights?

If a person takes some action, such as claiming a statutory benefit, the decision on the claim is usually made in accordance with the law that applied at the time the decision is made. However, if the benefit is taken away by a change in the law before the decision on the claim is made, then unless the law, expressly or by implication, takes away the person’s right to that benefit, it is presumed that the earlier law giving the right to the benefit continues to apply. The person is said to have accrued a right to have the earlier law apply because of their action in making the claim at that time.

⁵ *Repatriation Commission v Gorton* [2001] FCA 1194, (2001) 33 AAR 370, 65 ALD 609, 110 FCR 321.

For a right to accrue, it must be a 'substantive' right (such as a right to a particular benefit), not merely a right to have a particular procedure apply in determining the matter.

Sections 8, 8A, and 8B of the *Acts Interpretation Act 1901* and section 15 of the *Legislative Instruments Act 2003* provide for a presumption that a person has an accrued right if legislation is amended or repealed after the person has asserted their right under an Act or a legislative instrument.

Accrued rights may be taken away or modified by legislation.

How accrued rights apply in relation to SoPs under the VEA

The VRB must apply the law in force at the date of its decision.⁶ But if a claim cannot succeed under the current law does the VRB must consider whether previous law might apply because of an accrued right to have it apply.

Subject to legislative contrary intention, a claimant accrues a right to have the law applied as at the date the claimant took action to assert their rights, that is, the date of the claim.⁷

Subsections 120A(2) and 120B(2) of the VEA postpone an accrued right to the date of the Repatriation Commission's decision.⁸

This means that the Board must always apply the SoPs that are currently in force, but if the claim cannot succeed on

those SoPs, the claimant has a right to have the SoPs applied that were in force at the date of the decision under review.

Circumstances if cannot succeed under current SoP

1. No SoPs in force at date of the Commission's decision.

No SoPs apply (*Thompson*⁹)

2. SoP amended more than once since the Commission's decision.

Must apply the SoP in force at the time of the Repatriation Commission decision – cannot apply later amendments if not in force at the date of VRB decision. (*Gorton*¹⁰)

3. A chain of SoPs applies, in which more than one has been amended since the Commission's decision.

Must apply all the SoPs in force at the time of the Commission's decision.

4. A chain of SoPs applies, but no SoP applied at the time of the Commission's decision in respect of the claimed condition.

No SoPs apply. (*Spencer*,¹¹ *Thompson*¹²)

⁶ *Repatriation Commission v Gorton* [2001] FCA 1194.

⁷ *Esber v Commonwealth* (1992) 174 CLR 430.

⁸ *Repatriation Commission v Keeley* [2000] FCA 532; *Repatriation Commission v Gorton* [2001] FCA 1194.

⁹ *Repatriation Commission v Thompson* [2001] FCA 341, (2001) 107 FCR 235, 63 ALD 1, 32 AAR 514, 17 *VeRBosity* 40.

¹⁰ *Repatriation Commission v Gorton* [2001] FCA 1194.

¹¹ *Spencer v Repatriation Commission* [2002] FCA 229, (2002) 18 *VeRBosity* 21.

5. A chain of SoPs applies, but no SoP applied at the time of the Commission's decision in respect of a condition in the suggested causal chain.

Only those SoPs in force at the time of the Commission's decision apply.

No accrued rights to SoPs under the MRCA

Section 341 of the MRCA expressly takes away any accrued right and requires the current SoP to apply in all instances.

Decision-makers should not delay to wait for a change in SoPs

SoPs are legislative instruments, so when the RMA makes a SoP or amends a SoP, it makes a change to the existing law. In *VVAA(NSW) v. Cohen & Ors*,¹³ the Court held that the actions of the SMRC and RMA were legislative not administrative. The Full Federal Court case of *Repatriation Commission v Gorton*¹⁴ premised its finding that there were accrued rights to have an earlier SoP apply on the fact that the amendment of a SoP effects a change to the law.

In *Thornton v Repatriation Commission*,¹⁵ the Federal Court held that a delay was not unreasonable if it was to await for a **clarification** of the law by the High

Court in a case where judgment had already been reserved. The Court noted that such a delay was not to await a *change* to the law. The Court made a distinction between waiting for a clarification of the law and waiting for the law to change.

Starke J in *Ramsay v Aberfoyle Manufacturing Co*,¹⁶ said, 'It would be a cause of injustice if courts could adjourn cases because they had some real or imagined belief that the law might be amended.'

In *Beale v Administrative Appeals Tribunal*,¹⁷ the Federal Court dismissed an application for an order of the Tribunal that it would proceed to a hearing in the matter notwithstanding that Mr Beale was himself an applicant to the RMA seeking an investigation into the SoP that was relevant to the AAT proceedings. In *Beale's* case, the Tribunal had said:

The Tribunal is satisfied that in its content and form the legislation does not contemplate there being indefinite adjournments pending the review of an initial decision by the RMA as to whether or not it will grant a SoPs. Given that in carrying out a review, both the RMA and/or the SMRC are involved in a legislative function, the case law does not support the applicants' contention that an adjournment should be granted. Despite the beneficial nature of the legislation, in this case, there must, as

¹² *Repatriation Commission v Thompson* [2001] FCA 341, (2001) 107 FCR 235, 63 ALD 1, 32 AAR 514, 17 *VeRBosity* 40.

¹³ *VVAA(NSW) v. Cohen & Ors* [1996] FCA 981, (1996) 46 ALD 290.

¹⁴ *Repatriation Commission v Gorton* [2001] FCA 1194, (2001) 65 ALD 609.

¹⁵ *Thornton v Repatriation Commission* (1981) 52 FLR 285, 35 ALR 485, 3 ALD 281, 1 RPD 165.

¹⁶ *Ramsay v Aberfoyle Manufacturing Co* (1935) 54 CLR 230 at 253.

¹⁷ *Beale v Administrative Appeals Tribunal* (1998) 50 ALD 89.

always, be limitations on the rights conferred. It would, in the view of the Tribunal, be extending those rights to a greater degree than is contemplated by the Act or by the decided cases if the adjournments were to be granted upon request. There may be specific cases where it is appropriate to grant adjournments. Each case would depend on its particular circumstances. There is, however, nothing suggested in the circumstances of any of the cases before the Tribunal which would give rise to such a consideration being undertaken.

The Court agreed and said:

The legislative nature of an SoP and the express provisions of ss 120A (2) and 120B (2) go far to confirm that those rights [the right to ask the RMA to review the contents of a SoP] are not intended to lead to the general result that a claim for a pension is not to be determined by the Commission or those standing in its shoes until a pending request for review of the contents of an SoP has been resolved. By providing that once the RMA has given notice under s 196G of its intention to carry out an investigation in respect of a particular kind of injury, disease or death, the Commission must not determine a relevant claim until either the RMA has determined an SoP in respect of an injury, disease or death of the relevant kind or declared that it does not propose to do so, ss 120A (2) and 120B (2) recognise that where an initial SoP has already been determined, the Commission and those who stand in its shoes are not to refrain from determining a relevant claim merely

because an investigation by way of review of the contents of an already existing SoP has been requested by a claimant or is otherwise pending.

In these circumstances, it will not be procedural unfairness or a failure to take into account a relevant consideration, for the AAT to determine Mr Beale's application before it on 17 March 1998 on the footing of the three existing SoPs mentioned earlier, and, in particular, Statement of Principles number 352 of 1995. It cannot be a procedural unfairness or a failure to take into account a relevant consideration for a decision maker to decide a matter by reference to the legislation incorporating the relevant SoP as it stands at the time.

In *McMillan & Ors v Repatriation Commission*,¹⁸ the AAT had refused adjournments in seven cases, proceeded to hear them, and affirmed the decisions under review. The Federal Court rejected an argument that s 120A(2) of the VEA required the AAT to delay hearing the matters until the RMA had completed its review.

In *Re Seale & Anor and Repatriation Commission*,¹⁹ Deputy President Purvis said:

[30] The Tribunal is to act upon the law as it is at the time of its decision making. It is not relevant for a Court or the Tribunal to speculate upon the law that might be in the future (see

¹⁸ *McMillan & Ors v Repatriation Commission* [1998] FCA 127, (1998) 152 ALR 459.

¹⁹ *Re Seale & Anor and Repatriation Commission* [2004] AATA 700, (2004) 20 *VeRBosity* 44.

Thornton (supra) page 292). This is in contradistinction to the situation where a law is being clarified or construed by an appellate body. Indeed as it was said in *Meggitt Overseas Limited and Others v Grdovic* (1998) 43 NSWLR 428 at 530:

‘Since it is the task of the executive branch to give effect to Parliament’s intention expressed in legislation and the sworn duty of the judicial branch to uphold the law in decision making it is to me self evident that neither may disregard an enactment so long as it stands.’

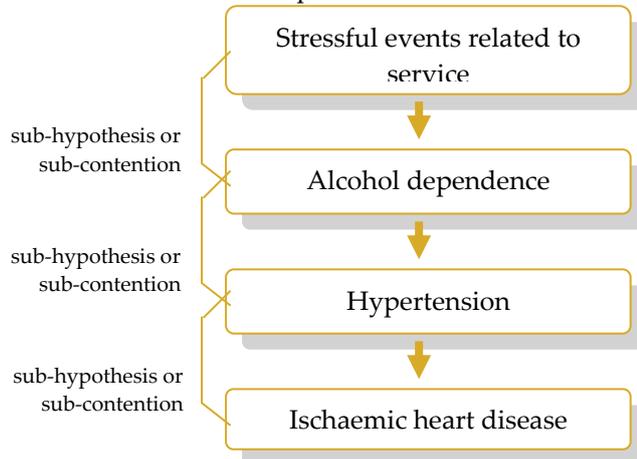
And at 533:

‘And most significantly there is the decision of this Court in *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246. There the Court of Appeal by majority refused an adjournment application based upon the ‘prospect of a legislative change in the situation. Thirdly as a general rule it is not a proper exercise of the discretion to grant an adjournment on the ground that it is believed that the law may or will be changed in the near or remote future...’

[31] To grant an adjournment in the present matter would be tantamount to seeking to disregard an enactment that presently stands. As I see it, the principle that it is not a proper exercise of the discretion to grant an adjournment on the ground that it is believed that the law may or will be changed in the near or remote future applies to the Tribunal in the exercise of its deliberative function. It is to apply the relevant law. It is bound in its decision making capacity by the law.

Chain of SoPs

A hypothesis or contention of a connection between an injury, disease or death and a person’s service may include a chain of causation linking the circumstances of a person’s service to an injury or disease leading to another injury or disease, or to the person’s death. For example:



If there is a SoP in force concerning the injury, disease or death that is the subject of the claim (ischaemic heart disease) as well as a SoP for an injury or disease (hypertension and alcohol dependence) that is said to have led to that injury, disease or death, then all the relevant SoPs must be met for the hypothesis to succeed.²⁰ In *McKenna’s* case,²¹ each part of the causal chain were called ‘sub-hypotheses’, and the Court held that each sub-hypothesis along a causal chain must satisfy the relevant SoPs. The same principle applies in cases concerning the

²⁰ *McKenna v Repatriation Commission* [1999] FCA 323.

²¹ *McKenna v Repatriation Commission* [1999] FCA 323.

reasonable satisfaction standard of proof. A contention of a connection between the claimed injury, disease or death and the person's service may contain sub-contentions.

The fact that an injury or disease within a causal chain has been accepted previously as war-caused or defence-caused does not create a presumption that it is related to service for the purposes of a claim for a different injury or disease.²² The Board must consider the entire chain of causation afresh. There is a limited exception to this rule in death claims.²³ See Chapter 23 in relation to death from an accepted disability.

If the kind of injury, disease or death is not one covered by a SoP, and the hypothesis relies on a sub-hypothesis that has a relevant SoP, the decision maker need not have particular

regard to that SoP.²⁴ Nevertheless, *Casey's* case²⁵ indicates that it is not an error of law to have regard to a SoP when assessing the reasonableness of the hypothesis even though the Board is not bound to apply the SoP provided that it is raised with the applicant in the course of the hearing and

the applicant is given an opportunity to make submissions in relation to it. It would certainly be an error to treat the SoP as if the Board were bound by it.

Meeting a factor in a SoP

The Court in *Connors*,²⁶ held that all essential elements in a SoP factor, including any defined terms, must be met for a factor to be met. Kenny J said:

[16] Mr Connors relied ... on a

template that include the elements set

Example: The osteoarthritis SoP includes the following factor:

- (g) having a trauma to the affected joint before the clinical onset of osteoarthritis in that joint;

The phrase 'trauma to the affected joint' is defined in the SoP as follows:

'trauma to the affected joint' means a discrete joint injury that causes the development, within twenty-four hours of the injury being sustained, of symptoms and signs of pain, and tenderness, and either altered mobility or range of movement of the joint. These symptoms and signs must last for a period of at least seven days following their onset; save for where medical intervention for the trauma to that joint has occurred and that medical intervention involves either:

- (a) immobilisation of the joint or limb by splinting, or similar external agent; or
- (b) injection of corticosteroids or local anaesthetics into that joint; or
- (c) surgery to that joint.

This means that the only types of traumas that are relevant for the purposes of this SoP are those that fit the SoP's definition of 'trauma to the relevant joint'. No other trauma will satisfy the factor.

²² *Langley v Repatriation Commission* (1993) 43 FCR 194, 9 *VeRBosity* 40.

²³ Paragraph 8(1)(f), s 70(5)(e), s 70(5A)(e), VEA, and s 28(1)(e), MRCA.

²⁴ *Spencer v Repatriation Commission* [2002] FCA 229, (2002) 18 *VeRBosity* 21.

²⁵ *Casey v Repatriation Commission* (1995) 60 FCR 510, 11 *VeRBosity* 86.

²⁶ *Connors v Repatriation Commission* [2000] FCA 783. Also see *Howard v Repatriation Commission* [1999] FCA 1030.

out in clause 5(g) of the SoP: that is, his suffering a trauma to the lumbar spine (as defined in clause 7) before the clinical onset of lumbar spondylosis. A question for the Tribunal was, therefore, whether the material before it raised (or pointed to) Mr Connors' suffering a physical injury to the lumbar spine that caused the development, within 24 hours, of 'acute symptoms and signs of pain, tenderness, and altered mobility or range of movement of that part of the spine' which lasted for at least a week immediately after the fall ...

[18] ... the SoP prescribes the essential content of what is a reasonable hypothesis, for s 120(3) purposes, capable of connecting the particular kind of injury, disease or death with the circumstances of the veteran's particular service. Because the existence of one of the ten factors specified in clause 5 of the SoP is an essential ingredient of that hypothesis, the material before the decision-maker must point to one of those factors.

Other SoPs and statements incorporated into a factor

If an injury or disease is included in a factor, and that injury or disease (eg,

depressive disorder) is itself the subject of a SoP, the second SoP (ie, depressive disorder SoP) is taken to be incorporated into the factor. This means that the terms of the second SoP must be met in order to meet the SoP factor.²⁷

The RMA has also incorporated other documents into SoP factors in some SoPs. For example, the RMA has made a statement concerning obesity, which is incorporated by reference to some SoPs.

Clinical onset

Most SoPs contain factors that refer to the time of clinical onset of the relevant injury or disease. The factors in SoPs that refer to 'clinical onset' relate to those connections to service that concern the cause of the injury or disease rather than the aggravation of, or material contribution to the injury or disease.

The time of clinical onset

Clinical onset is when there were sufficient signs or symptoms that would have enabled a medical practitioner to have diagnosed the disease at the relevant time. The time of clinical onset is

Example: The SoP for motor neurone disease (MND) defines it as 'a progressive neurodegenerative disease with clinical signs of lower and upper motor neurone damage in the absence of ... evidence of other disease processes that explain the clinical signs'.

In *Re Graham* [2002] AATA 112, the veteran had chest muscle problems in 1990. Expert evidence was that such problems could be a symptom of MND, but if it had been MND in Mr Graham's case, he would have died within 3 years. He was not diagnosed with MND until 1997 when he had cramps in his hands. Clinical onset was when he first had these symptoms in his hands. The chest symptoms must have been some other disability, not MND.

either:²⁸

²⁷ In many SoPs there is a clause that states this. It is also consistent with *McKenna v Repatriation Commission* [1999] FCA 323.

²⁸ *Re Robertson and Repatriation Commission* [1998] AATA 127; *Repatriation Commission v Cornelius*

- when a person becomes aware of some feature or symptom which enables a doctor to say the disease was present at that time, or
- when a finding is made on investigation which is indicative to a doctor of the disease being present at that time.

The minimum diagnostic criteria must exist at the time of clinical onset

If a SoP identifies a minimum set of signs and symptoms for a disease to be present, at least that minimum must be present for clinical onset to have occurred at that time.²⁹

'Clinical onset' is to be distinguished from simple 'onset'

The onset of a disease is when it began, whether detectable at that time or not. By the SoP using the phrase, 'clinical onset', as distinct from 'onset' *simpliciter*, it means that there must be objective signs and symptoms, for example, an abnormal ECG, or consistent high blood pressure readings. Thus 'clinical onset' is when the disease first was capable of diagnosis through objective assessment.

In 'reasonable hypothesis' cases, the time of clinical onset need only be pointed to by the material, not proven on the balance of probabilities.³⁰ If the time of clinical onset is an essential element of

a SoP factor, the material must point to at least the minimum diagnostic criteria as existing at the relevant time³¹.

In 'reasonable satisfaction' cases, the time of clinical onset must be found on the balance of probabilities.

Clinical onset steps:

1. Identify the injury or disease definitional criteria in the SoP;
2. Assess the evidence to see whether it points to or establishes the existence of those criteria necessary to meet the SoP definition;
3. Identify the earliest date from which the evidence points to or demonstrates that all the necessary diagnostic criteria existed.

Clinical worsening

Most SoPs contain factors that refer to the time of clinical worsening of the relevant injury or disease. The factors in SoPs that refer to 'clinical worsening' apply only in relation to **aggravation** of, or **material contribution** to an injury or disease that existed at the time of the person's relevant service.³² They do not apply to the cause of the injury or disease. If the clinical onset of the condition occurred after the person's eligible service, then the condition cannot have been aggravated by service, and the clinical worsening factors cannot apply.

[2002] FCA 750, 18 *VeRBosity* 52; *Lees v Repatriation Commission* [2002] FCAFC 398, (2002) 36 AAR 484, 74 ALD 68, 18 *VeRBosity* 109.

²⁹ *Lees v Repatriation Commission* [2002] FCAFC 398, (2002) 36 AAR 484, 74 ALD 68, 18 *VeRBosity* 109.

³⁰ *Repatriation Commission v Cornelius* [2002] FCA 750, 18 *VeRBosity* 52.

³¹ *Lees v Repatriation Commission* [2002] FCAFC 398, (2002) 36 AAR 484, 74 ALD 68, 18 *VeRBosity* 109; *Youngnickel v Repatriation Commission* [2004] FCA 1691.

³² *Re Bell and Repatriation Commission* (1999) 58 ALD 721 at paragraph [15].

The time of 'clinical worsening' is when there were sufficient signs or symptoms that would have enabled a medical practitioner to have found that the disease itself (rather than merely its signs and symptoms) had worsened and that worsening was more than a temporary change, and was not due merely to the natural deterioration or progression of the injury or disease.³³ If considering a clinical worsening factor, it is important to identify the evidence that indicates that the injury or disease clinically worsened and the time at which it occurred.³⁴

Flare-ups of a disease from time to time may not indicate 'clinical worsening'.³⁵ An increase in the frequency of medical treatment for an injury or disease,³⁶ or the emergence of new and persistent signs or symptoms³⁷ might be evidence of clinical worsening.

Worsening means progression of the underlying pathology of the condition. In many cases this will be indicated by an increase in the severity or frequency of symptoms including the need for lifestyle modifications or an increased level of treatment to control symptoms. However, this is not always the case. For example a veteran with cirrhosis of the

liver may not experience any increase in symptoms, even though the liver damage is extended by persistent drinking.

Worsening also includes a failure to show the expected improvement in the condition, for example a fracture that, given appropriate treatment, fails to heal as quickly as would be expected. Evidence of worsening would normally require a medical opinion. It should be supported by a personal case history of the claimant taken by the treating doctor or specialist.

Inability to obtain appropriate clinical management

'Appropriate clinical management' applies is more than simply treatment. It is concerned with the management of the underlying disease and, where relevant, addressing the cause or suspected cause of the injury or disease.

The 'inability to obtain appropriate clinical management' factor is concerned with the failure of the person to obtain the clinical management that would have prevented the worsening, or reduced the progress of worsening, of the person's injury or disease.

The factor applies only to the **aggravation** or **material contribution** to the applies claimed injury or disease or the condition that contributed to the person's death. It is not concerned applies with the cause of the injury or disease. The injury or disease, or the condition that contributed to the person's death must have existed before the person's service on which the claim is based. For an aggravation to be acceptable it must makes the condition

³³ *Repatriation Commission v Yates* (1995) 38 ALD 80, 21 AAR 331, 11 *VeRBosity* 45.

³⁴ *Repatriation Commission v Swinden* [2001] FCA 1147.

³⁵ *Re Walker and Repatriation Commission* [2003] AATA 1097 at paragraph [63].

³⁶ *Re Walker and Repatriation Commission* [2003] AATA 1097 at paragraphs [60]-[61].

³⁷ *Re McCormack and Repatriation Commission* [2005] AATA 60 at paragraphs [148]-[149].

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not merely worse but applies permanently worse.³⁸

The RMA can include the 'inability to obtain appropriate clinical management' factor in a SoP only if there is sound medical-scientific evidence that:

- once a disease has been contracted, it can be made worse; and
- there is a form of clinical management that will prevent the disease being made worse or reduce the progress of the worsening; and
- there is a circumstance that could be related to eligible service that might prevent such clinical management being obtained.

If the only factor in a SoP is the 'inability to obtain appropriate clinical management', it means that:

- there is no known factor that can be related to service that can make the disease worse; but
- the disease is one that can become worse through inherent or unknown processes (or processes that are known, but cannot possibly be related to service); and
- there exists a form of clinical management that can prevent, or reduce the progress of, worsening of the disease; and

- being unable to obtain such clinical management can make the disease worse than it would have been had that form of clinical management been obtained; and
- there are circumstances of service that could contribute to being unable to obtain such clinical management.

In summary, for the 'inability to obtain appropriate clinical management' factor to apply, the material before the Board must indicate that:

- during the veteran's eligible service there existed a form of clinical management that was effective in preventing the worsening, or reducing the progress of worsening of the claimed injury or disease; and
- not being able to obtain such clinical management worsened that injury or disease; and
- the circumstances of the veteran's service prevented the veteran from being able to obtain that clinical management.

It may often be relevant to ask some of the following questions

- Did military medical staff know about the person's condition?
- Was it reasonable that the military medical staff should have known of the person's condition on the basis of any symptoms that occurred at that time?

³⁸ Under the VEA or under s 27 or 28 of the MRCA: *Repatriation Commission v Yates*.

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- Was any clinical management provided?
- If so, was that clinical management appropriate for the disease or condition for the standards and knowledge of the time?

Evidence required for the ‘inability to obtain appropriate clinical management’ factor

1. That the condition was contracted during or before the relevant service that is said to have caused the inability to obtain appropriate clinical management.

This is a requirement of the material contribution and aggravation provisions of the VEA and MRCA.³⁹

2. What the appropriate clinical management was for that condition at that time.

The appropriate clinical management is the type of clinical management that would otherwise have been available to the person at the time of the eligible

service. (*Wellington* ⁴⁰) For example, the treatment of hypertension in World War 2 was very different from the current treatment for that disease.

3. That such clinical management would have prevented the worsening or reduced the worsening of the condition.

If the clinical management would have made no difference, the failure to obtain it could not have made the condition worse.

4. That the person was unable to obtain that clinical management.

While the inability to obtain clinical management is usually an objective test, in some cases, a person’s will might have been so overcome by circumstances of service that the person was

subjectively unable seek available medical assistance. (*Brew* ⁴¹)

5. That the person’s inability was due to their eligible service.

Availability of civilian medical assistance is relevant. (*Brown* ⁴²)

An applicant contracted a hiatus hernia during his service but not due to that service. There was no evidence that his service placed him in a situation where he was unable to seek medical assistance or unable to obtain appropriate clinical management for his hiatus hernia. Medical documents indicated that he saw medical officers from time to time during his service and complained of various problems. Based on the symptoms of which he complained, he received appropriate clinical management for those conditions on each occasion.

The fact that he did not receive a form of treatment that might have relieved the condition earlier or he could have been better treated, does not mean that he was unable to obtain appropriate clinical management. He received treatment that was appropriate to the symptoms at the relevant time.

³⁹ Paragraph 8(1)(e), s 9(1)(e), s 70(5)(d), s 70(5A)(d) of the VEA; and s 27(1)(d), and 28(1)(d) of the MRCA.

⁴⁰ *Repatriation Commission v Wellington* [1999] FCA 1552, (1999) 57 ALD 507, 15 *VeRBosity* 98.

⁴¹ *Brew v Repatriation Commission* [1999] FCA 1246, (1999) 30 AAR 63, 15 *VeRBosity* 72.

6. That the condition was worsened by that inability to obtain that clinical management.

The worsening must have been a worsening of the underlying disease, not merely of the symptoms of the disease, and must have been of a permanent nature. (*Yates* ⁴³)

What to do if there is no SoP ...

Reasonable hypothesis cases

The 4-step Deledio process requires: (1) raising a hypothesis; (2) identifying SoPs, if any; (3) determining whether the hypothesis is reasonable; and (4), if reasonable, whether the hypothesis has been disproved beyond reasonable doubt. These 4 steps also apply for a case if there is no SoP for the claimed injury, disease or death.

If at step 2, no SoP is identified, the decision-maker moves to step 3 in which the hypothesis is tested for reasonableness. Instead of having to meet a factor in a SoP, the *Bushell* standard of medical evidence applies. That is, it would 'be rare where it can be said that a hypothesis ... is unreasonable when it is put forward by a medical practitioner who is eminent in the relevant field of knowledge'.⁴⁴ The *East* ⁴⁵ & *Bey* ⁴⁶ test of a

reasonable hypothesis applies (as it also does in SoP cases): a reasonable hypothesis is more than a mere possibility, consistent with known facts, not too tenuous, remote, fanciful, impossible, or speculative. If the hypothesis is reasonable, the Board moves to step 4 to decide whether the hypothesis has been disproved beyond reasonable doubt. There is no fact-finding until step 4.

Balance of probabilities cases

In a balance of probabilities case in which no SoP applies, the Board must assess the reasonableness of any connection with service on the basis of medical opinions. For a case to succeed, the medical opinion supporting a connection must be more persuasive than any medical opinions opposing it.

Kattenberg — satisfying a quantitative SoP factor

In *Kattenberg*,⁴⁷ the Federal Court explained how a SoP factor can be related to service. If a factor in a SoP requires a minimum accumulation of consumption or exposure over time, that factor *need not be* satisfied by an accumulation that is *wholly* related to service. It is sufficient to meet the factor if:

- the person had the level of consumption or exposure specified by the SoP; and
- the level of consumption or exposure that can be related to

⁴² *Brown v Repatriation Commission* [2003] FCA 1130, (2003) 19 *VeRBosity* 114.

⁴³ *Repatriation Commission v Yates* (1995) 38 ALD 80, 21 AAR 331, 11 *VeRBosity* 45.

⁴⁴ *Bushell v Repatriation Commission* (1992) 175 CLR 408, per Mason CJ, Deane & McHugh JJ.

⁴⁵ *East v Repatriation Commission* (1987) 16 FCR 517, 74 ALR 518, 6 AAR 492, 3 *VeRBosity* 127.

⁴⁶ *Repatriation Commission v Bey* [1997] FCA 1347, (1997) 149 ALR 721, 47 ALD 481, 26 AAR 298, 13 *VeRBosity* 117.

⁴⁷ *Kattenberg v Repatriation Commission* [2002] FCA 412.

the person's service made a *material contribution* to the overall consumption or exposure.⁴⁸

Application of Kattenberg

The initial task is to decide whether a person's overall experience meets the minimum requirements set out in the SoP factor within whatever timeframe, if any, is stated in the SoP.

Consideration must then be given to whether the service-caused exposure made a 'material' contribution to that total consumption or exposure over the relevant period of time. This approach does not apply if a means of determining contribution from service is provided through formulae set out in the SoP that take account of both service and non-service contribution, such as those SoPs that relate to solar exposure.

If the person's overall consumption or exposure is below the minimum required by the SoP then clearly the SoP factor cannot met and the claim must fail.

If the person's overall consumption or exposure meets the minimum SoP requirement (for both quantity and time

limits), then the Board needs to determine what contribution was made to that situation by a person's eligible service.

If the consumption or exposure related to service can be shown to be above a trivial contribution (above *de minimis*) then it is a 'material' contribution and hence service is implicated in meeting the particular factor and the claim will succeed.

Smoking cases

If the material before the decision-maker reveals that a veteran had an established smoking habit of say 20 per day before, during and after a period of eligible service, then a claim might not succeed.

Where smoking increased due to operational service but then reverted to the pre-operational service level then, particularly where the operational service period is short or uneventful or both, the claim might fail: it being shown that the increase was *de minimis* in the overall picture.

Due to the addictive nature of smoking, in particular cases it is open to find that smoking in the period after eligible service can be related to service particularly if the level on service increased significantly.

The SoP for intervertebral disc prolapse required consumption of 219,000 cigarettes before clinical onset of the disease (which was in 1994). The smoking history accepted by the AAT was:

- (a) 1963 to 1964 — 1,560 (30 a week)
- (b) 1964 to 1966 — 10,400 (100 a week)
- (c) 1966 to 1967 — 20,800 (400 a week)**
- (d) 1967 to 1994 — 195,160 (140 a week)

The veteran's only eligible service was his operational service in period (c). The AAT accepted that the increase in his smoking in this period was related to his operational service.

The AAT held that the veteran's operational service had contributed to the cause of his intervertebral disc prolapse.
Re Aldcroft and Repatriation Commission [2002] AATA 432

⁴⁸ *Kattenberg v Repatriation Commission* [2002] FCA 412.

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Step	Explanation
<p>Step 1: Determine whether the material points to the factor having been experienced.</p>	<p>The material must point to exposure to the entire minimum quantity over the relevant time period as is required by the SoP factor.</p>
<p>Step 2: Consider service contribution.</p> <p>The relationship between service and meeting a SoP factor need only be one indicated in s 196B(14), namely:</p> <ul style="list-style-type: none"> • resulted from an occurrence; • arose out of, or was attributable to; • resulted from an accident; • material contribution or aggravation; • would not have happened but for service or changes of circumstances consequent upon rendering service. 	<p>For a particular s196B(14) relationship to apply, it must be one permitted in the particular case by the relevant liability provision (Sections 8, 9, or 70 of the VEA, or s 27 or 28 of the MRCA).</p> <p>For example, if the aggravation provision does not apply to a case, then the aggravation element of s 196B(14) cannot apply. A SoP does not create liability, but is used to uphold a connection already raised by the material and permitted in terms of the relevant liability provision applicable to the person's case.</p>
<p>If it is alleged that a person's exposure to a factor arose out of, or was attributable to the person's service, then a causal contribution to the person's exposure to that factor is all that is required for it to be 'related to' the person's service.</p>	<p>While the person must have met all the requirements of the SoP factor, it will be 'related to service' if the person's service merely contributed in a material way to meeting the factor's requirements.</p>
<p>Step 3: Determine whether the connection is reasonable.</p> <p>Finding that a SoP factor is 'related to' the person's service does not mean the claim must succeed:</p> <ul style="list-style-type: none"> • the hypothesis must still be 'reasonable', or • the decision-maker must be reasonably satisfied that connection between service and the claimed injury, disease or death actually existed, <p>in the circumstances of the particular case.</p>	<p>The fact that a hypothesis is upheld by a SoP does not make it reasonable. Being upheld by a SoP is a necessary, but not a sufficient test, for the reasonableness of a hypothesis. (<i>Bull</i> [2001] FCA 1832, (2001) 188 ALR 758, 17 <i>VeRBosity</i> 118)</p> <p>A SoP factor is something that can <i>contribute to</i> the cause or aggravation of a disease. If there is a contribution to a factor, it means there may have been <i>a contribution to a contribution</i> to the cause in a particular case. Whether such a connection is too remote to satisfy the test of 'reasonableness' of the hypothesis or connection between service and the claimed injury, disease or death in a particular case is a matter for the decision-maker's judgment on all the evidence.</p>

The following principles apply:⁴⁹

- For service to have contributed to the development of a condition it must be related to that service.
- In considering whether a SoP factor is satisfied the consumption or exposure that is related to the person's eligible service does not need to be the sole or dominant cause unless the factor states to the contrary.
- If quantification of consumption or exposure is required, the total period needs to be examined to ascertain whether the factor in the SoP can be met and, once this is established, the contribution made by the eligible service is considered.
- If there is a period within which the consumption or exposure needs to have occurred before clinical onset and if this period does not include a contribution from the person's eligible service, then the SoP factor cannot be satisfied.
- If the SoP factor:
 - allows a period during within which clinical onset must occur; or
 - following the cessation of the consumption or exposure, contains a period within which clinical onset must occur,
- the factor cannot be satisfied, regardless of any asserted service contribution, if clinical onset does not occur within the prescribed period, starting from the conclusion of the period of the service contribution. For example, where smoking of one pack year related to eligible service ceases, unless there is clinical onset of IHD within one year the factor cannot be satisfied.
- A contribution that is *de minimis* (so small that it makes no real contribution) cannot satisfy a SoP factor.

Same-sex couples

Trina McConnell

Legislation will be introduced in the Winter sittings of Parliament to amend the VEA, MRCA and SRCA to end discrimination against same-sex couples. The changes will not be retrospective, but will apply to same-sex partners and dependant children of same-sex partners of veterans or members who die on or after 1 July 2009.

They will be able to claim dependant benefits such as war widow's pension, and compensation under the different Acts.

The amendments will also affect income support pensions. Same-sex partners will become subject to joint income and assets tests, and be paid pension at the partnered rate.

⁴⁹ Adapted from Ted Harrison, 'How much is enough? *Kattenberg* considered', 2006 Veterans Law Conference.

Administrative Appeals Tribunal

Re Wood and Military Rehabilitation and Compensation

Mr R G Kenny, Member

[2007] AATA 2097
21 December 2007

Whether Mr Wood's neurological defect was a service injury or disease arising from treatment provided by the Commonwealth as provided by section 29 of the MRCA?

Facts

Mr Wood lodged a claim under the *Military Rehabilitation and Compensation Act 2004* (MRCA) with the Military Rehabilitation and Compensation Commission (MRCC) for the effects of the surgical procedure.

A delegate of the MRCC rejected liability for post procedural disorder of the nervous system sustained in the surgical procedure.

The decision was affirmed by the Veterans' Review Board and Mr Wood sought further review by the Administrative Appeals Tribunal (the Tribunal).

The Law

Section 29 of the MRCA defines a 'service injury or disease' to include an injury

sustained or disease contracted or an aggravation of an injury or disease that was an unintended consequence of treatment provided under the MRCA or paid for (wholly or partly) by the Commonwealth.

Section 29 of the MRCA is similar to section 6A of the *Safety, Rehabilitation and Compensation Act 1988* (SRCA). The Tribunal noted a number of cases decided under s 6A of SRCA and was satisfied that they assisted with the interpretation of s 29 of the MRCA. These authorities required that:

- the relevant condition must have been caused by the treatment and must be conceptually distinct from the treatment itself: see *Comcare v Houghton* [2003] FCA 332; (2003) 128 FCR 485.
- an unintended consequence is one that is not desired, aimed for or designed by the provider of the medical treatment and which is not a likely consequence of the medical treatment: see *Re Glendinning and Comcare* [2004] AATA 6; (2004) 78 ALD 723.
- a risk of 5-10% that an event would occur did not mean that the event was likely to occur: see *Re Parker and Military Rehabilitation and Compensation Commission* [2006] AATA 440; (2006) 92 ALD 654.

The Medical Evidence

The medical evidence in this case included several reports from Professor Morgan. He reported:

[There] is a 20% chance of some very bad thing happening to Mathew at surgery and we

discussed this including the risk of paralysis, loss of vision, loss of memory, loss of speech, loss of sensation and death.

He completed a further report following the surgery in response to specific questions concerning the probabilities of consequences following from the surgical procedure. Professor Morgan said that it was not possible to allocate a percentage point for every particular adverse consequence of the surgical procedure but that the sum total of potential complications was approximately 20%.

The MRCC's position

Counsel for the MRCC submitted that the analysis of whether the condition was 'likely' in the context of s 29 of the MRCA was not one which was to be determined on the balance of probabilities. He also submitted that consideration needed to be given to the delicate nature of the procedure in Mr Wood's case in that it involved brain surgery. He also submitted that regard should be had to Professor Morgan's evidence that the arteriovenous malformation was 'critically located'.

Mr Wood's position

For Mr Wood, it was submitted that the 20% level of risk described by Professor Morgan was in the order of that which arose in *Re Parker* and that the same outcome should prevail.

The Tribunal's reasoning

In assessing the likelihood of the consequence of Mr Wood's surgical procedure, the Tribunal accepted the MRCC's contention that regard must be had to the delicate nature of the surgical

procedure and location of the arteriovenous malformation. However, the Tribunal noted that Professor Morgan had completed more than 500 such procedures and was able to provide the estimate of a 20% risk level. The Tribunal considered it significant that in his written report, Professor Morgan confirmed the 20% estimate, in response to specific questions about the level of risk associated with the surgical procedure.

The Tribunal further accepted the MRCC's submission that the matter should not be concluded on the balance of probabilities. Member Kenny said:

The nature of the assessment undertaken by the Tribunal in *Parker* is not clear but it was not determined on the balance of probabilities. In that case, the risk was at the lower end of a risk scale and below Professor Morgan's estimate in Mr Wood's case. Nevertheless, I am satisfied that a 20% risk does not represent a likely outcome. It follows, therefore, that the consequences experienced by Mr Wood from the surgical procedure were unintended and that the Commonwealth is liable to compensate him.

Formal decision

The Tribunal set aside the decision under review and substituted its decision that post-procedural disorder of the nervous system sustained in a surgical procedure was a service injury or a service disease as provided for in s 29 of the MRCA.

Editorial Note

In *Comcare v Houghton* the Court set out the process to be followed when considering ‘unintended consequences of medical treatment’:

Step 1	Identify the injury or disease that is said to have resulted from the treatment.
Step 2	Decide whether the injury or disease was caused by the treatment and not merely associated with the treatment.
Step 3	Decide whether the injury or disease was ‘unintended’.

In the *Wood* case, the main issue in dispute before the Tribunal concerned step 3 of the process identified by the Federal Court in *Houghton* – deciding whether the injury or disease was unintended. Specifically, whether Mr Wood’s neurological disorder was not a likely consequence of the medical treatment.

In resolving the issue in dispute, the Tribunal placed significant weight on the evidence concerning the nature of the risk of neurological complications the surgical procedure posed. However, some other relevant considerations for the decision maker in this type of case may include:

- the nature and location of the original condition treated;
- the medical problems the member’s condition presented;

- the precise nature of the treatment that was undertaken;
- the nature of the risk the treatment posed;
- any steps taken to reduce the risk;
- why the resultant condition arose.

It should be noted that while there are similarities there are also significant differences between section 6A of the SRCA and section 29 of the MRCA, and the case law needs to be treated with some caution. For example, section 6A applies only to an ‘injury’, and not to a ‘disease’, whereas section 29 of the MRCA applies to both. Whether or not the claimed condition is an injury or a disease has been a contentious issue in a number of SRCA cases and may have been determinative in some: see for example *Re Price-Beck and Comcare* [2003] AATA 386; *Re Elliott and Comcare* [2001] AATA 305; and *Re Penny and MRCC* [2004] AATA 1004.

Further reading:
Please see detailed article ‘*Unintended consequences of medical treatment*’ in (2006) 22 *VeRBosity* at pages 38-49.

**Re Graff and Military Rehabilitation
and Compensation Commission**

Deputy President P.E Hack SC
Air Vice Marshall F.D Cox AO

[2008] AATA 102
8 February 2008

Service death – compensation for dependents – definition of dependent – person in respect of whom the member stands in the position of a parent?

Facts

Squadron Leader McCarthy's death was a 'service death' as defined in s 28 of the *Military Rehabilitation and Compensation Act 2004* (MRCA). The applicant, Ms Graff, was the mother of an infant (the child). She claimed that the child was a dependant of Squadron Leader McCarthy immediately before his death and thus was entitled to compensation under chapter 5 of MRCA.

A delegate of the Military Rehabilitation and Compensation Commission (MRCC) rejected the claim on the basis that the child was not a dependant of Squadron Leader McCarthy. The decision was affirmed on reconsideration and Ms Graff sought further review by the Administrative Appeals Tribunal (the Tribunal).

The Law

Section 15 of the MRCA sets out who is a 'dependant' for the purposes of the Act. Relevantly, section 15(2)(b) states that 'a person in respect of whom the member stands in the position of a parent' can be a dependant of a member.

The Tribunal was not aware of any judicial consideration of the meaning of this particular phrase, nor was any cited by either of the parties.

The issues

The issues for consideration by the Tribunal were:

(a) was the child a dependent of Squadron Leader McCarthy immediately prior to his death? Specifically, was the child a person in respect of whom Squadron Leader McCarthy stood in the position of a parent?

(b) Was the child partly dependent upon Squadron Leader McCarthy as set out in section 15(1)(a) and (b) of MRCA?

The Tribunal's reasoning

While there was no judicial guidance on the relevant phrase, the Tribunal noted that the similar term 'in loco parentis' (in the place of a parent) had been considered by Sir George Jessel in *Bennet v Bennet* (1879) 10 Ch 474. The Tribunal noted two matters of importance in regard to standing in the place of a parent:

- that there be the exercise of the roles and responsibilities of a parent; and
- that there be an intention to assume those roles and responsibilities.

Further, the Tribunal noted that the expression required the person to undertake some part of the role, and perform some of the ordinary duties, of a parent. Thus, a person 'in the position of a parent' would have some demonstrated responsibility, whether shared or otherwise, for decisions in relation to the health, well-being, education and nurture

of the child. A person in the position of a parent would play a role in the care of the child and there would be a demonstrated assumption of that responsibility.

The Tribunal considered evidence that Squadron Leader McCarthy had been a close friend of the child's father and that he took an interest in the child from the outset. He was the child's godfather and his deep affection was displayed by him in carrying photographs of the child and in conversations he had with others. He had discussed with Ms Graff where she intended to send the child to school, suggesting a particular private school and agreeing to pay the fees if Ms Graff chose that course. There were five occasions where Squadron Leader McCarthy had contributed financially to the child's needs giving Ms Graff sums of cash totalling \$1500. Further, Squadron Leader McCarthy had intended to put his support for the child on a more formal basis. He spoke of setting up a trust fund and changing his will to make provision for the child. Unfortunately, these matters had not been attended to prior to his death.

On the evidence before it, the Tribunal was not satisfied that Squadron Leader McCarthy performed any of the tasks, or undertook any of the roles, of a parent, or that which he did was done intending to assume parent like obligation. Instead, the Tribunal found that those matters were more readily explicable of the basis of friendship and generosity rather than the adoption of the role of the father. The evidence did not suggest to the Tribunal that Squadron Leader McCarthy was intending to assume a parental role; at

best he appeared to have been offering to adopt a more formal role in the future.

The Tribunal also went on to deal with the second issue – whether the child was partly dependent on Squadron Leader McCarthy.

The Tribunal noted that assistance in determining what is involved in 'dependence' may be gained from the *Re Buck and Comcare* [1999] AATA 171, where Deputy President McDonald said:

Dependence is a concept involving 'support and maintenance' by one person of another (see *Kauri Timber Co (Tas) Pty Ltd v Reeman*; (1973) 128 CLR 177 per Barwick CJ at 179, McTiernan J at 182). It is not limited to support and maintenance for the necessities of life: one person may be dependent on another to maintain a lavish lifestyle. ... A state of dependency may exist even though the recipient receives support from other sources (e.g. social security or employment, *Aaffes v Kearney* (1976) 8 ALR 455 at 461 per Gibbs J). Whether one person is dependent on another is to be determined by looking at all the circumstances. The Tribunal accepts the respondent's submission that occasional gifts are not sufficient to lead to a finding of a state of dependency.

The Tribunal found that the evidence fell short of demonstrating that the child was dependent on Squadron Leader McCarthy. While the Tribunal did accept that Squadron Leader McCarthy made frequent, but understandably irregular contributions to Ms Graff to meet the needs of the child, these were gifts of a generous godfather. The payments were

not for the benefit of a dependent child, and the Tribunal did not accept that there was dependence upon these payments.

Formal decision

The Tribunal was not satisfied that the child came within the definition of 'dependant' and the decision was affirmed.

Editorial note

Section 15(2)(a) of the MRCA sets out who is a 'dependant' for the purposes of the Act. It notes a number of family member relationships ranging from the member's partner to half brother or sister. Please see the detailed diagram on page 116 of the Handbook for Representatives (VeRBosity Special Issue 2006) for all of the relationships covered by this section.

The main issue for consideration in the Graff case concerned section 15(2)(b) of the MRCA, which extends the qualification of a dependant to people who stand in the position of a parent. The MRCA does not specify what is required to prove that a person is 'standing in the position of a parent'. Doubtless this is because, as the Tribunal noted in the Graff case, there is no universal template for what amounts to acting in the role of a parent.

Interestingly, the doctrine of *in loco parentis*, noted by the Tribunal in Graff has not commonly been considered by courts internationally in relation to compensation matters, but it has primarily been applied in the context of alleged violations of students' civil liberties by educational institutions.

Nonetheless, in determining who stands in the position of a parent and, in particular, whether there is a 'demonstrated responsibility' as noted by the Tribunal in Graff consideration may be given to the following factors:

- who did the child live with?
- who provided the child with necessary financial support?
- who made the decisions about the child's education, medical matters and religious and cultural observance?
- who did the child spend weekdays, weekends and holidays with?
- who did the child spend significant occasions such as birthdays with?
- what roles were the child's natural or adoptive parents fulfilling at the relevant times?
- were there any parenting plans or parenting order from the Family Court?
- who had custody of the child at the relevant times?
- did the child have an emotional bond with the relevant person?

The issue of whether a person is standing in the position of a parent is different from the economic dependency test in subsection 15(1) of MRCA, which is applied after consideration of subsection 15(2) of MRCA.

Further reading: Chapter 16 '*MRCA cases: compensation for dependents*' in the Handbook for Representatives at pages 114 to 123.

**Brinkworth v Repatriation
Commission**

D G Jarvis, Deputy President
S Ellis AM, Member
[2008] AATA 174
29 February 2008

Australian participants in British nuclear tests - meaning of 'nuclear test participant' - difficulties in obtaining evidence due to passage of time and secrecy of tests - shifting responsibility of parties to adduce evidence in hearings in AAT - inferences from circumstantial evidence

Facts

Between 11 August 1958 and 16 March 1961 Mr Brinkworth, served at the RAAF base at Edinburgh as a member of the 2 Air Trials Unit. He was an engine fitter with the RAAF, and his responsibilities included maintaining the engines of a Valiant bomber and Canberra bombers that belonged to the Royal Air Force.

These aircraft had flown to Maralinga in the south west of South Australia, being one of the areas where Britain had carried out atomic testing in Australia during the 1950's and 1960's.

Mr Brinkworth lodged a claim to be registered for non-liability health care treatment for all malignant neoplasms, on the ground that he had participated in the British nuclear test program in Australia. The claim was lodged pursuant to the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* (the Act).

A delegate of the Repatriation Commission (**Commission**) refused Mr Brinkworth's application. He then requested the Commission to review this decision, and another delegate affirmed the refusal of the application. Mr Brinkworth sought review by the Administrative Appeals Tribunal (**Tribunal**).

Issue before the Tribunal

The only issue before the tribunal was whether Mr Brinkworth was a '*nuclear test participant*' within the meaning of s 5(2) of the Act, on the grounds that he was involved in the maintenance or cleaning of aircraft that were contaminated as a result of use in the Maralinga nuclear test area.

The Commission's position

The Commission contended that there were no nuclear detonations in the Maralinga area after 9 October 1957, and there was no other evidence of any source of nuclear contamination in that area during Mr Brinkworth's service, so that even if any of the aircraft he cleaned or maintained had entered the area it was not possible, or alternatively there was no evidence, that they could have been contaminated by such exposure. Further, the Commission contended that the measures taken at Edinburgh in relation to servicing and cleaning the RAF aircraft, as described by Mr Brinkworth, constituted a fail-safe procedure, and did not of themselves constitute proof that any aircraft were contaminated.

The Tribunal's consideration

Firstly, the Tribunal considered the onus of proof:

[34] Proceedings in this tribunal are administrative proceedings, and where (as in the present matter) the relevant legislation does not impose, expressly or by implication, an onus of proof, neither party bears such an onus: *Bushell v Repatriation Commission* (1992) 175 CLR 408, at 425, per Brennan J. However, it remains necessary for a party asserting facts to adduce evidence which would support a finding by the tribunal that those facts exist: *McDonald v Director-General of Social Security* (1984) 1 FCR 354, at 358, per Woodward J. This proposition was clearly explained by SM Todd in *Re Eckersley and Minister for Capital Territory* (1979) 2 ALD 303, at [18], as follows:

‘I think that this is an instance in which, while no general responsibility of proof rests upon an applicant in an application to the Tribunal for review ... yet, when either party to such an application raises a specific fact for consideration, a situation can arise in which the responsibility of proving the existence of that fact must be accepted as falling upon the party who asserts its existence, in particular where that fact is, or has been, peculiarly within his own knowledge.’

The Tribunal noted that there was no evidence that the aircraft were in fact contaminated, or if so, of the level of that contamination. However, there was evidence that steps were taken on a regular basis to decontaminate the aircraft that had returned to the Edinburgh base from flights to Maralinga. Further, the Tribunal noted that the Act did not require an aircraft to be contaminated to any particular level.

The Tribunal also noted that Mr Brinkworth had experienced difficulties in obtaining evidence in support of his claim, and this has been in part due to the passage of time. Further, the tests in question were highly secret, and were being conducted by the British Government. It was not possible for Mr Brinkworth to obtain evidence from that government.

The Tribunal noted that section 31 of the Act was almost identical to s 119(1) of the *Veterans' Entitlements Act 1986*:

[43]... this subsection does not permit a decision-maker to ignore clear inferences arising from the circumstances of the particular case, or to provide either party with an ‘easy route’ to a favourable decision, or to disregard the relevant statutory criteria: see the comments of Mansfield J in *Fenner v Repatriation Commission* (2005) 218 ALR 122, at [23]...

The Tribunal further noted that Woodward J said in *McDonald v Director-General of Social Security* (1984) 1 FCR 354:

[48]... (after referring to circumstances where facts were peculiarly within the knowledge of a party, and a failure by that party to produce evidence as to those facts might lead to an unfavourable inference being drawn) that it was not helpful to categorise what he called a ‘common-sense approach to evidence’ as an example of an evidential onus of proof. Nevertheless, his Honour added (at page 358):

‘The same may be said of a case where a good deal of evidence pointing in one direction is before the Tribunal, and any intelligent observer could see that unless contrary

material comes to light that is the way the decision is likely to go.'

The Tribunal noted that the Commission had not adduced any evidence that the decontamination procedures adopted at Edinburgh during Mr Brinkworth's service were merely 'fail-safe' procedures. As such, the Tribunal did not accept the Commission's contention.

Formal decision

The Tribunal set aside the decision under review, and decided that Mr Brinkworth was a 'nuclear test participant' and that he was eligible to be provided with treatment under the Act.

Federal Court of Australia

Repatriation Commission v Hill

Mansfield J
[2008] FCA 50
19 February 2008

Whether the AAT erred in finding Mr Hill did not suffer from PTSD- that his pathological gambling and depressive illness were not war caused- that his alcohol dependence was war caused – whether material was sufficient to fit the template in the SoP – not permanently incapacitated for work as required by section 37AA of the VEA

Facts

A delegate of the Repatriation Commission (**Commission**) rejected Mr Hill's claim for alcohol dependence,

depressive disorder, pathological gambling and post traumatic stress disorder (**PTSD**). He sought further review of each of those decisions by the Administrative Appeals Tribunal (**Tribunal**). The Tribunal affirmed the decision of the Commission that Mr Hill was not entitled to disability pension in respect of depressive disorder, pathological gambling and PTSD. However, it set aside the decision in relation to alcohol dependence and substituted its decision that this condition was war caused.

In addition, a delegate of the Repatriation Commission had refused Mr Hill's claim for an invalidity service pension. He sought further review of this decision by the Administrative Appeals Tribunal (**Tribunal**). The Tribunal affirmed the decision of the Commission.

Grounds of appeal

There were five separate issues to be addressed on appeal. The Commission appealed to the Federal Court from the decision of the Tribunal to the extent that Mr Hill suffered from war caused alcohol dependence. Mr Hill cross appealed against the other four decisions of the Tribunal.

The disability pension claim

The alcohol dependence claim

The appeal by the Commission did not concern the Tribunal's finding that Mr Hill suffered from alcohol dependence. It concerned the Tribunal's approach to whether his alcohol dependence was war caused. Specifically, the Commission contended

that the Tribunal had committed three errors of law:

- It failed to ask whether the condition of alcohol dependence was war caused pursuant to clause 4 of the alcohol dependence SoP;
- It failed to ask whether Mr Hill suffered from a psychiatric disorder at the time of the clinical onset of alcohol dependence. As such, it asked the wrong question, namely, whether Mr Hill suffered from a psychiatric disorder (alcohol intoxication) prior to the clinical onset of alcohol dependence; and
- In finding the material pointed to an hypothesis in the alcohol dependence SoP when the material before the Tribunal on the issue of clinical onset amounted to no more than conjecture.

Justice Mansfield did not accept the first contention raised by the Commission. His Honour considered:

[66] The AAT did not in terms refer to cl 4 of the AD SOP. But it clearly understood the meaning and requirements of the AD SOP, including cl 4. It recorded the first (and accepted) hypothesis as Mr Hill suffering from a psychiatric disorder (alcohol intoxication) at the time of the clinical onset of alcohol dependence, and that that factor, namely the existence of alcohol intoxication at the time of the clinical onset of alcohol dependence, having been suffered while he was serving in Vietnam. That temporal relationship to service meets s 196B(14)(a) of the Act. The submissions of the Repatriation Commission on its

second contention recognise that the 'temporal overlap stipulated in the SOP, if met, is deemed sufficient to establish the requisite causal connection between the service related factor and the condition' (cl 12 of the Outline of Submissions on the appeal), so I do not need to go beyond that observation...

In relation to the second issue, Justice Mansfield considered that the Commission's contention involved a misconstruction of the Tribunal's reasons. His Honour was of the view that the Tribunal appreciated the requirement for the psychiatric disorder (alcohol intoxication) to exist at the time of the clinical onset of alcohol dependence stating:

[73]... It is consistent with that reading of the AAT's reasons that it described Dr Parker's evidence, upon which it found that hypothesis was reasonable and as fitting the AD SOP template, as saying that 'alcohol intoxication pre-dated or co-existed with alcohol dependence'. In my view, the contrary contention requires an over-zealous reading of the AAT's reasons: see *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 at 272; *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287.

In relation to the third contention, Justice Mansfield further considered the evidence of Dr Parker. Particularly, that he could not determine the date of clinical onset of alcohol dependence or its worsening, that he 'hazarded a guess on the topic' and said that alcohol intoxication pre-dated the condition of alcohol dependence. It was in the context

of this evidence that the Commission argued it was purely conjectural that Mr Hill suffered from alcohol intoxication as a psychiatric disorder whilst in operational service, and whilst he did so he developed the clinical onset of alcohol dependence.

Justice Mansfield did not agree. He considered Dr Parker's evidence as a whole stating:

[79]...He was speculative as to the precise date of onset of each of those conditions, but not as to the fact of their onset or as to their sequence. His evidence supports the critical issue – the existence of alcohol intoxication at the time of the clinical onset of alcohol dependence. That was material upon which the AAT could have reached its conclusion that a reasonable hypothesis had been raised by reasons of either cl 5(a) or cl 5(c) of the AD SOP being met, i.e. that one of the alternative minimum factors specified for the existence of a reasonable hypothesis connecting Mr Hill's alcohol dependence with his operational service.

The pathological gambling claim

The Tribunal affirmed the Commission's decision in relation to Mr Hill's pathological gambling condition because there was no reasonable hypothesis connecting this condition with Mr Hill's operational service. Counsel for Mr Hill submitted that this conclusion was 'perverse', so as to somehow demonstrate legal error. In Justice Mansfield's view the Tribunal did not misapply the law. His Honour stated:

[85]... the AAT's conclusion that, on the evidence as a whole, the hypothesis connecting Mr Hill's pathological

gambling with his operational service was 'speculative', based on 'some very general research', was open to it. So too was its conclusion that the hypothesis was not pointed to by the facts. Its factual conclusions, so long as they were reasonably open to the AAT, do not expose error of law even though other decision-makers may have reached a different conclusion: see e.g. *Willcocks v Comcare* (2001) 66 ALD 119.

The depressive disorder claim

In cross appeal, Counsel for Mr Hill sought to challenge the Tribunal's finding on the ground that it had misconceived the definition of 'severe psychosocial stressor.' Justice Mansfield considered that this contention itself was misconceived. His Honour said:

[94]... the contention does not meet the AAT's primary reason for rejecting the depressive disorder claim. It was simply that there was no material which could relate the clinical onset or worsening of depressive disorder to the two year period referred to in cl 5(b), (c) or (h) of the DD SOP, as the material only pointed to about 2000 as the time when the clinical onset of depressive disorder occurred.

The PTSD claim

Counsel for Mr Hill contended that the Tribunal, when addressing s 120 of the VEA in relation to the claimed condition of PTSD, erred by applying a civil standard of proof – the balance of probabilities – instead of the reverse criminal standard of proof specified in s 120(1).

Justice Mansfield noted from the outset that whether a claimant under the VEA has a particular condition is to be

determined on the balance of probabilities. His Honour considered that there was no scope to conclude that in deciding if Mr Hill suffered from PTSD, the Tribunal had misused the PTSD SOP or that it had erred in the way it went about deciding whether Mr Hill suffered from PTSD.

Invalidity service pension claim

The only issue in relation to Mr Hill's eligibility for an invalidity service pension was whether he was permanently incapacitated for work as required by s37(1)(c) of the VEA. A written determination pursuant to s37AA of the VEA provides the circumstances of permanent incapacity. Clause 5 of that determination is the relevant provision. The Tribunal decided that permanent impairment did not make Mr Hill permanently unable to do work for periods adding up to more than eight hours per week. As such, the second of the three criteria in cl (5)(2) was not satisfied.

Mr Hill, through his Counsel, submitted that the Tribunal had erred in law in reaching that conclusion by treating his house parent role as determinative of the question of incapacity for the whole of the relevant period. His Honour noted that the essence of these submissions was that the conclusion was so unreasonable that it could not have been reached, and so legal error must have underlain it.

His Honour considered that the AAT did address the whole of the relevant period and its conclusion was reached on the whole of the evidence. It did not err in law by failing to have regard to a relevant consideration, or by having

regard to an irrelevant one, or by misdirecting itself as to the applicable law or by misapplying the law.

Formal decision

Both the appeal and cross appeal were dismissed.

Editorial note

Many SoPs contain factors that refer to the time of clinical onset of the relevant injury or disease. In a reasonable hypothesis case, where the time of clinical onset is an essential element of an SoP factor, the material must point to at least the minimum diagnostic criteria as existing at the relevant time: *Lees v Repatriation Commission* (2002) 36 AAR 484.

Relevantly, in this case the diagnostic criteria for alcohol dependence was set out in clause 2(b) of the SOP for Alcohol Abuse and Dependence.⁵⁰ In accordance with the Full Federal Court's decision in *Lees* in order for Mr Hill to meet the SOP, there needed to be material before the decision maker regarding his experience in Vietnam which pointed to him suffering from symptomology which would have satisfied the diagnostic criteria set out in clause 2(b) of the SOP for Alcohol Dependence during that period.

If the decision maker had found that psychiatric opinion in this case was not based on any symptomology that Mr Hill had reported suffering whilst in Vietnam then it would have been open to the

⁵⁰ Please note diagnostic criteria in current SOP for alcohol dependence no 17 & 18 of 2008 is contained in clause 3(b).

decision maker to find that the opinion did not rise above the level of speculation.

Occurrence

In *Law's* case,⁵¹ the Full Federal Court held that an 'occurrence' was 'an event, incident or mishap which is susceptible of differentiation from the course of events which constitute the ordinary course of life'. By rejecting the Commission's first ground of appeal, the Court, at paragraph [66] of its reasons, appears to have extended the concept of 'occurrence' as that term is used in s 196B(14)(a) and by implication in s 9(1)(a) and s 70(4), such that it includes suffering from alcohol intoxication as a psychiatric disorder.

Repatriation Commission v Money

Stone J
[2008] FCA 118
4 March 2008

Whether idiopathic fibrosing alveolitis was defence caused – 'meaning of inability to obtain appropriate clinical management'

Facts

Mr Money served in the Royal Australian Navy from 14 March 1963 until his discharge on 13 March 1983. He rendered eligible 'defence service' for the purposes of the *Veterans' Entitlements Act 1986* (VEA) from 7 December 1972 until his discharge.

Mr Money made a claim for disability pension in respect of 'breathing disorder'. A delegate of the Repatriation Commission (**Commission**) determined that the appropriate diagnosis for Mr Money's lung condition was 'chronic bronchitis and emphysema' and rejected Mr Money's claim. The decision was affirmed on review by the Veterans' Review Board (VRB).

Mr Money sought further review by the Administrative Appeals Tribunal (Tribunal). The Tribunal set aside the decision and substituted its decision that Mr Money's idiopathic fibrosing alveolitis (IFA) was defence caused. Central to the Tribunal's decision was the meaning ascribed to the term 'appropriate clinical management.' The Commission appealed the decision of the Tribunal to the Federal Court.

Court's Consideration

The meaning of 'inability to obtain appropriate clinical management'

The first issue of appeal concerned the Tribunal's construction of the expression 'inability to obtain appropriate clinical management'. The Commission submitted that a failure to diagnose in accordance with contemporary medical knowledge does not create an inability to obtain appropriate clinical management where there is no effective treatment for the disease. The Commission cited *Somerset v Repatriation Commission* [2005] FCA 1399 as authority for this proposition.

Justice Stone considered that *Somerset* was distinguishable on the ground that there was no basis for believing that the veteran was suffering from the disease

⁵¹ *Repatriation Commission v Law* (1980) 31 ALR 140.

during his period of service. In addition, her Honour noted that in *Repatriation v Wedekind* [2000] 649 the Court was prepared to assume, without deciding, that diagnostic failure could lead to an inability to obtain appropriate clinical management.

In respect of the relevant phrase, Justice Stone noted that it had two separate aspects. In her Honour's view the plain meaning of 'appropriate clinical management':

[39]...would include not only active therapeutic treatment but also advice on the management of symptoms and other measures that would improve a patient's quality of life even if they had no effect on the ultimate progression and outcome of a condition. If the phrase 'appropriate clinical management' was intended to be limited to active treatment, one might ask why the phrase 'appropriate clinical treatment' was not used in its place...

In relation to the second aspect of the relevant phrase and whether the Tribunal erred in failing to consider the meaning of 'inability' Justice Stone said:

[42] The Tribunal clearly found that there was an inability to obtain appropriate clinical management; it expressly states so in [82] of its reasons. Although the Tribunal made no express findings as to why the identified systemic failures in the naval medical system presented a barrier to Mr Money receiving appropriate clinical management, it is implicit in its reasons that Mr Money was reliant upon the Navy's medical system during his period of service. As a matter of

practical reality, a person in Mr Money's position could not reasonably have been expected to take steps to obtain medical care beyond that offered by the Navy; see Brew at 88. The applicant has not demonstrated that the Tribunal applied an incorrect construction.

Overall, Justice Stone was of the view that a failure to diagnose was sufficient to create a barrier to obtaining appropriate clinical management. The evidence in Mr Money's case was that a diagnosis could have been made in 1979.

Aggravation & the SoP regime

The Tribunal made a finding that Mr Money's smoking had accelerated the natural course of his IFA, and held that if a diagnosis had been made, he should have been advised to stop smoking. In respect of this finding, the Commission contended that as the Repatriation Medical Authority (RMA) did not include smoking as one of the factors in the IFA SoP, the Tribunal's finding subverted the system of SoPs and subsumed the RMA's function of making determinations.

Justice Stone held that a factor not being mentioned in an SoP is not inconsistent with it being a factor that aggravates a disease, though it cannot of itself be a factor that creates a connection with defence service. Her Honour stated:

[48]...a Statement of Principles is not a conclusive statement of the factors that may aggravate a disease; rather it is a statement of the factors that may connect a disease to service...a finding that providing advice to avoid a factor that is not included in a Statement of Principles would constitute appropriate clinical management of a condition

does not undermine the regime of the Statement of Principles in the way the applicant suggests.

In addition, in respect of whether Mr Money's IFA had worsened during his defence service, Justice Stone noted the evidence that the course of Mr Money's IFA had been unusually slow. Nonetheless, Her Honour held that 'a slow worsening is still a worsening'.

Formal decision

Justice Stone held that the findings of the Tribunal were clear: Mr Money's IFA was aggravated by his inability to obtain appropriate clinical management of his condition, and that inability arose from a systemic failure of the Navy's medical structures. The Commission's appeal was dismissed with costs.

Editorial note

Nearly all SoPs contain the 'inability to obtain appropriate clinical management' factor. It only applies to aggravation or material contribution of a claimed condition where that claimed condition is contracted before or during the person's relevant service.

In the Money case, the central issue for consideration was the meaning of the phrase 'appropriate clinical management.' An important point made by the Court is that this phrase can encompass a more 'passive' approach to treatment. For example, it could include advice to avoid certain behaviours such as smoking. Nonetheless, it is important to remember that 'appropriate clinical management' must be measured by the standards available at the time of the

persons relevant service.⁵² In every case the issue of appropriate clinical management will largely be a medical matter.

Furthermore, while the Court held that 'appropriate clinical management' could include treatment that would have 'no effect on the ultimate progression and outcome of a condition', it is important to note that this finding does not alleviate the important step of considering whether the inability to obtain appropriate clinical management had aggravated the person's claimed condition. Clearly, if clinical management would have had 'no effect on the condition', a failure to obtain it could not have made the condition worse.

Finally, the other important issue for consideration in the Money case concerned the Tribunal's finding that smoking had accelerated Mr Money's IFA. Specifically, whether this finding challenged the exclusivity of SoPs in setting out the factors that cause certain injuries, diseases or deaths. The Court held that this was not the case. While a smoking factor was not mentioned in the SoP for IFA it could aggravate the condition. However, it could not by itself create a connection with Mr Money's relevant service.

⁵² *Repatriation Commission v Wellington* (1999) 57 ALD 507

Repatriation Commission v Newson

Edmonds J
[2008] FCA 401
31 March 2008

Osteoarthritis of the applicant's right hip and both knees – commencement date of period by which clinical onset of osteoarthritis must have occurred – requirement that the factors in SoP 'must be related to any relevant service rendered by the person'

Facts

Mr Newson rendered eligible service in the Royal Australian Air Force. He made a claim for disability pension in respect of 'bilateral knee osteoarthritis and right hip osteoarthritis'. A delegate of the Repatriation Commission (**Commission**) rejected Mr Newson's claim. The decision was affirmed on review by the Veterans' Review Board (**VRB**). Mr Newson sought further review by the Administrative Appeals Tribunal (**Tribunal**).

The Tribunal's reasoning

The Tribunal set aside the Commission's decision and substituted its decision that Mr Newson's osteoarthritis of the right hip and both knees was war caused. Central to the Tribunal's decision were its findings that Mr Newson's heavy lifting had ceased when he changed jobs in 1967 and that his kneeling and squatting had ceased on his retirement in 1989. The Commission appealed the decision of the Tribunal to the Federal Court.

Grounds of appeal

The Commission contended that the Tribunal had misapplied clause 5(j) and 5(k) of the Statement of Principles (**SoP**) No 82 of 2001 concerning osteoarthritis, by failing to take into account the requirement in clause 4 of the SoP that the relevant factors set out in cl 5 of the SoP 'must be related to any relevant service rendered by the person'. Specifically, the Commission submitted that the Tribunal had made no attempt to explain how Mr Newson's work as a carpenter/joiner during the two decades after his service were related to his eligible service.

The Court's consideration

Justice Edmonds considered that there was a fundamental problem with the Tribunal's reasoning process which infected the conclusion that Mr Newton met the factor 5(j) (right hip) and cl 5(k) (both knees) of the relevant SoP. His Honour said:

[35]... As a matter of construction, the periods referred to in the factors in cl 5(j) ('within any 10 year period') and (k) ('for at least two years') must encompass at least part of a period of relevant service for the requirement of cl 4 of Instrument No 82 of 2001 to be met; otherwise there is no relationship between the injury/disease and the relevant service. Moreover, that part of the period of relevant service must contribute to the requirements of each factor, in the case of the factor in cl 5(j) to the total weight lifted over the period not greater than 10 years and, in the case of the factor in cl 5(k), to the kneeling or squatting time requirement in one of the two years.

[38] Where the Tribunal's process of reasoning appears to have fallen into error is in its construction of the factors in cl 5(j) and (k) of Instrument No 82 of 2001 as to when the period of 25 years, within which clinical onset must occur, first starts. Under the current Statement of Principles in Instrument No 32 of 2005, it is clear that in the case of the factors in cl 5(i) and (l), the period of 25 years first starts immediately following the 10 year or lesser period and the two year period respectively. The Tribunal was of the view that the start date under the factors in cl 5(j) and (k) of the previous Statement of Principles in Instrument No 82 of 2001 did not occur until physical activity of the generic kind referred to in the factors, 'heavy lifting', in the case of cl 5(j), and 'kneeling and squatting', in the case of cl 5(k), actually ceases even if that cessation does not occur until years after the expiration of the 10 year or lesser period in the case of the factor in cl 5(j) and the expiration of the two-year period in the case of the factor in cl 5(k). Hence, the Tribunal's finding, that Mr Newson's 'heavy lifting' only ceased in 1967 led it to the conclusion that the 25 year period within which clinical onset must occur in the case of the right hip only then commenced; and the finding that Mr Newson's 'kneeling and squatting' only ceased in 1989 led it to the conclusion that the 25 year period within which clinical onset must occur in the case of both knees only then commenced.

[39] In my opinion, this process of reasoning is predicated on an erroneous construction of the references to 'such physical activity' in both cl 5(j) and (k) of Instrument No 82 of 2001. It is not a

reference to physical activity of that generic kind such as 'heavy lifting or 'kneeling and squatting'; the reference is to 'such physical activity' and, so understood, is a reference back to the physical activity meeting the anterior terms of the factors in cl 5(j) and (k). As indicated in [35] above, this in turn requires the relevant periods therein referred to -'within any 10 year period' and 'for at least two years' - to encompass at least part of a period of relevant service so as to provide a relationship to meet the requirements of cl 4 that the factor must be related to any relevant service rendered by the person. Such physical activity ceases, at the latest, at the end of the 10 year period in the case of the factor in cl 5(j) of Instrument No 82 of 2001 and, in the case of the factor in cl 5(k) of that instrument, at the end of the two year period; in other words, in the case of the factor in cl 5(j) in 1955 and in the case of the factor in cl 5(k) in 1947.

Formal decision

Justice Edmonds noted that for Mr Newson to meet the relevant factors in the SoP clinical onset of his osteoarthritis of the right hip would need to have occurred by 1980; the Tribunal found that it had occurred in the mid 1980s. In relation to his osteoarthritis of the knees, clinical onset would need to have occurred by 1972; the Tribunal found that it had occurred in 1999. As such, the Commission's appeal was allowed with costs.

Editorial note

The *Newson* case provides clarification on the construction of clauses 5(j) and (k) of SoP no 82 of 2001. The central issue for

consideration in this case was when physical activity ceases and when the period of 25 years, in which clinical onset must have occurred, first starts to run.

The Court held that the Tribunal's finding that the period of 25 years first starts when the relevant physical activity actually ceases (ie. change of job and retirement) was incorrect.

The Court considered that the relevant physical activity ceases and the period of 25 years first starts to run immediately following the 10 year (or lesser period) and the two year period. Importantly, the phrases 'within any ten year period' and 'for at least two years' cannot be considered in isolation. They must be read in conjunction with clause 4 of the SoP and, therefore, must encompass at least part of a period of relevant service.

Further reading: Please see 'Clinical onset' in VeRBosity Volume 22 No 1 at page 7

Drew v Repatriation Commission

Logan J
[2008] FCA 537
15 April 2008

Claim for PTSD – whether AAT considered evidence of veteran

Facts

Mr Drew rendered operational service in the Royal Australian Navy. He made a claim for pension for Post Traumatic Stress Disorder (PTSD). A delegate of the Repatriation Commission

(Commission) rejected his claim. The decision was affirmed on review by the Veterans' Review Board (VRB). Mr Drew sought further review by the Administrative Appeals Tribunal (Tribunal).

The Tribunal's reasoning

Before the Tribunal, the issue in contention was whether or not Mr Drew was suffering from PTSD. The Tribunal had the benefit of evidence from two specialist psychiatrists, Dr Likely and Dr Mulholland. Each of those psychiatrists had had regard to the diagnostic criteria in DSM-IV as well as an account of the applicant's service. Dr Likely had formed the view that applicant was suffering from post-traumatic stress disorder. He was the treating psychiatrist. Dr Mulholland had a different view. The Tribunal went on to find that it was not satisfied in relation to Mr Drew's response at the time for the purposes of satisfying criterion (a)(ii). The critical paragraph of the Tribunal's reasoning was:

[22]... While Mr Drew's feelings of being afraid, of agitation and of concern are understandable, I am reasonably satisfied that they lack the intensity of response required in the diagnostic criterion (a)(ii) in DSM-IV and the statement of principles. On the evidence that he gave, I am satisfied that his reactions do not constitute a response which involved intense fear, helplessness, or horror.

Grounds of appeal

The applicant's appeal to the Federal Court essentially concerned his written

statement. He contended that the Tribunal erred in law:

- by failing to consider his written statement;
- or refer to the statement in its reasons; and
- that the Tribunal had failed to comply with its obligations under the AAT Act by omitting to explain how it treated his oral evidence regarding his reaction to the alleged stressor as against the description in his written statement.

The Court's consideration

Justice Logan noted that there was no explicit reference to the applicant's statement in the Tribunal's reasons. However, his Honour considered that an analysis of the Tribunal's reasons made it quite plain that the Tribunal had regard to the written statement and, indeed, adopted particular passages from it in its reasons. As such, his Honour was satisfied that the Tribunal did have regard to the Applicant's statement in reaching its decision.

Further, his Honour noted the courts observation in *Willcocks v Comcare* (2001) 66 ALD 119:

As it is now well understood, any court reviewing a decision of the tribunal cannot turn 'a review of the reasons of the decision-maker upon proper principles into a reconsideration for merits of the decision': *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272. Those quite 'proper principles' do not allow a doubtful fact finding to be characterised as an error

of law. As Kenny J commented in *Minister for Immigration and Multicultural Affairs v Rajalingim* [1999] FCA 719; (1999) 93 FCR 220 at 257, 'a tribunal does not commit an error of law merely because it finds facts wrongly or upon a doubtful basis or because it adopts unsound or questionable reasoning.' Likewise those 'proper principles' do not require that it be shown that all matters raised in the proceeding before the tribunal are dealt with in the reasons. For the purposes of section 43(2B) of the AAT Act, the tribunal is not obliged to give a 'line by line refutation' of an applicant's evidence either generally or in those respects where there is evidence contrary to find things that material fact made by the tribunal: *Re Minister for Immigration and Multicultural Affairs Ex Parte Durairajasingham* [2000] HCA 1; (2000) 58 ALD 609; 168 ALR 407: see generally, *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 62 ALD 225; 180 ALR 1.

Justice Logan noted that the criteria in DSM-IV, including paragraph (a)(ii), concerns matters of primary fact. The Tribunal, in taking account of all of the evidence before it, particularly the oral evidence, was not satisfied as a matter of fact that the veteran's experience in response to the alleged stressor met the description in (a)(ii). It followed from this that there was no factual foundation for a finding that PTSD was present. His Honour considered that the process of reasoning of the Tribunal was both logical and reasonably open on the evidence before it.

Formal decision

Mr Drew's appeal to the Federal Court was dismissed.

Editorial note

In *Drew* the Court was concerned with threshold issue of diagnosis of PTSD. The Court found that there was no error of law in the approach the Tribunal had taken in relation to the PTSD claim.

The issue before the Tribunal concerned criteria A, commonly known as the 'causal factor' in the diagnostic criteria. Specifically, whether Mr Drew's reaction to a traumatic event involved intense fear, helplessness, or horror: *see criterion (A)(ii) in DSM IV*.

Despite the fact that both the psychiatrists who gave evidence before the Tribunal concluded that criterion that (A)(ii) was met, the Tribunal was reasonably satisfied that Mr Drew's feelings lacked the intensity required by criterion (A)(ii). Specifically, the Tribunal noted the evidence given by Mr Drew at the hearing on oath was not the same as the descriptions of his feelings given to the two psychiatrists.

The court held that the Tribunal's reasoning was both logical and reasonably open to it. As such, no factual foundation existed for a finding that Mr Drew suffered from PTSD.

Had the Tribunal found to the contrary in *Drew*, that both diagnostic criteria ie. (A)(i) and (A)(ii) (and the subsequent criteria) were satisfied, and there was no allegation before the Tribunal that PTSD was due to a cause other than one that was service related, the issue of the connection of Mr Drew's PTSD to his

service would largely have been a mere formality. This is because the 'causal factor' presented criteria (A)(i) and (A)(ii) would have already been found to exist on the more strenuous standard of proof – the balance of probabilities.

Tunks v Repatriation Commission

Madgwick J
[2008] FCA 521
18 April 2008

reasonable hypothesis test – Deledio steps – whether Tribunal engaged in impermissible fact finding in application of s 120(3) - whether Tribunal used correct test in application of s 120(1)

Facts

The late Veteran, Mr Kenneth Tunks, rendered operational service in the Royal Australian Navy. He died from cancer of the prostate. A delegate of the Repatriation Commission (**Commission**) denied Mrs Tunks claim that her late husband's cancer was caused by, or attributable to, his war service. The decision was affirmed on review by the Veterans' Review Board (**VRB**). Mrs Tunks sought further review by the Administrative Appeals Tribunal (**Tribunal**).

The Tribunal's reasoning

Before the Tribunal, there was no dispute as to Mr Tunks' kind of death. The primary question in the case was whether his 'kind of death' was war caused. The Tribunal held that there were no facts present to support the

hypothesis of an increase in animal fat consumption by at least 40%, as required by the SoP No 28 of 2005. The Tribunal was prepared to assume that the deceased increased his animal fat consumption post-service, but considered that the actual amount of increase was pure speculation, a finding confirmed by the reports of dietician, Dr English and gastroenterologist, Professor Duggan. Further, the Tribunal held that the applicant's case failed at the fourth Deledio step. The lack of evidence of the pre-service diet, and the inaccuracy of the post-service diet led the Tribunal to find that it was satisfied beyond reasonable doubt the factual foundation upon which the hypothesis linking war service to death could operate, did not exist. The Tribunal affirmed the decision of the VRB.

Grounds of appeal

The applicant contended that the Tribunal misconstrued sections 120(1) and (3) of the VEA and posed and answered the wrong questions. Such errors are errors of law. Specifically, the applicant contended that in applying s 120(3) of the VEA, the Tribunal had to consider all the material and determine:

1. whether it points to some fact or facts (the raised facts) which support a hypothesis connecting the death with the circumstances of operational service; and
2. whether that hypothesis can be regarded as reasonable, if the raised facts are assumed to be true.

In support of her propositions, the applicant relied on *Hill* 69 ALD 581 and the High Court in *Bushell v Repatriation Commission* [1992] HCA 47; (1992) 175 CLR 408.

The Commission's position

Justice Madgwick noted that this case demonstrated the difficulties attending matters concerning s 120(3) and s120A of the VEA. His Honour said:

[34] Nevertheless, there are, in this area of the law, a number of clearly defined steps which a decision-maker must take, each with its own mandated methodology of application. In particular, the four Deledio steps (with the exception of the correction made in *Bull v Repatriation Commission* (2001) 188 ALR 756 at [14]–[15]) have become something of an algorithm in cases of this kind. While the Deledio propositions were intended as an aid to clear thinking and, with respect, are clearly right, treating them as if they were a substitute for the statute and, as I have put it, an algorithm, indeed the only available algorithm, seems in practice to have created at least as many problems as their learned author intended that they should avoid. That is not, of course, their author's fault. Notwithstanding this, the application of the necessary steps cannot be said to be easy...

In respect of the above comments, his Honour framed his consideration in two ways. Firstly, in respect of the steps posed by Deledio. Secondly, avoiding the Deledio formulation.

Deledio steps

His Honour held that the Tribunal's finding that there was 'no evidence' of

the veteran's pre-service fat intake was wrong. In his Honour's opinion, the Tribunal had asked itself the wrong question at step 3 of *Deledio*:

[41] The lay evidence was to the effect that the deceased's war service had dramatically changed his dietary habits so that, afterwards, he ate much more animal fat than before it. This clearly 'pointed to' or 'raised' a hypothesis that the deceased had indeed increased his animal fat intake by a very large degree that may have equalled or exceeded 40%.

In respect of the question posed by the fourth step of *Deledio*, Justice Madgwick noted the comments of Justices Gyles in *Hall v Repatriation Commission* [2007] FCA 2021 at [19] that:

mis-statement of the statutory task pursuant to s 120(1) in the reasons cannot simply be ignored and treated as a slip of the pen. Satisfaction beyond reasonable doubt is an exacting standard, particularly where it is framed in the negative. As Barwick CJ said in *Keeley v Brooking* [1979] HCA 28; (1979) 143 CLR 162 at 169:

'To be satisfied beyond all reasonable doubt is, for the purposes of the law, to be certain.'
(Emphasis in original.)

In his Honour's opinion, the Tribunal in this case had incorrectly approached the task at step 4 of *Deledio*:

[46]... An absence of evidence or of reliable evidence cannot be a sufficient basis for the Tribunal to reach the requisite level of satisfaction that either a fact asserted by a claimant is not true, or that a contrary fact is true.

Avoiding the Deledio formulation

In respect of what was required by s 120(3) of the VEA, Justice Madgwick considered that:

[47] (1)...The lay evidence could hardly have precisely quantified the increase to 40% or more, and did not, in terms, purport to do so. However, that evidence strongly supported a *dramatic* increase in the deceased's animal fats consumption after his war service and the Tribunal did not hold the entirety of that evidence to be completely lacking in credibility. While an increase of such an amount in daily fat intake would certainly be very considerable, it could not be assumed from mere common experience to be impossible. There was no expert testimony establishing that an increase of 61 g of fat per day (ie to 187 g per day) was impossible...

In respect of s 120(1) of the VEA, his Honour considered that:

[47] (2) ... While the Tribunal may possibly have been positively satisfied beyond reasonable doubt under s 120(1) that, in fact, there was no sufficient ground for making the determination that the disease was war-caused, it could not do so merely because of its stated reasons, that either there was no evidence or no sufficient evidence to sustain a positive finding that there was such a connexion. Absence of proof of X simply cannot prove non-X.

Formal decision

Mrs Tunks' appeal to the Federal Court was upheld. Justice Madgwick considered that the Tribunal erred in law in application of s 120(3) by concluding that there was 'no evidence' going to

dietary habits of deceased veteran; and that the Tribunal could not reach level of satisfaction required by s 120 where there was only no evidence or no sufficient evidence that disease was war-caused.

Editorial note

In *Repatriation Commission v Hill* (2002) 69 ALD 581, the Full Court considered that where an SoP applies, it prescribes the essential content of what is a reasonable hypothesis for section 120(3) purpose. A hypothesis relied upon by a veteran to support a pension claim must be supported by material pointing to each element that the SoP makes essential for the hypothesis to be reasonable.

What the AAT was required to do in this case was determine whether the whole of the material before it (including the expert evidence) pointed too:

- the late Mr Tunks having an increase in animal fat consumption by at least 40%;
- consumption of at least 50g per day; and finally
- maintaining these levels for at least 5 years between 1967 and 1992

Importantly, in accordance with paragraph 4 of SoP No 28 of 2005, the Tribunal was required to consider whether all of the material pointed to an increased consumption of animal fat for the stipulated period being related to any relevant service rendered by the late Mr Tunks.

If the Tribunal found that all of the material did not point to Mr Tunks' operational service causing him to

increase his consumption of animal fat to the prescribed level and to maintain that consumption for at least five years within the twenty-five years before the clinical onset of malignant neoplasm of the prostate, then it would be open to find that the hypothesis was not fairly raised by the material and could not be deemed to be reasonable.

Further reading: Significant commentary and case reports on the group proceedings before the Administrative Appeals Tribunal concerning prostate cancer are reported in *VeRBosity* volume 21 no 4 at page 140.

Riley v Repatriation Commission

Edmonds J
[2008] FCA 531
21 April 2008

Decision refusing claim for chondromalacia patella of both knees – Material must raise reasonable hypothesis connecting veteran's injury or disease with circumstances of service – Tribunal forming an opinion on material before it – no impermissible resolution of possible conflicts in the evidence or impermissible findings of fact

Facts

Mr Riley rendered operational service in Vietnam. He lodged a claim for disability pension for a number of conditions. A delegate of the Repatriation Commission (**Commission**) accepted all of the conditions save for Mr Riley's chondromalacia patella of both knees. The decision was affirmed on review by the Veterans' Review Board (**VRB**).

Mr Riley sought further review by the Administrative Appeals Tribunal (**Tribunal**). The decision of the VRB was affirmed.

The Tribunal's reasoning

The issue for consideration before the Tribunal was whether Mr Riley satisfied factors 5(a), (b), (e) and/or (h) in the SoP concerning chondromalacia patella (CP). The Tribunal noted the meaning of 'clinical onset' considered by the Full Court in *Lees v Repatriation Commission* [2002] FCAFC 398 and found that the clinical onset of Mr Riley's CP did not meet the requirements of factors 5(a), (b) and (e) of the SoP. In addition, the Tribunal found that as the clinical onset of Mr Riley's CP was not until some time after his operational service, and not before his discharge from the Army, he could not succeed under factor 5(h). The Tribunal affirmed the decision of the VRB.

Grounds of appeal

The applicant contended that the Tribunal had failed to approach the question of whether Mr Riley's CP was war caused in the manner prescribed by sections 120(1) and (3) and 120A(3) of the VEA. Specifically, the applicant contended that the Tribunal had erred by:

- Treating clinical onset of CP as requiring the contemporaneous diagnosis of CP;
- impermissible fact-finding at the reasonable hypothesis stage by proceeding to resolve possible conflicts in the evidence and make a finding as to the time when the

applicant experienced clinical onset of his CP; and

- rejecting the alternative hypothesis (of inability to obtain appropriate clinical management in Vietnam for pre-existing CP) on the basis of impermissible fact-finding that the applicant's CP did not have its clinical onset until after his operational service.

The Court's consideration

Treating clinical onset of chondromalacia patella as requiring the contemporaneous diagnosis of chondromalacia patella

Justice Edmonds did not consider that this ground of appeal had been made out. His Honour said:

[41]...When the Tribunal's reasons are read in context, the Tribunal was correct, having regard to all the material before it, to observe that prior to Dr Diebold's diagnosis in 2003, there was no earlier diagnosis. However, it would be wrong, in my view, to conclude that this meant that the Tribunal required that the diagnosis of clinical onset, as explained in [33] above, be made at any specific time or close to the applicant's military service.

Impermissible fact-finding at the reasonable hypothesis stage

Justice Edmonds did not consider that this ground of appeal was made out. His Honour agreed with the Commission's submissions that the third step in Deledio required the Tribunal to 'form an opinion'. In his honour's view, the Tribunal was not involved in an exercise in fact-finding, specifically, as to the time when the applicant experienced clinical onset of his CP, outside the process of

forming that opinion that the hypotheses were not reasonable by reference to factors 5(a), 5(b) and 5(e) of the SoP.

Further, his Honour considered that the Tribunal was not involved in resolving possible conflicts in the evidence. The Tribunal's non acceptance of the evidence of one orthopaedic specialist was by way of reference to the accepted definition of clinical onset in Lee's case. It was not by way of preferring the evidence of another practitioner

Rejecting the alternative hypothesis

Justice Edmonds did not consider that this ground of appeal was made out. His Honour considered that all the Tribunal said in its reasons was that, in the absence of a diagnosis of CP before operational service, the underlying premise upon which factor 5(h) operated did not exist. Additionally, his Honour noted the Tribunal's finding that Mr Riley did not fit factor 5(h) because he did have an ability to obtain appropriate clinical management for CP. Doctors were available; and on some occasions he was prepared to, and in fact did, seek medical assistance for other conditions.

Further, his Honour could not identify any impermissible resolution of possible conflicts in the evidence or impermissible findings of fact in the Tribunal's reasoning in relation to the alternative hypothesis outside the process of forming an opinion as to whether, on the material before it, there was an hypothesis which was reasonable.

Formal decision

Mr Riley's appeal to the Federal Court was dismissed with costs.

Editorial note

Section 120(3) of the VEA requires the formation of an opinion by the decision maker that the material before it does or does not raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular service.

In *Bull v Repatriation Commission* [2001] FCA 1832 Emmett and Allsop JJ (Moore J agreeing) observed that:

[21] There is no doubt that the Tribunal is obliged to look at all the material, not just some of it. It is not entitled at this point to find facts or reject matters. See generally *Gleeson v Repatriation Commission* (1994) 34 ALD 505, 509.

[22] The formation of the opinion called for by subs 120(3) involves an assessment of the factual material before it. It involves reaching an opinion about a factual matter. It is, in that sense, a question of fact: *Bey*, supra at 373 and *Repatriation Commission v Owens* (1996) 70 ALJR 904...

In *Riley* the Federal Court held that the AAT had properly discharged its statutory duty under section 120(3) of the VEA. It has not gone outside the process of forming an opinion as to whether, on the material before it, there was an hypothesis which was reasonable. As such, there was no error of law.

Godwin v Repatriation Commission

Flick J
[2008] FCA 576
30 April 2008

Decision of AAT – subsequent section 31 review decision – section 31 review not beyond power – no misuse of section 31 decision

Facts

Mr Godwin rendered operational service in Vietnamese Waters on board HMAS Sydney. He lodged a claim for disability pension in respect of post traumatic stress disorder (PTSD). A delegate of the Repatriation Commission (Commission) refused his claim. The decision was affirmed on review by the Veterans' Review Board (VRB). Mr Godwin sought further review by the Administrative Appeals Tribunal (Tribunal).

The Tribunal concluded that Mr Godwin's PTSD was war caused, accepting that he had witnessed in Vung Tau harbour the destruction of a civilian sampan by a United States patrol boat. The claim was remitted to the Commission to assess the rate of pension payable.

The Commission determined the rate of pension and Mr Godwin appealed to the VRB. The VRB affirmed the decision and Mr Godwin sought further review by the Tribunal. The Tribunal decided that Mr Godwin was entitled to pension at the Special Rate.

Immediately subsequent to the decision of the Tribunal, a delegate of the Commission made a decision that Mr Godwin's PTSD was not war caused and assessed pension at 10% of the General Rate. This decision was a product of a review undertaken pursuant to section 31(4), (6) and (7) of the *Veterans' Entitlements Act 1986 (VEA)*.

Mr Godwin sought to challenge the Commission's review decision in the Federal Court via the *Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)*.

The applicant's position

The applicant contended that:

Section 31(4)

- Section 31(4) of the VEA did not confer any power to review a decision after the decision had been reviewed by the Tribunal;
- Alternatively, the power conferred was confined to those circumstances in which there had been evidence before the Commission which was 'false' – and there had been no such evidence in the present proceedings.

Section 31(6)

- There was no 'matter' which was not before the Tribunal – the material relied upon by the delegate of the Commission was a repetition of the material before the Tribunal.

Res Judicata and estoppel

- The issue being determined by the delegate of the Commission had already been finally determined by the Tribunal; and

- The Commission was precluded for contending to the contrary a fact which they had put in issue and had been found against them in the Tribunal.

Conduct of the Commission in undertaking the s 31 review

- The conduct of the Commission in undertaking the s 31 review breached section 6 of the ADJR Act and was '*vexatious and perfidious and was grossly improper in all the circumstances*'.

A breach of section 178

- The Commission had failed to comply with the provision of s178(1) of the VEA by decreasing the rate of the applicant's pension within six months of a decision by the Tribunal in respect of the rate of pension.

The Court's consideration

Justice Flick considered that section 31(4) conferred a power to review a decision after a decision of the Tribunal. His Honour noted that a statutory provision which permits further administrative reconsideration subsequent to a Tribunal decision is not surprising: see eg *Hanna v Australian Postal Corporation* (1990) 12 AAR 511.

Secondly, Justice Flick considered that the meaning of the term 'false' in the context of section 31(4), is considered to mean 'objectively incorrect'. His Honour noted that the conclusion of the delegate could not be construed as anything other than a conclusion that the account given by the applicant regarding the destruction of a civilian sampan was 'objectively incorrect'. As such, it was

open to the Commission to exercise the power of s31(4) as there was material upon which the delegate could be 'satisfied' that the evidence previously before the Commission was 'false' in a material particular.

Section 31(6)

Justice Flick considered that a 'matter' can include new evidence relevant to the manner in which the prior decision was made. His Honour noted that section 31(6)(a) has not been construed, and should not be construed, as precluding an exercise of the review power where new evidence or other material becomes available which had not been considered. In addition, it does not matter if that new material was available at the time when the Tribunal made its decision. His Honour said:

[32] Section 31(6) should not be constructed as excluding from the term 'matter' new evidence, albeit evidence in relation to an area of factual dispute already resolved.

Res Judicata and estoppel

Firstly, his Honour noted that, adjudication by an administrative tribunal is administrative in character and does not create an issue of estoppel: *WJ & F Barnes Pty Ltd v Federal Commissioner of Taxation* (1957) 96 CLR 294 at 315.

Secondly, Justice Flick considered that the conclusiveness of any administrative determination must be dictated by reference to the statutory regime pursuant to which the decisions are made. His Honour noted that the VEA expressly reserves the right for the Commission to conduct a review, even

after a decision has been made by the Tribunal. His Honour said:

[38]...The power conferred by s31 to undertake a review is an answer to any submission as to *res Judicata* or estoppel.

Conduct of the Commission in undertaking the s 31 review

Justice Flick considered that there had been no ‘misuse’ of the discretionary power conferred by s31. Nor did his Honour consider it ‘contrary to the public interest’ to exercise that statutory power in the present case. Further, his Honour said:

[47] In the present case there is no basis for concluding – as submitted on behalf of Mr Godwin – that the delegate was ‘off on a frolic to disprove the Applicant’s entitlement.’...even if the solicitor’s account of the conversations with the advocate prevail, those conversations do not support any conclusion that there had been an unreasonable exercise of power in bad faith.

A breach of section 178

Justice Flick noted that the Tribunal had granted the applicant pension at the Special Rate from 5 May 2005 – and said nothing as to the period prior. Further, that the delegate conducting the s 31 review concluded that pension was assessed at 10% of the General Rate with effect from 2 August 2000. His Honour considered that the decision of the delegate did not purport to diminish the effect of the Tribunal’s decision, and in any event, the six month period referred to in s 178(1) had expired.

Formal decision

Justice Flick did not consider that any of Mr Godwin’s grounds of appeal had been made out. As such, his appeal to the Federal Court was dismissed with costs.

Editorial note

The case of *Godwin* considered the scope of the power contained in s.31 of the VEA with respect to reviewing decisions previously made by the Tribunal. The general tenor of the Court’s decision is that s.31 of the VEA is very broad.

The Court considered that both s 31(4) and (6) conferred a power to review decisions previously made by the Tribunal.

Specifically, subsection 31(4) allows the Commission to review a decision, including one made by the Tribunal, where it was based on evidence that was ‘*false in a material particular*’. The Court held that false means ‘*objectively incorrect*’. However, it should be noted that use of the words ‘*in a material particular*’ in this section means that the Commission can only use s 31(4) where the objectively incorrect evidence has had a material influence on the outcome of the decision. This point was not at issue in the *Godwin* case.

Further, the Court held that s 31(6) also allows the Commission to review a decision, including one made by the Tribunal where:

- a matter (including any new evidence that is different) exists, which affects the payment of the pension;

- that matter was not before the Tribunal when its decision was made (even if that new matter would have been available at the time the Tribunal made its decision); and
- the new matter leads to the conclusion that a payment should be cancelled or suspended, or is being paid at a higher rate than it should be.

Finally, the Court noted that if a review under s 31 is made within six months of a Tribunal decision, and it leads the Commission to vary pension assessment, that variation can only affect the period before the assessment period relevant to the Tribunal's decision. However, once the six month period expires, the Commission is not restricted in such a way.

Repatriation Commission v Warren

Lindgren, Bennett and Logan JJ
[2007] FCAFC
24 April 2008

Whether AAT was entitled to rely on a concession made by the Commission - true meaning and effect of the concession

Facts

Mr Warren rendered operational service in South Vietnam between January 1971 and March 1972. He made a disability pension claim for post traumatic stress disorder (PTSD) and major depression. His claim was rejected by a delegate of the Repatriation Commission

(Commission) and the Veterans' Review Board (VRB). Mr Warren sought review by the Administrative Appeals Tribunal (Tribunal).

At the hearing before the Tribunal, the advocate for the Commission conceded the diagnosis of PTSD. As a result, the Tribunal decided that Mr Warren suffered from war-caused PTSD and war-caused alcohol dependence and set aside the Commission's decision to reject his claim.

Federal Court's reasoning

The Commission appealed to the Federal Court on the issue of diagnosis. It contended that the Tribunal was required to be satisfied that the diagnostic criteria for PTSD and alcohol dependence were met, by reference to the relevant SoPs. Further, the Commission contended that the Tribunal was not entitled to act upon the concession, as it had a statutory duty to decide the question of whether the respondent suffered from the condition for itself. Justice Kiefel held that diagnosis of a psychiatric disease is to be based on the descriptions in DSM-IV, and that was there was nothing to prevent the Tribunal accepting the Commission's concession, which was clear in its terms and was made in the background of evidence of a diagnosis of PTSD. As such, the appeal was dismissed.

Grounds of appeal

The Commission appealed to the Full Federal Court. It contended that the Tribunal was not entitled to act on the concession made by the Commission, and so was obliged to satisfy itself that both clause 2 and 5 of the respective SoPs

were satisfied. Specifically, the Commission contended that Mr Warren did not fulfil the criteria for a diagnosis of PTSD according to clause 2(b) of the SoP for PTSD and that the medical evidence did not substantiate such a diagnosis.

The Court's consideration

Lindgren and Bennett JJ

What was the true meaning and nature of the concession?

Their Honours considered that the concession made and accepted by the Tribunal was that, for the purposes of the SoP for PTSD, Mr Warren suffered from PTSD characterised and defined by the factors referred to in cl 2(b) of that SoP. The effect of the concession was that Mr Warren was entitled to succeed unless the Commission was satisfied beyond reasonable doubt that cl 5(a) of the SoP for the PTSD was not satisfied.

Was the Tribunal entitled to act on the concession?

In their Honours' opinion:

[83]... the Commission has not established any error of law on the part of the Tribunal in failing to disregard the concessions and to assume for itself the task of checking, one by one, that the various diagnostic factors laid down in cl 2(b) of the SoP for PTSD were present on the evidence. If the parties had agreed that the SoP for PTSD was not relevant, the Tribunal would have been bound to disregard their agreement. However, the concessions made were of a factual nature that did not undermine the statute. They were of the same nature as, for example, a concession that Mr Warren had served in Vietnam or

that he had experienced the two events there. The parties and the Tribunal did not proceed on an incorrect understanding of the provisions of the VE Act or of their application. The concessions were of facts susceptible of admission.

[85] In the absence of the concession, or if the concession were only of a medical diagnosis that did not conform with cl 2(b) of the SoP, the Tribunal would have been obliged to determine for itself whether each of the factors in cl 2(b) had been established on the evidence. This would have been the case whether or not the matter had been raised by the parties (*Grant*) and the Commission would have been entitled to raise the Tribunal's omission on appeal (*Thomas; Ferriday*).

[86] There is a distinction between failing to rely on non-satisfaction of a statutory requirement at trial, and a concession of satisfaction of a statutory test. A party who has conceded a matter should only be allowed to make the absence of what has been conceded to be present the basis for overturning the result in exceptional circumstances (*Kuswardana*). There are no such exceptional circumstances in the present case.

Logan J

Justice Logan agreed that the appeal should be dismissed. Specifically, his Honour considered that the practical effect of the concession made before the Tribunal was that it left only the question of whether factor 5(a) in the PTSD SoP was satisfied. However, his opinion differed from Lindgren and Bennett JJ in relation to:

[101]... whether it is open to contend that because the diagnosis that a clinician has made does not fit a SoP template, there is no SoP in respect of the disease for which the veteran has made his or her claim.

His Honour's comment above was made in reference to Lindgren and Bennett JJ observation:

[25]...If the clinician's diagnosis of PTSD is not upheld by the SoP for the kind of disease known as PTSD, there will not be a reasonable hypothesis connecting Mr Warren's disease with his service for the purposes of s 120(3) of the VE Act.

Justice Logan noted that in relation to an injury or disease or death that falls outside the 'kind of' injury, disease or death as defined in a SoP, the question of whether that injury, disease or death is war caused will fall for determination by reference to ss 120(1) and 120(3) of the VEA alone. The meaning and application of those subsections is explained in *Bushell v Repatriation Commission* [1992] HCA 47; (1992) 175 CLR 408 and *Byrnes v Repatriation Commission* [1993] HCA 51; (1993) 177 CLR 564. His Honour did not consider that this difference affected the outcome of the appeal.

Formal decision

Their Honours held that the Tribunal was entitled to act on the concession, and that there was no error of law in failing to satisfy itself independently that the other criteria were satisfied. As such, the Commission's appeal was dismissed.

Editorial note

The Commission's appeal to the Full Federal Court in *Warren* essentially

concerned step 2 of *Deledio*, identifying the statement of principles. At step 2 of *Deledio*, if a hypothesis of connection is raised, it is important for the decision maker to carefully consider the definition set out in the relevant SoP to determine whether or not it covers the applicant's injury or disease.

In this case, the Full Court considered that the Commission's concession before the Tribunal was not limited to 'pre *Deledio* diagnosis' but also encompassed stage 1, 2 and 3 of *Deledio*. The only issue that was not covered by the Commission's concession concerned step 4 of *Deledio*, which the Tribunal addressed by considering clause 5 of the SoP concerning PTSD.

In cases that involve PTSD, it is relevant to keep in mind that the diagnostic criteria includes identification of a causal factor. As diagnosis of a claimed condition must be determined on the balance of probabilities, where PTSD is accepted as the correct diagnosis its connection to service will usually be a mere formality.⁵³

Further reading: Please see *VeRBosity* Volume 23 No 1 pages 42 to 44 for further discussion regarding Justice Kiefel's decision in *Warren*.

⁵³ *Mines v Repatriation Commission* [2004] FCA 1331

Federal Magistrates Court of Australia

Repatriation Commission v Edmonds

Wilson FM
[2007] FMCA 13
29 January 2008

Entitlement to Special Rate – characterisation of remunerative work the veteran is able to undertake

Facts

A delegate of the Repatriation Commission (**Commission**) originally determined that Mr Edmonds' disability pension be increased to 90% of the General Rate. The decision was set aside on review by the Veterans' Review Board (**VRB**) and Mr Edmonds' disability pension was increased to 100% of the General Rate. Mr Edmonds' sought further review by the Administrative Appeals Tribunal (**Tribunal**). The decision of the VRB was set aside, and the Tribunal substituted its decision that Mr Edmonds was entitled to be paid disability pension at the Special Rate.

Grounds of appeal

The Commission appealed to the Federal Magistrates Court contending that the

Tribunal had erred in law in concluding that Mr Edmonds was entitled to pension at the special rate pursuant to section 24 of the *Veterans' Entitlements Act (VEA)*. The appeal concerned one issue:

- Whether the Tribunal had erred in its approach to the question of characterizing the remunerative work Mr Edmonds was undertaking for the purposes of section 24(1)(c) of the VEA?

The Commission's position

The Commission's submissions were focussed on paragraph [38] of the Tribunal's reasons:

[38] The Tribunal is satisfied that based on the above judicial reasoning and the applicant's military training and experience, that warehousing work is related to the logistical training and experience of the applicant. It may not have been of the same level and status of his work in the Army, that was his choice and also, it was the only employment available to him. The Tribunal therefore accepts his two short term periods of employment were 'remunerative work' for the purpose of this question.

The Commission's position was:

- The facts as found by the Tribunal did not allow it to conclude that Mr Edmonds was undertaking remunerative work. Instead, the Tribunal should have found that Mr Edmonds was unable to carry out that work.
- Further, the two periods of work were not substantial. The Tribunal should not have been satisfied that Mr Edmonds was undertaking

remunerative work, that he was prevented from continuing in.

- The Tribunal applied an incorrect test in asking whether the two short periods of employment were 'related to' work Mr Edmonds had undertaken during his military service. It should have asked whether the two periods of employment were in the same field of endeavour as the work he had undertaken during his service. If it had, the Tribunal should have concluded that the work attempted by Mr Edmonds post military service was not in the same field of endeavour as work he had previously undertaken.

The Court's consideration

Federal Magistrate Wilson considered that some confusion had crept into the Commission's understanding of the Tribunal's reasoning. His Honour considered that what the Tribunal was saying at paragraph [38] of its reasons was that the type of work sought to be undertaken by Mr Edmonds during the two short periods, characterised as warehouse work, was in the same field of endeavour as work previously undertaken by Mr Edmonds during his military service.

His Honour noted Mr Edmonds' evidence before the Tribunal that his logistics work in the Army was mainly stores accounting, basically to maintain records of account. He also maintained supervision of the quartermaster's store. Although in the last 15 years of his service he was involved in high level training, he said that he did storeman work when he started in the Army.

Federal Magistrate Wilson considered that the Tribunal had correctly approached the question by addressing whether the type of work attempted by Mr Edmonds following his retirement from the Army was in the same field of endeavour or of the same type as he had previously successfully performed, in his case in the Army.

His Honour considered that it was overly critical for the Commission to latch onto the use by the Tribunal of the words 'related to'. His Honour agreed with Counsel for Mr Edmonds submissions that, fairly read, the Tribunal concluded that warehousing work, or work as a storeman, was in the same field of endeavour as work that Mr Edmonds had previously undertaken in the Army. His Honour concluded that the Tribunal had not introduced a new concept and had addressed itself to the correct inquiry.

His Honour then went on to consider whether that finding was reasonably open to the Tribunal, noting that Counsel for the Commission accepted in submissions that if there had been evidence of Mr Edmonds having undertaken warehousing work successfully in the Army, the Commission's appeal must fail.

Federal Magistrate Wilson considered *Repatriation Commission v Butcher* [2006] FCA 811 and the Court's comments at [42]:

It seems to me that the determination of the type of work the veteran was undertaking, or his or her field of remunerative activity, involves a consideration of the veteran's

qualifications and the work which he or she has in fact undertaken in the past. On occasions, the decision will be a relatively straightforward one, where, for example, the veteran has specialised qualifications and has only ever worked in one field of employment. In other cases, of which this is one, the decision will involve a process of characterisation and it is not necessarily resolved by simply characterising the field of remunerative activity as involving all of the particular types of employment which the veteran has undertaken. Nor will it necessarily be appropriate to include in the field of remunerative activity a particular type of employment performed some time in the past for a short period of time.

Accordingly, Federal Magistrate Wilson noted that the Court in *Butcher* had adopted a more general characterisation of the type of work, or field of remunerative activity, that the veteran was undertaking.

In the present case, his Honour noted that there was evidence available to the Tribunal that Mr Edmonds had undertaken stores work during his Army service, and that this was substantive work:

[32] ...during his military service the respondent had acquired skills in logistics, which involved stores work. Although this work had occurred earlier in the respondent's career, and he had advanced considerably in the military by the time of his retirement, there is nothing in the evidence before the Tribunal that suggests this part of the respondent's work history should be ignored for the reasons advanced in

Butcher... the respondent's military career revealed that much of his service was spent in the logistics area, albeit at a higher level than storeman, a position the respondent said was assigned to a lower rank. This demonstrates that stores work was in the same field of endeavour as much of the respondent's military service...

...

[33] As Besanko J said, in *Butcher*, the crux of the test is whether the veteran is now unable to carry out remunerative work that he had successfully undertaken in the past, because of his war caused injury. Here, the respondent in the past had successfully performed the duties, inter alia of a storeman, whilst in that section of the Army. He can no longer perform such duties because of his war caused injury, particularly post traumatic stress disorder.

In his Honour's view, there was evidence that enabled the Tribunal to conclude:

[34]... that the type of work attempted by the respondent in the two jobs of very short duration was work of a kind that the respondent undertook previously in his military career. It was not necessary in those circumstances, for the respondent to establish that he successfully undertook the work when he attempted to do so following his retirement from active service.

Federal Magistrate Wilson found that the Tribunal considered the relevant test, and reached a conclusion that was open to it on the evidence.

Formal decision

The grounds of appeal argued by the Commission were rejected. The appeal was dismissed.

Editorial note

The Court's positive reference to *Repatriation Commission v Butcher* indicates that a distinction is starting to develop in the case law on section 24(1)(c). Specifically, that a more general characterisation of remunerative work the veteran is able to undertake is required.

While *Edmonds* case does not mention the decision of the Full Court in *Butcher* it should be noted that Tamberlin, Nicholson and Tracey JJ agreed with the primary judge's findings on the section 24 issue. Specifically, 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.

In a previous edition of *VeRBosity* (Volume 22 No 4) it was suggested that following *Butcher's*⁵⁴ case the words 'substantive remunerative work' in the context of section 24(1)(c) might have a different shade of meaning. Specifically, that 'substantive remunerative work' indicates that the type of work has a separate and independent existence from other remunerative work undertaken by the person. The case of *Edmonds* would lend support to this view.

Further reading: Please see 'Special rate cases: 1986 to 2006' in *VeRBosity* Volume 22 No 4 at pages 140 to 149 and *VeRBosity* Volume 23 No 1 pages 35 to 36 for further discussion regarding *Butcher's* case.

⁵⁴ [2007] FCAFC 36

Statements of Principles issued by the Repatriation Medical Authority

January to 30 June 2008

Number of Instrument	Description of Instrument
1 & 2 of 2008	Revocation of Statements of Principles (Instruments Nos 233 & 234 of 1995) and determination of Statements of Principles concerning malignant neoplasm of the urethra and death from malignant neoplasm of the urethra .
3 & 4 of 2008	Revocation of Statements of Principles (Instruments Nos 54 & 55 of 1994) and determination of Statements of Principles concerning cut, stab, abrasion and laceration and death from cut, stab, abrasion and laceration .
5 & 6 of 2008	Revocation of Statements of Principles (Instruments Nos 3 & 4 of 1999 as amended by Instrument No. 54 & 55 of 1999) and determination of Statements of Principles concerning posttraumatic stress disorder and death from posttraumatic stress disorder .
7 & 8 of 2008	Revocation of Statements of Principles (Instruments 33 & 34 of 1994, as amended by Instrument Nos. 223 & 224 of 1995 and 9 & 10 of 2002,) and determination of Statements of Principles concerning cholelithiasis and death from cholelithiasis .
9 & 10 of 2008	Amendment of Statements of Principles (Instruments Nos 11 & 12 of 2004) concerning diabetes mellitus .
11 & 12 of 2008	Amendment of Statements of Principles (Instruments Nos 35 & 36 of 2003, as amended by Instrument No. 3 & 4 of 2004) concerning hypertension .
13 & 14 of 2008	Revocation of Statements of Principles (Instruments Nos. 67 & 68 of 1994, as amended by Instrument No. 87 of 1997 and No. 281 of 1995) and determination of Statements of Principles concerning diverticular disease of the colon and death from diverticular disease of the colon .
15 & 16 of 2008	Revocation of Statements of Principles (Instruments Nos 78 & 79 of 1998) and determination of Statements of Principles concerning drug dependence and drug abuse and death from drug dependence and drug abuse .
17 & 18 of 2008	Revocation of Statements of Principles (Instruments Nos 76 & 77 of 1998) and determination of Statements of Principles concerning alcohol dependence and alcohol abuse and death from alcohol dependence and alcohol abuse .
19 & 20 of 2008	Revocation of Statements of Principles (Instruments Nos. 133 & 134 of 1995) and determination of Statements of Principles concerning benign prostatic hyperplasia and death from benign prostatic hyperplasia .
21 & 22 of 2007	Revocation of Statements of Principles (Instruments Nos 33 & 34 of 1997) and determination of Statements of Principles concerning spasmodic torticollis and death from spasmodic torticollis .
23 & 24 of 2008	Revocation of Statements of Principles (Instruments Nos 89 & 90 of 1996) and determination of Statements of Principles concerning polymyalgia rheumatica and death from polymyalgia rheumatica .

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- 25 & 26 of 2008 Revocation of Statements of Principles (Instruments Nos 128 & 129 of 1996) and determination of Statements of Principles concerning **bipolar disorder** and **death from bipolar disorder**.
- 27 & 28 of 2008 Revocation of Statements of Principles (Instruments Nos 17 & 18 of 2007) and determination of Statements of Principles concerning **depressive disorder** and **death from depressive disorder**.
- 29 & 30 of 2008 Revocation of Statements of Principles (Instruments Nos. 56 & 57 of 1994, as amended by Instrument No. 277 & 278 of 1995,) and determination of Statements of Principles concerning **analgesic nephropathy** and **death from analgesic nephropathy**.
- 31 & 32 of 2008 Revocation of Statements of Principles (Instruments Nos 141 & 142 of 1995) and determination of Statements of Principles concerning **smallpox** and **death from smallpox**.
- 33 & 34 of 2007 Revocation of Statements of Principles (Instruments Nos 182 & 183 of 1995) and determination of Statements of Principles concerning **benign neoplasm of the eye and adnexa** and **death from benign neoplasm of the eye and adnexa**.
- 35 & 36 of 2008 Amendment of Statements of Principles (Instruments Nos 13 & 14 of 2006) concerning **soft tissue sarcoma**.
- 37 & 38 of 2008 Revocation of Statements of Principles (Instruments Nos 57 & 58 of 1996) and determination of Statements of Principles concerning **Adjustment disorder**.
- 39 & 40 of 2008 Revocation of Statements of Principles (Instruments Nos 37 & 38 of 2001 as amended by 32 & 33 of 2002) and determination of Statements of Principles concerning **Acquired cataract**.
- 39 & 40 of 2008 Revocation of Statements of Principles (Instruments Nos 37 & 38 of 2001 as amended by 32 & 33 of 2002) and determination of Statements of Principles concerning **Acquired cataract**.
- 41 & 42 of 2008 Revocation of Statements of Principles (Instruments Nos 26 & 27 of 2004) and determination of Statements of Principles concerning **Haemorrhoids**.
- 43 & 44 of 2008 Revocation of Statements of Principles (Instruments Nos 109 & 110 of 1995 as amended by 193 & 194 of 1995) and determination of Statements of Principles concerning **Sickle-cell disorder**.
- 45 & 46 of 2008 Revocation of Statements of Principles (Instruments Nos 1 & 2 of 1997) and determination of Statements of Principles concerning **Relapsing polychondritis**.
- 47 & 48 of 2008 Determination of Statements of Principles concerning **Eating disorder**.
- 49 of 2008 Amendment of Statements of Principles (Instruments No 4 of 2008) concerning **cut, stab, abrasion and laceration**.
- 50 of 2008 Amendment of Statements of Principles (Instruments No 26 of 2008) concerning **bipolar disorder**.
- 51 of 2008 Amendment of Statements of Principles (Instruments No 13 of 2008) concerning **diverticular disease of the colon**.

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 2008

Description of disease or injury	SoPs under consideration	Gazetted
Accidental hypothermia	<i>Instrument Nos. 376/95 & 377/95</i>	27-06-07
Accommodation disorder	<i>Instrument Nos. 296/95 & 297/95</i>	2-05-07
Acoustic neuroma	<i>Instrument Nos 67/96 & 68/96</i>	25-06-08
Acute blepharitis	<i>Instrument Nos.115/95 & 116/95 as amended by 19/04 & 20/04</i>	25-06-08
Anal fissure	<i>Instrument Nos 247/95 & 248/95 as amended by 11/97 & 12/97</i>	25-06-08
Acute pancreatitis	<i>Instrument Nos 45/97 & 46/97 as amended by 74/98 & 75/98 & 41/03 & 42/03</i>	25-06-08
Acute sinusitis	<i>Instrument Nos. 209/95 & 210/95 as amended by 328/95 & 329/95</i>	27-06-07
Addison's disease	—	20-12-06
Alcohol dependence and abuse	<i>Instrument Nos. 17/08 & 18/08</i>	25-06-08
Alzheimer's disease	<i>Instrument Nos. 17/01 & 18/01</i>	28-01-01
Ancylostomiasis	<i>Instrument Nos. 137/95 & 138/95</i>	2-05-07
Animal envenomation	<i>Instrument Nos. 162/95 & 163/95</i>	2-05-07
Anxiety disorder	<i>Instrument Nos. 1/00 & 2/00</i>	1-09-04
Ascariasis	<i>Instrument Nos. 135/95 & 136/95</i>	2-05-07
Bronchiectasis	<i>Instrument Nos. 59/01 & 60/01</i>	20-12-06
Bronchiolitis obliterans organising pneumonia -		30-04-08
Berger's disease	<i>Instrument Nos. 73/95 & 74/95</i>	2-05-06
Cardiac myxoma	<i>Instrument Nos. 13/98 & 14/98</i>	28-06-06
Cerebral meningioma	<i>Instrument Nos. 207/95 & 208/95</i>	2-05-07
Cervical spondylosis	<i>Instrument Nos. 33/05 & 34/05</i>	16-11-05
Chilblains	<i>Instrument Nos. 265/95 & 266/95</i>	2-05-07
Chronic blepharitis	<i>Instrument Nos. 117/95 & 118/95 as amended by 21/04 & 22/04</i>	25-06-08
Chronic bronchitis & emphysema	<i>Instrument Nos 30/04 & 31/04</i>	20-10-04
Chronic rhinosinusitis	-	14-11-08
Chronic sinusitis	<i>Instrument Nos 21/01 & 22/03</i>	14-11-07
Coeliac disease	<i>Instrument Nos 17/97 & 18/97</i>	25-06-08
Conductive hearing loss	<i>Instrument Nos 19/96 & 20/96</i>	25-06-08
Conjunctivitis	<i>Instrument Nos 111/96 & 112/96</i>	25-06-08
Contact dermatitis	<i>Instrument Nos 65/97 & 66/97 as amended by 23/04 & 24/04</i>	25-06-08
Cushing's syndrome	<i>Instrument Nos. 249/95 & 250/95</i>	2-05-07
Deep vein thrombosis	<i>Instrument Nos. 5/01 & 6/01 as amended by 38/04 & 39/04</i>	8-11-06
Dental malocclusion	<i>Instrument Nos. 372/95 & 373/95</i>	27-06-07
Dislocation	<i>Instrument Nos. 290/95 & 291/95</i>	2-05-07

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Description of disease or injury	SoPs under consideration	Gazetted
Effects of lightning	<i>Instrument Nos 151/95 & 152/95 as amended by 197/95 & 198/95</i>	2-05-07
Extrinsic allergic alveolitis	<i>Instrument Nos 57/97 & 58/97</i>	25-06-08
Fibromuscular dysplasia	<i>Instrument Nos. 51/97 & 52/97</i>	28-06-06
Fibrosing alveolitis	-	14-11-07
Frostbite	<i>Instrument Nos. 166/95 & 167/95</i>	2-05-07
Gout	<i>Instrument Nos.11/00 & 12/00 as amended by 43/03 & 44/03</i>	09-01-08
Haemochromatosis	<i>Instrument Nos.5/97 & 6/97</i>	25-06-08
Hepatitis B	<i>Instrument Nos 11/99 & 12/99</i>	8-11-06
Hepatitis C	<i>Instrument Nos 43/95 & 44/95 as amended by 9/97 & 10/97</i>	8-11-06
Hepatitis D	<i>Instrument Nos 45/95 & 46/95</i>	8-11-06
Herpes simplex	<i>Instrument Nos 342/95 & 343/95</i>	27-06-07
Human T cell lymphatic virus type 1	<i>Instrument Nos 51/96 & 52/96</i>	25-06-08
Human immunodeficiency virus	<i>Instrument Nos 1/96 & 2/96</i>	25/06/08
Idiopathic fibrosing alveolitis	<i>Instrument Nos 15/98 & 16/98</i>	15-06-05
Idiopathic thrombocytopaenic purpura	<i>Instrument Nos. 19/97 & 20/97</i>	28-06-06
Immersion foot	<i>Instrument Nos. 168/95 & 169/95</i>	2-05-07
Influenza	<i>Instrument Nos. 267/95 & 268/95</i>	2-05-07
Internal derangement of the knee	<i>Instrument Nos 59/97 as amended by 96/97 & 60/97.</i>	25-06-2008
Intervertebral disc prolapse	<i>Instrument Nos. 39/07 & 40/07</i>	25-06-08
Irritable bowel syndrome	<i>Instrument Nos 103/96 & 104/96</i>	25-06-08
Kaposi's sarcoma	<i>Instrument Nos 159/96 & 160/96</i>	25-06-08
Lumbar spondylosis	<i>Instrument Nos. 37 & 38 of 2005</i>	25-06-08
Macular degeneration	<i>Instrument Nos. 25 and 26 of 2003</i>	1-03-06
Malaria	<i>Instrument Nos. 172/95 & 173/95</i>	2-05-07
Malignant neoplasm of the brain	<i>Instrument Nos 17/03 & 18/03</i>	8-11-06
Malignant neoplasm of the cerebral meninges	<i>Instrument Nos 205/95 & 206/95</i>	2-05-07
Malignant neoplasm of the cervix	<i>Instrument Nos 41/97 & 42/97</i>	25-06-08
Malignant neoplasm of the eye	<i>Instrument Nos 64/95 & 65/95</i>	10-11-99
Malignant neoplasm of the liver	<i>Instrument Nos 171/96 & 172/96</i>	8-11-06
Malignant neoplasm of the nasopharynx	<i>Instrument Nos 167/96 & 168/96</i>	25-06-08
Malignant neoplasm of the ovary	<i>Instrument Nos 43/97 & 44/97</i>	27-06-07
Malignant neoplasm of the renal pelvis	<i>Instrument Nos 155/95 & 156/95</i>	27-06-07
Malignant neoplasm of the ureter	<i>Instrument Nos 155/95 & 156/95</i>	27-06-07
Malignant neoplasm of the urethra	<i>Instrument Nos. 233/95 & 234/95</i>	28-06-06
Metatarsalgia	<i>Instrument Nos 39/96 & 40/96</i>	25-06-08
Methaemoglobinemia	<i>Instrument Nos. 284/95 & 285/95</i>	2-05-07
Migraine	<i>Instrument Nos. 74/99 & 75/99</i>	30-08-06
Nephrolithiasis	<i>Instrument Nos. 178/95 & 179/95</i>	2-05-07
Non fatal effects of electric shock & death from electrocution	<i>Instrument Nos. 149/95 & 150/95</i>	02-05-07
Non-Hodgkin's lymphoma	<i>Instrument Nos. 37/03 & 38/03</i>	20-12-06
Obstructive neuropathy	<i>Instrument Nos 87/96 & 88/96</i>	25-06-08

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Description of disease or injury	<i>SoPs under consideration</i>	Gazetted
Opisthorchiasis	<i>Instrument Nos. 5/95 & 6/95 as amended by 125/95</i>	28-06-06
Osteoarthritis	<i>Instrument Nos. 31/05 & 32/05</i>	20-12-06
Panic disorder	<i>Instrument Nos. 9/99 & 10/99 as amended by 58/99 & 59/99</i>	8-11-06
Personality disorder	<i>Instrument Nos. 143/95 & 144/95 as amended by 13/97 & 14/97</i>	8-11-06
Photocontact dermatitis	<i>Instrument Nos 63/97 & 64/97</i>	25-06-08
Pilonidal sinus	<i>Instrument Nos. 176/95 & 177/95 as amended by 312/95 & 313/95</i>	2-05-07
Poisoning and toxic reaction from plants	<i>Instrument Nos. 164/95 & 165/95</i>	2-05-07
Polyarteritis nodosa	<i>Instrument Nos 157/96 & 158/96</i>	25-06-08
Posterior advential heel bursitis	<i>Instrument Nos 55/96 & 56/96</i>	25-06-08
Pruritis ani	<i>Instrument Nos 41/96 & 42/96</i>	25-06-08
Rheumatic heart disease	<i>Instrument Nos. 93/95 & 94/95</i>	2-05-07
Rheumatoid arthritis	<i>Instrument Nos. 32/04 & 33/04</i>	30-08-06
Ross River Fever	<i>Instrument Nos 79/97 & 80/97</i>	25-06-08
Sarcoidosis	<i>Instrument Nos. 288/95 & 289/95</i>	28-06-06
Sensorineural hearing loss	<i>Instrument Nos 29/01 & 30/01</i>	25-06-08
Schistosomiasis	<i>Instrument Nos. 255/95 & 256/95</i>	2-05-07
Schizophrenia	<i>Instrument Nos. 132/96 & 133/96</i>	8-11-06
Scrub typhus	<i>Instrument Nos. 25/95 & 26/95</i>	27-06-07
Sinus barotrauma	<i>Instrument Nos. 316/95 & 317/95</i>	2-05-07
Strongyloidiasis	<i>Instrument Nos. 282/95 & 283/95</i>	2-05-07
Subarachnoid haemorrhage	<i>Instrument Nos. 39/03 & 40/03</i>	28-02-07
Suicide or attempted suicide	<i>Instrument Nos. 71/96 & 72/96 as amended by 177/96 & 178/96</i>	8-11-06
Tension type headache	<i>Instrument Nos. 76/99 & 77/99</i>	30-04-08
Trigeminal neuralgia	<i>Instrument Nos. 23/95 & 24/95</i>	28-06-06
Trigeminal neuropathy	<i>Instrument Nos. 23/95 & 24/95</i>	30-04-08
Ureteric calculus	<i>Instrument Nos. 180/95 & 181/95</i>	2-05-07
Varicocele	<i>Instrument Nos 124/96 & 125/96</i>	25-06-08

AAT and Court decisions – January to June 2008

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*

Carcinoma

Adenocarcinoma of the kidney
- exposure to respirable asbestos fibres
Baverstock, G (Navy)
[2008] AATA 467 5 June 2008

Brain
- kind of death
Taylor, D (Army) (death)
[2008] AATA 17 9 January 2008

Colorectum
- alcohol
Bott, M (Army) (death)
[2008] AATA 376 9 May 2008

Liver
- alcohol
Norton, L
[2008] AATA 1 2 January 2008

Oesophagus
- smoking
Dyson, A (RAAF) (death)
[2008] AATA 296 14 April 2008

Prostate
- kind of death
Reardon, M (Army) (death)
[2008] AATA 46 16 January 2008
- animal fat
Bridle, D (Army) (death)
[2008] AATA 31 14 January 2008
Dowde, E (Navy) (death)
[2008] AATA 136 21 February 2008
Tunks, V (Madgwick J)
[2008] FCA 521 18 April 2008

Circulatory disorder

Aortic stenosis
- hypertension
Meredith, M
[2008] AATA 499 17 June 2008

Cardiomyopathy
- infiltration of the myocardium
Heathcote, P (Navy)(death)
[2008] AATA 396 14 May 2008

Cerebrovascular Accident
- hypertension
Meredith, M
[2008] AATA 499 17 June 2008
- smoking
Dillon, N (Navy) (death)
[2008] AATA 276 7 April 2008

Heart failure (non SoP)
- Smoking
Hill, M (RAAF)(death)
[2008] AATA 12 8 January 2008

hypertension
- alcohol
Boyd, A (Navy)
[2008] AATA 379 12 May 2008
Kaluza, S (RAAF)
[2008] AATA 392 14 May 2008
- clinically significant depressive disorder
Blake, P (Navy)
[2008] AATA 78 30 January 2008
- salt
Meredith, M
[2008] AATA 499 17 June 2008

ischaemic heart disease
- depressive disorder
Mitchell, N (RAAF) (death)
[2008] AATA 294 29 February 2008
- hypertension
Meredith, M
[2008] AATA 499 17 June 2008
- smoking
Bain, A (Navy)
[2008] AATA 314 17 April 2008

Death

kind of death
- correct diagnosis
Taylor, D (Army) (death)
[2008] AATA 17 9 January 2008
Reardon, M (Army) (death)
[2008] AATA 46 16 January 2008
Munday, C (death) (Army)
[2008] AATA 398 15 May 2008

**AAT and Court decisions –
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Collins, J (RAAF) (death)
[2008] AATA 351 2 May 2008
- motor vehicle accident

Colacino, M (Army) (death)
[2008] AATA 416 21 May 2008
- suicide
- adjustment disorder caused by fear of
contracting asbestosis

Cox, D (death) (Navy)
[2008] AATA 368 6 May 2008

Dependant

Person who stands in the position of a parent

Graff, P
[2008] AATA 102 8 February 2008

Digestive disorders

Cirrhosis of the liver

- alcohol

Horbury, E (Army) (death)
[2007] AATA 6 4 January 2008

Eligible service

Period of operational service

- supernumerary flight crew Vietnam

Hanrahan, P (RAAF)
[2008] AATA 369 7 May 2008

qualifying service

- whether incurred danger from hostile
forces of the enemy

- Japanese bombing raids

Long, W (Army)
[2008] AATA 139 22 February 2008

- unexploded bombs in Townsville

Poppi, U (Army)
[2008] AATA 480 10 June 2008

Entitlement and liability

- eligibility for treatment

- nuclear test participant

Brinkworth, D (RAAF)
[2008] AATA 174 29 February 2008

Evidence and proof

relevant evidence

- consideration of oral / statement evidence

Drew (Logan J)
[2008] FCA 537 15 April 2008

standard of proof for determining kind of injury
or disease

- reasonable satisfaction (balance of
probabilities)

Hill (Mansfield J)
[2008] FCA 50 19 February 2008

Gastrointestinal disorder

gastro-oesophageal reflux disease

- alcohol

Bain, A (Navy)
[2008] AATA 314 17 April 2008

irritable bowel syndrome

- psychiatric disorder

- depressive disorder
Wootton, T (RAAF)
[2008] AATA 355 2 May 2008

Injury or disease

otitic barotraumas

- damage to the middle

- diving accident

Landy, R (Navy)
[2008] AATA 213 18 March 2008

Perforated ear drum

- diving accident

Landy, R (Navy)
[2008] AATA 213 18 March 2008

Jurisdiction and powers

Application before AAT

- meaning and effect of concession

Warren (Lindgren, Bennett, Logan JJ)
[2008] FCAFC 64 24 April 2008

Application before the VRB

- dismissal

Goulding, A
[2008] AATA 263 2 April 2008

Estoppel

- res Judicata

Godwin (Flick J)
[2008] FCA 576 30 April 2008

Scope of s31 review

Godwin (Flick J)
[2008] FCA 576 30 April 2008

**AAT and Court decisions –
January to June 2008**

**Endocrine / Nutritional /
Metabolic disorder**

Diabetes Mellitus
 - inability to undertake physical activity
 Falconer, R
 [2008] AATA 517 20 June 2008
 - Obesity
 Falconer, R
 [2008] AATA 517 20 June 2008
 Gout
 - alcohol
 Mann, W (Navy)
 [2008] AATA 163 27 February 2008
 Morbid obesity
 - excessive caloric intake
 Summers, F
 [2008] AATA 481 10 June 2008

Musculoskeletal disorder

Lumbar spondylosis
 - disordered joint mechanics
 Hall, I
 [2008] AATA 35 14 January 2008
 osteoarthritis
 - finger
 - trauma
 Masliczek, M (Army)
 [2008] AATA 251 31 March 2008
 -hip
 - trauma
 Hawksworth, R (Army)
 [2008] AATA 71 25 January 2008
 - knee
 - trauma
 Holt, R (Army)
 [2008] AATA 242 28 March 2008
 Rheumatoid arthritis
 - smoking
 Antony, A (Army)
 [2008] AATA 269 4 April 2008
 Spondylolisthesis
 - trauma
 Blake, P (Navy)
 [2008] AATA 78 30 January 2008

Neurological disorder

Alzheimer's disease
 Munday, C (death) (Army)
 [2008] AATA 398 15 May 2008

Practice and procedure

Application before AAT
 - meaning and effect of concession
 Warren (Lindgren, Bennett, Logan JJ)
 [2008] FCAFC 64 24 April 2008
 Application before the VRB
 -dismissal
 Goulding, A
 [2008] AATA 263 2 April 2008
 Scope of s31 review
 Godwin (Flick J)
 [2008] FCA 576 30 April 2008

Psychiatric disorder

adjustment disorder
 - psychosocial stressor
 - clinical worsening disease (bronchiectasis)
 Doyle, J (Army)
 [2008] AATA 148 26 February 2008
 alcohol abuse or dependence
 - diagnosis
 Easton, A (Army)
 [2008] AATA 524 24 June 2008
 Boyd, A (Navy)
 [2008] AATA 379 12 May 2008
 Phillips, M (Navy)
 [2008] AATA 466 5 June 2008
 - category 1A / 1B stressor
 - confrontation with Vietnamese Policeman
 Antony, A (Army)
 [2008] AATA 269 4 April 2008
 - critically injured cyclist
 Antony, A (Army)
 [2008] AATA 269 4 April 2008
 - morgue and coffin transportation
 Antony, A (Army)
 [2008] AATA 269 4 April 2008
 - experiencing a severe stressor
 - boarding party incident
 Mann, W (Navy)
 [2008] AATA 163 27 February 2008
 - casualties being unloaded from helicopters
 Bodsworth, R
 [2008] AATA 169 28 February 2008
 - scare charge / gun turret incident
 Pike, A (Navy)
 [2008] AATA 235 27 March 2008

**AAT and Court decisions –
January to June 2008**

- psychiatric disorder			- severe psychosocial stressor		
- anxiety disorder			- fires on shore Vung Tau Harbour		
Hughes, J (Army)			Patnaude, M (Navy)		
[2008] AATA 253	1 April 2008		[2008] AATA 255	1 April 2008	
Turnbridge, R (Navy)			- general war zone		
[2008] AATA 370	6 May 2008		Patnaude, M (Navy)		
- depressive disorder			[2008] AATA 255	1 April 2008	
Tanzer, B (RAAF)			- hearing a rifle shot or shots		
[2008] AATA 133	20 February 2008		Turnbridge, R (Navy)		
Nichols, R (Navy)			[2008] AATA 370	6 May 2008	
[2008] AATA 183	4 March 2008		- noise of jets and helicopters		
anxiety disorder			Patnaude, M (Navy)		
- clinical onset			[2008] AATA 255	1 April 2008	
Hughes, J (Army)			- playing cards on a casket		
[2008] AATA 253	1 April 2008		Kaluza, S (RAAF)		
- diagnosis			[2008] AATA 392	14 May 2008	
Phillips, M (Navy)			- scare charge		
[2008] AATA 466	5 June 2008		Pike, A (Navy)		
- category 1A / 1B stressor			[2008] AATA 235	27 March 2008	
- boarding party incident			Turnbridge, R (Navy)		
Mann, W (Navy)			[2008] AATA 370	6 May 2008	
[2008] AATA 163	27 February 2008		- transporting ill and injured soldiers		
- casualties unloaded from helicopters			Kaluza, S (RAAF)		
Bodsworth, R			[2008] AATA 392	14 May 2008	
[2008] AATA 169	28 February 2008		depressive disorder		
- death of a friend during Tet Offensive			- diagnosis		
Masliczek, M (Army)			Collins, M (RAAF)		
[2008] AATA 251	31 March 2008		[2008] AATA 373	7 May 2008	
- firing of rockets and mortars			Boyd, A (Navy)		
Masliczek, M (Army)			[2008] AATA 379	12 May 2008	
[2008] AATA 251	31 March 2008		- category 1A or 1B stressor		
- rocket attack			- altercation with Thai police		
Dadge, K (RAAF)			Tanzer, B		
[2008] AATA 473	6 June 2008		[2008] AATA 133	20 February 2008	
- threatened with handgun by a taxi driver			- chronic pain		
Masliczek, M (Army)			Blake, P (Navy)		
[2008] AATA 251	31 March 2008		[2008] AATA 78	30 January 2008	
- witnessed body of friend			- death of a friend during Tet Offensive		
Masliczek, M (Army)			Masliczek, M (Army)		
[2008] AATA 251	31 March 2008		[2008] AATA 251	31 March 2008	
- witnessed bodies of two Vietnamese girls			- firing of rockets and mortars		
Masliczek, M (Army)			Masliczek, M (Army)		
[2008] AATA 251	31 March 2008		[2008] AATA 251	31 March 2008	
- major illness or injury (clinical worsening)			- threatened with handgun by a taxi driver		
- mesothelioma			Masliczek, M (Army)		
Todd, G (Navy)			[2008] AATA 251	31 March 2008	
[2008] AATA 264	2 April 2008		- witnessed body of friend		
- tinnitus			Masliczek, M (Army)		
Taylor, P			[2008] AATA 251	31 March 2008	
[2008] AATA 318	18 April 2008				

**AAT and Court decisions –
January to June 2008**

- witnessed bodies of two Vietnamese girls Masliczek, M (Army) [2008] AATA 251 31 March 2008	- experiencing a severe stressor - aircraft accident Jenkins, C (Navy) [2008] AATA 359 5 May 2008
- clinical onset Midavaine, F (Army) 27 June 2008 [2008] AATA 545	- star shell incident Jimeson (Navy) [2007] AATA 6 4 January 2008
Wootton, T (RAAF) [2008] AATA 355 2 May 2008	- depth charges exploding Bain, A (Navy) [2008] AATA 314 17 April 2008
-experiencing a severe psychosocial stressor - accused of racist treatment of subordinate Collins, M (RAAF) [2008] AATA 373 7 May 2008	
- surgical removal of haemorrhoids Nichols, R (Navy) [2008] AATA 183 4 March 2008	
Panic disorder - scare charge / gun turret incident Pike, A (Navy) [2008] AATA 235 27 March 2008	
post traumatic stress disorder - diagnosis Patnaude, M (Navy) [2008] AATA 255 1 April 2008	
Masliczek, M (Army) [2008] AATA 251 31 March 2008	
Easton, A (Army) [2008] AATA 524 24 June 2008	
Midavaine, F (Army) [2008] AATA 545 27 June 2008	
Pike, A (Navy) [2008] AATA 235 27 March 2008	
Boyd, A (Navy) [2008] AATA 379 12 May 2008	
Kaluza, S (RAAF) [2008] AATA 392 14 May 2008	
Phillips, M (Navy) [2008] AATA 466 5 June 2008	
- category 1A / 1B stressor - aircraft accident Jenkins, C (Navy) [2008] AATA 359 5 May 2008	
- confrontation with Vietnamese Policeman Antony, A (Army) [2008] AATA 269 4 April 2008	
- critically injured cyclist Antony, A (Army) [2008] AATA 269 4 April 2008	
- morgue and coffin transportation Antony, A (Army) [2008] AATA 269 4 April 2008	
	Remunerative work & special rate of pension
	ceased to engage in remunerative work - compulsory retirement age Craig, A [2008] AATA 70 25 January 2008
	- gambling debts Cadd, J [2008] AATA 69 25 January 2008
	kind of work the person was undertaking - arts industry - nude life model Craig, A [2008] AATA 70 25 January 2008
	- clerical or administrative work - insurance sales Mackey, M [2008] AATA 81 31 January 2008
	- mail sorter / postal worker Clark, R [2008] AATA 126 19 February 2008
	- officer manager Tunny, N [2008] AATA 243 28 March 2008
	- government placements Gutteridge, G [2008] AATA 168 28 February 2008
	- public servant Tomlinson, M [2008] AATA 219 19 March 2008
	- warehouse manager/ night auditor Hillian, B [2008] AATA 435 27 May 2008
	-hospitality / personal services - publican / hotel manager Bucknell, T [2008] AATA 39 14 January 2008
	- sports club manager Cadd, J [2008] AATA 69 25 January 2008

**AAT and Court decisions –
January to June 2008**

- Management		- motivation enhance success of application
- senior manager agricultural industry		Craig, A
Munro, M		[2008] AATA 70 25 January 2008
[2008] AATA 146 26 February 2008		whether prevented by war-caused disabilities alone
- management paper / printing industry		- age
Higgs, N		Higgs, N
[2008] AATA 233 26 March 2008		[2008] AATA 233 26 March 2008
- Military		- effects of non-accepted disabilities
- boiler attendant		Mackey, M
Gutteridge, G		[2008] AATA 81 31 January 2008
[2008] AATA 168 28 February 2008		Doherty, R
- storeman in the Logistics Corps		[2008] AATA 99 7 February 2008
Doherty, R		Clark, R
[2008] AATA 99 7 February 2008		[2008] AATA 126 19 February 2008
- Retail work		Gutteridge, G
Bainbridge, N		[2008] AATA 168 28 February 2008
[2008] AATA 167 28 February 2008		Tomlinson, M
- Trade / manual work		[2008] AATA 219 19 March 2008
- communications tech / forklift driver		Antony, A (Army)
Bamford, T		[2008] AATA 269 4 April 2008
[2008] AATA 289 4 April 2008		Macklin, M
- engineering fitter and turner		[2008] AATA 496 17 June 2008
McLaughlin, B		Haffert, H
[2008] AATA 246 28 March 2008		[2008] AATA 512 16 June 2008
- Tree cutter		Hillian, B
Cousins, D		[2008] AATA 435 27 May 2008
[2008] AATA 67 24 January 2008		- gambling debts
- air-conditioning plumber		Cadd, J
Baljas, A		[2008] AATA 69 25 January 2008
[2008] AATA 225 20 March 2008		- redundancy / separation package
- transport industry		Bucknell, T
- driver		[2008] AATA 39 14 January 2008
Antony, A (Army)		Macklin, M
[2008] AATA 269 4 April 2008		[2008] AATA 496 17 June 2008
remunerative work		McLaughlin, B
- general characterisation rather than specific		[2008] AATA 246 28 March 2008
Edmonds (Wilson FM)		- relocation
[2008] FMCA 13 29 January 2008		Tomlinson, M
whether genuinely seeking to engage in remunerative work		[2008] AATA 219 19 March 2008
- attending Centrelink		- time out of workforce
Bainbridge, N		Bamford, T
[2008] AATA 167 28 February 2008		[2008] AATA 289 4 April 2008
- failure to complete required course		- work place injury
Cousins, D		Cousins, D
[2008] AATA 67 24 January 2008		[2008] AATA 67 24 January 2008
- Job search applications		Baljas, A
McLaughlin, B		[2008] AATA 225 20 March 2008
[2008] AATA 246 28 March 2008		

**AAT and Court decisions –
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Respiratory disorder

Bronchiectasis
 - collapse or fibrosis of the segment of the lung /
 clinical worsening
 Doyle, J (Army)
 [2008] AATA 148 26 February 2008

Chronic obstructive airways disease
 - smoking
 Falconer, M (Army) (death)
 [2008] AATA 418 21 May 2008

Sleep apnoea
 - alcohol
 Gilkinson, D (Navy)
 [2008] AATA 364 6 May 2008

- chronic obstruction of the upper airways
 Bowser, G (Army)
 [2008] AATA 506 18 June 2008

Gilkinson, D (Navy)
 [2008] AATA 364 6 May 2008

Sense Organs

otitis media
 - rupture of the tympanic membrane
 - perforated ear drum
 Landy, R (Navy)
 [2008] AATA 213 18 March 2008

otitis externa
 - chronic suppurative otitis media
 - perforated ear drum
 Landy, R (Navy)
 [2008] AATA 213 18 March 2008

Service pension

Invalidity service pension
 - permanently incapacitated for work
 Hill (Mansfield J)
 [2008] FCA 50 19 February 2008

Chau, T L
 [2008] AATA 470 6 June 2008

pension loans scheme
 - pensioner concession card
 - assets test
 Gibson, D
 [2008] AATA 431 11 April 2008

Skin and Subcutaneous Tissue

Psoriasis
 - clinically significant psychiatric disorder
 Bain, A (Navy)
 [2008] AATA 314 17 April 2008

Words and phrases

clinical onset
 Hill (Mansfield J)
 [2008] FCA 50 19 February 2008

Newson (Edmonds J)
 [2008] FCA 401 31 March 2008

Riley (Edmonds J)
 [2008] FCA 531 21 April 2008

dependent
 - Person who stands in the position of a parent
 Graff, P
 [2008] AATA 102 8 February 2008

false
 - s31(4) 'objectively incorrect'
 Godwin (Flick J)
 [2008] FCA 576 30 April 2008

inability to obtain appropriate clinical mgmt
 Money (Stone J)
 [2008] FCA 118 4 March 2008

Remunerative work the veteran is able to undertake
 Edmonds (Wilson FM)
 [2008] FMCA 13 29 January 2008

unintended consequence of treatment
 Wood, M
 [2007] AATA 2097 21 Dec 2007

