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### Editor's notes

This annual edition of *VeRBosity* contains reports on all of the Federal Court decisions relating to veterans' matters in the 2009 calendar year.

The Full Federal Court's decisions in *Hill* and *Collins* deal with the issue of "kind of death" and provide clear guidance that the "kind of death" met by a person is the medical cause or causes of death, including the contributing or underlying medical cause of death.

In *Money* the Full Court deals with "inability to obtain appropriate clincial management". In addition, Justice Dowsett's judgment sets out three helpful steps for approaching a "contention of connection" in cases where a person has rendered defence service.

We have continuously monitored over 150 decisions published by the AAT in 2009 relating to veterans' matters, and included ten reports in this edition. The three published decisions dealing with claims under the MRCA will be of particular interest for readers.

This edition of *VeRBosity* also includes a new "questions and answers" section. We would welcome any questions from readers, which can be sent to: [contact@vrb.gov.au](mailto:contact@vrb.gov.au).

Don't forget to look out for "editorial notes", "practical tips", "further reading" and "appeal alerts" which appear at the end of some case reports.

Katrina Harry  
Editor

## Determinations & instruments of allotment in 2009

### **Determination of Warlike Service – Operation Kruger**

The Minister for Defence Science and Personnel for the Minister for Defence recently determined that service rendered as a member of the Defence Force assigned for service with the ADF contribution to the provision of security to the Australian Embassy in Iraq on Operation KRUGER on and from 1 January 2009 in the specified area is warlike service for the purposes of the definition of “warlike service” in subsection 5C(1) of the *Veterans’ Entitlements Act 1986* (VEA).

### **Determination of Warlike Service - Operation Riverbank**

The Minister for Defence Science and Personnel for the Minister for Defence recently determined that service rendered as a member of the Defence Force assigned for service with the ADF contribution to the United Nations Assistance Mission in Iraq on Operation RIVERBANK on and from 21 July 2008 in the specified area is warlike service for the purposes of the definition of “warlike service” in subsection 5C(1) of the VEA.

### **New operational area for DAMASK VI area of operations**

A new operational area has been added to Schedule 2 of the VEA to include the Operation DAMASK VI area of operations for the period of 13 to 19 January 1993. The Vice Chief of Defence Force has now retrospectively allotted for duty HMAS Canberra as part of Operation DAMASK VI during the period of 13 January to 19 January 1993. This change will give all 213 Australian Defence Force personnel who served on board the vessel during the period 13 – 19 January 1993 qualifying service under the VEA.

### **Determination of Warlike Service - Operation Slipper (11 October 2001 – 30 July 2009)**

The Minister for Defence Personnel, Materiel and Science for the Minister for Defence revoked the determination made under subsection 5C(1) of the VEA on 7 December 2001 in relation to Operation SLIPPER; and determined that service rendered as a member of the Australian Defence Force allotted for service on Operation SLIPPER during the period 11 October 2001 to 30 July 2009 in the Specified Areas is warlike service for the purposes of the definition of “warlike service” in subsection 5C(1) of the VEA.

**Determination of Warlike Service -  
Operation Slipper (31 July 2001 –  
Ongoing)**

The Minister for Defence Personnel, Materiel and Science for the Minister for Defence determined that service rendered as a member of the Australian Defence Force allotted for service on Operation SLIPPER on and from 31 July 2009 in the Specified Area is warlike service for the purposes of the definition of “warlike service” in subsection 5C(1) of the VEA.

**Military Rehabilitation and  
Compensation (Warlike Service)  
Determination 2009/2**

This Determination revokes the Military Rehabilitation and Compensation (Warlike Service) Determination 2009/1 by adding a new operation, Operation Riverbank in the Schedule, which sets out warlike service for the purposes of that Act. The schedule includes operations CATALYST, PALATE, SLIPPER, PALATE II, KRUGER and RIVERBANK.

**Military Rehabilitation and  
Compensation (Warlike Service)  
Determination 2009/3**

This Determination revokes and replaces the Military Rehabilitation and Compensation (Warlike Service) Determination 2009/2 to replace the existing list of six operations by adding an end date to Operation SLIPPER with its current area of operations (item 3) and adding a new Operation SLIPPER with an amended area of operations (item 7).

**Military Rehabilitation and  
Compensation  
(Pay-related Allowances)  
Determination 2009 (No 1)**

This Determination was tabled in the House of Representatives on 26 May 2009 and the Senate on 16 June 2009. It provides that the following allowances are taken to be a pay-related allowance for the purposes of the *Military Rehabilitation and Compensation Act 2004*:

- Allowance for Specialist Operations, and Special Forces Disability Allowance (commence on 13 December 2007)
- Flying and Flight Duties Allowance and Submarine Service Allowance (commence on 4 June 2008); and
- Reserve Allowance (commences on 1 July 2008).

The determination may be relevant when considering incapacity payments under MRCA.

**Military Rehabilitation and  
Compensation  
(Pay-related Allowances)  
Determination 2009 (No 2)**

This Determination was tabled in the House of Representatives and the Senate on 14 May 2009. It provides that the Trainee Allowance is taken to be a pay-related allowance for the purposes of the *Military Rehabilitation and Compensation Act 2004*.

The determination may be relevant when considering incapacity payments under MRCA. This Determination commenced on 8 January 2009.

# Legislative amendments

## Same-sex relationships legislation commences

On 1 July 2009, the Same-Sex Relationships (*Equal Treatment in Commonwealth Laws—General Law Reform*) Act 2008 (No. 144, 2008) (the Amending Act), came into force giving equal treatment to same-sex relationships.

The purpose of the Amending Act was to recognise, across the Australian Government, all de-facto couples, regardless of sexual orientation or gender and ensure that same-sex couples and their families have the same entitlement as opposite-sex defacto couples.

In relation to Veterans' Entitlements, the changes in the Amending Act mean that a person in a same-sex relationship is now entitled to claim a war widow(er)'s pension under the VEA or dependant's compensation under the MRCA.

The Amending Act provides for some changes of terms and definition in both the VEA and MRCA. A detailed discussion of the changes is set out below. However, one of the key definitional changes in the VEA is in relation to 'de facto' relationships rather than 'marriage-like' relationships.

Nonetheless, under section 11A of the VEA, the matters to be considered for de facto relationships are identical to those that formerly were required to be considered in relation to marriage-like relationships.

Also, in relation to the definition of a 'partner' in subsection 5(1) of the MRCA, subsection 5(2) now provides that section 11A of the VEA applies to the forming of the Commission's opinion about whether a person and a member are in a de facto relationship.

The definitions of 'child' and 'parent' have also been expanded to include the children and certain other dependants of same-sex couples or registered relationships. This means that a child of a person in such relationships is now entitled to the same dependant benefits as a child of a person in de facto relationships under the relevant legislation.

In addition, the amendments remove references to gender specific language. Generally, some of these language changes include:

- *marital* status now *relationship* status;
- *husband* and *wife* now *partner*;
- *father* or *mother* now *parent*; and
- *son* or *daughter* now *child*.

A discussion of some the key legislative amendments is set out below.

## Same-sex amendments to MRCA

### *Definition of a child*

The definition of a "child" has been inserted into section 5 of the MRCA. It has extended the range of persons who can be considered as the child of a person for the purposes of the MRCA.

*Definition of a parent*

The definition of a “parent” has also been inserted into section 5 of the MRCA to extend the range of persons who can be considered to be parent of a ‘child’ within the meaning of the key definition of ‘child’.

*Definition of a partner*

The words “of the opposite sex to the member” have been omitted from the definition of a “partner” in section 5 of the MRCA and the definition has been amended to extend the ordinary meaning of ‘partner’ to include:

- another individual (whether of the same or a different sex) with whom the member is in a relationship that is registered under a State or Territory law prescribed for the purposes of subsection 22B of the *Acts Interpretation Act* as a kind of relationship prescribed for the purposes of that subsection; and
- another individual who is, in the Commission’s opinion in a de facto relationship with the member and is not an ancestor, descendant, brother, sister, half-brother or half-sister of the member.

The effect of these amendments is that the same sex partner of a member is recognised for the purposes of the MRCA. This definition extends to married couples, and to opposite and same sex de facto couples.

*Definition of a stepchild*

The definition of a “stepchild” has also been inserted into section 5 of the MRCA to extend the range of persons who can be considered to be the ‘step child’ to include a person who would be the step child of a person who is the de facto partner of a parent of the child, except that the person and the parent are not legally married.

*Definition of a step-parent*

The definition of a “step-parent” has also been inserted into section 5 of the MRCA to extend the range of persons who can be considered to be the ‘step parent’ to include a person who would be the step-parent of someone who is the child of the de facto partner of the person, except that the person and the parent are not legally married.

*At the end of section 5*

New subsections 5(2) and 5(3) have been inserted into section 5 of the MRCA.

Subsection 5(2) provides that, for the purposes of the subparagraph (c)(i) of the definition of ‘partner’ in subsection 5(1), section 11A of the *Veterans’ Entitlements Act* 1986 applies to the forming of the Commission’s opinion about whether a person and a member are in a de facto relationship. This will provide criteria for the Commission to have regard to when forming an opinion whether two people are living together in a de facto relationship.

Subsection 5(3) provides that, for the purposes of subparagraph (c)(ii) of the definition of ‘partner’, a child who is, or ever has been, an adopted child of a person is taken to be a natural child of the person. This also operates to the effect that the adoptive parent of a child is taken to be the natural parent of a person. This amendment ensures that the adopted child of a member or adoptive parent of a member cannot be in a de facto relationship with a member because they would be considered an ancestor, brother or sister of a member.

#### ***Definition of dependent***

Section 15(2)(a) of the MRCA has been amended to replace gender-specific language with gender neutral language (such as replacing ‘son’ and ‘daughter’ with ‘child’). This allows a person who is a child of a person within the meaning of the key definition of ‘child’ to be considered a ‘dependant’ of that person for the purposes of the MRCA.

#### ***Adoptive relationships***

A new subsection 16(1) of the MRCA expands relationships referred to in paragraph 15(2)(a) of the definition of ‘dependant’ to include relationships by adoption and relationships that arise because of the definition of ‘child’. For example, in relation to a child, the other children of the parent are that child’s siblings.

Subsection 16(2) of the MRCA expands who may be considered to be a person’s relative for the purposes of paragraphs 215(f) and 218(g) of the MRCA. Members of a person’s family are taken to include:

- a partner of a person;
- a stepchild or an adopted child of a person, or someone of whom the person is a stepchild or adopted child, and
- someone who is a child of a person, or someone of whom the person is a child, because of the definition of ‘child’ in section 5 of the MRCA.

Paragraph 16(2)(d) provides that anyone else who would be a relative of a person because the persons in paragraphs 16(2)(a) to 16(2)(c) are taken into account is taken to be a relative of a person. For example, the child of a de facto partner of a person would be considered to be a relative of the person for the purposes of paragraphs 215(f) and 218(g) of the MRCA because of the definition of ‘child’.

#### ***Sections 18 and 80***

Section 18(1) and subsection 80(3) of the MRCA have been amended to replace the gender specific term ‘son or daughter’ with the gender neutral term ‘child’. This allows a person who is a child of a person within the meaning of the key definition of ‘child’ to be considered a ‘dependant’ of that person for the purposes of the MRCA.

#### ***Same-sex amendments to VEA***

##### ***Family relationships definitions***

The definition of ‘parent’ in section 5F(1) now has the meaning given by section 10A.

***Parent of a person***

The new section 10A is a definition of ‘parent’ that expands the classes of person that may be taken to be a parent of a child. The amendments add to the current definition of parent so that a person can be considered to be a parent of a person if that person is the person’s child because of the key definition of ‘child’.

***Definition of a stepchild***

The definition of ‘step child’ has been added to subsection 5F(1) and extends the range of persons who can be considered to be the ‘step child’ to include a person who would be the step child of a person who is the de facto partner of a parent of the child, except that the person and the parent are not legally married.

***Definition of a step-parent***

The definition of ‘step parent’ has been added to subsection 5F(1) and extends the range of persons who can be considered to be the ‘step parent’ to include a person who would be the step-parent of someone who is the child of the de facto partner of the person, except that the person and the parent are not legally married.

***Australian residence definitions***

The new subsection 5G(1AB) expands the nature and extent of family relationships a person has in Australia. Specifically, family relationships are taken to include:

- relationships between partners, and
- relationships of child and parent that are present if someone is the parent of a person under new section 10A.

The effect of these provisions is that relationships between partners and relationships of child and parent that are present if someone is the parent of a person under new section 10A are taken to be family relationships for the purposes of paragraph 5G(1A)(b).

***Definition of widow and widower***

The definition of widow and widower in section 5E(1) has been amended to remove references to gender. These amendments now provide that:

- a woman who was the partner of a person (whether male or female) immediately before they died is considered to be the widow of that person; or
- a man who was the partner of a person (whether male or female) immediately before they died is considered to be the widower of that person.

***Member of a couple***

Section 5E(2)(aa) has been inserted to provide for a person who is in a registered relationship—opposite sex or same sex—to be considered a ‘member of a couple’. This means that registration of a relationship is presumptive evidence as to whether a person is a member of a couple with another person, providing the couple are not living separately and apart from each other on a permanent basis.

Subparagraph 5E(2)(b)(i) has been amended by replacing the phrase 'of the opposite sex' with 'whether of the same sex or a different sex'. In addition, subparagraph 5E(2)(b)(iii) has been amended by replacing the term 'marriage like' with 'de facto'.

These amendments ensure that the definition of 'member of a couple', includes a same sex relationship as well as an opposite sex relationship.

### *Child of a veteran or other person*

New subsections 10(1) and (2) extend who can be considered a child of a veteran. This provision also removes gender specific terms such as 'woman' and 'mother'.

Subsection 10(1) provides that a reference to a child of a veteran or a deceased veteran is a reference to:

- a child or adopted child of the veteran
- a child who is the product of the relationship the veteran has or had as a couple with another person, or
- any other child who is, or was, wholly or substantially dependent on the veteran immediately before the veteran's death.

Subsection 10(2) requires that for the purposes of paragraph 10(1)(b), the child must be:

- the biological child of at least one person in the relationship, or
- born to a woman in the relationship.

### *De facto relationships*

Amendments to section 11A replace the term 'marriage like' with 'de facto'. Subparagraph 11A(c)(i) and subparagraph 11A(e)(iv) extend the meaning of the criteria to include:

- whether the people hold themselves out in a de facto relationship with each other, and
- whether the people see their relationship as a de facto relationship.

Further amendments were made to the VEA. Comprehensive coverage of all the amendments to the VEA can be obtained by viewing or downloading a copy of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 No 144, 2008*.

### **Extension of same-sex couples legislation**

In September 2009, regulations were made under the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* to entitle certain dependents of Defence Force members and veterans to certain benefits, where the member or veteran dies prior to the commencement of the Same-Sex Act on 1 July 2009.

Under the VEA, where the veteran's death occurred prior to 1 July 2009, and the Same Sex Act applies to veteran's partner or child, a war widow(er)'s pension or orphan's pension is available, provided that the partner or child meets all other eligibility criteria for the relevant benefit claimed.



Benefits under the VEA are only payable on or from the later of 1 July 2009, or the date the claim is lodged.

In relation to the MRCA, where the member's death occurred prior to 1 July 2009, and the Same Sex Act applies to veteran's partner or child, wholly dependent partner periodic payment (or lump sum equivalent); or periodic payments to eligible young persons are available provided the partner or child, where the partner or child meet all the eligibility criteria under MRCA.

## **Defacto relationships**

### **Statutory Criteria**

When deciding whether two people are in a defacto relationship for the purposes of the VEA, or in relation to the definition of 'partner' in the MRCA whether a person is in a defacto relationship with a member, regard must be had to all the circumstances of the relationship including, in particular, the following matters:

(a) the financial aspects of the relationship, including:

- (i) any joint ownership of real estate or other major assets and any joint liabilities; and
- (ii) any significant pooling of financial resources especially in relation to major financial commitments; and

(iii) any legal obligations owed by one person in respect of the other person; and

(iv) the basis of any sharing of day-to-day household expenses;

(b) the nature of the household, including:

(i) any joint responsibility for providing care or support of children; and

(ii) the living arrangements of the people; and

(iii) the basis on which responsibility for housework is distributed;

(c) the social aspects of the relationship, including:

(i) whether the people hold themselves out as being in a de facto relationship with each other; and

(ii) the assessment of friends and regular associates of the people about the nature of their relationship; and

(iii) the basis on which the people make plans for, or engage in, joint social activities;

(d) any sexual relationship between the people;

(e) the nature of the people's commitment to each other, including:

(i) the length of the relationship; and

(ii) the nature of any companionship and emotional support that the people provide to each other; and

(iii) whether the people consider that the relationship is likely to continue indefinitely; and

(iv) whether the people see their relationship as a de facto relationship.

Any one criterion in section 11A of VEA is not definitive of a defacto relationship, nor is there any order of importance following the way the criteria are set out in the section.

Importantly, the criteria in section 11A of the VEA are not the only criteria that can be considered. All facets of the relationship between the two people must be considered: *Lambe v Director-General of Social Services* (1981) 3 ALN 72.

Further, the factors for a defacto relationship are objectively determined and the subjective views of the parties as to the nature of the relationship are not determinative: *Re Tang and Director-General of Social Services* (1981) AATA 42.

Nonetheless, a decision maker is to take into account what is the norm for the applicant's peer group: *Lynam v Director-General of Social Security* [1983] AATA 203.

### Recent consideration

In *Re Cunningham and Military Rehabilitation and Compensation Commission*<sup>1</sup> the Tribunal reviewed a decision of a delegate of the MRCC, which affirmed that Ms Cunningham did not qualify for compensation as she did not satisfy the criteria of a dependent of the late member, PTE Turner, pursuant to Section 4 of the

*Safety, Rehabilitation and Compensation Act* 1988.

In considering whether Ms Cunningham was in a de facto relationship with the PTE Turner, the Tribunal considered the criteria in the *Social Security Act* 1991, which is identical to the criteria in section 11A of the VEA. In reaching a conclusion, the Tribunal noted that there was no one feature which stood out as dictating an outcome. In considering all of the evidence before it, the Tribunal noted in respect of Ms Cunningham and the late PTE Turner's relationship:

- that their relationship was only of a couple of months' duration,
- at no time did they have an independent household,
- there was evidence that a sexual relationship commenced and a child was conceived,
- there were no joint bank accounts and Ms Cunningham maintained a separate source of income, namely benefits, which she received as a single person, and
- there was no evidence of Ms Cunningham cooking meals for the late member, or attending to his laundry, as distinct from making a general contribution to the household.

In reaching a conclusion that Ms Cunningham and the late member were not in a bona fide domestic relationship, the Tribunal noted that being someone's girlfriend does not on its own equate with living in a bona fide domestic relationship.

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<sup>1</sup> [2009] AATA 344 (14 May 2009)



## Questions & Answers

### Question:

**Five years on, what has happened since the High Court's decision in *Roncevich*?**

### Answer:

Before discussing how the High Court's approach in *Roncevich* has been applied in recent cases, a quick recap of the High Court's decision is set out below.

#### *Defence-caused: the High Court's approach*

A purposive approach was adopted by the High Court in *Roncevich v Repatriation Commission*<sup>2</sup> to what was an injury which 'arose out of or was attributable to defence service', the test in section 70(5)(a) of the VEA.

The Court found that any activity that an employee is 'reasonably required, expected or authorised to do to carry out his duties' amounts to defence service for the purpose of the provision. That is, service extends to any activity 'incidental' to the actual work the person is employed or 'expected' to do as part of service. As the majority (McHugh, Gummow, Callinan and Heydon JJ, with whom Kirby J agreed) noted:

The use disjunctively in s 70(5) of the expressions 'arose out of' and 'attributable' manifest a legislative

intention to give 'defence-caused' a broad meaning, and certainly one not necessarily to be circumscribed by considerations such as whether the relevant act of the appellant was one that he was obliged to do as a soldier. A causal link alone or a causal connexion is capable of satisfying a test of attributability without any qualifications conveyed by such terms as sole, dominant, direct or proximate.

#### *The AAT's decision following the High Court*

While the joint judgement of the High Court acknowledged that a tribunal could find for Mr Roncevich, Justice Kirby indicated that this was not the only result available to the AAT:

'...whatever view might have been taken of attendance at the Mess function for a time, for the purpose of welcoming a distinguished Army guest, it was open to the Tribunal to conclude that proceeding to become intoxicated was not "defence caused" and thus not within the causative character [required]'.)

However, on remission the Tribunal decided that Mr Roncevich's internal derangement of the knee was defence-caused. In relation to his becoming intoxicated the Tribunal said:

' [56] Whilst we accept that Mr Roncevich was not required as a matter of duty to drink to the state where his faculties were impaired, we are well satisfied that there was an expectation that he would drink and do so quite heavily by the standards of today. No doubt the position is quite different in the Army at present with the greater recent awareness of the dangers of alcohol abuse. However we are of the view that in 1986 Mr Roncevich drank because he was expected

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<sup>2</sup> *Roncevich v Repatriation Commission* [2005] HCA 40; (2005) 222 CLR 115; (2005) 218 ALR 733; (2005) 79 ALJR 1366.

to do so and because he was expected to keep pace with his RSM, Mr Lee..."<sup>3</sup>

### **Recent decisions**

The High Court's decision in *Roncevich* has been considered in a number of different decisions dealing with claims under the VEA and SRCA. Consideration by the Federal Court and the Tribunal in relation to two SRCA related matters is set out below.

The High Court's decision in *Roncevich*, was considered by the Federal Court in *Military Rehabilitation & Compensation Commission v Clark*<sup>4</sup>, a matter which concerned a claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988*.

In *Clark*, an Able Seaman Clearance Diver (ABCD), suffered serious injuries in a motorcycle accident at a Naval Base in Western Australia. During the day of the accident, ABCD Clark had attended a function at a part of the base to welcome new team members and farewell some who were being deployed for military exercises.

ABCD Clark's claim was rejected at Departmental level but had been set aside by the Tribunal. On the evidence before the Tribunal, Deputy President Groom found that attendance by ABCD Clark at the function was for the purpose of his employment. The function commenced as a work function and remained a work function until the clean-up about 5.30pm, and it followed that it

was ABCD Clark's place of work until he departed on his motorcycle. Although ABCD Clark was under the influence of alcohol and was therefore guilty of "serious and wilful misconduct" under section 4(13) of the Act, he remained entitled to receive compensation due to his "serious and permanent impairment" under section 14(3) of the Act.

Justice Heerey noted there was no dispute about the finding that at its inception the function was work-related, and that ABCD Clark was required or expected to attend it as part of his duties, applying *Roncevich*. The issue in dispute was that, at some time before ABCD Clark left, the function ceased to have the character of an officially-approved work function. However, Justice Heerey considered there was ample evidence on which the Tribunal could make the finding it did and the appeal was dismissed.

The High Court's decision in *Roncevich*, was also considered by the Administrative Appeals Tribunal in *Bucknall and Military Rehabilitation & Compensation Commission*<sup>5</sup>, a matter which concerned a claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988*.

In *Bucknall*, the applicant suffered a depressive disorder as a result of a sexual assault by a fellow cadet whilst returning from a social outing. The applicant's claim was rejected by the Commission on the basis that the injury was not an injury

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<sup>3</sup> *Re Roncevich and Repatriation Commission* [2006] AATA 660.

<sup>4</sup> [2006] FCA 306

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<sup>5</sup> [2007] AATA 2014

“arising out of, or in the course of” her employment.

The first issue considered by the Tribunal was whether the applicant’s mental injury arose “in the course of” her employment. The Tribunal found that the period of leave which the applicant took for the social outing was an interlude within an overall period of work, and not a break between two discrete periods of work. The Tribunal was satisfied on the evidence before it that the applicant was actively encouraged by her employer to socialise with her classmates both on and off college grounds. The Tribunal concluded that the injury sustained by the applicant was sustained within the course of her employment as it occurred whilst she was socialising with her peers, which was encouraged by her employer.

In case the Tribunal was incorrect in this conclusion, the Tribunal considered it was appropriate to examine whether the applicant’s mental injury “arose out of” her employment. The Tribunal indicated:

‘The expression “arose out of...employment” requires a causal, rather than a merely temporal connection and does not import terms such as “sole, dominant, direct or proximate”: *Roncevich v Repatriation Commission* [2005] HCA 40; (2005) 222 CLR 115 at pp 125-6. The High Court was dealing with different legislation to that before us but was considering the phrase “arose out of defence service”. The Court said that whether an event arises “out of” an activity ‘depends upon such matters as the nature of the person’s employment, the circumstances in which it is undertaken, and what, in consequence, the person is required or expected to do to carry out the actual duties.’

The Tribunal found that the injury suffered by the applicant “arose out of” her employment. The causative factors, which were not merely temporal, were the employer’s encouragement for the socialisation to occur, the fact that the assault was occasioned by a fellow employee who had requested the applicant to accompany him, and the assault occurring as the applicant was returning to college from a social gathering of peers.

The Tribunal also considered the “but for” test was satisfied, dealt with an issue concerning payment of compensation, and set aside the decision of the Commission, deciding that the applicant was entitled to compensation for depressive disorder as a result of the sexual assault.



### Question:

**Under the MRCA, when has a condition stabilised; and**

**If one or more accepted conditions have not stabilised, when is interim compensation payable?**

### Answer:

Before turning to the issue of whether a ‘compensable condition’ has stabilised, a number of preconditions for permanent impairment compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA) must be met.

***When is the Commonwealth liable to pay permanent impairment compensation to a person?***

In accordance with section 68, 69 and 71 of the MRCA, permanent impairment compensation is payable where:

- liability has been accepted for one or more conditions;
- a claim for permanent impairment compensation has been lodged;
- as a result of the accepted condition(s), the person has suffered an impairment which constitutes a minimum number of impairment points;
- the impairment is likely to continue indefinitely; and
- the condition has or, if more than one condition has been accepted, all of the conditions have, stabilised.

It is necessary to consider whether all of the accepted conditions have stabilised because a 'compensable condition', for the purposes of section 68, is defined to mean the 'one or more' conditions for which liability has been accepted.

### *When has a condition stabilised?*

A condition is considered stable when there is unlikely to be any further change in the condition, whether a deterioration or an improvement. Medical evidence and whether any active treatment is being undertaken will usually dictate whether an accepted condition is stable. While an accepted condition might be likely to continue indefinitely it may not yet be stable. For example, where liability has been accepted for intervertebral disc prolapse and the client is undergoing a physiotherapy/rehabilitation program for the condition at the time of permanent impairment assessment.

If an accepted condition has not stabilised, and as such, permanent

impairment compensation is not payable under section 68, this does not mean that a claimant will not necessarily be paid compensation. Decision makers should consider whether interim permanent impairment compensation is payable under section 75.

### *When is interim permanent impairment compensation payable?*

Interim permanent impairment compensation is payable under section 75 where a final assessment of the degree of impairment cannot be made because one or more of the accepted conditions have not stabilised.

An interim payment of permanent impairment compensation can be made under section 75 where a decision-maker is satisfied that:

- the person will be entitled to permanent impairment compensation under section 68 or 71;
- the degree of impairment suffered by the person cannot be determined because one or more of the accepted conditions have not stabilised; and
- the impairment currently suffered by the person constitutes at least 10 impairment points.

Please note that impairment points from more than one accepted condition (including accepted VEA or SRCA conditions) can be combined to meet the 10 impairment point threshold requirement. In relation to whole person impairment, all accepted conditions (VEA, SRCA and MRCA) must be counted towards the final impairment rating.

Under subsection 75(2), the amount of interim compensation is the amount determined to be reasonable, based on the best estimate of the final impairment point rating suffered by the claimant once the conditions have stabilised.

Please note that also under subsection 75(2), once the impairment point rating has been determined, in calculating the compensation factor no lifestyle effect is included.

When all accepted conditions have stabilised, under subsection 75(4) final permanent impairment compensation becomes payable, which includes assessment of lifestyle effects. If the amount of permanent impairment compensation is more than the interim compensation, the person is entitled to the difference between those amounts from the date when all accepted conditions have stabilised.



**Question:**

**Do all tables in GARP M incorporate age dependent criteria?**

**Answer:**

No, not all tables in GARP M contain age dependent criteria. While some tables incorporate age dependent criteria, other tables have no such criteria and require subsequent age adjustment by applying tables provided for that purpose.

Each table is clearly marked in the bottom left hand corner with instructions on age adjustment for ratings derived from that table.

# Administrative Appeals Tribunal

## Re Tunks and Repatriation Commission

Ms N Isenberg, Senior Member  
Dr S Toh, Member

[2009] AATA 229  
6 April 2009

### ***War widow's pension claim - Veteran died as a result of cancer of the prostate - animal fat consumption***

#### **Facts**

Mr Tunks rendered operational service in the Royal Australian Navy during World War II. He died in 2002 from prostate cancer.

Mrs Tunks sought a review of the Repatriation Commission's refusal of her claim for a war widow's pension, which was affirmed by the Veterans' Review Board and the Administrative Appeals Tribunal (**the Tribunal**). The Tribunal's decision was set aside by the Federal Court and remitted to the Tribunal to be reheard.

#### **The applicant's position**

There was no dispute before the Tribunal that Mr Tunks' kind of death was prostate cancer.

The hypothesis of connection put forward by Mrs Tunks was that Mr Tunks had a diet low in animal fat prior to his enlistment in the Navy. He became habituated to eating fatty foods whilst in the Navy, which continued after his service. Therefore, Mr Tunks met the relevant factor in the applicable SoP:

increasing animal fat consumption by at least 40% and to at least 50gm/day, and maintaining these levels for at least five years within the twenty-five years before the clinical onset of malignant neoplasm of the prostate

### **The Tribunal's reasoning**

At the outset the Tribunal found that it was difficult to ascertain the amount of animal fat consumed by Mr Tunks prior to enlistment. The only inference which could be drawn was that his intake was, at best, around and possibly slightly below the national average.

The Tribunal indicated that there were no facts upon which to base an estimation of average daily fat intake during Mr Tunks' service.

Mrs Tunks provided evidence regarding Mr Tunks' post-service diet. The Tribunal also considered evidence from a nutritional consultant, dietician and gastroenterologist.

Despite the unreliability of the material before it, the Tribunal accepted that there may exist a reasonable hypothesis linking Mr Tunks' death with his naval service. The Tribunal stated:

There is material from which it could be inferred that, pre-service, the deceased's intake of animal fat was restricted.

During his naval service, the deceased was at times probably served greasy and fatty foods. It is alleged that because of this, he developed a liking for foods high in animal fats. That his naval service engendered in the deceased a liking for foods high in animal fats is sufficient to establish, for the purposes of a hypothesis, that naval service caused his food preference. See *Repatriation Commission v Law* (1981) 147 CLR 635 and *Repatriation Commission v Tuite* (1993) 39 FCR 540.

The evidence from the Applicant and other family members is that the deceased, post service, enjoyed a diet that was high in animal fats. If one assumes as a fact that the deceased's diet increased its animal fat content by 40% as opposed to his pre war diet, then an hypothesis exists which conforms to Factor 5(c) of the SoP.

The Tribunal indicated that as the hypothesis conformed with the SoP, it was deemed to be a "reasonable hypothesis".

The Tribunal went on to consider whether it was satisfied beyond reasonable doubt that there was no sufficient ground for granting Mrs Tunks' claim. The Tribunal indicated that expert evidence cast doubt on the factual basis of Mrs Tunks' hypothesis - which depended on an animal fat intake of less than 100 grams per day prior to enlistment. On enlistment Mr Tunks' BMI was within normal range, and based on expert evidence this would not have been possible if Mr Tunks' intake of animal fats was less than 100 grams per day.



The Tribunal was satisfied that if Mr Tunks had increased the animal fat content of his diet to the level suggested by Mrs Tunks, then his weight would have increased well beyond what was actually recorded. Therefore, the Tribunal was satisfied beyond reasonable doubt that Mr Tunks did not increase the animal fat content of his diet by 40% and to 50 grams per day.

#### **Formal decision**

The Tribunal decided that the decision under review must be affirmed.

### **Re Glanville and Repatriation Commission**

Ms N Bell, Senior Member  
Dr J Campbell, Member

[2009] AATA 229  
2 October 2009

#### ***War widow's pension claim - Veteran died as a result of cancer of the prostate - animal fat consumption***

##### **Facts**

Mr Glanville served in the Australian Army during World War II and rendered operational service in the Pacific Islands including, Morotai and Tarakan. Mr Glanville's cause of death (or "*kind of death*") was carcinoma of the prostate.

Mrs Glanville sought a review of the Repatriation Commission's refusal of her claim for a war widow's pension, which was affirmed by the VRB.

##### **The applicant's position**

Mr Glanville's kind of death was not disputed. The remaining question for the Tribunal to consider was whether Mr Glanville increased his animal fat consumption to the required degree and for the required period of time under either the current SoP (28 of 2005) or the SoP in force at the time of his claim (84 of 1999). If so, was that increase connected to his operational service?

##### **The Tribunal's reasoning**

*Did Mr Glanville increase his animal fat consumption to the required degree and for the required period of time?*

The Tribunal noted that this question should be answered in the positive. Both dietitians gave evidence before the Tribunal that Mr Glanville met the risk factor in both SoPs. The Tribunal noted that one dietitian, Dr English, was of the view that the results of the dietary questionnaire which formed the basis of the dietitians' opinions were invalid. However, the Tribunal considered that this was a matter to consider when posing the question of whether it may be satisfied, beyond reasonable doubt, that the condition is not war-caused.

*Was the increase in fat consumption connected to Mr Glanville's service?*

The Tribunal considered that the material before it pointed to a hypothesis that during the frightening conditions of service Mr Glanville had only boring and bland food; as a result, he rejected that kind of food after leaving the theatre of war and desired instead flavoursome food which meant, in those days, food containing a high level of animal fat; he

continued to demand and consume such food notwithstanding Mrs Glanville's attempts to decrease the amount of fat in his diet and would not change that established habit.

The Tribunal noted that this hypothesis was raised in the absence of any evidence from the late veteran himself, and that Dr Volker's opinion relied on the assumption that Mr Glanville rejected bland food after he left service. However, the Tribunal noted that an assumption is not sufficient to make a hypothesis unreasonable (*Byrnes v Repatriation Commission* [1993] HCA 51; (1993) 177 CLR 564).

*Was the Tribunal satisfied beyond reasonable doubt that the condition was not war caused?*

The Tribunal adopted the same conclusion reached by a differently constituted Tribunal, and quoted:

We note the objections and doubts raised by Dr English as to the validity of the questionnaire answers. In contrast, the report of Dr Volker, Consultant Dietitian, accepts the answers as plausible. It is unnecessary to air the habitual contest between these two experts. The reasonableness of the hypothesis will not be disproved by either one of their opinions. There are variables in the equations that are applied to estimate increases in fat consumption: differences in metabolic rate, differences in exercise levels, and the effects of illnesses. The different ways in which different experts incorporate these variables into their calculations, and the different formulae used by them, mean that the opinion of just one expert dietician, in opposition to that of another, does not serve to disprove, beyond reasonable doubt, a reasonable hypothesis.

### Formal decision

The decision under review was set aside and the Tribunal decided that Mr Glanville's death was caused by his operational service and the claim for war widow's pension made by Mrs Glanville should be granted.



### Appeal Alert

The Commission has lodged an appeal to Federal Court from the Tribunal's decision in *Re Glanville*.



### Editorial note

*Assumptions & the Reasonable Hypothesis*

The Tribunal noted in *Re Glanville*, that an assumption is not sufficient to make a hypothesis unreasonable. In *Repatriation Commission v Dunn* [2006] FCA 1703 the Federal Court provided further guidance on this point when it said:

...As was the case in *Byrnes* at 569, the hypothesis is one of connection of the veteran's condition with the circumstances of his service. If there is an assumed fact it cannot be the fact to which the hypothesis must be addressed; that is, the fact of connection.

The Federal Court's statement in *Dunn* has been relied upon to contend that material, which supports the hypothesis of the connection, must exist.

The 'existence' or 'reliability' of information was a significant issue in *Re Tunks*. The Tribunal noted at the outset that there was no reliable information as to Mr Tunks actual

dietary intake of animal fat prior to service. Nonetheless, the Tribunal accepted there may exist a reasonable hypothesis linking the death of the deceased veteran with his service.

However, when it came to assessing whether the Tribunal was satisfied beyond reasonable doubt that there was no sufficient ground for making that determination, the Tribunal reiterated that there was very little real evidence as opposed to speculation and conjecture as to the amount of dietary fat consumed by Mr Tunks pre service. Given the evidence of the two specialists together “the speculation and conjecture inherent in the Applicant’s case”, the Tribunal was satisfied beyond reasonable doubt that the Mr Tunks did not increase the animal fat content of his diet by 40% and to 50 grams per day.

It could be inferred from *Re Tunks* in matters where there is very little real evidence in relation to a “fact of connection”, it may provide difficulties not only at stage 3 of the methodology in *Deledio*, but also at stage 4.

*Evidence in Widows’ cases concerning death from prostate cancer*

The recent decisions from the Tribunal emphasise that to have the best chance of succeeding, a claim which connects a kind of death from prostate cancer to service via an animal fat factor, must have evidence pointing to:

- pre eligible service consumption of animal fat;
- consumption of animal fat during service;

- consumption of animal fat post service;
- the circumstances of the veteran’s eligible service which caused the change in food preferences during service and for the relevant period after service;
- the increased level of animal fat being consumed for at least 5 or 10 years; and
- the 5 or 10 years of high animal fat consumption occurring within the 25 years before the clinical onset of malignant neoplasm of the prostate.

Finally, in *Re Glanville*, there was some discussion about whether the applicant was relying on the current SoP (28 of 2005) or the SoP in force at the time of the claim (84 of 1999). The main difference between the two SoPs is that the newer SoP factors focus on the immediate post-war period in relation to levels of animal fat in the diet, with the requirement that animal fat consumption be maintained for at least 5 or 10 years within the 25 years before the clinical onset of malignant neoplasm of the prostate.

### Further reading



A summary of the Federal Court’s decision in *Tunks v Repatriation Commission* [2008] FCA 521 is contained in (2008) 24 *VeRBosity* at pages 48-51. A practice note is also available on the VRB’s website. Further, for a general overview of war widows’ pensions, please also see the detailed article ‘*Guide to war widows’ pensions*’ in (2007) 23 *VeRBosity* at pages 84-91

**Re Gibson and  
Repatriation Commission**

Deputy President S A Forgie

[2009] AATA 115  
20 February 2009

***Operational service - hypertension  
- application of SoPs- effect of  
revocation of SoPs between date  
of Commission's decision and  
Tribunal's decision - accrued  
rights***

**Facts**

Mr Gibson served in the Royal Australian Navy and rendered nine periods of "operational service" in Vietnam between 1966 and 1969.

Mr Gibson sought a review of the Repatriation Commission's decision, as affirmed by the Veterans' Review Board (VRB), that refused his claim for hypertension. A legal personal representative was appointed to continue the claim after Mr Gibson's death.

**The Tribunal's reasoning**

There was no issue as to diagnosis. The Commission accepted that Mr Gibson suffered from hypertension.

*Step 1 - is there a hypothesis?*

The hypotheses put forward by the applicant were based on stress, alcohol, physical activity and obesity. The Tribunal was satisfied that there was a connection between the particular circumstances of Mr Gibson's service and

his PTSD (an accepted condition), and that there was material pointing to:

- a connection between PTSD and hypertension in certain circumstances;
- a connection between Mr Gibson becoming physically inactive and obese, and his suffering from PTSD;
- Mr Gibson having acute alcoholism during his naval service, and also to his alcohol abuse being related to service.

*Step 2 - Relevant SoPs?*

The Tribunal identified the relevant Statements of Principles concerning hypertension as:

- SoP number 25 of 1999 - which was in force when the Commission and VRB made their decisions;
- SoP number 31 of 2001;
- SoP number 35 of 2003, as amended by SoP number 3 of 2004 and SoP number 11 of 2008 - currently in force

The Tribunal examined the issue of:

...whether a right accrues to a veteran to have the Commission's decision reviewed by reference to the SoP in force at the date of the VRB's review, as well as that in force at the date of the Commission's decision and that of the Tribunal.

The Tribunal considered the application of principles in *Esber v The Commonwealth* (1992) 174 CLR 430 to the issues in this case, and stated that:

It seems to me that the principles set out in *Esber* require me first to have regard to the time or times at which

Mr Gibson acquired or accrued a right or rights. The first time occurred when the delegate of the Commission made the decision. This has, of course, already been decided by *Keeley v Repatriation Commission*. At that time, Mr Gibson had a right to have his claim properly determined in accordance with the relevant SoP in force at that time. That is a right that survives the subsequent repeal or amendment of that SoP. It survives an ultimate application for review and review by the Tribunal. As decided by *Gorton*, the Tribunal is under a duty to decide the issue having regard to the SoP in force at the time of its decision. Mr Gibson and the Commission have correlative rights as a result.

The principles that lead to the conclusion that a right accrues at these two times also lead to the conclusion that the right also arises at a further two times. One of those further times is the time at which the VRB reviews the Commission's decision. The other occurs should the Commission undertake a review of its own decision.

Those two other times are part of the continuum of administrative decision-making that culminates in the Tribunal's review of a decision.

*Step 3 - Is the hypothesis consistent with the template set out in the relevant SoPs?*

The Tribunal turned to the SoP currently in force. The Tribunal found that there was material pointing to the clinical onset of hypertension in 1999. The Tribunal considered the following factor in the SoP:

suffering from a clinically significant anxiety disorder for the six months immediately before the clinical onset of hypertension

The Tribunal found that there was material pointing to the hypothesis fitting the template provided for in the SoP.

In relation to the other hypotheses (obesity, physical inactivity and alcohol), the Tribunal did not find material pointing to their fitting the template. The Tribunal looked to their fit with SoP number 25 of 1999, however it concluded that they did not fit the template.

*Step 4 - satisfaction beyond reasonable doubt*

Based on the material before it, the Tribunal was not satisfied beyond reasonable doubt that that Mr Gibson's hypothesis was not war-caused.

### Formal decision

The Tribunal set aside the decision under review and substituted its decision that Mr Gibson's hypertension was war-caused.



### Editorial note

*Accrued rights to SoPs under the VEA*

As noted by the Tribunal in *Re Gibson*, decision makers at the Tribunal (and 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: *Repatriation Commission v Gorton* [2001] FCA 1194.

In *Re Gibson*, the Tribunal also emphasised the point made in *Gorton*, that there is no accrued right to the SoPs that are in force as at the time of the VRB decision.

*No delay to wait for a change in SoPs*

Interestingly, the Tribunal in *Re Gibson* also made reference in the decision to the Commission, VRB and AAT having to await the outcome of an RMA review, before it could make a decision.

The Tribunal's decision makes no reference to *Beale v AAT* (1998) 82 FCR 132 where the Federal Court held..."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."

The VRB will give an applicant a reasonable time to prepare their case for hearing. However, the Board will not delay a hearing to await a decision of an RMA investigation. The VRB must determine a matter on the law as it currently stands, which includes an SoP already in force.

*Exception: MRCA applications and Non-SoP Investigations*



The only exception to this relates to MRCA applications where the RMA is investigating a condition where there is not already a SoP in force for the condition. In this particular circumstance, subsections 338(2) and 339(2) of the MRCA provide

that the MRCC, VRB and AAT must await the making of a SoP if there is not already a SoP in force for that condition.



**Further Reading:** For further discussion in relation to how accrued rights apply in relation to

SoPs under the VEA please see (2008) 24 No 1. VerBosity at pages 15-16.

### Re Jimmieson and Repatriation Commission

Dr K S Levy, Senior Member

[2009] AATA 89  
12 February 2009

***Whether alcohol abuse/dependence was defence-caused - clinical onset - unable to obtain appropriate clinical management***

#### Facts

Mr Jimmieson served in the Royal Australian Navy and rendered two short periods of "operational service" aboard HMAS Duchess in 1971.

In addition, Mr Jimmieson rendered defence service from 1972 until his discharge in May 1974.

This application was a rehearing of part of a Tribunal decision that had been remitted back from the Federal Court.

Mr Jimmieson had sought a review of a Repatriation Commission decision that refused his claim for PTSD, alcohol dependence or alcohol abuse and depressive disorder. The VRB affirmed the decision. It also varied the decision

and determined that there was no diagnosed condition in relation to alcohol dependence or alcohol abuse.

The Tribunal held that PTSD was not related to operational service or eligible defence service. The Tribunal also held that Mr Jimmieson developed alcohol abuse on eligible defence service, and that the conditions of major depressive disorder and alcohol dependence were consequential effects of alcohol abuse and therefore were related to eligible defence service - which was the subject of an appeal to the Federal Court. By consent of the parties, this part of the decision was set aside, to be reheard by the Tribunal.

### Issues before the Tribunal

The Tribunal accepted the parties' submissions regarding depression and found that it was not defence caused. The remaining issue was whether or not Mr Jimmieson's alcohol abuse (and now alcohol dependence) was related to his eligible defence service, in particular:

- Did Mr Jimmieson suffer a condition of alcohol dependence or alcohol abuse before or during his eligible service?
- Was Mr Jimmieson unable to obtain appropriate clinical management for that condition during his defence service?
- If so, was the inability to obtain appropriate clinical management connected to Mr Jimmieson's defence service?
- Did such inability materially contribute to, or did it aggravate,

Mr Jimmieson's condition of alcohol abuse or alcohol dependence?

### The Tribunal's consideration

#### *Clinical onset of alcohol abuse*

In forming a view as to clinical onset, the Tribunal said:

Clinical onset refers to when a person becomes aware of symptoms or other indications of a disease which will allow a doctor to make a diagnosis of a disease and when that disease was likely to have commenced or was present (*Re Robertson and Repatriation Commission* (1998) 50 ALD 668; *Repatriation Commission v Cornelius* (2002) FCA 750). All of the symptoms of a disease ought be shown to exist (*Youngnickel v Repatriation Commission* (2004) FCA 1691). However, difficulties occur in the identification of symptoms where a disease develops progressively, such as alcoholism (*Re Skene and Repatriation Commission* [2004] AATA 782). The question then arises whether there is material before the Tribunal which indicates that any medical practitioner had actually stated that a symptom was present and that a disease was being suffered by a veteran at a particular time, or whether the material before the Tribunal enabled it to make such a finding by inference (*Cornelius* (supra); *Youngnickel* (supra)).

The Tribunal considered conflicting expert medical evidence, and found that the clinical onset of alcohol abuse occurred by 1973 during defence service on the basis of the level of drinking which commenced in 1971, and taking account of other indicia since that time.

*Inability to obtain appropriate clinical management*

The Tribunal referred to the relevant factor in the applicable Statement of Principles for alcohol dependence and alcohol abuse:

inability to obtain appropriate clinical management for alcohol dependence or alcohol abuse.

The Tribunal said:

That factor must be pointed to by the evidence before the necessary connection with relevant service can be said to exist. It applies only to a material contribution to or aggravation of, alcohol abuse in circumstances where the condition of alcohol abuse "...was suffered or contracted before or during (but not arising out of) the person's relevant service". So much is made clear by paragraph 7 of the SOP. It must be assessed according to a medical scientific standard (not a lay standard) and there must be evidence of a clinical worsening of the disease as defined in the SOP. In other words, there must be evidence of "...clinically significant impairment or distress" as manifested by at least three of the factors shown in the definition (*Repatriation Commission v Milenz* [2006] FCA 1436; (2006) 93 ALD 107).

The Tribunal accepted there was a clinical worsening of the condition as defined in the SOP and based on a medical expert's diagnosis.

In relation to Mr Jimmieson's case that he could not get appropriate clinical management and that had caused the escalation of alcohol abuse to alcohol dependence over a long period of time, the Tribunal indicated that three pre-

conditions must be satisfied "on the balance of probabilities":

1. alcohol abuse must have existed during military service;
2. there must have been an inability to obtain appropriate clinical management because of that military service; and
3. pre-condition (2) must have resulted in a material contribution to or an aggravation of the condition.

The Tribunal referred to *Brew v Repatriation Commission* [1999] FCA 1246; (1999) 94 FCR 80, in which Justice Merkel said that the approach to be adopted should consider:

...objective barriers such as lack of power, capacity or means or a subjective barrier such as the condition of being unable. Whether the objective or subjective barrier to obtaining treatment is made out in a particular case depends on the facts of that case.

In that case Justice Heerey said:

Clearly the factor operating on the person's choice would have to be a substantial one before it could be said there was "inability". How substantial is a question of fact...

While the Tribunal was satisfied that the clinical onset of alcohol abuse occurred during defence service, the Tribunal said:

The requisite inability to obtain appropriate clinical management is that the member must feel unable to, or be prevented because of a service reason, from seeking treatment. In the circumstances I find there is no substantial evidence of an objective barrier to Mr Jimmieson obtaining



treatment, nor was there a lack of appropriate clinical management which was available to Mr Jimmieson. The only subjective barrier was a general reference in the first hearing to personality factors and this was not prosecuted by any party in relation to this issue.

### Formal decision

The Tribunal decided that the decision under review must be affirmed.

**Re Pianta and  
Repatriation Commission**

Deputy President, S Hotop  
Dr P A Staer, Member

[2009] AATA 21  
14 January 2009

***Paranoid schizophrenia - Statement of Principles (SoP) - inability to obtain appropriate clinical management for schizophrenia***

### Facts

Mr Pianta served in the Royal Australian Air Force from August 1973 until August 1994 and rendered “defence service” during that period.

Mr Pianta sought a review of the Repatriation Commission’s decision, as affirmed by the Veterans’ Review Board, that refused his claim for paranoid schizophrenia.

### Issues before the Tribunal

The issues for the Tribunal were:

- Whether Mr Pianta was suffering from a mental disorder, and, if so, the appropriate diagnosis; and
- Whether such mental disorder was defence-caused.

### The Tribunal’s reasoning

#### *Diagnosis*

The Tribunal found that Mr Pianta suffers from a psychiatric disorder, based on the medical evidence before the Tribunal. However, the appropriate diagnosis was problematic due to conflicting medical evidence. On the basis of Mr Pianta’s evidence and one expert’s evidence, the Tribunal found that Mr Pianta has been suffering from paranoid schizophrenia since 1992.

#### *Causation*

The Tribunal noted that:

Pursuant to s 120 B(3) of the VEA, the Tribunal is to be reasonably satisfied that the applicant’s paranoid schizophrenia condition is a defence-caused disease only if:

- The material before it “raises a connection between” that condition and the applicant’s defence service; and
- The SoP “upholds the contention” that the condition is, on the balance of probabilities, connected with that service.

The Tribunal was satisfied that the material before it “raises a connection between” Mr Pianta’s paranoid schizophrenia and his defence service.

The critical issue was whether the Statement of Principles “upholds the contention” that Mr Pianta’s paranoid schizophrenia was, on the balance of probabilities, connected with his defence service.

Mr Pianta contended that the following factors in the applicable Statement of Principles for schizophrenia existed in his case:

(a) experiencing an event perceived as a severe psychosocial stressor within the 30 days immediately before the clinical worsening of schizophrenia; or

...

(d) inability to obtain appropriate clinical management for alcohol dependence or alcohol abuse.

The Tribunal was not reasonably satisfied that factor (a) existed in Mr Pianta’s case. The Tribunal indicated that even if it was reasonably satisfied that Mr Pianta experienced an event perceived as a “severe psychosocial stressor” (as defined in the SoP), there was insufficient medical evidence regarding any clinical worsening of schizophrenia. Even if there had been a clinical worsening, the Tribunal could not make a finding on the evidence before it regarding the date of clinical worsening and could not be reasonably satisfied that such clinical worsening occurred within the requisite time frame in factor (a).

In relation to factor (d), the Tribunal referred to *Repatriation Commission v Money* (2008) 100 ALD 527, in which Justice Stone said:

In my view the plain meaning of ‘appropriate clinical management’ 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 ultimately progression and outcome of a condition.

The Tribunal also referred to *Brew v Repatriation Commission* [1999] FCA 1246; (1999) 94 FCR 80, in which Justice Merkel said:

In my view Sundberg J [at first instance] was quite correct in treating the meaning of ‘inability’ ... as ‘lack of ability; lack of power, capacity, means’ (the Macquarie Dictionary) or ‘the condition of being unable; lack of ability, power or means’: the New Shorter Oxford Dictionary. The dictionary definitions embrace what may fairly be described as objective barriers such as lack of power, capacity or means or a subjective barrier such as the ‘condition of being unable’. Whether the objective or subjective barrier to obtaining treatment is made out in a particular case depends upon the facts of that case.

...

... If a veteran is subjected to any psychological or emotional circumstances which are such that, as a matter of practical reality, the veteran could not reasonably be expected to take steps to obtain appropriate clinical management for a medical condition I see no reason why those circumstances are not capable of constituting a ‘condition of being unable’ to obtain treatment.

The Tribunal considered evidence from a psychologist and psychiatrists who had examined Mr Pianta during his RAAF service, who had diagnosed Mr Pianta was suffering from a paranoid condition or delusional disorder of the persecutory type (rather than schizophrenia). In accordance with expert evidence, the Tribunal found that the diagnostic conclusions reached by those psychiatrists were reasonable and appropriate, as Mr Pianta had not provided them with any clear history of hallucinations.

However, during his RAAF service Mr Pianta did not obtain any medical treatment or “clinical management for schizophrenia”, or medical treatment or clinical management for the diagnosed psychiatric disorder before his discharge from the RAAF. The Tribunal stated that:

...the applicant’s failing to obtain such “clinical management” was entirely due to his mental state by reason of which he:

- lacked any insight in relation to his medical condition;
- failed to provide an appropriate history of hallucinations to the psychiatrists who examined him in 1993-1994; and
- refused to accept the opinions of those psychiatrists that he was suffering from a mental disorder and he was, accordingly, unwilling to seek or accept medical treatment or advice in respect of such disorder.

Accordingly, although there was no “objective barrier” to the applicant’s obtaining “clinical management”, there

was, in the Tribunal’s opinion, a “subjective barrier” to his obtaining “clinical management”, namely, his mental state which, as a matter of practical reality, rendered him unable to obtain such “clinical management”: see Brew...

The Tribunal was reasonably satisfied that factor (d) existed in Mr Pianta’s case.

The Tribunal then turned to the question of whether Mr Pianta’s “inability to obtain appropriate clinical management for schizophrenia” was related to his defence service. The Tribunal was not reasonably satisfied that Mr Pianta’s mental state, which was the sole cause of his “inability to obtain appropriate clinical management for schizophrenia”, was related to service. Therefore, the Statement of Principles did not “uphold the contention” that Mr Pianta’s paranoid schizophrenia was, on the balance of probabilities, connected with his defence service.

### Formal decision

The Tribunal decided that the decision under review must be affirmed.

### Editorial note



In both *Re Jimmieson* and *Re Pianta*, the key issue for the Tribunal’s consideration concerned “inability to obtain appropriate clinical management”. Most Statements of Principles contain this factor and it has been a common issue in many cases under review.

Recently, the issue came before the Full Federal Court in *Repatriation Commission and Money* [2009] FCAFC 11. A full case report and editorial note is contained on page 60.

The recent decisions from the Tribunal emphasise that to have the best chance of succeeding, a claim which connects a condition to service via an “inability to obtain appropriate clinical management” factor, must have evidence pointing to:

- the condition existing before or being contracted during the relevant service;
- the appropriate clinical management that would have been available to the person at the time of the relevant service. (In *Repatriation Commission and Money* Justice Finn and Justice Edmonds agreed with the primary judge that “appropriate clinical management” is not limited to the provision of beneficial treatment stating:

“[43]...we are satisfied that the making of prudential recommendations as to the taking of, or refraining from, courses for the purpose of thereby foreclosing the possible impacts of extraneous causes that might be likely to accelerate the progress of the disease may, in appropriate circumstances, properly be regarded as falling within appropriate clinical management...”

- such clinical management having prevented or reduced the worsening of the condition;

- the person being unable to obtain that clinical management (in both *Re Jimmieson* and *Re Pianta* the Tribunal referred to the Federal Court’s decision in *Brew*<sup>6</sup>, which held that this can be an objective test, but in some cases, the circumstances of a person’s service may have resulted in the person being subjectively unable to seek available medical assistance);
- the person’s inability was due to their eligible service; and
- the inability occasioned a material contribution to, or aggravation of the claimed condition. (In *Repatriation Commission v Yates*<sup>7</sup>, the Court held that there must be a worsening of the underlying disease, not merely the symptoms of the disease, and it must have been of a permanent nature.)

In both *Re Pianta* and *Re Jimmieson*, the key issue for the Tribunal’s consideration was whether the veteran had been unable to obtain the relevant clinical management. In both matters there was no evidence of an “objective” barrier to the veteran obtaining treatment.

However, in Mr Pinata’s case, the Tribunal considered that there was a “subjective barrier” to his obtaining clinical management in the form of his mental state.

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<sup>6</sup> [1999] FCA 1246, (1999) AAR 63.

<sup>7</sup> (1995) 38 ALD 80, 21 AAR 331.

Importantly, *Re Pinata* highlights that even where there is evidence that a person was subjectively unable to obtain clinical management, there needs to be evidence that the “inability” was due to their relevant service.

**Re Lake and  
Military Rehabilitation and  
Compensation Commission**

Mr R G Kenny, Member  
Dr G J Maynard, Brigadier (Rtd), Member

[2009] AATA 64  
2 February 2009

***Claim for acceptance of liability of  
chondromalacia patella of right  
knee - application of Statement of  
Principles - presence of meniscus  
damage at time of clinical onset***

**Facts**

Mr Lake served in the Australian Regular Army from November 1995 until April 2008. He lodged a claim under the *Military Rehabilitation and Compensation Act 2004* (MRCA) with the Military Rehabilitation and Compensation Commission (MRCC) for acceptance of liability in relation to osteoarthritis of the right knee.

A delegate of the MRCC accepted liability for chondral damage of the medial condyle of the right knee, but rejected liability for chondromalacia patella, derangement of the anterior horn of the right medial meniscus and right patellar tendinopathy.

The decision in relation to the rejected conditions came before the Veterans' Review Board (VRB). The VRB consented to withdrawal of the claim regarding right patellar tendinopathy and accepted liability for derangement of the anterior horn of the right medial meniscus. The VRB affirmed the decision in relation chondromalacia patella and Mr Lake sought further review by the Administrative Appeals Tribunal (the Tribunal).

**Issues before the Tribunal**

Mr Lake rendered peacetime service under the MRCA, so the decision concerning liability was to be made to the Tribunal's reasonable satisfaction. The Tribunal could only accept liability if a relevant Statement of Principles (SoP) upheld Mr Lake's contention that his chondromalacia patella was, on the balance of probabilities, connected with that service.

**The Tribunal's consideration**

The Tribunal was reasonably satisfied that Mr Lake experienced pain and swelling in his right knee at time of football games in July 2006 and that the pain became progressively worse in the following weeks, based on the evidence of Mr Lake and medical evidence.

The Tribunal referred to the relevant factors in the applicable SoP for chondromalacia patella and the associated definition:

- (a) suffering direct trauma to the patella of the affected knee within the three months immediately before the clinical onset of chondromalacia patellae;  
or

(b) suffering an injury to the affected knee resulting in meniscal damage or permanent ligamentous instability within the three months immediately before the clinical onset of chondromalacia patellae;...

“Direct trauma to the patella” means a blow to the kneecap causing immediate patellar pain that persists for at least 24 hours unless alleviated by analgesia;...(emphasis in original.)

The Tribunal was reasonably satisfied that factor (a) was not met. Mr Lake had consistently stated that he did not experience a specific incident involving his knee during his games of football, and the Tribunal was satisfied that a person would need to be aware of the direct trauma to the kneecap to meet the definition.

The Tribunal indicated that one way of meeting factor (b) was through an injury resulting in meniscus damage. The Tribunal noted that the Oxford Dictionary definition of “injury” includes harm or damage, and was satisfied that this may occur without the degree of realisation required in the case of direct trauma, and in the context of physical activity associated with playing football - provided there are symptoms afterwards which point to the harm or damage having occurred. The Tribunal found that Mr Lake experienced knee pain.

Although meniscus damage was determined to be a service injury by the VRB, in determining whether factor (b) was met it was necessary for the Tribunal to re-consider whether meniscus damage was related to service in accordance with

the relevant SoP. The Tribunal referred to the relevant factor:

(a) suffering a direct trauma or a twisting or wrenching injury to the affect knee:

(i) within the six months immediately before the clinical onset of internal derangement of the knee; and

(ii) resulting in pain and swelling of the knee within the 2 hours immediately following the trauma or injury;...

The Tribunal was satisfied, on the balance of probabilities, that Mr Lake experienced some harm or damage to his knee from twisting actions during touch football games, even though he was not aware of any specific incident, as his right knee was pain-free before the football carnival but painful after it.

The Tribunal considered conflicting medical evidence regarding Mr Lake’s meniscus damage and accepted that the VRB had correctly determined that it was a service injury. The Tribunal was reasonably satisfied that the clinical onset of chondromalacia patella occurred within the time frame of factor (b) of the SoP for chondromalacia patella.

#### **Formal decision**

The Tribunal set aside the decision under review and substituted its decision that Mr Lake’s chondromalacia patella was a service injury for which the MRCC was liable.



### Editorial note

*Application of SoPs and standards of proof under the MRCA*

As noted by the Tribunal in *Re Lake*, the SoPs are applied to the determination of claims for liability under sections 27 and 28 of the MRCA. However, it is important to note that SoPs **do not** apply to claims for liability relating to unintended consequences of medical treatment (s29) and aggravation of signs and symptoms (s30).

In terms of the different standards of proof, “beyond reasonable doubt” SoPs apply to claims arising out of warlike and non warlike service. However, in cases such as *Re Lake*, which concern a claim arising out of peacetime service, the “balance of probability” SoPs apply.

### Re Blewitt and Military Rehabilitation and Compensation Commission

Senior Member Bernard J McCabe and  
Dr G J Maynard, Brigadier (Rtd), Member

[2009] AATA 487  
30 June 2009

### ***Accepted right knee condition - compensation for permanent impairment - whether applicant suffers at least 10 impairment points***

#### **Facts**

Mr Blewitt injured his right knee while playing sport at work in 2005.

The Military Rehabilitation and Compensation Commission (MRCC) accepted liability for the injury. The original decision disallowed lump sum compensation for permanent impairment. A later decision revoked the original decision but concluded that it was inappropriate to award lump sum compensation, as it was unclear whether Mr Blewitt had experienced at least the requisite degree of impairment. Mr Blewitt sought review of this decision by the Administrative Appeals Tribunal (the Tribunal).

#### **Issues before the Tribunal**

The issue for determination was whether Mr Blewitt was entitled to be paid lump sum compensation for permanent impairment, which requires the Tribunal to be satisfied that his condition attracts at least 10 impairment points under the Guide to Determining Impairment and Compensation.

#### **The Tribunal’s consideration**

The Tribunal was cautious in its approach to Mr Blewitt’s claims that all, or substantially all, of his current impairment was due to his right knee condition. Mr Blewitt’s failure to disclose information about a prior back condition and other inconsistencies in his evidence did not reflect well on his credibility.

The Tribunal considered all of the medical evidence was unsatisfactory in one important respect, as none of the doctors had conducted extensive objective tests to enable them to verify Mr Blewitt’s claims about the extent of his impairment. The Tribunal preferred and accepted the evidence of one of the

doctors, due to his careful observations of Mr Blewitt and the results of the limited objective tests. Based on that evidence, the Tribunal was satisfied that Mr Blewitt had established that at least 10 impairment points ought to be awarded for his right knee condition.

### Formal decision

The Tribunal varied the decision under review by determining Mr Blewitt should be allocated 10 impairment points under Table 3.2.2 and five impairment points under Table 3.4.1. His entitlement to compensation should be calculated on that basis. The Tribunal also ordered the MRCC to pay Mr Blewitt's costs.



### Editorial note

*Minimum Threshold  
Impairment Points*

The key issue for consideration by the Tribunal in this case was whether Mr Blewitt met the minimum impairment threshold level.

Pursuant to section 69 of the MRCA, before compensation can be paid minimum threshold levels must be met.

If the impairment results only from:

- hearing loss;
- loss, or loss of use of, a finger or toe; or
- loss of the sense of taste or smell;

the threshold impairment is 5 impairment points.

However, in all other cases the threshold is 10 impairment points.

*Combining impairment points to meet the threshold requirement*

While Mr Blewitt's case only concerned one accepted condition, in cases where a person has more than one accepted condition, the impairment points from the other accepted conditions can be combined to meet the 10 impairment point requirement.

However, for impairments of the fingers, the toes, the sense of taste and smell, and hearing loss impairment points from more than one condition cannot be combined to meet the 5 impairment point requirement.

### Re James and Militray Rehabilitation and Compensation Commission

Deputy President Forgie  
[2009] AATA 842  
30 October 2009

### ***MRCA - permanent impairment – previous SRCA injury – chapter 25 of GARP M***

#### Facts

The Military Rehabilitation and Compensation Commission (Commission) decided that Lieutenant James was entitled to compensation for permanent impairment in respect of a right knee injury. Lieutenant James had two previous injuries accepted under the SRCA, and the issue before the Tribunal was the manner in which permanent impairment was assessed.



Counsel for Lieutenant James submitted that permanent impairment should be assessed in a way that led to a lump sum of \$32,966.70. Counsel for the Commission submitted that Lieutenant James' entitlement amounted to a lump sum of \$1,209.45.

### Issues

There were five issues for the Tribunal to consider. At the outset, DP Forgie noted that he would not decide the fourth and fifth questions, as they did not arise in relation to the decision under review. Further, DP Forgie noted that the questions should be answered in the context of a decision that does raise them so that they may be properly canvassed.

1. Section 68 of MRCA confers an entitlement in respect of a permanent impairment. What is its proper construction?
2. Does Chapter 25 of GARP M operate in a way that reduces, diminishes or destroys the entitlement conferred by s 68?
3. Do the MRCA Transitional Provisions Act or Regulations authorise Chapter 25 of GARP M to operate in such a way that a person's entitlement under s 68 of the MRCA is reduced?
4. Does Chapter 25 of GARP M operate for all purposes of the MRCA?
5. If Chapter 25 does reduce or extinguish a person's entitlement under s 68 of the MRCA, is it permissible that it does so?

### The Tribunal's reasoning

#### *SRCA claims: right ankle injury & left knee injury*

Lieutenant James had asked for a further assessment of his SRCA injuries. By consent, the parties agreed that Lieutenant James was not entitled to a further amount of compensation in respect of his right ankle injury. In respect of his left knee injury the parties agreed by consent that his level of impairment had increased from 10% to 20% when assessed in accordance with the approved Comcare Guide and as such, Lieutenant James was to be paid \$17,859.55.

#### **MRCA claim**

#### *Construction of section 68 of MRCA & "compensable condition"*

DP Forgie first considered the preconditions for permanent impairment compensation, which are the criteria set out in section 68(1) of the MRCA. DP Forgie noted the first criterion that must be satisfied is that the Commission must have accepted liability "for one or more service injuries or diseases" which together are described as the "compensable condition".

The Tribunal noted that on the face of section 68(1)(a), there was no suggestion that the Commission only looks to the service injury or disease that is the subject of the most recent application for compensation for PI that has not been determined. DP Forgie considered that:

...the "compensable condition" must include those service injuries or diseases in respect of which the Commission has accepted liability in

response to a previous claim or claims under s 319 and in respect of which a claim for compensation for permanent impairment has been made under s 319. The “compensable condition” does not include service injuries or diseases the subject of previous claims for permanent impairment made under s 319.

DP Forgie went on to note the second and third criteria: that the person has suffered an impairment, the impairment is likely to continue indefinitely, and the person’s compensable condition has stabilised.

#### *Minimum impairment threshold levels*

After considering the above three criteria, DP Forgie noted that the next issue for the decision maker to determine included the degree of impairment suffered by the person as a result of the compensable condition and the date on which the person suffered a permanent impairment as a result of the compensable condition. However, before determining these issues, DP Forgie first considered in respect of what is compensation payable under s68. Specifically, whether Parliament had taken a path different from the that in the SRCA.

In considering this issue, the Tribunal examined the recent decision of the majority of the High Court in *Fellowes v Military Rehabilitation and Compensation Commission*<sup>8</sup>. DP Forgie said:

[91]...From my analysis of s 68, Parliament has taken a path different from that it took in s 24(1) [SRCA]. It has not made the Commonwealth liable in respect of an injury when that injury results in a permanent impairment...

... [96] The difference in wording between the two definitions when read with the differences in wording between ss 24(1) and 68(1) is crucial. Provided the other two criteria in s 68(1) are met, the focus of the entitlement to compensation for permanent impairment under the MRC Act is upon the person’s having suffered an impairment and the loss that is represented by that impairment to the person. The focus is not upon the loss that is represented by that impairment to someone who is not the person in respect of whose permanent impairment compensation is being claimed. The provisions of the MRC Act lead, therefore, to a conclusion different from that reached by the majority of the High Court in *Fellowes* when they concluded that the Guide determined by Comcare did not direct attention to the effect of an injury or disease on a particular individual. Under the MRC Act, the Commission must determine GARP M so that it does direct attention to the effect of a service injury or disease on the particular individual who suffered the service injury or disease for which compensation is claimed.

Returning to the minimum threshold impairment points, while Lieutenant James clearly met the requirement (with 12 impairment points determined for his MRCA condition), DP Forgie nonetheless considered the issue and noted that the emphasis of s 69 is upon impairment points and, in particular, upon the “*impairment suffered by the person*” constituting the minimum number of

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<sup>8</sup> [2009] HCA 38

points designated for the circumstances. The Commonwealth's liability to pay compensation under s 68 is not approached by reference to the injury. Rather, it is approached by reference to the impairment suffered by the person as a result of the service injury or disease or service injuries or diseases. DP Forgie noted that the same considerations also applied in relation to s 70 and compensation in respect of a single aggravated injury or disease. DP Forgie said:

...The scheme of the MRC Act is that compensation for permanent impairment is given in respect of that permanent impairment provided it attracts the requisite number of impairment points.

It does not provide for compensation in respect of a service injury or disease.

#### ***GARP M***

Turning to consider the issues in relation to GARP M, DP Forgie concluded that the Commission is not only empowered to determine a guide under s 67 of the MRCA but is also required to do so. Without the guide, a person's right to compensation under the MRCA would be a right to an indeterminate amount.

DP Forgie considered that the Transitional act and regulations formed part of the MRCA, and the guide (be it GARP V (M) or GARP M) each formed part of a scheme and that, together, they formed the whole scheme.

Further, in considering whether the transitional Provisions or Regulations authorise Chapter 25 of GARP M to operate in such a way that a person's entitlement under s 68 of the MRCA is reduced, DP Forgie noted that the

combination of points necessarily leads to a lower assessment of impairment than addition of impairment points. However, DP Forgie went on to note that this was consistent with a scheme of compensation that has, at its heart, an assessment of whole person impairment rather than of compensation by reference to the impairment resulting from each injury or disease.

Noting his view of the decision in *Fellowes*, and that the basis on which compensation for permanent impairment is paid differs between the SRCA and the MRCA, DP Forgie considered that this difference could not change the fact that Chapter 25 of GARP is consistent with the formulae set out in the Transitional Regulations. The Tribunal noted that chapter 25 has provided for an offset of the payments a person has received under the SRCA. An offset is clearly contemplated by s 13(4) of the Transitional Act. DP Forgie concluded:

[164] When regard is had to the whole of the provisions of the MRC Act, the Transitional Act and the Transitional Regulations, the method that is adopted in GARP M in relation to old injuries or diseases under the VE Act or the SRC Act and compensation received in relation to them is consistent with the method adopted in the MRC Act when a person has two or more unrelated service injuries or diseases in respect of which compensation is claimed for permanent impairment under the MRC Act. It is consistent with that adopted in relation to the aggravation of the earlier by a later service injury or disease. It is consistent with it in that it, like those under the MRC Act, is based on whole person impairment. By providing for whole person impairment and deducting from

the amount of weekly compensation otherwise payable under the MRC Act, the amount of weekly compensation represented by the lump sum under the SRC Act, the method in Chapter 25 seeks to ensure that compensation is paid for impairment for which the Commonwealth is liable but has not previously compensated the person for. That method is consistent with that provided under the MRC Act for service injuries or diseases for which the Commonwealth is liable and which are not within the purview of the VE Act or the SRC Act.

[165] It follows that I regard the method provided for in Chapter 25 to be reasonably proportionate to the power given to the Commission under the MRC Act and the Transitional Act to determine a guide.

DP Forgie also noted that while chapter 25 does not provide for a situation where a person has an old injury or disease under both the VEA and SRCA, the method in chapter 25 is intended to, and does, cover both situations.

#### **Formal decision**

The Tribunal affirmed the decision that Lieutenant James was entitled to compensation for permanent impairment as a result of his right knee injury amounting to \$0.95 per week or, a lump sum of \$1,209.45.

#### **Editorial note**



*Re James* case considered a number of issues in relation to the transitional provisions and permanent impairment compensation under the MRCA, including:

- the preconditions for entitlement to permanent impairment compensation; and
- using chapter 25 of GARP M to assess compensation for permanent impairment from a MRCA condition, where the claimant also had accepted disabilities under the SRCA.

Please note that the transitional provisions do not apply to a person whose eligibility for compensation or other benefits arises only under the MRCA.

#### ***Entitlement to Permanent Impairment Compensation***

In relation to the preconditions for permanent impairment compensation, DP Forgie's decision emphasises that it is necessary for a decision maker to consider all service injuries and diseases, not merely the one or more for which the person is seeking compensation. This is particularly important when considering whether the person's compensable condition has stabilised. If there is a service injury or disease that has not stabilised then the precondition in section 68(1)(b)(iii) is not satisfied and the Commonwealth is not liable to pay compensation.

Similarly, DP Forgie's comments in respect of the minimum threshold impairment points emphasises that s 69 not approached by reference to the injury, rather, it is approached by reference to the impairment suffered by the person as a result of the service injury or disease or service injuries or diseases. As such, impairment points from more than one accepted condition can be

combined to meet the 10 impairment point requirement. Aggravations are subject to the same minimum threshold impairment points.

DP Forgie's decision in relation to the minimum threshold impairment points did not specifically comment on the Commission's policy that accepted VEA and SRCA conditions can be combined to meet the 10 impairment point requirement. Probably, this was the case as Lieutenant James clearly meet the requirement (with 12 impairment points determined for his MRCA condition).

Nonetheless, from DP Forgie's comment that the old injury or disease "...should be read as a reference to the old injury or disease in relation to which liability has been accepted under the VE Act or the SRC Act.." and that "this interpretation is not inconsistent with the direction given to the Commission that it determine the impairment points constituted by the impairment suffered as a result of the old injury or disease" it could be inferred that it is a person's total impairment rating, which is the impairment rating to be used to assess eligibility in respect of minimum threshold impairment points under sections 69, 70, 71, 72 and 75 of the MRCA.

A person's total impairment rating is arrived at by determining the impairment points suffered as a result of the person's VEA and/or SRCA condition and the impairment points suffered as a result of the person's MRCA conditions and combining the two ratings under Table 18.1: Combined Values Chart.

### Practical tip



When combining impairment ratings by applying table 18.1, it is important to remember that the combined impairment rating is not to be rounded. Rounding is unnecessary since impairment periodic payments are based on whatever impairment rating is determined and are not in multiples of 5 or 10 as in the VEA.

### Chapter 25 of GARP M

While DP Forgie's decision acknowledged that the combination of points, under the chapter 25 method of assessment, necessarily leads to a lower assessment of impairment than addition of impairment points, it emphasises that the method in Chapter 25 seeks to ensure that compensation is paid for impairment for which the Commonwealth is liable but has not previously compensated the person for. If the method in chapter 25 was not used to assess compensation for permanent impairment, it could result in dual entitlements for people receiving, or eligible to claim, benefits under the MRCA and the VEA and/or the SRCA.

### Appeal Alert



An appeal has been made to the Federal Court from the Tribunal's decision in *Re James*.

### Further reading



For a detailed discussion of Chapter 25 of GARP M and for steps on how the 'bringing across' process works, please see chapter 15, page 103 and 104 of the *Handbook for Representatives* VerBOSITY special issue 2006.

### Re Rodsted and Repatriation Commission

Deputy President D G Jarvis  
Mr S Ellis AM (Member)

[2009] AATA 658  
1 September 2009

***operational service – claim for post-traumatic stress disorder, alcohol dependence or alcohol abuse – whether date of clinical onset can be determined in the absence of medical evidence - legal professional privilege – filing and service of witness statement***

### Facts

Mr Rodsted, served with the Royal Australian Navy and rendered operational service on *HMAS Derwent* as part of the Far East Strategic Reserve, and also in Vietnamese waters.

Mr Rodsted lodged a claim for Post Traumatic Stress Disorder (PTSD), which was refused by the Repatriation Commission (the Commission). On review, the Veterans' Review Board affirmed the Commission decision. Mr Rodsted appealed to the

Administrative Appeals Tribunal (the Tribunal) and it affirmed the VRB's decision. Mr Rodsted then appealed to the Federal Court and the matter was remitted to the Tribunal.

Prior to the matter being listed for a hearing, further diagnoses were made that Mr Rodsted was also suffering from major depression secondary to PTSD and alcohol abuse or alcohol dependence.

### The stressors

Mr Rodsted contended a number of stressors, namely:

- hearing scare charges detonate whilst below the waterline on the *HMAS Derwent* ("the scare charge incident");
- destroying boats during patrols off Borneo when it was possible that there were still occupants on board those boats ("the *Hawke* incident");
- a young boy fell through a gap between the top of the gangway and *HMAS Stalwart*, when it was at a wharf in Hobart. The boy was crushed between the ship and the tender and subsequently died. Mr Rodsted was the quartermaster on the watch at the time and had attempted to catch the boy before he fell but was unable to do so, and saw him crushed between the ship and the tender; and
- regularly seeing prisoners on the quarter deck of the *Derwent* abused.

The Tribunal also noted that Mr Rodsted was dismissed from the Navy after pleading guilty to being charged with two counts of car stealing.

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**Issues before the Tribunal**

The issues before the tribunal were:

- a) whether Mr Rodsted suffers from PTSD, and if so, whether it is war-caused;
- b) whether he suffers from a depressive disorder, and if so, whether it is war-caused; and
- c) whether he suffers from alcohol abuse or alcohol dependence, and if so, whether it is war-caused

**The Tribunal's consideration**

*Diagnosis of PTSD*

The appeal proceeded with the Tribunal considering whether any of the contended stressors gave rise to a diagnosis of PTSD. Specifically, the Tribunal considered criterion A of the diagnostic criteria for PTSD referred to in DSM-IV, which is expressed in similar terms to the definition of "*experiencing a severe stressor*".

The Tribunal considered the evidence provided by Mr Rodsted at the hearing as well as the evidence he had provided at the first Tribunal hearing in 2002. Further the Tribunal considered the reports of a number of psychiatrists as well the evidence of a number of sailors apart from Mr Rodsted.

In relation to the *Hawke* incident, the Tribunal considered Mr Rodsted's evidence to be unreliable and held that the incident did not meet the objective requirements of criterion A in DSM IV. Nor did Mr Rodsted's evidence of his reaction to the circumstances (eg. being worried and frightened) satisfy the

subjective requirements of criterion A in DSM IV.

In relation to the scare charge incident, the Tribunal also found aspects of Mr Rodsted's evidence to be unreliable and incorrect. After carefully considering all of the evidence before it the Tribunal evaluated the reliability of Mr Rodsted's evidence and said:

[66]...we do not accept Mr Rodsted's evidence in relation to the scare charge event. He was an unsatisfactory witness, and at times prevaricated in the course of his cross-examination. We find it unnecessary to determine whether his memory and resulting evidence was affected by some or all of the possible factors referred to by Doctors Furze and Davis, or whether he gave evidence that was deliberately untruthful. Insofar as the diagnosis of PTSD relates to the scare charge event, we must decide whether we are reasonably satisfied that the scare charge event occurred, and that Mr Rodsted had an intense subjective reaction to any event of that sort. We are not so satisfied...Further, he did not give credible evidence before us of any other stressor that would support a diagnosis of PTSD that was war-caused.

In summary, the Tribunal was satisfied on the evidence that Mr Rodsted was not suffering from PTSD, nor that he had suffered from the condition at any time since he lodged his application for a disability pension.

*Alcohol dependence or abuse*

The Tribunal noted, in relation to one psychiatric report that the opinion contained appeared to be inconsistent with the diagnostic criteria for alcohol dependence or abuse to the extent that it referred to Mr Rodsted suffering from

both alcohol dependence and alcohol abuse.

Nonetheless, the Tribunal found that Mr Rodsted was suffering from alcohol dependence when he lodged his claim for pension. However, the Tribunal further found that it had been in remission, probably since November 2005.

*Diagnosis of depressive disorder*

The Tribunal considered the evidence and found that Mr Rodsted's depressive symptoms were secondary to his alcohol dependence. As such, the Tribunal was not satisfied that Mr Rodsted had suffered from a depressive disorder since lodging his claim for pension.

*Was Mr Rodsted's alcohol dependence war-caused?*

In determining whether Mr Rodsted's alcohol dependence was war caused, the Tribunal applied the methodology set out in *Deledio*.

In relation to step 1, the Tribunal considered that Mr Rodsted's evidence that he experienced the *Hawk* event and the scare charge event and used alcohol to obtain relief from the symptoms he experienced as a result of those events, and also the various medical reports pointed to an hypothesis connecting Mr Rodsted's alcohol dependence with his operational service.

In relation to step 2, the Tribunal noted the current SoP in force in relation to alcohol dependence, was no. 1 of 2009 and that Mr Rodsted could rely upon any earlier SoP in force at the time of the Commission's decision, if this was more

favourable to him: *Gorton v Repatriation Commission* [2001] FCA 1194; (2001) 65 ALD 609.

Further, the Tribunal noted the relevant SoP factors as:

- Factor 6(a) of the 2009 Alcohol SoP – having a clinically significant psychiatric condition at the time of the clinical onset of alcohol dependence;
- Factors 6(b) and (c) of 2009 Alcohol SoP – experiencing a category 1A or 1B stressor within the five years before the clinical onset of alcohol dependence; and
- Factor 5(a) of the 1998 Alcohol SoP – suffering from a psychiatric disorder at the time of the clinical onset of alcohol dependence, and factor 5(b) - experiencing a severe stressor within two years before clinical onset of alcohol dependence.

The Tribunal then turned to consider the reasonableness of the hypothesis connecting Mr Rodsted's alcohol dependence with his war service.

In relation to factor 6(a) in the 2009 Alcohol SoP, and whether Mr Rodsted was suffering from a clinically significant psychiatric condition (namely PTSD) at the time of the clinical onset of alcohol dependence, the Tribunal noted that the SoPs concerning PTSD must also be considered: *McKenna v Repatriation Commission* [1999] FCA 323; (1999) 86 FCR 144.



Specifically, the issue for the Tribunal to consider was whether there was material pointing to Mr Rodsted having experienced a category 1A or category 1B stressor before the clinical onset of PTSD by reference to the relevant SoP for PTSD. However, the Tribunal could not make any finding as to whether that in fact occurred.

In relation to the *Hawke* incident, the Tribunal considered that Mr Rodsted's evidence-in-chief relating to the event was too tenuous or not credible, taking into account other material including psychiatric evidence and evidence of a number of sailors apart from Mr Rodsted. However, in relation to the scare charge incident, the Tribunal concluded that there was material before it consistent with Mr Rodsted having experienced a category 1A stressor.

The Tribunal then turned next to consider the issue of whether there was material pointing to Mr Rodsted experiencing the scare charge event, before the clinical onset of PTSD and found that this was the case.

For the sake of completeness, the Tribunal also went onto consider the two earlier SoPs.

Finally, the Tribunal turned to consider step 4 of *Deledio*, whether it was satisfied, beyond reasonable doubt, that there was no sufficient ground for making a determination that Mr Rodsted's alcohol dependence was war caused. The Tribunal highlighted that the key considerations, in relation to its findings of fact was Mr Rodsted's evidence that the scare charge event occurred, and his

evidence as to his subjective reaction to it.

The Tribunal noted that, in the context of considering the issue of diagnosis, it was not reasonably satisfied that the scare charge event occurred. Nonetheless, the Tribunal went on to note that over the course of his claim for PTSD, Mr Rodsted has referred to various asserted stressors. The Tribunal said:

[129]...This changing focus on the basis of Mr Rodsted's claim is inconsistent with Dr Davis' opinion to the effect that he would expect there to be a major stressor and an intense and clear recollection of the core experience of it in order to explain four decades of illness...

The Tribunal then went on to note that it considered Mr Rodsted was an unsatisfactory witness, and summarised all of the areas where it considered Mr Rodsted's evidence to be unreliable, unsatisfactory, or incorrect. The Tribunal concluded:

"[136]...we are satisfied beyond reasonable doubt that there is no credible evidence before us that the scare charge event occurred, or that Mr Rodsted suffered the serious subjective reaction that he asserts in consequence of any event of that sort, and accordingly there is no sufficient ground for us to determine that Mr Rodsted's alcohol dependence was war-caused."

### Formal decision

The Tribunal varied the decision under review by deciding that:

- Mr Rodstead was not suffering from PTSD and affirmed the decision under review in relation to PTSD; and
- Mr Rodsted was not suffering from a depressive disorder, and
- His condition of alcohol dependence was not war-caused.

### Re McKerlie and Repatriation Commission

Mr J G Short (Member)

[2009] AATA 718

22 September 2009

***Post-traumatic stress disorder –  
ischaemic heart disease –  
hypertension – diagnosis of PTSD –  
severe stressor***

### Facts

Mr McKerlie served in the Royal Australian Navy from 27 July 1959 until 26 July 1979. He rendered operational service in South Vietnamese waters.

Mr McKerlie lodged a claim for post-traumatic stress disorder and alcohol dependency together with ischaemic heart disease and hypertension.

The Repatriation Commission (the Commission) answered the claim by determining post-traumatic stress disorder (PTSD), ischaemic heart disease and hypertension were not related to

Mr McKerlie's relevant service. On review, the Veterans' Review Board affirmed the Commission's decision. Mr McKerlie appealed to the AAT.

### The stressor

Mr McKerlie contended that he experienced a severe stressor when HMAS Swan (the Swan) anchored in Vung Tau Harbour on 8 December 1971. Specifically, the Swan, was escorting HMAS Sydney (the Sydney) in Vung Tau Harbour on 8 December 1971, and had dropped anchor.

Mr McKerlie had been alerted to bubbles emanating from around the anchor line and had, in company with others in the ship's tender vessel, investigated the bubbles and that while doing so, the tender vessel had been secured by an occupant of that vessel to the anchor chain.

Mr McKerlie had been the first diver to enter the water alongside the anchor chain to investigate the source of the bubbles. When Mr McKerlie was approximately three feet under water, he felt a force which he momentarily considered may have been an attack from an enemy diver. He then concluded that the force had come from above and was the force of another of the Swan's divers falling on top of him.

### Issues before the Tribunal

The appeal proceeded by way of one distinct issue:

- whether the Swan anchored in Vung Tau Harbour on 8 December 1971.

The VRB had determined that the *Swan* did not anchor on 8 December 1971 and consequently rejected Mr McKerlie's claim.

The Commission contended that if the Tribunal were to find that the *Swan* did not anchor and consequently Mr McKerlie did not experience the asserted stressor, then a diagnosis of PTSD could not be established to the Tribunal's reasonable satisfaction.

### **The Tribunal's consideration**

At the outset, the Tribunal noted that the diagnostic criteria for PTSD in DSM IV clearly required the experience of a severe stressor.

The Tribunal heard evidence from a number of witnesses including the ship's then captain, Commodore James, and that of his then executive officer, Lieutenant Commander, now Captain Nobes. Their evidence was firm and unshaken that the *Swan* did not anchor on 8 December 1971 and this evidence was consistent with that recorded in the *Swan's* log. The Tribunal noted:

[107]... the ship's run distances were recorded for each of the 24 hours of 8 December 1971, if the *Swan* had anchored for two to three hours (as alleged by Mr McKerlie) then the ship's run distance would have had to be incorrectly recorded rather than omitted. I am satisfied that this did not occur.

Having considered all of the material the Tribunal accepted the evidence of Commodore James and Captain Nobes. Where that evidence differed from that of

the applicant or his witnesses, the Tribunal rejected the evidence of the applicant and his witnesses.

The Tribunal found that the anchoring of the *Swan* on 8 December 1971 did not occur. As such, the Tribunal was not reasonably satisfied that Mr McKerlie suffered from PTSD.

The Tribunal also noted that had it found that Mr McKerlie suffered from PTSD when it came to considering the fourth step in *Deledio*, the Tribunal would have been satisfied, beyond reasonable doubt, that Mr McKerlie did not experience a severe stressor as asserted and consequently his claim would then fail.

### **Formal decision**

The Tribunal affirmed the decision under review.

### **Editorial note**



The Tribunal's decision in *Re McKerlie* reflects the approach approved by Gray J in *Mines v Repatriation Commission* (2004) 86 ALD 62 at 74:

[48] It is therefore clear that the question whether a veteran is suffering, or has suffered, a claimed injury or disease must be determined to the reasonable satisfaction of the decision-maker, ie on the balance of probabilities. That question is not to be determined by asking whether there is a reasonable hypothesis that the veteran is suffering, or has suffered, the injury or disease and asking whether the material establishes that the facts supporting that hypothesis do not exist beyond reasonable doubt. If the question is posed as whether a veteran

has suffered PTSD as a result of a traumatic event said to have occurred during the veteran's operational service, it must be answered by saying that the decision-maker must be reasonably satisfied that the traumatic event occurred before reaching the conclusion that the veteran suffered PTSD ...

Only if such a conclusion is reached does the reasonable hypothesis process of reasoning, outlined in the four steps referred to in *Deledio*, come into operation. As I have already suggested, in those circumstances, the connection between the disease and the operational service has already been determined, and the four steps in *Deledio* hardly need to be considered.

However, it is important to remember that in cases dealing with the newer SoP factors "*experiencing a 1A or 1B stressor*", the definition of a category 1A or 1B stressor is narrower than criterion A of DSM-IV, which must be met in order to establish a diagnosis of PTSD. For example, while a person could be diagnosed with PTSD because he or she was "confronted" with an event that involved threat of death or serious injury, that may no longer meet the definition of a category 1A or 1B stressor in the current SoPs.

It will be sometime before there may be any change to Criterion A in DSM-IV, with the next major revision of the manual not due to occur until 2012.

In the meantime, it may be the case that decision makers considering claims dealing with the newer SoPs and 1A or 1B stressors will take a more cautious approach than that suggested in *Mines*

case and proceed to consider all four steps in *Deledio*. While the nature of the claim in *Re Rodsted* involved a number of layers of complexity, it is interesting to note that the Tribunal's decision makes no reference to *Mines* case.

## Federal Court of Australia

### Milbourn v Repatriation Commission

Graham J  
[2009] FCA 176  
3 March 2009

### ***Widow's pension – whether husband's death was 'war-caused' – Whether evidence to connect smoking to service***

#### **Facts**

The late Mr Milbourn served in the Australian Army between 13 January 1942 and 1 February 1943. He suffered no accepted war-caused disabilities and died in 1987 of small cell metastatic carcinoma of the lung.

Mrs Milbourn applied to the Repatriation Commission (Commission) for a war widow's pension on the ground that her late husband's lung cancer was war caused. The Commission refused Mrs Milbourn's claim. The VRB affirmed the Repatriation Commission's decision (VRB).

Mrs Milbourn sought further review by the Administrative Appeals Tribunal (Tribunal). The Tribunal affirmed the decision under review. It was not reasonably satisfied on the balance of probabilities in accordance with subsection 120(4) that Mr Milbourn's death was war-caused. Mrs Milbourn appealed the decision of the Tribunal to the Federal Court.

### **Grounds of appeal**

The relevant question of law put forward by the applicant was whether section 43(2B) of the Administrative Appeals Tribunal Act 1975 (AAT Act) required the Tribunal to give reasons that disclosed:

- where evidence relating to the said question of fact is uncontradicted, why that evidence was not accepted; or
- where evidence relating to the said question of fact is in conflict with other evidence or material before the Tribunal, why the first mentioned evidence was not accepted.

### **The Court's consideration**

Justice Graham considered that the applicant's question of law should be answered in the negative. His Honour considered that section 43(2B) of the AAT Act did not require the Tribunal to provide reasons to be given to support why particular evidence or other material, which could have supported a finding of fact, was not accepted. Under the Act, the Tribunal was obliged to give reasons for 'its decision'. Justice Graham said:

[48] In relation to the question of whether or not Mr Milbourn smoked during the time of his war service and the question of whether or not his smoking was relevantly related or connected to his war service, it was sufficient to record the Tribunal's lack of satisfaction as it did in paragraph 14 of its reasons for decision. Its lack of satisfaction on the balance of probabilities is borne out in part by its observation at [14] 'In our opinion, the material before us is unclear about a temporal connection with army service and even less clear about any greater relationship to army service' (emphasis added). There was no obligation upon the Tribunal to provide reasons why evidence that was favourable to the applicant's case was not accepted. The evidence that tended one way, favourable to the applicant, took the form of hearsay from some years after the event, and evidence that tended the other way took the form of business records (an exception to the rule against hearsay) in respect of facts that would appear to have been admitted by the late Mr Milbourn during his lifetime. In the absence of any direct evidence, 'rejection' of evidence did not become an issue. As Sheppard J said in *Brackenreg v Comcare Australia* (1995) 56 FCR 335 at 350 'a tribunal may properly say that it does not accept the evidence of a witness and no more ...', especially where the evidence relied upon is hearsay. As Sheppard J made clear, a tribunal's conclusion in a matter of this kind may be largely intuitive.

Justice Graham concluded that the Tribunal had clearly articulated why it was not satisfied on the balance of probabilities that Mr Milbourn's death was war caused.

### Formal decision

Mrs Milbourn's appeal was dismissed with costs.



### Editorial Note

Further reading:  
*Re Milbourn and  
Repatriation Commission*

[2008] AATA 959 is reported in VerBosity Vol 24 No 2.

### Renton v Repatriation Commission

Dowsett J  
[2009] FCA 268  
27 March 2009

### **Statement of Principles – alcohol dependence or alcohol abuse – whether applicant experienced a severe stressor**

#### Facts

Mr Renton served in the Australian Army from 5 March 1968 until 2 December 1970. He rendered operational service in Vietnam from 4 June until 24 September 1970. He made a claim unsuccessfully for an anxiety condition and alcohol dependence. The Veterans' Review Board (VRB) accepted the applicant's anxiety condition was war-

caused but affirmed the Repatriation Commission's decision to reject the claim in respect of alcohol dependence. He sought further review by the Administrative Appeals Tribunal (Tribunal). The Tribunal upheld the VRB's decision. Mr Renton appealed to the Federal Court.

### The Tribunal's reasoning

The parties agreed before the Tribunal the Mr Renton suffered from alcohol dependence and the Tribunal accepted the medical evidence to that effect. Mr Renton was a radio keyboard operator in Saigon. In relation to his claim, he put forward two stressors, handling casualty figures and a shooting incident in Saigon.

In relation to the handling casualty figures stressor, the Tribunal was not satisfied the events described by Mr Renton satisfied the definition of severe stressor in the SoP. Specifically, the Tribunal indicated that a person with the background and experience of the applicant – even one with a relative who had been hurt in the past – would not have regarded the experience of reading the casualty lists as a severe stressor of a kind or magnitude of the other examples given in the definition.

In relation to the shooting incident, the Tribunal considered that the events described by Mr Renton were implausible. Specifically, the Tribunal noted that there was no other evidence to corroborate the applicant's account. The Tribunal was not satisfied the incident occurred.

The Tribunal also considered Factor 5(a) - experiencing a psychiatric condition at the time of the clinical onset of alcohol dependence, and factor 5(c) - suffering a psychiatric disorder at the time of the clinical worsening of the condition.

The Tribunal considered that the evidence pointed to the maladaptive pattern of alcohol use being firmly in place long before the date of onset of the anxiety condition. There was no evidence of an aggravation of the condition within the period contemplated by the SoP.

### Grounds of appeal

Mr Renton raised three questions of law:

- Whether the Tribunal had erred in law in failing to take into account deficiencies in obtaining evidence from official records to ascertain the existence of a fact (or apply the presumption in s119(1)(h) of the VEA);
- Whether the Tribunal had erred in law in failing to correctly apply the test in s120 of the VEA that it must be satisfied beyond reasonable doubt that the applicant's incapacity did not arise from a war caused injury. The Tribunal then failed to take into account relevant material or facts; and
- Whether the Tribunal had erred in law failing to correctly apply a statutory test when evaluating the statement of principles for alcohol dependence or abuse. The Tribunal then failed to take into account relevant material facts and ignore relevant material facts.

### The Court's Consideration

*First ground of appeal - Section 119(1)(h) of the VEA*

Justice Dowsett considered that section 119(1)(h) of the VEA requires the decision maker to take into account "difficulties" which lie in the way of ascertaining the existence of any fact, matter, cause or circumstance. Such difficulties include the passage of time and the effects thereof, and any shortcomings in relevant official records, including those resulting from failure to report an occurrence. In this case, his Honour considered that no relevant "difficulties" were identified:

In effect, the applicant submits that s119(1)(h) should be construed as requiring the Tribunal to accept the applicant's claims simply because he has made them. That is not the correct approach to the section. See *Fenner v Repatriation Commission* (2005) 218 ALR 122 at [26]-[29]. There is nothing in this ground of appeal.

*Second ground of appeal - Definition of "experiencing a severe stressor"*

In relation to the 'handling casualty figures' stressor, Justice Dowsett considered that the Tribunal did not fully understand the definition of the words "experiencing a severe stressor". His Honour considered that reading the casualty lists may have amounted to the applicant experiencing, witnessing or being confronted by an event or events "that involved actual or threat of death or serious injury or a threat to the person's or other peoples' physical integrity which event or events might invoke intense fear helplessness or

horror.” The Court’s finding in this respect was contrary to the Commission’s submission that this ground of appeal was really an attack on a finding of fact.

Justice Dowsett went on to consider that, the applicant’s evidence that he felt no particular reaction to the lists (other than relief), might at the fourth step of Deledio, lead to a rejection of the applicant’s claim. However:

...that process should not be allowed to impinge on step three. I consider that the Tribunal did not consider the relevant question in dealing with the applicant’s handling of the causality lists as a potential stressor.

His Honour further noted that the Tribunal had not paid attention to the three specific categories of experience identified as severe stressors in the second part of the definition. His Honour also made reference to *Repatriation Commission v Constable* (2006) 151 FRC 391 at [42] -[50] noting that the Full Court held that an experience falling within any of these categories will be a severe stressor.

*Third ground of appeal – SoP for alcohol dependence or abuse*

In respect of factor 5(a) of the SoP, Justice Dowsett noted that the Tribunal clearly considered that the applicant’s evidence was not reliable because of the passage of time and the effects of his alcohol dependence and anxiety condition. His Honour said:

Given the Tribunal’s adverse view of the applicant as a witness, there was evidence from which it could infer that

the applicant’s alcohol dependence pre dated his arrival in Vietnam. Given that factual finding, his alcohol pre dated his anxiety condition. That condition therefore cannot satisfy para 5(a) of the SoP.

In relation to the “inability to obtain appropriate clinical management factor”, Justice Dowsett noted that there was no evidence of any aggravation or contribution. That was a finding of fact.

### Formal decision

Justice Dowsett allowed Mr Renton’s appeal on the ground that the Tribunal had misunderstood the SoP as applied to the applicant’s handling of casualty lists.



### Editorial Note

*Section 119 of the VEA*

Recently, section 119 of the VEA has been discussed in a number of cases. The Court’s comments in *Renton* follow the line of authority from a number of cases, in which the court has said that section 119 of the VEA does not remove, from the decision maker, the responsibility of applying ss 120 and 120A and other relevant provisions of the VEA according to the proper terms. The provision cannot be used to fill substantial evidentiary gaps, or to take a more benevolent view of the applicant’s case than a decision maker would otherwise have taken: see *Grundman v Repatriation Commission* [2001] FCA 892 at [33]; *Dunlop v Repatriation Commission* [2002] FCA 1400 at [52]; and *Mason v Repatriation Commission* [2000] FCA 1409 at [75] to [76].



*An “event” and the definition of “experiencing a severe stressor”*

The SoP concerning alcohol dependence or alcohol abuse defined ‘experiencing a severe stressor’ as:

... the person experienced, witnessed or was confronted with, an event or events that involved actual or threat of death or serious injury, or a threat to the person’s or other people’s physical integrity, which event or events might evoke intense fear, helplessness or horror...

The Court considered that even if actual events were not identified on the casualty lists, having repeated exposure to casualty lists themselves may well have involved the applicant being confronted with an event for the purposes of the definition in the SoP.

While the current SoPs concerning alcohol dependence (no 1 & 2 of 2009) no longer contain the “experiencing a severe stressor” definition they refer to “a category 1A stressor” and “a category 1B stressor”, both of which refer to “severe traumatic events”. While a category 1A stressor refers to experiencing a life-threatening event, category 1 B refers to a person being an eyewitness to a person being killed or critically injured; or viewing corpses or critically injured casualties as an eyewitness. An eyewitness is defined in the SoP to mean a person who observes an incident first hand and can give direct evidence of it. It excludes a person exposed only to media coverage of the incident.

*Deledio steps*

In *Renton*, the Court considered that the applicant’s evidence that he felt no

particular response other than “concern” and “relief” upon discovering his brother and cousin were not on the casualty list, should not be allowed to impinge upon step three of *Deledio*. Arguably, this could indicate that reactions of “concern” and “relief” are particular responses capable of pointing to this element of the SoP definition being met. Nonetheless, the Court indicated that the applicant’s evidence, in conjunction with medical evidence, might, at the fourth step of *Deledio* lead to the rejection of the applicant’s claim.

### Repatriation Commission v Hill

Cowdroy J  
[2009] FCA 270  
30 March 2009

***Whether Tribunal correctly determined “kind of death” and whether there was an applicable SoP to the “kind of death”.***

#### Facts

Mrs Hill’s late husband, Dr Walker, served in the Royal Australian Air Force and rendered operational service from 9 October 1942 to 8 December 1945. Mrs Hill applied for a widow’s pension. The delegate of the Repatriation Commission (Commission) refused Mrs Hill’s claim on the ground that the death of Dr Walker was not related to his war service. The Veterans’ Review Board (VRB) affirmed the Commission’s decision.

Mrs Hill sought further review by the Administrative Appeals Tribunal (Tribunal). The Tribunal set-aside the decision under review and substituted its decision that Dr Walker's death was war-caused. The Commission appealed from the Tribunal's decision to the Federal Court.

### **The Tribunal's reasoning**

In setting aside the decision under review, the Tribunal held that Dr Walker suffered two kinds of death: heart failure and kidney failure. The Tribunal did not consider that either dementia or ischaemic heart disease (IHD) was a "kind of death". The Tribunal went on to note that there was no SoP for either of the kinds of death it had found. As such, the Tribunal then considered whether there was a reasonable hypothesis connecting the veteran's death with his service according to the principles outlined in *Bushell* and *Byrne*. The Tribunal concluded that a hypothesis was established. That hypothesis was that Dr Walker developed a heavy smoking habit during and in consequence of his service which caused IHD and that IHD was one cause of his death. The Tribunal found that such hypothesis was reasonable and that it was not satisfied beyond a reasonable doubt that any element of the hypothesis had been disproved beyond reasonable doubt.

### **Grounds of appeal**

The Commission made the following submissions:

- When characterising the 'kind of death' met by the veteran, the

decision maker is to have regard to the characterisation of such death as provided by the IHD SoP. The veteran must have met a death with which that SoP is concerned in order to link such death with his war service: see *Lees v Repatriation Commission* [2002] FCAFC 398; (2002) 125 FCR 331 at [16].

- The Tribunal wrongly made its finding on the 'kind of death' based upon the proximate cause or terminal event. Specifically, the Tribunal's finding did not consider the cause of heart failure or kidney failure.
- Given that the Tribunal found that IHD was not a 'kind of death', it must have not been satisfied, on the balance of probabilities, that IHD had contributed to the veteran's death.
- The Tribunal's hypothesis connecting the veteran's death to his service was erroneous because it was premised on IHD contributing to the veteran's death.
- Further, by the finding that IHD was not a cause of death of the veteran, but that glomerulonephritis (GN) was such cause, the Tribunal should have concluded that the GN SoP was applicable.

### **The Respondent's position**

Counsel for Mrs Hill made the following submissions:

- The determination of the 'kind of death' was a question of medical causation and as such comprised a

factual finding which could not be the subject of an appeal to the Court.

- The factual finding was open to the Tribunal since there was evidence that heart failure occurred; and that heart failure was a cause of the veteran's death.
- There is no SoP applicable where heart failure 'constituted a kind of death'.
- Any finding that the veteran's heart failure was the 'proximate' or 'ultimate' cause of death or that the IHD was the 'underlying' or 'contributing' 'medical cause of death' was a factual consideration made on the medical evidence before the Tribunal.
- If the Tribunal made a factual finding to the effect that the heart failure sustained by the veteran was the proximate or ultimate cause of death, and was therefore a terminal event or terminal condition as defined in the IHD SoP, the SoP would have been applicable to the 'kind of death' sustained by the veteran.
- No party made any submission to the Tribunal that a 'kind of death' of the veteran was mesangial IgA glomerulonephritis and that no party referred to the GN SoP.

### **The Court's Consideration**

#### *Question of fact or of law*

Justice Cowdroy rejected the Respondent's contention that the Tribunal's finding concerning the cause of death of the veteran was a finding only of fact. His Honour considered that

the 'kind of death' to be determined involves the question whether such words should be given their ordinary meaning or some technical meaning. Accordingly, this question of construction raises a question of law.

#### *Misapplication of the IHD SoP*

By having regard to the proximate or ultimate cause of death, Justice Cowdroy considered that the Tribunal had committed an error of law similar to the kind referred to in *Repatriation Commission v Codd* (2007) 95 ALD 619. His Honour considered that by failing to appreciate the underlying nature of the disease and directing its attention to the consequence of the disease, the Tribunal had failed to direct its attention to the circumstances leading to the 'kind of death'.

Before the Tribunal, it was contended for Mrs Hill that the veteran's 'kind of death' (heart failure) was caused by IHD. Justice Cowdroy noted that the Tribunal was required to consider the IHD SoP (in accordance with the SoP prevailing at the date of its decision: see Gorton). Applying the IHD SoP, the critical issue for the Tribunal's determination was the identification of the cause of the IHD, as itemised in the IHD SoP.

#### *Application of section 120(3)*

Justice Cowdroy considered that the Tribunal erred by determining that a reasonable hypothesis existed, pursuant to ss 120(1) and 120(3) of the VEA, linking Dr Walker's service to his death. His Honour considered that since the IHD SoP existed, it was not open to the Tribunal to attempt to find a reasonable

hypothesis otherwise than in accordance with that SoP, as was held by the Full Court in *Woodwood* at [100]:

Once an [sic] SoP is determined in relation to a particular condition, it covers the field in relation to that condition.

#### *Standard of proof*

Justice Cowdroy noted that in assessing what the veteran's 'kind of death' was, the Tribunal was required, by s 120(4) of the VEA, to be satisfied on the balance of probabilities. His Honour went on to comment that given that the Tribunal found that IHD was not a 'kind of death', it does not follow that IHD could not have contributed to the veterans' death. The Tribunal's finding only established that the contribution had not been sufficient to satisfy the high standard found in s120(4) of the VEA. While his Honour considered that the Tribunal had misapplied the VEA regarding the 'kind of death', it had not subverted the standard of proof prescribed by s 120 of the VEA:

Provided that the Tribunal correctly interprets the phrase 'kind of death', such that it accords with the meaning of that phrase as judicially determined, the risk of the misapplication of the SoP scheme will be minimised.

#### *Cause of death of the veteran*

As the Tribunal found that IHD was not a 'kind of death' on its apparent acceptance of the evidence that glomerulonephritis caused the veteran's hypertension and renal failure, Justice Cowdroy considered that the Tribunal should have then asked itself whether the hypothesis of a connection between

the veteran's death and his operational service was upheld by the GN SoP.

His Honour held that the error of law made by the Tribunal, treating the proximate or ultimate cause of death as the 'kind of death' instead of having regard to the cause of that failure resulted in the provisions of the GN SoP being circumvented in the same manner as the IHD SoP.

#### **Formal decision**

Justice Cowdroy allowed the Commission's appeal and remitted the matter to be heard by a differently constituted Tribunal. His Honour considered that the Tribunal erred in:

- finding that kidney failure and heart failure were the 'kinds of death' suffered by the veteran;
- misapplying the IHD SoP to support a reasonable hypothesis; and
- failing to find that the GN SoP was relevant to the 'kind of death' suffered by the veteran.



#### **Appeal Alert**

An appeal was lodged to the Full Federal Court from this decision. The Full Court's decision is reported on page 66 of this edition of *VerBosity*.



#### **Editorial Note**

The matter of *Hill* follows the line of reasoning in *Repatriation Commission v Codd* (2007) 95 ALD 619 that the "kind of death" met by a person is the medical cause of death, including the

contributing or underlying medical cause of death.

Recently, in *Collins v Repatriation Commission* [2008] FCA 1982, the Court also emphasised that ‘kind of death’ is a question of medical causation. Specifically, the Court held that the issue of whether a disease “hastened” a person’s death will only be a relevant consideration where there is evidence that a particular disease is a cause that contributes to the ultimate cause of death.

The Court in *Hill* makes it plain that it is an error of law to treat the proximate or ultimate cause of a person’s death as the ‘kind of death’. A decision maker must have regard to the underlying nature and the consequences of the relevant disease.

The decision in *Hill* also demonstrates that provided a decision maker correctly interprets the phrase ‘kind of death’, as judicially determined, the risk of misapplication of the SoP scheme will be minimised.

### **Hopkins v Repatriation Commission**

Mansfield J  
[2009] FCA 1037  
16 September 2009

#### **Meaning of “ceasing to engage in remunerative work” in s 24(2)(a)(i)**

##### **Facts**

Mr Hopkins claimed a pension under the *Veterans’ Entitlements Act* 1986 (VEA) in respect of a number of conditions.

The Commission accepted the conditions and decided that Mr Hopkins was entitled to pension at 100% of the General Rate. The decision was affirmed by the Veterans’ Review Board. Mr Hopkins then sought review by the Administrative Appeals Tribunal (Tribunal). He appealed from the decision of the Tribunal to the Federal Court.

##### **The Tribunal’s reasoning**

The key issue for consideration before the AAT was whether Mr Hopkins met the qualifying criteria specified in section 24(1)(c) of the VEA. The Tribunal approached this issue by way of the four questions set out in *Flentjar v Repatriation Commission* (1997) 48 ALD 1. While the first two questions were answered uncontroversially, there was also the issue as to the date Mr Hopkins ceased to engage in remunerative work for the purposes of section 24(1)(c).

In respect of this issue Mr Hopkins claimed that while he has received a redundancy payment on 28 November 2003 he had applied over 100 times for employment, up until in 2007, when he received a report from the Veterans’ Vocational Rehabilitation Scheme indicating that he was not suitable for their services.

The Tribunal held that Mr Hopkins ceased to engage in remunerative employment on 28 November 2003, the phrase used in s24(2)(a)(i). It found that he ceased to engage in remunerative employment at that time because he was retrenched, so that his reasons for doing so were other than his incapacity from his war caused condition. Further, in

terms of s24(2)(b), the Tribunal found that Mr Hopkins was not genuinely seeking to engage in remunerative work at any time during the assessment period.

### Grounds of appeal

Mr Hopkins contended that the Tribunal had erred in law in reaching the conclusion that he ceased to engage in remunerative work on 28 November 2003, because it did not make the necessary findings of fact to support that conclusion. Specifically, it had failed to make findings as to whether Mr Hopkins had sought employment after 28 November 2003.

### The Court's Consideration

Justice Mansfield considered that the Tribunal did not fail to make the findings of fact required to determine Mr Hopkins' application. It was required to determine when Mr Hopkins had ceased to engage in remunerative work. It decided that question of fact. Further, his Honour noted the following:

- In respect of Mr Hopkins' claim that he made over 100 applications, the Tribunal had rejected this claim because Mr Hopkins has not retained any copies of the applications, even though none of them resulted in an interview.
- The Tribunal rejected Mr Hopkins' claim that he believed that physiotherapy would allow him to return to the workforce, because he failed to obtain or seek that treatment.
- The Tribunal also rejected his claim that he had not read any sickness

certificates provided by his GP and so did not realise he was suffering from shortness of breath and chronic obstructive airways disease, because it was implausible. In addition, the Tribunal also partly rejected this evidence because it was aware that Mr Hopkins had deliberately misinformed the VRB.

### Formal decision

Justice Mansfield was satisfied that the error of law asserted by Mr Hopkins was not made out. As such, his application was dismissed with costs.



### Editorial Note

Section 24(2)(a) of the VEA provides that a person will not be able to satisfy the "loss of earnings" test in section 24(1)(c) if something other than his or her accepted disabilities is also stopping the person from working. In this case, the Tribunal took the view that Mr Hopkins had ceased to engage in remunerative employment because he was retrenched.

#### *Genuinely seeking work etc*

The alone test in section 24(1)(c) is ameliorated by s24(2)(b) which provides that if the veteran is under 65 years, has not been engaged in remunerative work and satisfies the Commission that he or she has been genuinely seeking such work, and would have continued to do so but for the incapacity from the war caused condition, and the war caused condition is the substantial cause of his or her inability to obtain that remunerative work - then the veteran

shall be treated as having been prevented by reasons of the incapacity from continuing to undertake the remunerative work the veteran was undertaking.

The Full Court's decision in *Leane v Repatriation Commission* [2005] FCAFC 83, provides guidance on the issue of "genuinely seeking work".

Firstly, the person must be genuinely seeking to engage in remunerative work during the assessment period: see [30]-[32]. Further, the decision maker must consider the subjective intention or purpose of the claimant - what is required is that the claimant must honestly be trying to engage in remunerative work: see [28].

In this case, the Tribunal rejected Mr Hopkins' claim that he made over 100 applications, because he had not retained any copies of the applications. However, it is important to note that while there will usually be objective evidence of a person 'genuinely seeking' work, such evidence is not essential. In *Leane*, the full Court said:

It may be accepted that, in the ordinary course, a person in the position of the Veteran would have difficulty in establishing that he or she was honestly trying to engage in remunerative work unless there were some 'objective signs of active pursuit of remunerative work'. However, it would be wrong to turn the practical issue of how a person might establish his or her case into some legal pre-condition...

**Repatriation Commission v  
Heathcote**

Greenwood J  
[2009] FCA 1270  
27 October 2009

***whether veteran's death from amyloid cardiomyopathy was related to the veteran's defence service having regard to the veteran's exposure to benzene and hydrocarbons.***

**Facts**

Mr Heathcote served in the Royal Australian Navy and rendered Defence Service, performing the duties of an Aircraft Technician Stoker. Mr Heathcote died at the age of 42 from amyloid cardiomyopathy. The Repatriation Commission (Commission) appealed from a decision of the Administrative Appeals Tribunal (Tribunal) setting aside a decision of the Commission affirmed by the Veterans' Review Board, that the death of Mr Heathcote was not defence caused.

**Grounds of appeal**

The Commission accepted that Mr Heathcote died from cardiomyopathy, and therefore, the Statement of Principles (SoP) concerning cardiomyopathy applied. However, the issue raised by the Commission was whether Mr Heathcote's death from amyloid cardiomyopathy, was related to his defence service. Specifically, whether Mr Heathcote's monoclonal gammopathy of uncertain significance (MGUS) was attributable to his defence service. In addition, the Commission

contended that a SoP concerning myeloma also applied, as the kind of death Mr Heathcote suffered was a manifestation of a condition known as myeloma, having regard to the evidence accepted by the Tribunal. In failing to apply the SoP for myeloma, the Commission contended that the Tribunal had erred in reaching its decision.

#### **The Tribunal's reasons**

The Tribunal noted that the parties had reached agreement that the deceased's condition of cardiomyopathy was the cause of death and that factor (p) of clause 6 of the SoP existed.

The Tribunal noted that Mr Heathcote's condition at death was a complex one and that even medical specialists grappled with the exact developmental pattern of the disease. The Tribunal had before it, evidence from Mr Heathcote's consulting cardiologist, Dr Davidson as well as reports from a number of other specialists. Four specialists, including Dr Davidson were of the opinion that Mr Heathcote was suffering a MGUS which had accelerated the progression of AL amyloidosis explaining the comparatively early death of Mr Heathcote at 42. The Tribunal determined on the balance of probabilities that Mr Heathcote suffered from MGUS at a time sufficiently early in his life to explain the condition, amyloidosis, evident at his death.

Based on a statement provided by a member of the RAN who worked with Mr Heathcote and a statement from one of Mr Heathcote's supervisors, the Tribunal further found that during

Mr Heathcote's six years of defence service, he was exposed to hydrocarbons.

In terms of whether Mr Heathcote's exposure to hydrocarbons gave rise, on the balance of probabilities, to MGUS (the primary pathology which caused amyloid deposits to develop resulting in death by amyloid cardiomyopathy), the Tribunal recorded that it considered "all of the documentary and oral evidence" put before it and accepted the evidence of three specialists, including Dr Davidson, that Mr Heathcote's death was causally related to his defence service, on the balance of probabilities.

#### **The Court's Consideration**

In relation to the issue of whether Mr Heathcote's death from amyloid cardiomyopathy was related to his defence service, Justice Greenwood first considered the Commission's contention that the Tribunal had failed to make a finding on the balance of probabilities as to whether Mr Heathcote had contracted a MGUS prior to amyloidosis. His Honour considered the evidence before the Tribunal, and its finding noted above, that Mr Heathcote was suffering a MGUS which had accelerated the progression of AL amyloidosis explaining the comparatively early death of Mr Heathcote. As such, his Honour did not consider that this ground was made out.

Justice Greenwood then considered whether the Tribunal had made findings of fact for which there was no evidence. Specifically, his Honour considered the Commission's contention that there was no evidence to support the finding of a causal relation or connection between



Mr Heathcote's death from amyloid cardiomyopathy and his defence service. His Honour considered the material that was before the Tribunal and noted that:

[76]...Dr Woods again emphasised that death from cardiac amyloidosis at 42 is extremely young as compared with the median age diagnosis of 60 years, which, in Dr Woods's view, "implied", or from which he inferred, a "significant toxic exposure when in the Australian Navy". That fact need not have been implied or inferred as there was direct evidence of exposure. What Dr Woods was suggesting in his evidence was that early death at 42 from amyloid cardiomyopathy suggested a relationship between toxic exposure and early onset of MGUS which led to amyloidosis and premature death.

... [80] Dr Woods expresses the opinion that since there is a demonstrated statistically significant elevation in the risk of death from multiple myeloma by reason of exposure to benzene, it is "entirely plausible and likely" that workplace exposure to the nominated hydrocarbons including benzene contributed to the cause of Mr Heathcote developing MGUS which, having regard to the latency period of 19 years, makes it "very likely" that MGUS was present in Mr Heathcote for many years. Having regard to the demonstrated risk rate of 25 times the benchmark population of developing multiple myeloma having been diagnosed with MGUS and that benzene exposure significantly elevates the risk of death from multiple myeloma, Dr Woods thought it open, in his view, to conclude that it is plausible that benzene exposure

presents an elevated risk of developing MGUS, as MGUS seems to be a precursor risk to myeloma. Once developed, MGUS has a risk progression to AL amyloidosis of 8.4 times the benchmark population. His Honour further noted that the Commission had not put any epidemiological evidence before the Tribunal or any literature searches of scientific material.

Justice Greenwood considered that a foundation existed for Dr Woods' views and it was, therefore, open to the Tribunal to reach this same conclusion and rely upon the opinion of Dr Woods. It follows therefore, the Tribunal was entitled to conclude that Mr Heathcote's death from cardiomyopathy was defence-caused because he developed MGUS, on the balance of probabilities, by reason of exposure to hydrocarbons including benzene. That condition was the primary pathology that gave rise to a secondary consequence of emergent amyloidosis and caused Mr Heathcote's death from amyloid deposits infiltrating his heart giving rise to amyloid cardiomyopathy reflecting the special disorder contemplated by factor (p) in the SoP.

The remaining contention by the Commission was that the kind of death Mr Heathcote suffered was a manifestation of a condition known as myeloma and that the Tribunal was required to apply the SoP concerning myeloma. Specifically, the Commission said that the issue for consideration was whether the condition or manifestation of a disease called AL amyloidosis (confirmed by the biopsy results two

days before Mr Heathcote died) was a condition characterised as myeloma for the purposes of the definition of myeloma in clause 2(b) of the SoP. Justice Greenwood noted that this contention was made by the Commission, notwithstanding that the specialist clinicians giving evidence in this case regarded MGUS, AL amyloidosis and myeloma as separately expressed conditions, as a function of diagnostic evaluation. Further, his Honour noted that the application of the definition in the SoP to the clinical circumstances confronting Mr Heathcote involved a question of fact.

Justice Greenwood considered that Mr Heathcote was not diagnosed with “myeloma” and did not suffer a “death from myeloma”. In his Honour’s view, the SoP concerning myeloma had no application as a matter of construction having regard to the evidence before the Tribunal and, on the findings of fact, Mr Heathcote’s primary pathology was MGUS which is excluded from the definition of myeloma.

#### **Formal decision**

Justice Greenwood considered that the Commission had not demonstrated error on the part of the Tribunal. The appeal was dismissed with an order that the Commission pay the costs of the respondent of and incidental to the application.

### **Cunningham v Repatriation Commission**

Sundberg J  
[2009] FCA 1272  
9 November 2009

***SoP for depressive disorder – experiencing a severe psychosocial stressor – severe seasickness on operational service - disposition to sea sickness preceded operational service***

#### **Facts**

Mr Cunningham appealed from the decision of the Federal Magistrates Court, which dismissed an appeal from the decision of the Tribunal. The Tribunal had affirmed the Commission’s decision that Mr Cunningham’s depressive disorder was not war related.

#### **Grounds of appeal**

Counsel for Mr Cunningham contended that the Tribunal’s reasons revealed two questions of law:

- whether, having identified a stressor fitting within the definition of “severe psychosocial stressor” in clause 8 of the SoP the Tribunal was required to determine whether the stressor was related to service by applying s 196B of the Act, and
- whether the Tribunal was correct to hold that a pre-existing condition can never give rise to a stressor that is related to service within the meaning of s 196B.

The Commission argued that the Tribunal erred in law in finding or assuming that the appellant experienced a severe psychosocial stressor.

### **The Court's Consideration**

#### *First ground – the section 196B Question*

Justice Sundberg was not satisfied that the Tribunal had properly considered section 196B(14) of the VEA. His Honour noted that it was necessary for the Tribunal to go through the 'related to service' exercise in section 196B(14) and said:

I am not satisfied that the Tribunal's use of the expressions "not attributable to operational service" and "the cause of the seasickness" shows that it properly considered s 196B(14). The subsection is broader than "attributable" in par (b) and "cause" in par (f). Paragraph (a) was potentially applicable. It could be that the appellant's seasickness resulted from an occurrence (rough seas) on the way to Vietnam. The Tribunal did not consider whether the appellant's pre-existing disposition to seasickness was aggravated by his service (par (d)). Nor did it consider whether the seasickness "arose out of" his operational service (par (b)). In *Roncevich v Repatriation Commission* [2005] HCA 40; (2005) 222 CLR 115 at [27], in considering a provision in the same terms as s 169B(14)(b), the Court said the use disjunctively of the expressions "arose out of" and "attributable" manifests an intention to give "defence-caused" a broad meaning. What was there said in relation to the expression "defence-

caused injury" is applicable to "injury ... related to service" in s 196B(14).

#### *Second ground – pre-existing condition*

Justice Sundberg considered that in relation to this ground of appeal, the Tribunal had made an error of law by asking itself the wrong question. His Honour considered that the Tribunal should have directed itself to the various "related to service" elements of s 196B(14) in order to determine whether the seasickness was related to his operational service. Further, his Honour said:

... I am unable to see why the pre-operational severe seasickness should foreclose the possibility that a later occurrence of seasickness on operational service would be a stressor that was related to service within s 196B. To take subs (14)(b) as an example, it would in my view be open to the Tribunal to find that the appellant's seasickness on the voyages to Vietnam arose out of, or was attributable to, that operational service notwithstanding that he had earlier suffered from seasickness when engaged in non-operational service.

#### *The Commission's contention - severe psychosocial stressor*

Before the Federal Magistrate, the Commission had argued that there was no evidence before the Tribunal that seasickness was a severe illness and therefore an occurrence, which, of its nature was an identifiable occurrence that evoked feelings of substantial distress in an individual.

Justice Sundberg noted that the Tribunal did not expressly address whether the

appellant's seasickness was an identifiable occurrence that evoked feelings of substantial distress in an individual. His Honour went onto note that the Tribunal had evidence before it of Dr Strauss, and that he agreed with the Magistrate's interpretation that Dr Strauss' report evinced or was at least open to the interpretation that "he regarded these matters both objectively and as they affected Mr Cunningham individually."

In Justice Sundberg's view, that evidence ...satisfies the requirements that the seasickness suffered by the appellant was objectively an occurrence the nature of which is such to evoke feelings of substantial distress.

Finally, his Honour concluded that the findings of fact made by the Magistrate were open to him on the evidence.

#### Formal decision

The appeal was allowed and the orders of the Magistrate dismissing the appeal were set aside and the matter was remitted to the Tribunal for determination in accordance with the Court's reasons.

#### Further reading



A practice note relating to the Federal Magistrate's decision can be found on the VRB's website, "archived practice notes 2008, no 19.

#### Repatriation Commission v Money

Finn, Dowsett and Edmonds JJ  
[2009] FCFC 11  
13 February 2009

#### ***Proper meaning of "appropriate clinical management" – whether failure to obtain appropriate clinical management a material or contributing or aggravating factor of claimed condition***

##### Facts

A delegate of the Repatriation Commission (Commission) rejected Mr Money's claim for 'chronic bronchitis and emphysema'. 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. The Federal Court dismissed the Commission's appeal on the ground that the Tribunal did not err in fact finding based on evidence. The decision of Justice Stone was appealed to the Full Federal Court.

### Full Court's Consideration

*The expression "inability to obtain appropriate clinical management"*

The Commission sought to challenge the Primary Judge's conclusion that the expression "inability to obtain appropriate clinical management" included 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.

In the joint judgment, Justice Finn and Justice Edmonds considered that the Tribunal erred in the construction it placed on cl 5(a) as limited by cl 6, as did the primary judge, to the extent that the construction given was an overinclusive one. Their Honours said:

[42] ... The cl 5(a) inability must occasion a material contribution to, or aggravation of the IFA disease. The requirement that the inability affect the disease itself is the common thread that runs through s 70(5), s 120B(3), s 196B(3) and cl 5(a) as limited by cl 6 of the SoP...

[43] However, we do not on the material before us accept that the expression "appropriate clinical management" envisages only positive treatment of the disease. Both the Tribunal and Dr Waring expressed opinions consistent with the propositions that advice properly could and should be given to a patient in the proper course of providing a prognosis that he or she desist from certain activities (eg to stop smoking) or take

other steps (eg to lose weight or to cease to work on submarines) as measures designed to preclude exacerbation of the disease's inexorable progress. Let it be accepted that, on the evidence, there was no treatment recognised to be efficacious in halting the progress of the disease let alone of curing it. Nonetheless, we are satisfied that the making of prudential recommendations as to the taking of, or refraining from, courses for the purpose of thereby foreclosing the possible impacts of extraneous causes that might be likely to accelerate the progress of the disease may, in appropriate circumstances, properly be regarded as falling within appropriate clinical management for cl 5(a) purposes. In expressing this view, we agree with the primary judge's conclusion that providing advice as part of the appropriate clinical management of a condition in relation to factors not mentioned in the SoP does not undermine the regime of SoPs.

[44] A further consequence of our view is that, notwithstanding that there may not be an efficacious positive treatment for IFA, a failure to diagnose IFA could itself be a manifestation of an inability to obtain appropriate clinical management of IFA because it would preclude the giving of advice for the purposes we have mentioned...

[46] ...If providing advice on extraneous factors that could possibly accelerate the progress of a disease constitutes appropriate clinical management of that disease as we have held, then it is not to the point that such other "factors" are not referred to in the SoP. Rather, they are capable of

being captured by what the factor that is prescribed comprehends...

[47] ...Again we have indicated our view that the expression used in cl 5(a) is not limited to the provision of some beneficial treatment that was available for the disease. It could encompass recommendations as to the taking of reasonable precautionary measures to preclude the exacerbation of the disease's progress...

[59] It was insufficient to show that, there was simply an inability to obtain such management. Before such an "inability" could qualify as a cl 5(a) factor it had to be shown to have contributed in a material degree to, or aggravated, Mr Money's very slowly progressive disease.

*A 'state of affairs' is not an 'occurrence'*

In the joint judgment, Justice Finn and Justice Edmonds also considered:

[50] We are satisfied that subpara (14)(a) is inapt in the circumstances to relate the cl 5(a) factor to Mr Money's defence service. We agree with the appellant's submission that it strains the ordinary meaning of the word "occurrence" in this setting. The word more naturally refers to an event, incident or happening or a combination of such events, etc which caused a factor to occur. While one may be able to isolate examples of the system's failure in the medical management structure which affected Mr Money, these were simply manifestations of "the state of affairs" (as the Tribunal so described it) that caused Mr Money not to be provided with appropriate clinical management. It was that state of affairs (which was not an "occurrence"), not the individual

instances manifesting it, that produced the cl 5(a) inability.

In a separate judgment, Justice Dowsett considered the preferable construction of s120B(3)(a) of the VEA. His Honour said:

[86] Section 120B(3) imposes a significant limitation upon the circumstances in which the Commission may find that a disease is defence-caused. It prescribes a two-step process. Firstly, the Commission must, on the material before it, identify any connection between the disease and a veteran's service. Secondly, it must consider whether the relevant statement of principles "upholds the contention" that the disease is, on the balance of probabilities, connected with such service. If that question is answered in the affirmative, the Commission may proceed to consider whether it is reasonably satisfied as to the relevant causal link contemplated by s 70...Section 120(4) requires that the Commission be reasonably satisfied as to such matter...

[87]... it would not be sufficient to identify the connection as being simply "inability to obtain appropriate clinical management". That inability would not, itself, demonstrate a connection between any material contribution to, or aggravation of, the Veteran's condition and his service. That process necessarily involves:

identification of a discernible material contribution or aggravation; and

description of the connection between such contribution or aggravation and the Veteran's service.

[95]...The [Tribunal's] failure to identify the contribution or aggravation necessarily led to there being no identification of the connection between it and the Veterans' service....

[99] The Tribunal erred in focussing on the statement of principles to the exclusion of any proper consideration of the question posed by s 70(5) in accordance with ss 120(4) and 120B(3). The question posed by s 120B(3)(a) was not addressed, and so that posed by s 120B(3)(b) could not be addressed.

### Formal decision

The Commission's appeal was allowed and the decision of the Tribunal was set aside and remitted to the Tribunal for further hearing.

Justice Finn and Justice Edmonds were unprepared to make a finding that Mr Money's condition was not defence caused, as their Honours did not accept that degree of construction the Commission had placed upon the SoP.



### Editorial Note

In *Money*, both of the judgments make clear that in respect of an "inability to obtain appropriate clinical management" the inability must occasion a material contribution to, or aggravation of the claimed condition. In addition, both judgments emphasise that it is necessary for a decision maker (in this case the Tribunal) to identify any contribution to a material degree, or aggravation of the claimed condition, or in other words, how the inability affected the disease itself.

While Justice Finn and Justice Edmonds agreed with the primary judge that "appropriate clinical management" is not limited to the provision of beneficial treatment, it is important to note that an inability to obtain such has to be shown to have contributed in a material degree to, or aggravated, the claimed condition.

### *Assessing a contention of connection with service*

Justice Dowsett's decision provides clear guidance on how a decision maker should assess a contention of connection between a person's claimed condition and their service.

#### *Step 1 – identifying a connection with service*

Firstly, the decision maker must, on the material before it, identify any connection between the disease and a veteran's service. The decision maker must consider all the material, but not the statement of principles. However, in a practical sense these may help the decision maker to identify relevant aspects of the material he or she must consider.

#### *Step 2 – deciding whether the claimed condition is connected with service*

Secondly, the decision maker must consider whether the relevant statement of principles "upholds the contention" that the disease is, on the balance of probabilities, connected with such service.

#### *Step 3 – deciding whether there is a casual link*

Thirdly, the decision maker must proceed to consider whether he or she is reasonably satisfied as to the relevant

causal link set out in section 70 of the VEA and that the exclusion provisions in that section does not prevent acceptance of the claim.

**Collins v Repatriation Commission**

Mansfield, Stone and Edmonds JJ  
[2009] FCFCA 90  
5 August 2009

***Whether Tribunal correctly determined “kind of death” – whether a medical conditions contributes to death of veteran by only affecting its timing***

**Facts**

Mr Collins rendered operational service in the Royal Australia Air Force from January 1943 until January 1946. He died in 2005 and the death certificate recorded the following as “cause of death and duration of last illness”:

- (1)(a) Pulmonary Embolism, days
- (1)(b) Myocardial Infarction (Acute), days
- (2) Motor Axonal Neuropathy, years  
Hypertension, years

Ms Collins claimed a war widow’s pension. The Repatriation Commission (Commission), refused the claim and the Veterans’ Review Board (VRB) affirmed that refusal. Ms Collins then applied to the Administrative Appeals Tribunal (Tribunal) who affirmed the decision under review. She then appealed from the Tribunal’s decision to the Federal

Court. Justice Emmett dismissed the appeal. Ms Collins then appealed to the Full Federal Court.

**Grounds of appeal**

It was argued on behalf of Ms Collins that the Tribunal erred in law when it found that ischaemic heart disease had contributed to the time of death of the veteran but did not constitute a “kind of death”. It was then argued that the primary judge had also erred in not recognising that error of law, and in focusing on what his Honour identified as the “ultimate” cause of death. Specifically, by asking whether ischaemic heart disease contributed to the “ultimate” cause of death, rather than whether it contributed to the veteran’s death.

**Question of law**

The question of law was whether, if a medical condition contributes to the death of a veteran only by affecting its timing, it is an error of law on the part of the Tribunal to conclude that the kind of death (or medical cause or causes of death) does not include that medical condition.

**The Court’s Consideration**

*Cause of death of the veteran*

At the outset, Justices Mansfield and Stone noted that where the word “death” appears in ss 8 and 13 it means the medical cause or causes of death. Hence, the “kind of death” referred to in ss 120A(2) and (4) is also one which refers to the medical cause or causes of death. In addition, their Honours noted that:



In the event of a dispute about the "death" or the medical cause or causes of death, the issue is to be decided on the balance of probabilities: Cooke. That decision confirms that the resolution of such an issue (if it arises) is anterior to, and unrelated to, whether the death is war caused.

Their Honours then turned their attention to the Tribunal's decision, particularly the following passage:

[the medical evidence was that] ischaemic heart disease hastened, but was not the cause of, the veteran's death. What caused his death was the pulmonary embolism, which occurred as a consequence of the motor axonal neuropathy which the veteran had suffered for many years. While the veteran may have died when he did – rather than some hours or days later – because he had ischaemic heart disease, it is not correct to say that the ischaemic heart disease was the cause, or even one of the causes, of his death. The cause of death was the pulmonary embolism. In the language of ss 120 and 120A of the [VE] Act, the "kind of death" met by the veteran was "death by pulmonary embolism.

In Justices Mansfield and Stone's view, the passage above did not demonstrate any legal error on the part of the Tribunal. It asked what was the medical cause of the veteran's death. It did not overlook the evidence that the veteran also suffered from ischaemic heart disease. It made a finding of fact, that the cause of death was pulmonary embolism. There was evidence upon which it could have reached that conclusion. Justice Edmonds, while giving separate reasons, also agreed that the Tribunal's findings did not involve an error of law.

#### *Issue of time of death*

Justices Mansfield and Stone concluded that inquiry about the death or the kind of death for the purposes of the VEA is a question of fact about the medical cause or causes of the death. There is not a legislative intention that any medical condition which hastens the time of death by a measurable period, even a short one, where in medical terms another medical condition is clearly the medical condition which accounts for the pathological changes leading to death, is itself a medical cause of the death. Their Honours said:

...we do not consider that as a matter of law any medical condition which may affect the time of death of a veteran by a measurable period, but does not otherwise play any real role in the pathological changes leading to the death (which are medically ascribed to another medical condition), is a death (that is a medical cause of death) or a kind of death under the VE Act.

#### **Findings of the primary judge**

In relation to the Primary Judge's findings, Justices Mansfield and Stone considered that the reference to "the ultimate cause of death" may be capable of being misunderstood. However, their Honours did not consider the primary judge to have made any distinction between the ultimate or primary and secondary medical causes of death, but simply to be recording the finding of the Tribunal (in this instance that ischaemic heart disease was not a medical cause of the death of the veteran).

Justice Edmonds, also agreed that the primary judge had not drawn any distinction in his use of the phrase “the ultimate cause of death.”

### Decision

Mrs Collins’ appeal was dismissed with costs.



### Editorial Note

This appeal was argued at the same time as *Hill v Repatriation Commission* [2009] FCAFC 91. The legal issue in both appeals was, in essence, the same. Consequently, both *Hill* and *Collins*, follow the line of reasoning in a number of recent Federal Court cases that the “kind of death” met by a person is the medical cause or causes of death.

The matter of *Collins* differs slightly from *Hill* in that the issue in relation to kind of death was focussed upon the time of death. Specifically, whether a medical condition contributes to the death of a veteran if it only affects its timing. Justice Mansfield and Stone’s conclusion that a medical condition that only affects timing, but does not play a real role in the pathological changes leading to the death, should not be considered a kind of death in terms of the VEA, follows the line of reasoning of the Court in *Repatriation Commission v Codd* (2007) 95 ALD 619. Specifically, that kind of death is concerned with causation, it is not concerned with how slow, fast or otherwise the death occurred.

### Further reading



For an example of a practical application and further reading on the primary judge’s decision please see

VeRBosity Vol 24 No 2, pages 120 – 122.

### Hill v Repatriation Commission

Mansfield, Stone and Edmonds JJ  
[2009] FCFC 91  
5 August 2009

**Whether Tribunal correctly determined “kind of death”**

### Facts

Mrs Hill’s late husband, Dr Walker, served in the Royal Australian Air Force and rendered operational service from 9 October 1942 to 8 December 1945. Mrs Hill applied for a widow’s pension. The delegate of the Repatriation Commission (Commission) refused Mrs Hill’s claim on the grounds that the death of Dr Walker was not related to his war service. The Veterans’ Review Board (VRB) affirmed the Commission’s decision. Mrs Hill sought further review by the Administrative Appeals Tribunal (Tribunal). The Tribunal set-aside the decision under review and substituted its decision that Dr Walker’s death was war-caused.

The Commission appealed from the Tribunal's decision to the Federal Court. Justice Cowdroy allowed the Commission's appeal and remitted the matter to be heard by a differently constituted Tribunal. Mrs Hill appealed against this decision, and in effect, sought to re-instate the Tribunal's decision.

### **Grounds of appeal**

It was argued on behalf of Mrs Hill that the primary judge erred in interpreting ss 5D and 120A of the VEA by concluding that neither "heart failure" nor "kidney failure" was capable of constituting a "kind of death". Specifically, the primary judge had failed to consider the definition of "disease" in s 5D of the VEA and had erroneously drawn a distinction between the terms "condition" and "disease". Counsel for Mrs Hill argued that the definition of "disease" in s5D of the VEA indicates that the "condition" which leads to the death of a veteran may be determined as the medical cause of death. As such, Dr Walker's "conditions" of renal failure and heart failure were each kinds of death.

### **The Court's Consideration**

#### *Cause of death of the veteran*

Their Honours noted that the Tribunal was required to make a finding about the medical cause or causes of the death of the veteran. This was a question of fact for the Tribunal on the balance of probabilities.

In respect of the death certificate, their Honours noted that it was not, itself, determinative of the cause or causes of the veteran's death. It was a part of the

evidence, that included extensive expert evidence, on which the medical cause or causes of the veteran's death was to be determined.

Their Honours considered that the primary judge correctly held that the Tribunal erred in law by concluding that Dr Walker's death was caused by heart failure. Specifically, their Honours noted:

The Tribunal erred in law because it failed to determine why the veteran's heart gave up and why his renal function ceased. It failed to identify the cause or causes of his death. It recognised the issue between the two specialists as to the extent to which, if at all, ischaemic heart disease (in context, also the damage caused by the myocardial infarct which the ischaemic heart disease caused) contributed to the veteran's heart failing. For the purposes of ss 8, 120 and 120A, in our view, it was required to determine whether, on the balance of probabilities, ischaemic heart disease was a cause of the veteran's death.

...

... By focusing erroneously on the cause of death only in a general way, by looking at the medical processes leading to the veteran's death and not to the medical cause or causes of the death, the Tribunal in effect found that a particular kind of death, namely death from ischaemic heart disease, was war-caused (in accordance with the reverse onus of proof prescribed by s 120(1) and (3)) even though it had rejected the claim that ischaemic heart disease was a cause of, or a particular kind of, death. It also, by its error, failed to apply the IHD SoP to determine if the death was war-caused

in accordance with ss 120 and 120A (assuming it had found ischaemic heart disease to have been a medical cause of death).

*The definition of "disease"*

In respect of Mrs Hill's argument concerning the definition of "disease", their Honours considered that the provision recognises that a "medical condition" is one which is to be identified at a proper level of specificity and to be capable of diagnosis and management. Similarly, their Honours considered that the definition of "disease" also contemplates that a morbid condition requires the identification of the particular medical condition, based upon medical diagnosis, not a description only in a general way.

**Decision**

Mrs Hill's appeal was dismissed.



**Editorial Note**

The matter of Hill follows the line of reasoning in a number of recent Federal Court cases that the "kind of death" met by a person is the medical cause or causes of death, including the contributing or underlying medical cause of death.<sup>9</sup> It is a question of medical causation.<sup>10</sup>

The Full Court's decision emphasises the importance of a decision maker making a finding as to the medical cause or causes of death, and the synchronicity between that finding and the finding as to whether the death was war-caused. That is because, once the cause of death is determined, that finding will inform the question whether there is a SoP applicable to that particular kind of death. That in turn indicates how the question of whether the death is war-caused is addressed in accordance with the method set out in Deledio.

*The definition of "disease"*

The comments of their Honours in Hill regarding the "definition of disease" are consistent with Parliament's intent, when the definition of a disease was amended in 1991. The Explanatory Memorandum to the Veterans' Affairs Legislation Amendment Bill 1991 said:

"...The amended definition is intended to prevent conditions which are not medically defined as a disease being regarded as such for the purposes of the Act."

The 1991 amendment followed a decision of the Tribunal where an applicant had claimed hypertension, and the Tribunal had found that the applicant had a "disease" even though medical specialists agreed that he was not suffering from hypertension but rather "borderline" or "pre hypertension".

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<sup>9</sup> *Repatriation Commission v Codd* (2007) 95 ALD 619

<sup>10</sup> *Ilins v Repatriation Commission* [2008] FCA 1982

## Statements of Principles issued by the Repatriation Medical Authority

January to December 2009

Number of Instrument	Description of Instrument
1 & 2 of 2009	Revocation of Statements of Principles (Instruments Nos 17 & 18 of 2008) and determination of Statements of Principles concerning <b>alcohol dependence and alcohol abuse</b> and death from alcohol dependence and alcohol abuse.
3 & 4 of 2009	Revocation of Statements of Principles (Instruments Nos 15 & 16 of 2008) and determination of Statements of Principles concerning <b>drug dependence and drug abuse</b> and death from drug dependence and drug abuse.
5 & 6 of 2009	Revocation of Statements of Principles (Instruments Nos 296 & 297 of 1995) and determination of Statements of Principles concerning <b>accommodation disorder</b> and death from accommodation disorder.
7 & 8 of 2009	Revocation of Statements of Principles (Instruments Nos 73 & 74 of 1995) and determination of Statements of Principles concerning <b>thromboangiitis obliterans</b> (Buerger's disease) and death from thromboangiitis obliterans.
9 & 10 of 2009	Revocation of Statements of Principles (Instruments Nos 265 & 266 of 1995) and determination of Statements of Principles concerning <b>chilblains</b> and death from chilblains.
11 & 12 of 2009	Revocation of Statements of Principles (Instruments Nos 13 & 14 of 1998) and determination of Statements of Principles concerning <b>cardiac myxoma</b> and death from cardiac myxoma.
13 & 14 of 2009	Revocation of Statements of Principles (Instruments Nos 25 & 26 of 2003) and determination of Statements of Principles concerning <b>macular degeneration</b> and death from macular degeneration.
15 & 16 of 2009	Revocation of Statements of Principles (Instruments Nos 132 & 133 of 1996) and determination of Statements of Principles concerning <b>schizophrenia</b> and death from schizophrenia.
17 & 18 of 2009	Revocation of Statements of Principles (Instruments Nos 59 & 60 of 2001) and determination of Statements of Principles concerning <b>bronchiectasis</b> and death from bronchiectasis.
19 & 20 of 2009	Revocation of Statements of Principles (Instruments Nos 207 & 208 of 1995) and determination of Statements of Principles concerning <b>cerebral meningioma</b> and death from cerebral meningioma.
21 & 22 of 2009	Revocation of Statements of Principles (Instruments Nos 205 & 206 of 1995) and determination of Statements of Principles concerning <b>malignant neoplasm of the cerebral meninges</b> and death from malignant neoplasm of the cerebral meninges.

## Repatriation Medical Authority

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23 & 24 of 2009	Revocation of Statements of Principles (Instruments Nos 166 & 167 of 1995) and determination of Statements of Principles concerning <b>frostbite</b> and death from frostbite.
25 & 26 of 2009	Revocation of Statements of Principles (Instruments Nos 168 & 169 of 1995) and determination of Statements of Principles concerning <b>immersion foot</b> and death from immersion foot.
27 & 28 of 2009	Revocation of Statements of Principles (Instruments Nos 25 & 26 of 2008 as amended by No 50 of 2008) and determination of Statements of Principles concerning <b>bipolar disorder</b> and death from bipolar disorder.
29 & 30 of 2009	Revocation of Statements of Principles (Instruments Nos 81 & 82 of 1995 as amended by No 11 of 2002) and determination of Statements of Principles concerning <b>trigeminal neuropathy</b> and death from trigeminal neuropathy.
31 & 32 of 2009	Revocation of Statements of Principles (Instruments Nos 149 & 150 of 1995 concerning non fatal effects of electric shock and death from electrocution; and Instruments 151 & 152 of 1995, as amended by Nos 197 & 198 of 1995, concerning effects of lightning) and determination of Statements of Principles concerning <b>electrical injury</b> and death from electrical injury.
33 & 34 of 2009	Revocation of Statements of Principles (Instruments Nos 249 & 250 of 1995) and determination of Statements of Principles concerning <b>Cushing's syndrome</b> and death from Cushing's syndrome.
35 & 36 of 2009	Revocation of Statements of Principles (Instruments Nos 15 & 16 of 1998 concerning idiopathic fibrosing alveolitis) and determination of Statements of Principles concerning <b>fibrosing interstitial lung disease</b> and death from fibrosing interstitial lung disease.
37 & 38 of 2009	Amendment of Statements of Principles (Instruments Nos 47 & 48 of 2005) concerning <b>epileptic seizure</b> and death from epileptic seizure.
39 & 40 of 2009	Determination of Statements of Principles concerning <b>toxic maculopathy</b> and death from toxic maculopathy.
41 & 42 of 2009	Amendment of Statements of Principles (Instruments Nos 85 & 86 of 2007) concerning <b>systemic lupus erythematosus</b> and death from systemic lupus erythematosus.
43 & 44 of 2009	Amendment of Statements of Principles (Instruments Nos 89 & 90 of 2007) concerning <b>ischaemic heart disease</b> and death from ischaemic heart disease.
45 & 46 of 2009	Amendment of Statements of Principles (Instruments Nos 74 & 75 of 2008) concerning <b>deep vein thrombosis</b> and death from deep vein thrombosis.
47 & 48 of 2009	Amendment of Statements of Principles (Instruments Nos 47 & 48 of 2008) concerning <b>eating disorder</b> and death from eating disorder.
49 & 50 of 2009	Amendment of Statements of Principles (Instruments Nos 70 & 71 of 2008) concerning <b>personality disorder</b> and death from personality disorder.

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51 & 52 of 2009	Amendment of Statements of Principles (Instruments Nos 39 & 40 of 2008) concerning <b>acquired cataract</b> and death from acquired cataract.
53 of 2009	Amendment of Statements of Principles (Instrument No 7 of 2006) concerning <b>motor neurone disease</b> and death from motor neurone disease.
54 & 55 of 2009	Revocation of Statements of Principles (Instruments Nos 23 & 24 of 1995) and determination of Statements of Principles concerning <b>trigeminal neuralgia</b> and death from trigeminal neuralgia.
56 & 57 of 2009	Revocation of Statements of Principles (Instruments Nos 74 & 75 of 1999) and determination of Statements of Principles concerning <b>migraine</b> and death from migraine.
58 & 59 of 2009	Revocation of Statements of Principles (Instruments Nos 267 & 268 of 1995) and determination of Statements of Principles concerning <b>influenza</b> and death from influenza.
60 & 61 of 2009	Revocation of Statements of Principles (Instruments Nos 172 & 173 of 1995) and determination of Statements of Principles concerning <b>malaria</b> and death from malaria.
62 & 63 of 2009	Determination of Statements of Principles concerning <b>bronchiolitis obliterans organising pneumonia</b> and death from bronchiolitis obliterans organising pneumonia.
64 & 65 of 2009	Determination of Statements of Principles concerning <b>systemic sclerosis</b> and death from systemic sclerosis.
66 & 67 of 2009	Determination of Statements of Principles concerning <b>localised sclerosis</b> and death from localised sclerosis.
68 & 69 of 2009	Revocation of Statements of Principles (Instruments Nos 9 & 10 of 1999 as amended by Nos 58 & 59 of 1999) and determination of Statements of Principles concerning <b>panic disorder</b> and death from panic disorder.
70 & 71 of 2009	Revocation of Statements of Principles (Instruments Nos 43 & 44 of 1997) and determination of Statements of Principles concerning <b>malignant neoplasm of the ovary</b> and death from malignant neoplasm of the ovary.
72 & 73 of 2009	Revocation of Statements of Principles (Instruments Nos 25 & 26 of 1995) and determination of Statements of Principles concerning <b>scrub typhus</b> and death from scrub typhus.
74 & 75 of 2009	Determination of Statements of Principles concerning <b>adrenal insufficiency</b> and death from adrenal insufficiency.
76 & 77 of 2009	Determination of Statements of Principles concerning <b>hypopituitarism</b> and death from hypopituitarism.

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 31 December 2009

Description of disease or injury	SoPs under consideration	Gazetted
Acoustic neuroma	Instrument Nos 67/96 & 68/96	25-06-08
Acute articular cartilage tear	—	4-11-09
Acute blepharitis	Instrument Nos.115/95 & 116/95 as amended by 19/04 & 20/04	25-06-08
Acute pancreatitis	Instrument Nos.45/97 & 46/97 as amended by 74/98 & 75/98 & 41/03 & 42/03	25-06-08
Acute sprain and acute strain	Instrument Nos.55/06 & 56/06	23-12-09
Adhesive capsulitis of the shoulder	Instrument Nos.17/99 & 18/99 as amended by 28/02 & 29/02	24-06-09
Alzheimer's disease	Instrument Nos.17/01 & 18/01	19-09-07
Anal fissure	Instrument Nos.247/95 & 248/95 as amended by 11/97 & 12/97	25-06-08
Angle-closure glaucoma	Instrument Nos.15/99 & 16/99 as amended by 25/06 & 26/06	24-06-09
Anxiety disorder	Instrument Nos.101/07 & 102/07	24-06-09
Aortic aneurysm	Instrument Nos.66/98 & 67/98	24-06-09
Atherosclerotic peripheral vascular disease	Instrument Nos.65/02 & 66/02	14-01-09
Carotid arterial disease	Instrument Nos.9/03 & 10/03 as amended by 29/03 & 30/03	14-01-09
Chondromalacia patellae	Instrument Nos.33/01 & 34/01 as amended by 27/05	29-04-09
Chronic blepharitis	Instrument Nos.117/95 & 118/95 as amended by 21/04 & 22/04	25-06-08
Cluster headache syndrome	Instrument Nos.66/99 & 67/99	24-06-09
Coeliac disease	Instrument Nos.17/97 & 18/97	25-06-08
Conductive hearing loss	Instrument Nos.19/96 & 20/96	25-06-08
Conjunctivitis	Instrument Nos 111/96 & 112/96	25-06-08
Contact dermatitis	Instrument Nos.65/97 & 66/97 as amended by 23/04 & 24/04	25-06-08
Dental malocclusion	Instrument Nos.372/95 & 373/95	27-06-07
Depressive disorder	Instrument Nos.27/08 & 28/08	24-06-09
Diabetes mellitus	Instrument Nos.11/04 & 12/04 as amended by 9/08 & 10/08	24-06-09
Dislocation	Instrument Nos. 290/95 & 291/95	2-05-07
Dupuytren's contracture	—	26-08-09
Endometriosis	Instrument Nos.7/04 & 8/04	24-06-09



## Repatriation Medical Authority

<b>Description of disease or injury</b>	<b>SoPs under consideration</b>	<b>Gazetted</b>
Extrinsic allergic alveolitis	<i>Instrument Nos.57/97 &amp; 58/97</i>	25-06-08
Fibrosing interstitial lung disease	<i>Instrument Nos.35/09 &amp; 36/09</i>	4-11-09
Gout	<i>Instrument Nos.11/00 &amp; 12/00 as amended by 43/03 &amp; 44/03</i>	9-01-08
Gulf War syndrome	—	14-01-09
Haemochromatosis	<i>Instrument Nos.5/97 &amp; 6/97</i>	25-06-08
Iliotibial band syndrome	—	26-08-09
Internal derangement of the knee	<i>Instrument Nos.59/97 &amp; 60/97 as amended by 96/97</i>	25-06-08
Intervertebral disc prolapse	<i>Instrument Nos.39/07 &amp; 40/07 as amended by 80/08 &amp; 81/08</i>	29-04-09
Irritable bowel syndrome	<i>Instrument Nos 103/96 &amp; 104/96</i>	25-06-08
Ischaemic heart disease	<i>Instrument Nos.89/07 &amp; 90/07 as amended by 43/09 &amp; 44/09</i>	4-11-09
Joint instability	—	23-12-09
Kaposi's sarcoma	<i>Instrument Nos 159/96 &amp; 160/96</i>	25-06-08
Lumbar spondylosis	<i>Instrument Nos.37/05 &amp; 38/05 as amended by 78/08 &amp; 79/08</i>	29-04-09
Malignant neoplasm of the cervix	<i>Instrument Nos.41/97 &amp; 42/97</i>	25-06-08
Malignant neoplasm of the liver	<i>Instrument Nos 171/96 &amp; 172/96</i>	8-11-06
Malignant neoplasm of the nasopharynx	<i>Instrument Nos 167/96 &amp; 168/96</i>	25-06-08
Malignant neoplasm of the renal pelvis	<i>Instrument Nos 155/95 &amp; 156/95</i>	27-06-07
Metatarsalgia	<i>Instrument Nos 39/96 &amp; 40/96</i>	25-06-08
Methaemoglobinaemia	<i>Instrument Nos. 284/95 &amp; 285/95</i>	2-05-07
Multiple sclerosis	<i>Instrument Nos.44/02 &amp; 45/02</i>	27-08-08
Nephrolithiasis	<i>Instrument Nos. 178/95 &amp; 179/95</i>	2-05-07
Non-aneurysmal aortic atherosclerotic disease	<i>Instrument Nos.68/98 &amp; 69/98</i>	24-06-09
Non-Hodgkin's lymphoma	<i>Instrument Nos. 37/03 &amp; 38/03</i>	20-12-06
Obstructive neuropathy	<i>Instrument Nos 87/96 &amp; 88/96</i>	25-06-08
Open-angle glaucoma	<i>Instrument Nos.69/01 &amp; 70/01 as amended by 23/06 &amp; 24/06</i>	24-06-09
Parkinson's disease and parkinsonism	<i>Instrument Nos.65/07 &amp; 66/07</i>	4-11-09
Photocontact dermatitis	<i>Instrument Nos.63/97 &amp; 64/97</i>	25-06-08
Pilonidal sinus	<i>Instrument Nos. 176/95 &amp; 177/95 as amended by 312/95 &amp; 313/95</i>	2-05-07
Poisoning and toxic reaction from plants	<i>Instrument Nos. 164/95 &amp; 165/95</i>	2-05-07
Polyarteritis nodosa	<i>Instrument Nos 157/96 &amp; 158/96</i>	25-06-08
Polycythaemia vera	<i>Instrument Nos.78/99 &amp; 79/99 as amended by 11/01 &amp; 12/01 &amp; 30/05</i>	24-06-09
Posterior adventitial heel bursitis	<i>Instrument Nos 55/96 &amp; 56/96</i>	25-06-08
Psoriatic arthropathy	<i>Instrument Nos.27/98 &amp; 28/98</i>	24-06-09
Pulmonary thromboembolism	<i>Instrument Nos.3/01 &amp; 4/01</i>	4-11-09
Pruritus ani	<i>Instrument Nos 41/96 &amp; 42/96</i>	25-06-08

## Repatriation Medical Authority

<b>Description of disease or injury</b>	<b>SoPs under consideration</b>	<b>Gazetted</b>
Reiter's syndrome	<i>Instrument Nos.17/98 &amp; 18/98</i>	24-06-09
Renal artery atherosclerotic disease	<i>Instrument Nos.39/98 &amp; 33/99</i>	24-06-09
Retinal vascular occlusive disease	<i>Instrument Nos.33/06 &amp; 34/06</i>	5-11-08
Rheumatic heart disease	<i>Instrument Nos. 93/95 &amp; 94/95</i>	2-05-07
Ross River fever	<i>Instrument Nos.79/97 &amp; 80/97</i>	25-06-08
Schistosomiasis	<i>Instrument Nos. 255/95 &amp; 256/95</i>	2-05-07
Sensorineural hearing loss	<i>Instrument Nos. 29/01 &amp; 30/01</i>	25-06-08
Sinus barotraumas	<i>Instrument Nos. 316/95 &amp; 317/95</i>	2-05-07
Strongyloidiasis	<i>Instrument Nos. 282/95 &amp; 283/95</i>	2-05-07
Subarachnoid haemorrhage	<i>Instrument Nos. 39/03 &amp; 40/03</i>	9-01-08
Symptomatic Epstein-Barr virus infection	<i>Instrument Nos.25/98 &amp; 26/98</i>	24-06-09
Ureteric calculus	<i>Instrument Nos. 180/95 &amp; 181/95</i>	2-05-07
Varicocele	<i>Instrument Nos 124/96 &amp; 125/96</i>	25-06-08
Varicose veins of the lower limb	<i>Instrument Nos.70/98 &amp; 71/98</i>	24-06-09
Vascular dementia	<i>Instrument Nos.21/06 &amp; 22/06 as amended by 63/06 &amp; 64/06</i>	4-11-09

# AAT and Court decisions – January to December 2009

AATA = Administrative Appeals Tribunal  
HCA = High Court of Australia  
FCA = Federal Court  
FCAFC = Full Court of the Federal Court

## Allowances and benefits

Compensation for German internment  
- whether veteran interned  
**Collett** (Logan J)  
[2009] FCA 667 19 June 2009

Gold card  
- qualifying service  
**Hannon, R** (Navy)  
[2009] AATA 251 17 Apr 2009

## Autoimmune disorder

Systemic lupus erythematosus  
- exposure to sunlight  
**Cronin, N** (Army)  
[2009] AATA 712 21 Sept 2009

## Carcinoma

colorectum  
- alcohol consumption  
**Bray, P** (RAAF)  
[2009] AATA 343 14 May 2009  
- smoking  
**Bray, P** (RAAF)  
[2009] AATA 343 14 May 2009  
**Gretton, C** (Navy)  
[2009] AATA 908 26 Nov 2009

thyroid  
- smoking  
**Hogan, M** (Army)  
[2009] AATA 288 28 Apr 2009

## Circulatory disorder

hypertension  
- alcohol consumption  
**Harris, P** (Army)  
[2009] AATA 631 25 Aug 2009  
- clinically significant anxiety disorder  
**Gibson, B** (Navy)  
[2009] AATA 115 20 Feb 2009

ischaemic heart disease  
- smoking  
**Bray, P** (RAAF)  
[2009] AATA 343 14 May 2009  
**Cooper, N** (Army & RAAF)  
[2009] AATA 896 20 Nov 2009  
**Kirk, H** (Navy)  
[2009] AATA 140 6 Mar 2009

## Compensation for permanent impairment

degree of permanent impairment  
- minimum threshold impairment points  
**Blewitt, B**  
[2009] AATA 487 30 Jun 2009

manner in which compensation is assessed  
- Chapter 25 GARP (M)  
**James, J**  
[2009] AATA 842 30 Oct 2009

## Death

funeral benefit  
- not eligible for grant  
**Murray, V** (Army) (death)  
[2009] AATA 518 8 July 2009

## AAT and Court decisions – January to December 2009

kind of death			<b>John, E</b> (Army) (death)		
- adverse reaction to vancomycin			[2009] AATA 36	20 Jan 2009	
	<b>Rennie, E</b> (Navy) (death)		<b>Knight, J</b> (Navy) (death)		
	[2009] AATA 338	13 May 2009	[2009] AATA 929	18 Nov 2009	
- Alzheimer's disease			- malignant neoplasm of the anal canal		
	<b>Kilmartin, A</b> (Navy) (death)		<b>Allen, M</b> (Army) (death)		
	[2009] AATA 634	19 Aug 2009	[2009] AATA 418	11 June 2009	
- aortic stenosis			<b>Sands, K</b> (Army) (death)		
	<b>Lockhart, J</b> (Army) (death)		[2009] AATA 560	30 July 2009	
	[2009] AATA 826	26 Oct 2009	- malignant neoplasm of the brain		
- atrial fibrillation			<b>Bradley, M</b> (Army) (death)		
	<b>Lockhart, J</b> (Army) (death)		[2009] AATA 401	3 June 2009	
	[2009] AATA 826	26 Oct 2009	- malignant neoplasm of the colorectum		
- bronchopneumonia			<b>Delaney, L</b> (Army) (death)		
	<b>Hinwood, H</b> (RAAF) (death)		[2009] AATA 507	3 July 2009	
	[2009] AATA 922	27 Nov 2009	- malignant neoplasm of the prostate		
	<b>Irwin, M</b> (RAAF) (death)		<b>Glanville, C</b> (Army) (death)		
	[2009] AATA 797	16 Oct 2009	[2009] AATA 759	2 Oct 2009	
	<b>Polack, G</b> (Army) (death)		<b>Polack, G</b> (Army) (death)		
	[2009] AATA 65	4 Feb 2009	[2009] AATA 65	4 Feb 2009	
- cerebrovascular accident			<b>Tunks, V</b> (Navy) (death)		
	<b>Blake, N</b> (Army) (death)		[2009] AATA 65	4 Feb 2009	
	[2009] AATA 821	26 Oct 2009	- whether contributory cause ischaemic heart disease		
	<b>Haysom, D</b> (Navy) (death)		<b>Bertalli, W</b> (RAAF) (death)		
	[2009] AATA 855	6 Nov 2009	[2009] AATA 334	12 May 2009	
- cerebrovascular disease			- metastatic carcinoma of the colon		
	<b>Dunbabin, P</b> (RAAF) (death)		- whether contributory cause ischaemic heart disease		
	[2009] AATA 730	24 Sept 2009	<b>Ridgway, J</b> (Army) (death)		
- diabetes mellitus			[2009] AATA 391	29 May 2009	
	<b>Dunbabin, P</b> (RAAF) (death)		- metastatic prostate cancer		
	[2009] AATA 730	24 Sept 2009	- whether contributory cause pneumonia		
	<b>Haynes, M</b> (Army) (death)		<b>Brodie, N</b> (Army) (death)		
	[2009] AATA 521	13 July 2009	[2009] AATA 217	2 Apr 2009	
- hypertension			- multiple myeloma		
	<b>Haynes, M</b> (Army) (death)		<b>Crump, M</b> (RAAF) (death)		
	[2009] AATA 521	13 July 2009	[2009] AATA 752	30 Sept 2009	
- infection with multi-organ failure			- Parkinson's disease		
- whether contributory cause ischaemic heart disease			<b>Moffatt, J</b> (RAAF) (death)		
	<b>Laurie, J</b> (Army) (death)		[2009] AATA 845	2 Nov 2009	
	[2009] AATA 378	25 May 2009	- schwannoma of posterior fossa of the brain		
- intracranial haemorrhage			<b>Tomlinson, J</b> (RAAF) (death)		
	<b>Garrett, P</b> (RAAF) (death)		[2009] AATA 704	10 Sept 2009	
	[2009] AATA 314	19 Jan 2009	- tractor accident		
- ischaemic heart disease			<b>Taber, Z</b> (Army) (death)		
	<b>Gray, K</b> (Army) (death)		[2009] AATA 504	3 July 2009	
	[2009] AATA 832	28 Oct 2009			
	<b>Haynes, M</b> (Army) (death)				
	[2009] AATA 521	13 July 2009			

## AAT and Court decisions – January to December 2009

- whether Tribunal correctly determined kind of death

**Collins** (Mansfield, Stone and Edmonds JJ)  
[2009] FCAFC 90                      5 Aug 2009  
**Heatcote** (Greenwood J)  
[2009] FCA 1270                      27 Oct 2009  
**Hill** (Cowdroy J)  
[2009] FCA 270                      30 Mar 2009  
**Hill** (Mansfield, Stone and Edmonds JJ)  
[2009] FCAFC 91                      5 Aug 2009

### Disability pension – assessment of incapacity

general rate

**Fowler, G** (RAAF)  
[2009] AATA 167                      16 Mar 2009  
**Polglaze, R**  
[2009] AATA 958                      26 Nov 2009

### Eligible service

defence service

- not a member of the Forces

**Boothman, E** (Army)  
[2009] AATA 303                      1 May 2009  
**Brain, J** (Army)  
[2009] AATA 643                      28 Aug 2009  
**Rana, R** (Army)  
[2009] AATA 671                      4 Sept 2009

### Endocrine/Nutritional/Metabolic disorder

connective tissue disorder

- mercury

**Rowe, T** (Navy)  
[2009] AATA 308                      4 May 2009

diabetes mellitus

- smoking

**Hogan, M** (Army)  
[2009] AATA 288                      28 Apr 2009

goitre

- smoking

**Hogan, M** (Army)  
[2009] AATA 288                      28 Apr 2009

morbid obesity

- eating disorder due to depressive disorder

**Anderson, T** (Army)  
[2009] AATA 23                      15 Jan 2009

### Gastrointestinal disorder

irritable bowel syndrome

- psychiatric disorder
- depressive disorder

**Pinding, G** (Army)  
[2009] AATA 210                      30 Mar 2009

gastro oesophageal reflux disease

- alcohol consumption

**Bray, P** (RAAF)  
[2009] AATA 343                      14 May 2009  
**Dahl, R** (Army)  
[2009] AATA 387                      29 May 2009  
**Kowalski, K** (Army)  
[2009] AATA 853                      6 Nov 2009

- obesity

**Kowalski, K** (Army)  
[2009] AATA 853                      6 Nov 2009

- smoking

**Bray, P** (RAAF)  
[2009] AATA 343                      14 May 2009

- smooth muscle relaxant drug

**Kowalski, K** (Army)  
[2009] AATA 853                      6 Nov 2009

### Jurisdiction and powers

Administrative Appeals Tribunal

- applications for extension of time to file and serve notice of appeal

**Sleep** (Lander J)  
[2009] FCA 1413                      1 Dec 2009

## AAT and Court decisions – January to December 2009

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- application for disqualification on grounds of bias  
**Kowalski, K** (Army)  
[2009] AATA 853                      6 Nov 2009
- application for reconstitution of Tribunal on grounds of bias  
**Kowalski, K** (Army)  
[2009] AATA 807                      19 Oct 2009
- application to dismiss or permanently stay application for review  
**Kowalski, K** (Army)  
[2009] AATA 6                        7 Jan 2009
- determination of a claim for compensation where Commission has not assessed compensation  
**Irwin** (Downes, Greenwood and Tracey JJ)  
[2009] FCAFC 33                      20 Mar 2009
- direction to obtain Medicare and PBS histories  
**Rayson, S**  
[2009] AATA 231                      7 Apr 2009
- dismissal
  - extension of time  
**Franks, P**  
[2009] AATA 247                      16 Apr 2009
  - reasonable excuse  
**Groundwater, I**  
[2009] AATA 233                      8 Apr 2009
- extent of obligations to provide reasons regarding findings of fact  
**Milbourn** (Graham J)  
[2009] FCA 176                        3 Mar 2009
- estoppel (whether Commission estopped from contesting factual findings of VRB)  
**Kowalski, K** (Army)  
[2009] AATA 853                      6 Nov 2009
- jurisdiction
  - application lodged within 3 month period  
**Kent, A**  
[2009] AATA 104                      10 Feb 2009
  - power to review assessment  
**Holloway, D**  
[2009] AATA 432                      15 June 2009
- summons to produce documents
  - Tribunal would not permit issue  
**Rodsted, M**  
[2009] AATA 403                      3 June 2009

### Federal Court

- application for leave to appeal decision of Judge not to disqualify himself  
**Kowalski** (Mansfield J)  
[2009] FCA 47                        30 Jan 2009
- application for leave to appeal interlocutory decision of primary judge  
**Kowalski** (Spender, Graham and Gilmour JJ)  
[2009] FCAFC 107                      14 Aug 2009
- competency of appeal  
**Irwin** (Downes, Greenwood and Tracey JJ)  
[2009] FCAFC 33                      20 Mar 2009
- exercise of judicial power  
**Irwin** (Downes, Greenwood and Tracey JJ)  
[2009] FCAFC 33                      20 Mar 2009
- findings of fact not open to challenge on appeal  
**Renton** (Dowsett J)  
[2009] FCA 792                        30 Jul 2009
- summary dismissal of appeal from AAT decision  
**Kowalski** (Mansfield J)  
[2009] FCA 153                        27 Feb 2009
- whether grounds of appeal relate to questions of law or questions of fact  
**Kowalski** (Besanko J)  
[2009] FCA 794                        30 Jul 2009

<b>Musculoskeletal disorder</b>
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### cervical spondylosis

- carrying loads on the head  
**Wainwright, M** (RAAF)  
[2009] AATA 209                      30 Mar 2009
- trauma  
**Hall, C** (Navy)  
[2009] AATA 758                      2 Oct 2009
- Kitson, C** (RAAF)  
[2009] AATA 656                      1 Sept 2009
- Magor, C** (Army)  
[2009] AATA 736                      25 Sept 2009
- Page, C** (Army)  
[2009] AATA 49                        23 Jan 2009

## AAT and Court decisions – January to December 2009

<p>chondromalacia patallae</p> <ul style="list-style-type: none"> <li>- meniscus damage</li> </ul> <p><b>Lake, M</b> (Army) [2009] AATA 64</p>	2 Feb 2009	<p>- determination of a claim for compensation where Commission has not assessed compensation</p> <p><b>Irwin</b> (Downes, Greenwood and Tracey JJ) [2009] FCAFC 33</p>	20 Mar 2009
<p>intervertebral disc prolapse</p> <ul style="list-style-type: none"> <li>- trauma</li> </ul> <p><b>McNamara, L</b> (Army) [2009] AATA 583</p>	6 Aug 2009	<p>- direction to obtain Medicare and PBS histories</p> <p><b>Rayson, S</b> [2009] AATA 231</p>	7 Apr 2009
<p>lumbar spondylosis</p> <ul style="list-style-type: none"> <li>- scoliosis</li> </ul> <p><b>Marsh, T</b> (Army) [2009] AATA 542</p>	21 July 2009	<p>- dismissal</p> <ul style="list-style-type: none"> <li>- extension of time</li> </ul> <p><b>Franks, P</b> [2009] AATA 247</p>	16 Apr 2009
<ul style="list-style-type: none"> <li>- trauma</li> </ul> <p><b>Briscoe, K</b> (Navy) [2009] AATA 910</p>	26 Nov 2009	<ul style="list-style-type: none"> <li>- reasonable excuse</li> </ul> <p><b>Groundwater, I</b> [2009] AATA 233</p>	8 Apr 2009
<p><b>Nicholls, C</b> (Army) [2009] AATA 925</p>	30 Nov 2009	<p>- estoppel (whether Commission estopped from contesting factual findings of VRB)</p> <p><b>Kowalski, K</b> (Army) [2009] AATA 853</p>	6 Nov 2009
<p>osteoarthrosis</p> <ul style="list-style-type: none"> <li>- elbow</li> </ul>		<p>- extent of obligations to provide reasons regarding findings of fact</p> <p><b>Milbourn</b> (Graham J) [2009] FCA 176</p>	3 Mar 2009
<ul style="list-style-type: none"> <li>- diagnosis</li> </ul> <p><b>Armstrong, L</b> (Navy) [2009] AATA 114</p>	19 Feb 2009	<p>- jurisdiction</p> <ul style="list-style-type: none"> <li>- application lodged within 3 month period</li> </ul> <p><b>Kent, A</b> [2009] AATA 104</p>	10 Feb 2009
<ul style="list-style-type: none"> <li>- shoulder</li> </ul> <p><b>Membrey, E</b> (RAAF) [2009] AATA 942</p>	9 Dec 2009	<ul style="list-style-type: none"> <li>- power to review assessment</li> </ul> <p><b>Holloway, D</b> [2009] AATA 432</p>	15 June 2009
<p><b>Tearle, G</b> (Navy) [2009] AATA 5</p>	7 Jan 2009	<p>- summons to produce documents</p> <ul style="list-style-type: none"> <li>- Tribunal would not permit issue</li> </ul> <p><b>Rodsted, M</b> [2009] AATA 403</p>	3 June 2009
<div style="border: 1px solid black; padding: 5px; text-align: center;"> <b>Practice and procedure</b> </div>			
<p>Administrative Appeals Tribunal</p> <ul style="list-style-type: none"> <li>- application for disqualification on grounds of bias</li> </ul> <p><b>Kowalski, K</b> (Army) [2009] AATA 853</p>	6 Nov 2009	<p>Federal Court</p> <ul style="list-style-type: none"> <li>- applications for extension of time to file and serve notice of appeal</li> </ul> <p><b>Sleep</b> (Lander J) [2009] FCA 1413</p>	1 Dec 2009
<ul style="list-style-type: none"> <li>- application for reconstitution of Tribunal on grounds of bias</li> </ul> <p><b>Kowalski, K</b> (Army) [2009] AATA 807</p>	19 Oct 2009	<ul style="list-style-type: none"> <li>- application for leave to appeal decision of Judge not to disqualify himself</li> </ul> <p><b>Kowalski</b> (Mansfield J) [2009] FCA 47</p>	30 Jan 2009
<ul style="list-style-type: none"> <li>- application to dismiss or permanently stay application for review</li> </ul> <p><b>Kowalski, K</b> (Army) [2009] AATA 6</p>	7 Jan 2009		

## AAT and Court decisions – January to December 2009

- application for leave to appeal interlocutory decision of primary judge <b>Kowalski</b> (Spender, Graham and Gilmour JJ) [2009] FCAFC 107                      14 Aug 2009	- events on HMAS Vampire <b>Burnet, M</b> (Navy) [2009] AATA 272                      21 Apr 2009
- competency of appeal <b>Irwin</b> (Downes, Greenwood and Tracey JJ) [2009] FCAFC 33                      20 Mar 2009	- fear of landmine attack or ambush <b>Williams, J</b> (Army) [2009] AATA 912                      27 Nov 2009
- exercise of judicial power <b>Irwin</b> (Downes, Greenwood and Tracey JJ) [2009] FCAFC 33                      20 Mar 2009	- fuel-tanker incident <b>Brown, B</b> (Navy) [2009] AATA 870                      11 Nov 2009
- findings of fact not open to challenge on appeal <b>Renton</b> (Dowsett J) [2009] FCA 792                      30 Jul 2009	- lost in jungle in Papua New Guinea <b>Quinton, D</b> (Army) [2009] AATA 250                      17 Apr 2009
- summary dismissal of appeal from AAT decision <b>Kowalski</b> (Mansfield J) [2009] FCA 153                      27 Feb 2009	- possible gun shots while maintaining generator in power-house <b>Matthews, T</b> (Army) [2009] AATA 647                      28 Aug 2009
- whether grounds of appeal relate to questions of law or questions of fact <b>Kowalski</b> (Besanko J) [2009] FCA 794                      30 Jul 2009	- scare charge <b>Newton, C</b> (Navy) [2009] AATA 485                      30 June 2009
	- shot at and arrested by South Vietnamese police officer <b>Allen, P</b> (Army) [2009] AATA 968                      18 Dec 2009
	- trapped under swimming pool liner <b>Matthews, T</b> (Army) [2009] AATA 647                      28 Aug 2009
	- viewing of corpses <b>Gawley, R</b> (Army) [2009] AATA 284                      27 Apr 2009
	- witnessed wounded soldier in field hospital <b>Walker, O</b> (Army) [2009] AATA 781                      9 Oct 2009
	- clinical onset <b>Stewart, C</b> (Navy) [2009] AATA 641                      27 Aug 2009
	- death of significant other <b>Walker, O</b> (Army) [2009] AATA 781                      9 Oct 2009
	- diagnosis <b>Dahl, R</b> (Army) [2009] AATA 387                      29 May 2009
	<b>Harris, P</b> (Army) [2009] AATA 631                      25 Aug 2009
<b>Psychiatric disorder</b>	
adjustment disorder - diagnosis <b>Weir, G</b> [2009] AATA 902                      25 Nov 2009	
alcohol abuse or dependence - category 1A/ 1B stressor - being caught in a civilian riot <b>Dignon, P</b> (Army) [2009] AATA 245                      15 Apr 2009	
- boiler-room steam incident <b>Brown, B</b> (Navy) [2009] AATA 870                      11 Nov 2009	
- encountering decapitated bodies <b>Dignon, P</b> (Army) [2009] AATA 245                      15 Apr 2009	
- events on HMAS Sydney <b>Burnet, M</b> (Navy) [2009] AATA 272                      21 Apr 2009	



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- experiencing a severe stressor				- inability to obtain appropriate clinical management			
- being caught in a civilian riot				<b>Jimmieson, T</b> (Navy)			
<b>Dignon, P</b> (Army)				[2009] AATA 891		2 Feb 2009	
[2009] AATA 245		15 Apr 2009		<b>Quinton, D</b> (Army)			
- bodies in water				[2009] AATA 250		17 Apr 2009	
<b>McAnally, L</b> (Navy)				- psychiatric disorder			
[2009] AATA 354		15 May 2009		- anxiety disorder			
- encountering decapitated bodies				<b>Hunter, B</b> (Navy)			
<b>Dignon, P</b> (Army)				[2009] AATA 259		21 Apr 2009	
[2009] AATA 245		15 Apr 2009		<b>Walker, O</b> (Army)			
- events on HMAS Sydney				[2009] AATA 781		9 Oct 2009	
<b>Burnet, M</b> (Navy)				- borderline personality disorder			
[2009] AATA 272		21 Apr 2009		<b>Malady, M</b> (Army)			
- events on HMAS Vampire				[2009] AATA 454		23 June 2009	
<b>Burnet, M</b> (Navy)				- post traumatic stress disorder			
[2009] AATA 272		21 Apr 2009		<b>Rodsted, M</b> (Navy)			
- lost in jungle in Papua New Guinea				[2009] AATA 658		1 Sept 2009	
<b>Quinton, D</b> (Army)							
[2009] AATA 250		17 Apr 2009					
- possible gun shots while maintaining generator in power-house				anxiety disorder			
<b>Matthews, T</b> (Army)				- category 1A/ 1B stressor			
[2009] AATA 647		28 Aug 2009		- aircraft engine ceased operating on landing			
- scare charge				<b>Booth, J</b> (RAAF)			
<b>Newton, C</b> (Navy)				[2009] AATA 129		2 Mar 2009	
[2009] AATA 485		30 June 2009		- collision with Vietnamese fishing boat			
- shot at and arrested by South Vietnamese police officer				<b>Thomas, P</b> (Navy)			
<b>Allen, P</b> (Army)				[2009] AATA 276		24 Apr 2009	
[2009] AATA 968		18 Dec 2009		- confrontation with South Korean soldier on patrol			
- stand-to				<b>Mewburn, D</b> (Army)			
<b>Scott, R</b> (Army)				[2009] AATA 58		28 Jan 2009	
[2009] AATA 1		5 Jan 2009		- events on HMAS Sydney			
- suicide				<b>Burnet, M</b> (Navy)			
<b>Pinding, G</b> (Army)				[2009] AATA 272		21 Apr 2009	
[2009] AATA 210		30 Mar 2009		- events on HMAS Vampire			
- trapped under swimming pool liner				<b>Burnet, M</b> (Navy)			
<b>Matthews, T</b> (Army)				[2009] AATA 272		21 Apr 2009	
[2009] AATA 647		28 Aug 2009		- flight steward in SE Asia			
- Vietnamese woman				<b>Booth, J</b> (RAAF)			
<b>Newton, C</b> (Navy)				[2009] AATA 129		2 Mar 2009	
[2009] AATA 485		30 June 2009		- guarding a severely wounded prisoner			
- viewing of corpses				<b>Mewburn, D</b> (Army)			
<b>Gawley, R</b> (Army)				[2009] AATA 58		28 Jan 2009	
[2009] AATA 284		27 Apr 2009		- significant other who experienced category 1A stressor			
- whether Statement of Principles correctly applied				<b>Walker, O</b> (Army)			
<b>Renton</b> (Dowsett J)				[2009] AATA 781		9 Oct 2009	
[2009] FCA 268		27 Mar 2009					

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## AAT and Court decisions – January to December 2009

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- trench in Ubon			- severe psychological stressor		
<b>Booth, J</b> (RAAF)			- aircraft engine ceased operating on		
[2009] AATA 129	2 Mar 2009		landing		
- turned back by US Military police in			<b>Booth, J</b> (RAAF)		
enemy-occupied territory			[2009] AATA 129	2 Mar 2009	
<b>Mewburn, D</b> (Army)			- collision with Vietnamese fishing boat		
[2009] AATA 58	28 Jan 2009		<b>Thomas, P</b> (Navy)		
- viewing of casualties being unloaded by			[2009] AATA 276	24 Apr 2009	
helicopter			- events on HMAS Sydney		
<b>Mewburn, D</b> (Army)			<b>Burnet, M</b> (Navy)		
[2009] AATA 58	28 Jan 2009		[2009] AATA 272	21 Apr 2009	
- viewing of corpses			- events on HMAS Vampire		
<b>Gawley, R</b> (Army)			<b>Burnet, M</b> (Navy)		
[2009] AATA 284	27 Apr 2009		[2009] AATA 272	21 Apr 2009	
- witnessed wounded soldier in field			- flight steward in SE Asia		
hospital			<b>Booth, J</b> (RAAF)		
<b>Walker, O</b> (Army)			[2009] AATA 129	2 Mar 2009	
[2009] AATA 781	9 Oct 2009		- landing craft trip		
- category 2 stressor			<b>Emmertson, A</b> (Navy)		
- being charged with a disciplinary			[2009] AATA 576	4 Aug 2009	
offence			- observing sonar reading		
<b>Wright, J</b> (Navy)			<b>Emmertson, A</b> (Navy)		
[2009] AATA 187	19 Mar 2009		[2009] AATA 576	4 Aug 2009	
- being posted to Nui Dat			- possible terrorist ambush		
<b>Walker, O</b> (Army)			<b>Murrell, R</b> (RAAF)		
[2009] AATA 781	9 Oct 2009		[2009] AATA 282	27 Apr 2009	
- possible friendly fire			- stand-to		
<b>Wright, J</b> (Navy)			<b>Scott, R</b> (Army)		
[2009] AATA 187	19 Mar 2009		[2009] AATA 1	5 Jan 2009	
- sleep deprivation and noise of activity in			- trench in Ubon		
ship			<b>Booth, J</b> (RAAF)		
<b>Wright, J</b> (Navy)			[2009] AATA 129	2 Mar 2009	
[2009] AATA 187	19 Mar 2009		- viewing of corpses		
- clinical onset			<b>Gawley, R</b> (Army)		
<b>Stewart, C</b> (Navy)			[2009] AATA 284	27 Apr 2009	
[2009] AATA 641	27 Aug 2009				
- diagnosis			depressive disorder		
<b>Dahl, R</b> (Army)			- category 1A/ 1B stressor		
[2009] AATA 387	29 May 2009		- assaulted in Singapore		
<b>You, K</b> (Army)			<b>Lee, D</b> (Navy)		
[2009] AATA 19	13 Jan 2009		[2009] AATA 991	24 Dec 2009	
- psychiatric disorder			- boiler-room steam incident		
- alcohol abuse			<b>Brown, B</b> (Navy)		
<b>Thomas, P</b> (Navy)			[2009] AATA 870	11 Nov 2009	
[2009] AATA 276	24 Apr 2009		- collision with Vietnamese fishing boat		
			<b>Thomas, P</b> (Navy)		
			[2009] AATA 276	24 Apr 2009	

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## AAT and Court decisions – January to December 2009

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- fuel-tanker incident <b>Brown, B</b> (Navy) [2009] AATA 870                      11 Nov 2009	- substance abuse <b>Malady, M</b> (Army) [2009] AATA 454                      23 June 2009
- significant other who experienced category 1A stressor <b>Walker, O</b> (Army) [2009] AATA 781                      9 Oct 2009	- severe psychological stressor - assaulted in Singapore <b>Lee, D</b> (Navy) [2009] AATA 991                      24 Dec 2009
- witnessed body of Vietnamese girl <b>Stiff, I</b> (Army) [2009] AATA 75                      6 Feb 2009	- collision with Vietnamese fishing boat <b>Thomas, P</b> (Navy) [2009] AATA 276                      24 Apr 2009
- witnessed wounded soldier in field hospital <b>Walker, O</b> (Army) [2009] AATA 781                      9 Oct 2009	- Tribunal required to determine if stressor was related to service <b>Cunningham</b> (Sundberg J) [2009] FCA 1272                      9 Nov 2009
- category 2 stressor - attempted suicide of spouse <b>Kearey, P</b> (RAAF) [2009] AATA 181                      18 Mar 2009	drug abuse - psychiatric disorder - borderline personality disorder <b>Malady, M</b> (Army) [2009] AATA 454                      23 June 2009
- being posted to Nui Dat <b>Walker, O</b> (Army) [2009] AATA 781                      9 Oct 2009	eating disorder - category 2 stressor <b>Hay, J</b> (Navy) [2009] AATA 883                      13 Nov 2009
- chronic pain <b>Anderson, T</b> (Army) [2009] AATA 23                      15 Jan 2009	- inability to obtain appropriate clinical management <b>Hay, J</b> (Navy) [2009] AATA 883                      13 Nov 2009
- clinical onset <b>Lee, D</b> (Navy) [2009] AATA 991                      24 Dec 2009	
<b>McAnally, L</b> (Navy) [2009] AATA 354                      15 May 2009	
- diagnosis - diagnostic criteria not met <b>Rodsted, M</b> (Navy) [2009] AATA 658                      1 Sept 2009	post traumatic stress disorder - category 1A/ 1B stressor - accused of mishandling rockets in ammunition depot <b>Border, R</b> (Army) [2009] AATA 924                      30 Nov 2009
- medical illness or injury - conditions do not meet definition <b>Anderson, T</b> (Army) [2009] AATA 23                      15 Jan 2009	- being caught in a civilian riot <b>Dignon, P</b> (Army) [2009] AATA 245                      15 Apr 2009
- ischaemic heart disease <b>Stiff, I</b> (Army) [2009] AATA 75                      6 Feb 2009	- boiler-room steam incident <b>Brown, B</b> (Navy) [2009] AATA 870                      11 Nov 2009
- psychiatric disorder - alcohol abuse/dependence <b>Scott, R</b> (Army) [2009] AATA 1                      5 Jan 2009	- encountering decapitated bodies <b>Dignon, P</b> (Army) [2009] AATA 245                      15 Apr 2009
<b>Thomas, P</b> (Navy) [2009] AATA 276                      24 Apr 2009	- fear of landmine attack or ambush <b>Williams, J</b> (Army) [2009] AATA 912                      27 Nov 2009
- anxiety disorder <b>Scott, R</b> (Army) [2009] AATA 1                      5 Jan 2009	

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## AAT and Court decisions – January to December 2009

- fuel-tanker incident <b>Brown, B</b> (Navy) [2009] AATA 870 11 Nov 2009	- traumatic event <b>Hunter, B</b> (Navy) [2009] AATA 259 21 Apr 2009
- incident involving Indonesian destroyer <b>Hunter, B</b> (Navy) [2009] AATA 259 21 Apr 2009	<b>Newton, C</b> (Navy) [2009] AATA 485 30 June 2009
- left behind when unit moved base <b>Border, R</b> (Army) [2009] AATA 924 30 Nov 2009	<b>Thomas, P</b> (Navy) [2009] AATA 276 24 Apr 2009
- observed a body, apparently executed, on roadway <b>Simeon, W</b> (Army) [2009] AATA 581 5 Aug 2009	- experiencing a severe stressor - being caught in a civilian riot <b>Dignon, P</b> (Army) [2009] AATA 245 15 Apr 2009
- scare charges <b>Kirk, H</b> (Navy) [2009] AATA 140 6 Mar 2009	- encountering decapitated bodies <b>Dignon, P</b> (Army) [2009] AATA 245 15 Apr 2009
- scorpion bite <b>Border, R</b> (Army) [2009] AATA 924 30 Nov 2009	- incident involving Indonesian destroyer <b>Hunter, B</b> (Navy) [2009] AATA 259 21 Apr 2009
- shot at in streets of Vung Tau <b>Corran, R</b> [2009] AATA 984 22 Dec 2009	- scare charges <b>Kirk, H</b> (Navy) [2009] AATA 140 6 Mar 2009
- turned on torch and told he would be shot <b>Border, R</b> (Army) [2009] AATA 924 30 Nov 2009	- viewing of corpses <b>Gawley, R</b> (Army) [2009] AATA 284 27 Apr 2009
- viewing of corpses <b>Gawley, R</b> (Army) [2009] AATA 284 27 Apr 2009	schizophrenia - diagnosis <b>Pianta, P</b> (RAAF) [2009] AATA 21 14 Jan 2009
- diagnosis - diagnostic criteria not met <b>McKerlie, T</b> (Navy) [2009] AATA 718 22 Sept 2009	- inability to obtain appropriate clinical management <b>Pianta, P</b> (RAAF) [2009] AATA 21 14 Jan 2009
<b>Rodsted, M</b> (Navy) [2009] AATA 658 1 Sept 2009	<b>Remunerative work &amp; special rate of pension</b>
<b>Story, M</b> (Army) [2009] AATA 582 6 Aug 2009	
<b>Wallbank, G</b> (Navy) [2009] AATA 813 23 Oct 2009	ceased to engage in remunerative work - bankruptcy <b>Pearson, T</b> (Army) [2009] AATA 856 6 Nov 2009
<b>West, E</b> (Army) [2009] AATA 935 4 Dec 2009	- divorce <b>Pearson, T</b> (Army) [2009] AATA 856 6 Nov 2009
- extreme traumatic stressor <b>Splatt, M</b> (Navy) [2009] AATA 46 22 Jan 2009	- termination of contract <b>Jackson, D</b> (Army) [2009] AATA 449 22 June 2009
- response to event <b>McAnally, L</b> (Navy) [2009] AATA 354 15 May 2009	

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January to December 2009**

- retrenchment			<b>Messer, D</b> (RAAF)	
<b>Hopkins, F</b> (Navy)			[2009] AATA 202	24 Mar 2009
[2009] AATA 339	14 May 2009		<b>Young, R</b> (Navy)	
			[2009] AATA 349	15 May 2009
remunerative work				
- able to work at least 8 hours a week		whether prevented by war-caused disabilities alone		
<b>Bellamy, M</b> (Army)		- age		
[2009] AATA 639	27 Aug 2009	<b>James, N</b> (Army)		
<b>Graham, R</b> (Army)		[2009] AATA 547	14 July 2009	
[2009] AATA 312	6 May 2009	<b>Mann, B</b> (RAAF)		
<b>Jensen, I</b> (Army)		[2009] AATA 804	15 Sept 2009	
[2009] AATA 353	15 May 2009	<b>Stewart, R</b> (Army)		
<b>Magor, C</b> (Army)		[2009] AATA 419	5 June 2009	
[2009] AATA 736	25 Sept 2009	- duties as carer for wife		
<b>Pearson, T</b> (Army)		<b>Mann, B</b> (RAAF)		
[2009] AATA 856	6 Nov 2009	[2009] AATA 804	15 Sept 2009	
<b>Petersen, D</b> (Army)		- drinking and difficulty communicating		
[2009] AATA 459	24 June 2009	<b>Jordan, K</b> (Army)		
<b>Roose, R</b> (Army)		[2009] AATA 331	12 May 2009	
[2009] AATA 145	9 Mar 2009	- effects of non-accepted disabilities		
- able to work more than 20 hours a week		<b>Bradley, M</b> (Army)		
<b>Bellamy, M</b> (Army)		[2009] AATA 400	3 June 2009	
[2009] AATA 639	27 Aug 2009	<b>Butcher, (Army)</b>		
<b>Graham, R</b> (Army)		[2009] AATA 332	12 May 2009	
[2009] AATA 312	6 May 2009	<b>Holden, T</b> (Army)		
<b>Roose, R</b> (Army)		[2009] AATA 735	24 Sept 2009	
[2009] AATA 145	9 Mar 2009	<b>Hunter, B</b> (Navy)		
- whether prevented from continuing to undertake		[2009] AATA 259	21 Apr 2009	
<b>Shatzman, S</b>		<b>Magor, C</b> (Army)		
[2009] AATA 823	26 Oct 2009	[2009] AATA 736	25 Sept 2009	
whether genuinely seeking to engage in remunerative work		<b>McMahon, P</b> (RAAF)		
- not genuine		[2009] AATA 253	20 Apr 2009	
<b>Jensen, I</b> (Army)		<b>McQueen, J</b>		
[2009] AATA 353	15 May 2009	[2009] AATA 900	25 Nov 2009	
<b>Marshall, D</b> (Army)		<b>Messer, D</b> (RAAF)		
[2009] AATA 751	30 Sept 2009	[2009] AATA 202	24 Mar 2009	
- substantial cause of inability to obtain remunerative work		<b>Monteith, T</b> (Navy)		
<b>Ash, P</b> (Army)		[2009] AATA 394	29 May 2009	
[2009] AATA 326	8 May 2009	<b>Nest, H</b> (Navy)		
<b>Beasley, S</b> (Army)		[2009] AATA 112	18 Feb 2009	
[2009] AATA 237	8 Apr 2009	<b>Stewart, R</b> (Army)		
<b>Marshall, D</b> (Army)		[2009] AATA 419	5 June 2009	
[2009] AATA 751	30 Sept 2009	<b>Tearle, G</b> (Navy)		
		[2009] AATA 5	7 Jan 2009	
		<b>Vella, D</b> (Navy)		
		[2009] AATA 472	26 June 2009	

Respiratory disorder

<b>Service pension</b>
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partner service pension

- eligibility ceases on remarriage

**Dwyer, S**

[2009] AATA 287

27 Apr 2009

service pension

- inclusion of undeducted purchase price  
where in receipt of superannuation pension

**Peers, A**

[2009] AATA 681

9 Sept 2009

- notification of change in circumstances

**Tehan, T & A**

[2009] AATA 687

7 Sept 2009

treatment of lump sum payment of arrears of  
British pension

- income

**Evans, K**

[2009] AATA 7

8 Jan 2009

### Words and phrases

appropriate clinical management

**Money** (Finn, Dowsett and Edmonds JJ)

[2009] FCAFC 11

13 Feb 2009

ceased to engage in remunerative work

**Hopkins** (Mansfield J)

[2009] FCA 1037

16 Sept 2009

incurred danger

**Hannon, R** (Navy)

[2009] AATA 251

17 Apr 2009

remunerative work

**Jackson, D** (Army)

[2009] AATA 449

22 June 2009

**Jordan, K** (Army)

[2009] AATA 331

12 May 2009

**Shatzman, S**

[2009] AATA 823

26 Oct 2009

**Wilson, V** (Navy)

[2009] AATA 955

15 Dec 2009

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