

**THE CHANGING PATTERN OF ELIGIBILITY FOR
VETERANS' AFFAIRS PENSIONS**

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ABSTRACT

The thesis follows the development of the ways by which successive Australian Governments, from World War I onwards, have attempted to provide a measure of compensation to veterans who suffered injury or disease on war service, and to dependants of veterans whose death could be related to war service.

Initially, purely local assessment and determination of claims within a broad framework was applied, but lack of consistency around the country forced the setting up of an entirely new department of government, devoted to serving the ex-service community. Superimposed, in the interest of fairness, was a multiple-level system of review and appeal in a sequence of Boards, Tribunals and, eventually, the Federal Court and High Court, with substantial involvement of lawyers appearing for claimants or the government. As detailed assessment of the effects of disease and injury are a matter for specialists, the medical profession has also become deeply involved in the determination process, but with an all too frequent display of diametrically opposed views on the relationship, if any, of a particular veteran's present conditions and the incomplete record of what happened to him during his time in the Forces. As in other spheres of law, corroboration of a claimant's evidence is highly desirable, but the sheer lapse of time, half a century in the case now of World War II veterans, has made it often impossible to find witnesses with a reliable memory and willing to sign a Statutory Declaration. Increasingly, too, and especially in regard to certain conditions, lack of direct evidence has been relieved by the use of epidemiological data, whereby an acknowledged extra risk has been usable to grant a claim, often long after the death of the veteran concerned.

Claims which are seen to lie at the extremes of acceptance or rejection are relatively easy to assess. The inevitable doubt attached to border-line cases are a different matter as shown by the detailed examples in the text. Lest it be thought that the last word has been said on the subject, there is now (June 1994) yet another piece of amending legislation before Parliament, containing some provisions likely to be resisted by the ex-service community.

Finally, a plea is made for the abandonment of the present squabbling on medical and legal grounds in favour of a two-tiered, but otherwise universal, flat rate. Adjustment of actual rates of pension should enable this approach to reach the usual objective of budgetary neutrality and is suggested as likely to attract wide approval by those affected.

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INTRODUCTION

One of the more surprising features of Australian life noticed by a newcomer is the relative lack of formality, coupled with a penchant for abbreviating names of people and institutions. The Governor-General, for example, is referred to as Bill Hayden, rather than William, and a former Prime Minister is Bob Hawke, rather than Robert. In neither case does an element of disrespect attach to the person or to his office. Similarly, and particularly amongst older citizens, the institution to which so many of them have turned, (mostly with affection), still turn and will continue to turn, is not the Repatriation Department but the Repat. Only the younger ones have adopted to the newer Veterans' Affairs, possibly because no abbreviated form appears obvious.

As the full title implies, the 'Repat' strives to meet the needs, interpreted widely, of members of the Armed Forces, returning from conflict overseas, together with the needs of their dependants. One of those needs has been a measure of compensation for the loss of ability, by reason of war-caused injury or disease, to sustain themselves and their dependants by their own efforts. For various reasons, the compensation award has been distributed by way of pensions, benefits, allowances, adjustments and payments, but the major item of expenditure has been the provision of fortnightly disbursement of disability pensions, war widows' pensions and service pensions. From the start there has been a need to demonstrate eligibility in accordance with legislation, rather than a 'free-for-all'. The underlying philosophy has been to provide most help for those most in need. It has been a slow, difficult learning process for the legislature, the administration and the client base. Mistakes have been made, mostly by way of two much here or two little there.

This thesis is an attempt to follow the process over the last 80 years. Whilst assessment of direct injury and disease soon after the event has been relatively easy, the passage of time has brought the complication of further injuries post-service, together with the normal effect of age on abnormally compromised physical and mental resilience of the men and women concerned. No doubt some matters would be handled differently if a future need were to arise. It is to be hoped that it will not, but at least there will be a substantial base of experience to guide those who have to make what are often quite difficult decisions and carry them through.

In retrospect, much of the work has at times resembled attempting to shoot at a moving target from a moving platform. The original Act consisted of only a few pages, but never-ending amendments, repeal, additions, regulations and parallel legislation has grown to a pile several centimetres thick and still growing. Information contained up to June 1994 is believed to be correct, but is subject to yet a new Bill currently on its way through Parliament.

CHAPTER ONE

THE CHANGING PATTERN OF ELIGIBILITY FOR VETERANS' AFFAIRS PENSIONS

INTRODUCTION

Ancient Rome was established and maintained by armed force. It declined, in part at least, when its defence was shouldered less and less by enthusiastic volunteers from amongst its citizenry, and more and more by unwilling conscripts from the outposts of empire. However, it did seem to have recognised that injury received in battle should attract a measure of recompense from the State as a right and not merely as an act of generosity to be withdrawn at will¹. England established a similar provision but only to a mild degree in 1595 after the defeat of the Spanish Armada². Minor extensions occurred through the next three centuries, supplemented for the dependants of Crimean War veterans by voluntary charitable bodies set up for just that purpose. "The warriors of Balaclava are worthy of more than the workhouse"³.

Only after Federation in 1901 did Australia begin to organise its own national navy and army. Early general provision was made by regulation for compensation for death or incapacity from wounds or disease contracted on active service or on duty. 'Active service', as distinct from war service, appears to have been intended to mean service outside Australia in time of war against an enemy⁴. The distinction lay in the fact that only volunteers could be required to serve outside Australia. The first such claims for compensation arose as a result of the Gallipoli

¹ For example, *The Decline of the Ancient World*. AHM Jones, Longmans, Green, London, 1966. Chapter XXVI. Why did the Western Empire fall? Also, *The End of the Roman Empire*. 3rd Edition. D Kagan, D C Heath, 1992. Part II. Military Explanations.

² Independent Enquiry into the Repatriation System. The Hon. Justice P B Toose. AGPS (1975), p 19.

³ The workhouse institution provided older citizens, no longer able to support themselves in employment, with dormitory accommodation, basic food and clothing in return for such domestic work as the inmates could perform. Since the cost was borne by taxation from unwilling land owners, the workhouse was commonly run not merely on a shoe-string but on a very thin thread. Those who could shunned the place except as a last resort.

⁴ Supra. n2

campaign in 1915 when increasing numbers of disabled veterans began to appear in the streets⁵.

Since at that time, most Australian men earned their living by manual work, severe injury to or, worse still, the complete loss of, one or more limbs effectively prevented those men from supporting themselves, let alone a wife and children, by attempting to return to their former type of employment. The alternative of leaving them to beg in the street would have been regarded as a national disgrace and certainly not conducive to maintaining the level of voluntary recruitment needed to replace the earlier casualties⁶. An organised scheme of support was required to be brought into existence and quickly.

The War Pensions Act, 1914-1916, extended by the Australian Soldiers' Repatriation Act, 1917-1918, replaced by the Australian Soldiers' Repatriation Act, 1920-1922, to be replaced in turn by the current Veterans' Entitlement Act, 1986, brought, and continues to bring, undeniable benefits to many hundreds of thousands of ex-servicemen and their dependants of two world wars and three smaller conflicts. The greatest number of actual veterans receiving benefit at any one time appears to have reached its peak somewhere in the 1980s⁷ - uncertainty arises from greater numbers of World War II veterans dying, against greater numbers achieving eligibility from favourable decisions of review and appellate bodies, or from reaching 60, the minimum age for receiving a service pension, based solely on service. In contrast, dependent children peaked in the 1970s whilst dependent widows are expected to peak soon after the turn of the century at around 170,000, assuming no further armed conflict in the meantime⁸. The number of other kinds of dependant, such as widowed mothers of unmarried veterans, has always been relatively small.

5 Ibid. p20.

6 Ibid. p22.

7 From information supplied jointly by the Department of Veterans' Affairs and the Australian Bureau of Statistics.

8 Ibid.

EARLY LEGISLATION

Sections 2 and 3 of the 1914 Act provided, in general terms, that death or incapacity, from either injury or disease, arising out of warlike operations would attract compensation. It applied only to men who had enlisted for service outside Australia or who served on a warship. It did not cover incapacity arising from, for instance, accidental injury whilst training. The War Pensions Act, 1914 – 1915, Sections 4, 4A, 5A and 6 introduced a simple appeal procedure by which doubtful claims could be examined twice.

Not surprisingly, early difficulty arose in determining whether a disability, (such as tuberculosis), had indeed been contracted while outside Australia, or had been present, but undetected, on enlistment only to become manifest under the stress of active service at the Front, especially under assault by poison gas. The 1920-1922 legislation therefore allowed the benefit of doubt to be given, on the grounds that, if not for the adverse effect of service, a latent condition may reasonably be expected to have remained latent if the man had continued in civilian life.

By 1929 other defects in the legislation had become apparent, prompting the setting up of a more elaborate appeal machinery in the form of War Pensions Entitlement Tribunals and War Pensions Assessment Tribunals, which were charged with operating in accordance with substantial justice and the merits of the case⁹. That these were imprecise terms, leading to inconsistency of decision making by the various tribunals, was quickly evident, as will be discussed later.

Furthermore, many men had preferred to suffer in silence rather than "hold out their hand for charity"¹⁰. Yet the effects of injuries and disease, shrugged off whilst in their twenties, began to overtake them in their forties, to the extent that they could not compete with younger, uninjured men for the few jobs available. To its credit, the Commonwealth Government introduced the service pension in 1935, based on the fact, turned up by its own Statistician, that there was a 13%

⁹ Australian Soldiers' Repatriation Act, 1929, Section 6.

¹⁰ Supra. n2. p395.

higher mortality amongst veterans than amongst those of comparable age who had never served in the armed forces¹¹.

WORLD WAR II LEGISLATION

This was seen to be needed mainly as widening the existing scope in such areas as:-

- (a) accepting liability for death or incapacity whilst travelling on or back from leave related to overseas service, Australian Soldiers' Repatriation Regulations 1941.
- (b) extending the meaning of overseas service to cover those parts of Northern Territory and offshore islands whilst under aerial/naval attack, Australian Soldiers' Repatriation Act 1943.
- (c) including Australian seamen, Seamen's War Pensions and Allowances Act 1940.
- (d) allowing contribution to a material degree, or aggravation, of a pre-enlistment condition, resulting in incapacity or death Australian Soldiers' Repatriation Act 1943.

This last has proved, perhaps surprisingly, productive of by far the greatest contention between medical authorities on the one hand, and ex-service organisations on the other hand (as will be discussed later).

FORTY YEARS ON

Initial claimants from both World Wars were easily recognisable as suffering from the effects of gunshot, explosives generally, chemical warfare (World War I), or out of conditions in Japanese prisoner-of-war camps in the tropics (World War II). Not so easily recognisable were those suffering from mental breakdown; their existence was well-known to ex-service organisations, but their identity had to be protected for fear of loss of employment and family income. The extent of the cover-up

¹¹ Ibid. p 35. Quoting from the Official History of the Australian Army Medical Services in the War of 1914 – 1918. Volume III. p 818.

can be no more than a very rough estimate; even less recognisable were those with no visible injury, but whose physical and mental strength had been weakened beyond repair. Such men kept going in civilian life by over-reliance on cigarettes, alcohol, cover-up by relatives and friends, until final breakdown. No particular occurrence on active service could be linked with the breakdown to justify the granting of a pension in the terms of existing legislation, yet it was clear that the claims were genuine¹². By the early 1970s, it was clear that a complete overhaul was needed; it was provided by "**An Independent Enquiry into the Repatriation System**,"¹³ with a range of recommendations including access, with legal representation, to the Administrative Appeals Tribunal, the Federal Court and eventually the High Court.

Legal dissection of the wording of the Act took place, fostered by representatives of claimants to facilitate the opening of the door, but resisted by the Repatriation Commission, fearful of the cost of a few more thousand claims pouring through the door in the wake of each new favourable decision. The culminating point was probably the **O'Brien** case. Essentially "I served. I now have condition X. It must be due to war service. Therefore I claim compensation as of right."¹⁴ The viewpoint will be discussed later.¹⁵

Clearly, simple revamping of the legislation no longer made sense; transitional legislation, Repatriation Amendment Act 1985, followed by an entirely new **Veterans' Entitlement Act** in 1986, came into existence. In particular S.120(3) requires to be produced not necessarily equivalent to proof, from which a 'reasonable hypothesis' may be deduced linking a veteran's own services and his present condition, but the Commission must then accept the claim if no reasonable grounds exist, all things considered, for rejecting the claim. It is clear already from judicial interpretation that:-

¹² Similar circumstances were dealt with by the Evatt Royal Commission on the Use of and Effects of Chemical Agents on Australian Personnel in Vietnam, (1985), Volume 2, Chapter VI, p 122. Alcohol-Related Disease and Alcoholism.

¹³ Supra. n2.

¹⁴ (a) Skerman AP. Repatriation in Australia. p. 72. Credited to the Hon. W.M. Hughes, Minister for Health and Repatriation in October 1934 in relation to a deputation representing sufferers from tuberculosis.

(b) Supra. n.2. p 233.

¹⁵ Chapter 5. p55.

- (a) close reading of Hansard and ministerial statements is essential to clarify the intention of the wording of the Act,
- (b) close reading of decisions already handed down and the detailed reasoning behind them is also essential,
- (c) substantial tightening of the grounds for eligibility has taken place,
- (d) ex-service organisations need the assistance not only of skilled advocates but also of people skilled in the use of clinical library services and, if at all possible, with personal experience of combat conditions. Regrettably the pool, such as it was, has dwindled to a mere puddle.

Whilst an historical introduction is invaluable and indeed indispensable in understanding the present situation in regard to entitlement to war pensions, the bulk of the thesis will examine the effect of judicial reasoning at Administrative Appeal Tribunal level and upwards over the last fifteen years. That the system still has its rough patches is clear. A Monitoring Committee set up by the Department of Veterans' Affairs to oversee the working of the new Act has itself made over fifty recommendations. Its Chairman is the Hon. Justice PB Toose, author of the 1975 Independent Enquiry. The field remains open.

CHAPTER TWO

WORLD WAR I AND THE YEARS UP TO WORLD WAR II

At the outbreak of World War I, 4 August 1914, the Commonwealth Government:-

- (a) had been in existence for only some thirteen years,
- (b) had by its Constitution only limited powers and very little experience of using those powers,
- (c) had only a relatively small staff of skilled administrators, and
- (d) had no history of handling the complex operation of moving large numbers of men and equipment oversea to engage in what turned out to be a mammoth war, or of handling the inevitable consequences of such a war.

To its credit, the Government, through its Minister of Defence, Senator E. Millen, and within thirty days, prepared¹⁶ and presented to Parliament the draft of a scheme whereby a pension would become payable upon the death or incapacity of "a member of the Forces resulting from his employment in connexion with warlike operations". In either event, a pension was to be payable to his dependants, defined widely, and of course to the man himself if still alive but incapacitated. The latter was taken to include incapacity from disease contracted not by any fault on the part of the man. Within a further three months the scheme had acquired a title, passed through both Houses, and come into force as the War Pensions Act 1914. Its basic principle has remained unchanged over the succeeding 75 years, (but with amendments and extensions from time

¹⁶ Hansard Vol 24. p 1896-2001.

to time)¹⁷, which was that the pension should take the form of compensation for the degree of loss suffered.

It is, however, debatable if such an apparently simple but all-embracing scheme would have found Parliamentary favour in precisely that form if it had been appreciated that:-

- (a) despite supremely confident public feeling in both Britain and Australia that the war would be all over by Christmas, four and almost five Christmases would pass before it was indeed all over,
- (b) of some 416,000 men enlisting, over 60,000 would have been killed, died of wounds or posted as missing,
- (c) two years after the end of hostilities, pensions would have become payable to over 90,000 veterans and 125,000 dependants,¹⁸
- (d) most single men, even though injured in battle, would acquire a wife, with children as a natural consequence, all of them becoming entitled as dependants.
- (e) as an example to consider, the United States Government was still paying pensions to veterans and dependants of the American Civil War of 1861-6.¹⁹

Initial arrangements for determining matters of entitlement such as dependency, and of degree of incapacity, proved soon to be inadequate and early transfer took place to the already established administration of the Invalid and Old-Age Pensions Act, 1908-1912. This too became overloaded by the influx of claims arising out of the heavy casualties of the Gallipoli campaign,²⁰ so that the advantage became apparent of:-

¹⁷ eg Australian Soldiers' Repatriation Act 1917- 1918, Australian Soldiers' Repatriation Act 1920-1935 and Australian Soldiers' Repatriation Act 1943.

¹⁸ Pryor L.J. *The Origin of Australia's Repatriation Policy* (1914-20) 1932, p 30.

¹⁹ Ibid. p 6. Over 200,000 a further 18 years later in 1932, together with a further 200,000 from the Spanish American War of 1898-9.

²⁰ Supra. n.2. p 69.

- (a) setting up an entirely new Repatriation Department to deal with re-habilitation into civil life as well as pensions,
- (b) covering the administrative skeleton of such a Department by a new Act, (the Australian Soldiers' Repatriation Act, 1917,
- (c) leaving matters of detail to the corresponding Regulations, since these could more readily respond to the demand of practical experience by order of the Governor-General rather than the far more cumbersome procedure of debate in both Houses of Parliament.

It should be noted that Britain had followed a similar course by setting up a Ministry of Pensions in December 1916. Other similarities included differential pension rates according to rank and rate of pay at the date of death or of the incident leading to incapacity although the Australian scale gave higher pensions than the British scale to lower ranks and less to higher ranks²¹. A striking dissimilarity was the British method of declared combined scales for pensioners with dependants whilst the Australian method was to have separate scales for wives, widows and successive children²². This method allowed more readily direct pension payments to the wife of a husband who might not always be reliable in money matters towards his dependants.

Further experience produced yet another Act, the Australian Soldiers' Repatriation Act, 1920. Amongst other benefits, it ended the problem of a Repatriation Department needing an unpredictable increase of money to carry out its responsibilities yet, at the same time, having repeatedly to justify its requests from a Treasury, which was saddled with the burden of finding that money. From the 1920 Act onwards, the Department has been funded directly by Parliament, usually in close approximation to a reasoned budget, and certainly more generous than in many other

²¹ Rules of Incapacity Pension and Widow's Pension based on the member's rank were terminated by the Repatriations Act 1972 (No 2) Section 19 (1). This development seems largely to have resulted from the attitude of various associations which deprecated any difference in a widow's pension because of a deceased member's rank. The classic comparison often drawn was between the widow of a VC winner who served as a private with great distinction in the field and the widow of a colonel serving only in Base area and with an utter lack of distinction. The general attitude was that compensation was for the widow, who needed it just as much if her husband had been an Able Seaman as if he had been an Admiral of the Fleet. Skerman AP. Repatriation in Australia. p (21).

²² War Pensions Act, 1914 Section 8.

countries, including Britain, where the funding basis appears to have been not so much honouring a commitment to servicemen, but to see what proportion of the national cake could be spared in competition with other calls upon it.

Therefore these two statutory "foundation stones", the War Pensions Act and the Australian Soldiers' Repatriation Act, as amended, with their attendant Regulations, have been the basis upon which all subsequent legislation and administration of benefits towards veterans and their dependants have been supported. Interestingly, the first arrangements for medical treatment of incapacitated veterans came only by regulation in 1919 through a Medical Advisory Committee. Originally intended to confine itself to questions of policy and procedure for continuing the treatment of injured and sick veterans after discharge from the Forces, the Committee soon became involved in the claims of individual men. Many of the decisions became precedents leading to policy alterations, easily justified on the grounds that adequate treatment could often reduce the level of incapacity and enable a veteran to achieve not merely a financial level of self support but the therapeutic effect of holding regular employment within the general community. Many such veterans did indeed earn a normal wage from a job within their own capacity whilst suffering a considerable degree of physical disablement and classed as "totally incapacitated", meaning unable to undertake the usual heavy manual type of work of most Australian men prior to 1914²³. It was compensation for economic loss as a consequence of physical loss²⁴. Those who were in addition so disabled as to have no hope of competing at all on the open labour market, for example those having lost both arms, were classed as "totally and permanently incapacitated" (TPI) and pensioned at a varying level above the general earning rate at the time. On the face of it, such classification should have no relevance to men upon reaching the age of 65 when their chance of securing any employment at all would virtually cease. However, successive governments have all avoided unpleasant public debate by continuing for life a TPI pension once granted, whilst usually denying it to a veteran becoming disabled to TPI standard after 65 unless he happened to be self-

²³ Supra. n.2. p 275–6.

²⁴ Skerman, AP. Repatriation in Australia. P 20. "The member coming to the Department for assistance even though he had lost one leg and had a permanently stiffened arm might be found employment as a clerk and draw full wages in addition to full pension".

employed and no longer able to continue his business solely by reason of war-related injury or disease²⁵.

1919 saw the return to Australia of almost all veterans. The fortunate few had their previous employment or the family farm readily available to them but the remainder needed training and assistance to enter a preferred field, especially where a moderate degree of disablement existed. Understandably the greatest effort of the Repatriation Department was applied in this direction, assisted by the provisions of the new Repatriation Act of 1920.

Meanwhile, the debilitating longer-term effects were becoming apparent of sickness arising out of prolonged periods of physical and mental stress, low levels of hygiene, inadequate and ill-balanced nutrition and, for those on the Western Front, repeated exposure to poison gas. At least one unfortunate Army division suffered in a single tour of duty in the trenches a greater level of shelling than in the whole of the Gallipoli campaign. The survivors were inevitably showing the strain by premature breakdown of what health remained²⁶.

WIDENING THE SCOPE

Inconsistency is a common consequence of flexibility, not least in the administration of legislation in a new field. It becomes even more so when greater numbers of decision takers are involved with little interchange of accumulating learning²⁷, and little personal experience to

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- 25 Veterans' Entitlement Act, 1986. Section 24 sub-section 2(b) reads in part: "Where a veteran, not being a veteran who has attained the age of 65 years, who has not been engaged in remunerative work, satisfies the Commission that..."
- 26 Moore W. *The Thin Yellow Line*. (Cooper L. London, 1974); quoting from the Official History of Australia in the War. No more precise detail provided by W Moore to a location within the multi-volume Official History.
- 27 Determined efforts to deal with this problem have included:-
- a) annual conferences of the Repatriation Review Tribunal with widespread circulation of the Proceedings. This Tribunal existed only from 1979-1984.
 - b) an organised body of Repatriation case law appearing firstly as a loose-leaf Information Service, followed by bound Volumes 1 and 2 of Review Decisions.
 - c) Publication in Administrative Law Decisions of the more important cases coming before the Administrative Appeals Tribunal, (starting in November 1979), Federal Court and High Court.
 - d) Publication in Verbosity, the official organ and reporting service of the Veterans' Review Board from when the Board commenced hearings in 1985 (A Board hearing is reported by code letter and number. If appealed further the matter would appear with the name of the

guide them. But since a claim, especially for a TPI pension or a War Widow's pension, has to be accepted or rejected with no middle ground, it was highly disturbing to ex-service organisations that apparently identical circumstances could lead to completely different responses, depending upon whichever body dealt with the claim. In particular, the impossibility of clear definition of "whose death or incapacity results or has resulted from his employment in connexion with warlike operations", (Section 3 of the War Pension Act as amended), brought perpetual wrangling. Benefits were originally intended for those serving voluntarily outside Australia, expected to be almost the total number of men enlisting. On the other hand, it needs an appreciable number of men, necessarily under military discipline of "never off duty, always on call" to keep supplies moving, yet in little or no danger from enemy action and at less risk than the civilians engaged in the manufacture of explosives. An eventual compromise was reached by a revised arrangement in the Australian Soldiers' Repatriation Act, (1920), in which a clear distinction was drawn between those enlisted or appointed for or employed on active service outside Australia or employed on a ship-of-war, and those enlisted or appointed only for service in connexion with naval or military preparations or operations. These latter became pensionable only if death or incapacity arose directly from their employment, whilst the former could claim where death or incapacity arose from any occurrence happening during the period of their service, (not necessarily whilst outside Australia), but excluding death or incapacity arising out of intentional self-inflicted injury or any occurrence happening during the commission of any breach of discipline by the member. Clearly the person(s) instructing the Parliamentary Draftsman, and indeed the politicians who agreed to the wording of the legislation, can themselves have had little combat experience, especially in connection with the trench warfare across Northern France. Otherwise they would have been aware of the impossibility of *proving intentional* self-infliction of injury or any but the most blatant breach of discipline. Soldiers laden with rifle, bayonet, ammunition for themselves and the platoon machine guns, water-bottle, gas mask, emergency rations, pick and shovel, etc. *can* stumble when crossing obstacle strewn or muddy

veteran or widow and may take two years or more to appear in print. Substantial care is needed by claimants and representatives before using Veterans' Review Board decisions to support a claim at primary or secondary level with apparently similar facts, in case the Board decision is itself under appeal, or has been appealed and with what result).

ground; a safety catch *can* inadvertently be left in the off position; sheer exhaustion or stress *can* lead to an increasing numbness of mind, the Manual of Military Discipline notwithstanding, and, in any case, the code of mateship covers against the "dobbing-in" of a fellow-soldier who decided he could absorb no more battlefield style of undeserved punishment, physical or mental²⁸. The relevant sub-sections were therefore of little practical consequence in comparison with the difficulty of interpreting the word "occurrence".

As already mentioned, the classic gun-shot wound from enemy action presented no difficulty; it was obviously an identifiable occurrence documented in regimental records, confirmed in Army Medical Corps treatment files. In contrast, a former sailor might start to cough up blood a year or two after discharge from the Navy. A visit to his doctor, probably with a further visit to a thoracic specialist, might confirm the suspected diagnosis of pulmonary tuberculosis. Even as late as the mid 1930s, mortality amongst those accepted as having contracted this disease was around 40%²⁹. Had he acquired the disease since discharge; did he get it from a shipmate whilst serving in the permanently wet, cold and cramped conditions of a destroyer on North Atlantic convoy duty, or had he in fact brought it into the Navy with him in latent form, exacerbated by exhaustion of natural body reserves just before his service ended? If medical examination on enlistment, such as it was, had disclosed no overt sign of the disease, he must be presumed without question to have been free of it then. Unless he had been thoroughly checked for it on discharge, such as by x-ray or biopsy, neither in routine use in 1919, and it appears that few were, then the authorities could not claim later that he did not have it on that date and therefore could not have acquired it during service³⁰. What was known was that the disease, although not invariably fatal, progressed at different rates in different men, depending on their constitutional level of resistance, their level of nutrition and their general living conditions. Since the whole tenor of compensation

²⁸ For obvious reasons, accurate documentation of the incidence of self-inflicted injury over armies of upward a million men spread over hundreds of miles is not possible. Suspicion is not proof, whilst the men concerned as well as any witnesses, if indeed the event occurred in daylight, may have died from enemy action a short time later. Survivors of a stark campaign prefer not to discuss such matters except amongst themselves and then rarely and unwillingly. Further discussion appears in Chapter 3.

²⁹ *Supra*. n.2. p 74.

³⁰ The Medical Examination Form Prior to Discharge asks the soldier if he has had any of a number of diseases. As a layman he is not competent to answer beyond "I do not know" to most of them.

legislation was to err if at all on the generous side, it had to be conceded by the government of the day that aggravation of an existing disease by the conditions of war service should equally be as compensable as disease acquired directly out of war service. To remove any doubt an amendment was passed as the Australian Soldiers' Repatriation Act, 1921 Section 2 "Notwithstanding that the origin of the cause of death or incapacity of a member of the Forces who, after enlistment with those Forces, served in camp in Australia for at least six months, or embarked for active service with those Forces overseas, existed prior to his enlistment, where, in the opinion of a Board:-

- (a) the conditions of his war service contributed to any material degree to the death or incapacity of the member; and
- (b) neither the death or incapacity, nor the origin of the cause of the death or incapacity, was due to the default or wilful act of the member, the Commonwealth shall be liable to pay..."

Again, it can hardly be a matter of surprise that widely differing interpretations began to flow of the phrase "contributed to any material degree", or indeed whether "default or wilful act" covered those instances where a recruit in his eagerness to serve, possibly alongside his older brother, concealed the existence of some ailment, known or suspected by him to exist³¹. (The writer has seen the file of a young recruit, claiming to be 18 years and 1 month, medically examined and assessed "Grade 1 Fit for Service", re-examined one week later by a second medical officer, whose comments included "Unfit- chest and girth measurements inadequate". One wonders if the boy really was a shade over 18, or appreciably less, and was he using an older brother's birth certificate, if indeed such a document were required to be produced in 1914?).

"Contribution to any material degree" is a matter not of fact but of medical opinion, and equally eminent, or apparently equally eminent, medical opinion may come down on one side of the fence or the other in regard to any particular veteran. As at that time original claims were assessed by State Repatriation Boards, (appointed by the Governor-

³¹ Chapter 6. *Infra* p105.

General, presumably with advice from the Government), which Boards, consisting entirely of non-medical men with the State Deputy Commissioner of Repatriation as chairman, could be in considerable doubt, even with the aid of external medical opinion. If a claim were rejected, an aggrieved claimant, (veteran or widow), could appeal to the Repatriation Commission, itself consisting of men appointed by the Governor-General, no doubt also with advice from the Government. Further medical examination could be undertaken by the Commission as the basis for an opinion, (hardly if the veteran had already died), but a second rejection could be seen as merely the result of appealing from Caesar unto Caesar. Public and parliamentary criticism resulted in the setting up of the Blackburn Commission which reported grave difficulties in assessing the possible relation of war service to illness appearing long after discharge, not least because of the general inadequacy of medical reports on veterans at the date of discharge. So often did medical officers accept without examination a man's negative response to questions about his health when in reality he was desperate to leave the Forces and feared that disclosure of illness would entail his retention for treatment for weeks, maybe months.

In the end, the Blackburn Commission did little more than confirm the existence of a severe administrative problem, but without offering a solution. As a compromise the Government relented, but not until information had been obtained from all the major countries participating in World War I showing that they too had found it desirable to set up an appeal procedure, independent of the government of the day. The result was the grafting on to the current two levels of determination a third level in two sections, a War Pensions Entitlement Appeal Tribunal and a War Pensions Assessment Appeal Tribunal. The first was to adjudicate on whether a veteran's death or incapacity was indeed attributable to war service, whilst the second would determine the level of compensation where this could not be agreed at either of the two lower levels. The Australian Soldiers' Repatriation Act, 1929 Section 6, providing by new Sections 45K and 45L for the two Tribunals, brought these into law just in time to meet the adverse economic circumstances of the Depression.

To deal with the Entitlement Tribunal first, the appeal was to be determined upon the same evidence as had been considered at the lower level. Where fresh evidence came to light during the Tribunal hearing, the appeal had to return to the Commission for determination, before

going up once more to the Tribunal if still unsuccessful at Commission level. No case was ever finally closed until the death of the veteran or dependant concerned because the discovery of fresh evidence was always an acceptable basis for re-opening the matter. Probably inevitably, every advance has its price, the price here being that the Commission was now given the power of appeal to either Tribunal to review a decision against the Commission if fresh evidence *against* the claimant had become available, or where it appeared that fraud or impersonation had occurred.

Far outweighing this small cost, however, was the introduction of a negative burden of proof upon the Commission to the Tribunal that a claimed incapacity was not contributed to, caused by or aggravated by war service. The Commission level of determination was under no comparable obligation itself until six years later when a new section (39B) to the Act required it to "act according to substantial justice and the merits of each case and...give the appellant the benefit of any reasonable doubt". Eight years later still under the impact of World War II, the word "reasonable" was removed and the onus of proof was specifically laid by a new sub-section to 39B upon "the person or authority who contends that the claim, application or appeal should not be granted or allowed to the full extent claimed".

One further advance in the 1929 Act was to allow an appellant or his representative access to the appellant's own files subject to withholding information which might be distressful to the veteran or widow³². The present Commonwealth Freedom of Information Act 1982 thus has a respectable fifty years approximate ancestry in relation to war pension claims. There appears to be little evidence of abuse of the facility since no Government has attempted to withdraw this very desirable access.

It is at least arguable that these two phrases:- "burden (onus) of proof (disproof)" and "benefit of doubt" in its various forms such as "any doubt" or "any reasonable doubt" as in the current Section 120 have become the most contentious, the most misunderstood by lawyers, by members of Tribunals, lay and legal, by members of parliament, and certainly by much of the ex-service community, leaning on the above-mentioned people for guidance through the legislative maze. The terms

³² Section 6, creating a new section 45Z in the Principal Act.

have, of course, a traditional legal background and therefore have added to, rather than displaced, the earlier medically based disputation arising from interpretation of attributability, (in its various forms), of death or incapacity to war service, (in its various forms). One wonders just what was intended by the Minister and his advisers who offered to Parliament amendments to the Act using these terms of legal art and what they were understood to mean by the members of Parliament who passed them into law. With that uppermost in mind, it is clear why successive governments have resisted all attempts by veterans and widows to have the benefit of even ex-service legal representation at hearings below the level of the Administrative Appeal Tribunal, where the Department of Veterans' Affairs itself appears to spare no legal or medical expense in resisting claims whilst offering little if any help in that direction to impecunious claimants.

The decade immediately before World War II saw two initiatives in eligibility for repatriation pensions. The first, based entirely on the need to save money, denied the award of pensions to wives who married a veteran after a particular date or to a veteran's children born after a certain other date. The restrictions were relatively short lived, affected only a few individuals, mostly second wives whose age was such that they might be expected to have a marketable skill at their finger tips and able to earn, provided that they did not produce a child.

The second, much more extensive in its impact, took cognisance of the severe toll on a veteran's reserves of health imposed by combat experience in any theatre of war. As far back as 1919 an Interim Report on the Organisation and Activities of the Repatriation Department had stated:- "No man who passed through the battle zone returned to the Commonwealth in a normal condition". Although it was based on a perceived need to help ex-servicemen found after discharge to be suffering from tuberculosis, not able to be established as the result of an "occurrence" on active service, its provisions were widened to allow for premature ageing and consequent loss of earning power, particularly when jobs of any kind were so difficult to obtain. The **Australian Soldiers' Repatriation Act**, 1935, therefore inserted a new Division 5 into the Principal Act, entitled "Service Pensions" and making available a modest welfare type pension to a member who had served in a theatre of war and had reached the age of sixty, (fifty five for a female), with no addition for dependants. A further section of the Act allowed for the

payment of a more compensation based service pension, irrespective of age, to a member (and his dependants) with provable service in a theatre of war and who had been accepted as being either permanently unemployable or suffering from tuberculosis. In essence, the new Act brought forward the payment of Old Age Pensions by five years or, alternatively, recognised that not every ex-serviceman had come forward for treatment at the first sign of sickness either during or after service, but had continued to support himself and dependants without charge to the taxpayer for some seventeen years post-war^{33 34}. These men surely deserved sympathetic consideration. Presumably, without the recession, most would have continued in some form of employment until aged at least sixty, if only as a matter of self-respect.

One further notable provision referred to by the 1935 Act was Section 18, creating a new Section 39A of the Principal Act, by which dependants of veterans who immediately before death were receiving the special rate pension applicable to those who were blinded, double amputees, tuberculous due to war service, or were accepted as totally and permanently incapacitated. These dependants became eligible for war widow's pension, (and correspondingly for children), irrespective of the actual cause of death, e.g. falling off a ladder or as an innocent victim of a road accident. It explains, in part at least, the great urge by so many veterans to become TPI pensioners, when the merits of their case, for some of them, was at best doubtful. It did ensure, if their claim were successful, the highest possible level of benefit or pension plus a variety of allowances, to their widow. What is rarely recognised, however, is that so very many of these same widows were unpaid nurses all round the clock, every day of the year, helping their husbands to cope with not merely physical but mental breakdown, not all that visible, and quite beyond the knowledge or understanding of anyone outside the immediate family.

33 When a whole unit of men has been subject to poison gas or is suffering from dysentery, it is no longer sufficiently noteworthy to be recorded on the medical files of individual men. The absence of any such note when the files are examined 20, 30 or 40 years later definitely does not mean that the event sought for did not occur. See also Veterans' Review Board decision N82/0237 in which "official notice was taken of the fact that soldiers generally had (unreported) dysentery on tropical service". Verbosity Vol 1, No 1, p 8.

34 Skerman, AP. Repatriation in Australia. p 74:- "Another factor was the contention of many lay and medical persons that gassing could have weakened a member's lungs and rendered him particularly prone to contraction of the disease. Qualifying this contention and lending it point was the admitted fact that numbers of gassed men had remained in action and never been reported as casualties".

The cost of providing institutional care to anything like the same level for the remaining years of life of the veterans concerned would have been immensely more.

CHAPTER THREE

CHANGES ARISING DURING WORLD WAR II

The writer recalls widespread disbelief in Britain in mid-1939 that another European war could be contemplated by the government of any country which had suffered during the war of 1914–1918. Whilst Britain itself had not been a battlefield, very large numbers of men had been killed, had died of wounds, severely injured or stricken with disease, a fact possibly rendered acceptable by the survivors in the belief that it had been “a war to end all wars”. Remembrance Day services centred upon this belief in much the same way as did Anzac Day commemoration services in far-off Australia.

True, there had been a peace treaty, intended, in part at least, to discourage the possibility of similar wars. However, those provisions not to the liking of the National Socialist Government of Germany were gradually being whittled away by that government³⁵.

Keen students of international politics will recall that diplomatic protest followed, but no armed resistance, no doubt encouraging the German government into thinking it could continue to do whatever it liked, with impunity. As none of the earlier events directly affected Britain, itself still in economic depression, politicians and public alike shied away from the thought of conflict in continental Europe. So, if Britain seemed unwilling to take effective action, Australia had even less cause to worry. Nevertheless when Britain did declare war on Germany on 3 September 1939, (in response to the German invasion of Poland), Australia's consequential involvement was immediate. The enemy of Britain would be the enemy of Australia also.

So far as the Repatriation Department was concerned, it still had a large number of veterans and their dependants in its care. Furthermore, it had

³⁵ Examples include;

- (i) Re-entry into the districts west of the River Rhine of German army units in uniform, despite existing occupation by British and French units.
- (ii) Forced Annexation of the Sudetenland province of Czecho-Slovakia.

a couple of decades of experience of administering the relevant legislation, as amended to date. In contrast to 1914, there were no German-held territories in the South-West Pacific to be attacked, hence, and likely to produce casualties as a result. Even in Europe the bitterly cold winter of 1939–40 prevented large-scale movement of land forces, although a few RAAF pilots were in Britain³⁶.

Of more immediate concern was the rapidly rising cost of pensions already being paid. In particular:

(a) **Disability Pensions**

Whenever a veteran had been awarded such a pension, the rate of payment had been based upon an assessment of the extent of disability on the date of lodgment of the claim. It followed that increasing disability, as time went on, could be the basis of further claims, with the possibility of higher rates of pension payable. There could be no question of denying liability for medically confirmed deterioration of war-damaged muscles and joints, and of lungs damaged by poison gas. Deterioration by reason of sporting injury or domestic accident was a different matter. A veteran could not be expected to abandon the usual activities of a man of his age. He needed to live, not merely exist. Similarly age-related degeneration would have a greater and earlier effect on muscles, joints and lungs, already damaged during the incidents of war. Provided particular disabilities had already been accepted as due to war service, then a well-constructed claim based upon exacerbation had a good chance of attracting a higher rate of pension. After all, ex-service medical officers themselves could provide all the corroborative evidence needed.

(b) **Service Pensions**

Payable to those who had served in a theatre-of-war and who had either reached the age of 60, or who could be assessed as permanently unemployable in the general labour market within reasonable distance from their home, all of them aged 39 and

³⁶ Verbosity (official Bulletin of the Veterans' Review Board) Vol. 4 No 1. Supplement. p(i). "Australia was not able to employ all the airmen it trained prior to 1939 and many Australians transferred to the RAF when it was recruiting about 20% of its pilots from Commonwealth countries".

above. (The numbers of the third category, those with pulmonary tuberculosis, were already falling).

In 1936, the first year of availability of service pensions, close to 4,000 such pensions had been awarded. Three years later the figure was approaching 14,000 as more veterans reached the age of 60 or dropped, or were pushed, out of the labour force in favour of younger, stronger men³⁷. Lessening the rising cost of these was the fact that not all eligible veterans applied, preferring not to accept what they regarded as charity. Obviously their numbers are not known. Some would have calculated the effect on a notional pension of a means test related to other income and to saleable assets and preferred not to trust a government with such personal details in exchange for a very modest pension³⁸.

TREATMENT

During the 1914–1918 war, military hospitals had been set up around Australia to deal more efficiently with service men repatriated from the various battle-fronts by reason of injuries or disease, beyond the resources of the Australian Army Medical Corps immediately behind the fronts. The method enabled the development of specialist teams with a high combined level of expertise in, for instance, gun-shot wounds, severe burns, and diseases indigenous to the Eastern Mediterranean areas. But, in this direction also, degeneration due to advancing age was bringing greater numbers of men forward for free hospital and medical treatment, not all of whom had been willing to admit episodes of sickness in particular at their final medical examination before discharge. That might have delayed the long awaited discharge. But by the late 1930s, the cost of providing treatment for those who did apply was rising quickly³⁹. Offsetting this, to some extent, was the unknown number of veterans who preferred to have no contact with Departmental Medical officers, commonly because of at least one unsympathetic encounter in

37 Annual Reports of the Repatriation Commission, 1936 to 1940.

38 The writer has interviewed a large number of veterans' widows over the last decade. An appreciable proportion have declined to apply for a pension of any sort, preferring to remain independent and, presumably, having the resources to do so.

39 Annual Reports of the Repatriation Commission, (1935 onwards).

the past^{40,41}. Of these, some made use of a family doctor near where they lived, but when a medical practice changed hands for whatever reasons, or closed altogether, such clinical records as existed often were lost. The unfortunate sequel was that when the veteran, or his widow, eventually did come forward, there was little medical supporting evidence. Lest it be thought that the above applied only to World War I veterans, the writer comes across similar circumstances relating to veterans of later conflicts three or four times per annum. The number, Australia-wide, must be considerable.

NEW LEGISLATION

From the above discussion, it will have become clear that the Department was aware of its dual responsibility, the provision of benefits to those veterans and their dependants who were entitled by statute and, secondly, the protection of public funds by ensuring so far as possible that claims from persons not so entitled were declined.

The Department was also aware that legislation could rarely take into account all possible sets of circumstances, and that therefore it was better to maintain tight control with discretionary power to relax when appropriate. Once a new route of entitlement had become available, and a flood of unforeseen proportions had begun to pour through, it would be "a practical impossibility to subsequently close the gates in the face of inevitable public outcry"⁴².

The latter months of 1939 saw considerable debate in Parliament over alleged anomalies of the Principal Act as it then stood⁴³, such that the current Minister for Repatriation set up an internal committee for the specific purpose of considering what changes, if any, seemed desirable. Its

⁴⁰ R Griffiths Marsh – *The Sixpenny Soldier*. Angus and Robertson. Sydney 1990. p 374–377 records his own battle to receive treatment from the Repatriation Department, totally unsuccessful until an outside specialist used his influence.

⁴¹ Mr J Francis MHR. Commonwealth Hansard Vol 163, p 1660.

⁴² Supra. n 14a. p 114 and 125.

⁴³ For example, Commonwealth Hansard Vol 160–163. Messrs J Francis MHR Vol 163, p 1660 and J A Beasley MHR Vol 163, p 1662.

recommendations leading to amendments to the Act⁴⁴ included the following:–

- (a) insertion of the word “directly” before “attributable” in “attributable to his service”, “attributable to his employment”, and in the phrase “an accident whilst travelling directly to or from his place of employment”. The immediate effect was to make it easier for the Commission or the Boards to refuse a number of claims which previously could have succeeded. Clearly the assessment of directness was subjective and could well depend on whether the assessor had personal experience of the kind of circumstances upon which a claim was based. Whilst the official view of the Commission was that insertion of the word “directly” made little operational difference, and that every benefit of doubt was given, it appeared that the word was always used from then onwards in correspondence concerning rejection of claims⁴⁵.
- (b) making the limitations relating to intentional self-inflicted injury or breach of discipline applicable to all members, at home and abroad. Where previously it had been thought that conditions of service within Australia were so mild that an all-volunteer force would not become involved in misconduct, it appeared that, this time, conscription might be necessary, and unwilling conscripts should be deterred from the start from thought of any action which might end their liability to serve and, at the same time, provide them with a life-long pension. In addition, a proviso was added that pension would become payable only where incapacity or death was not due to default or wilful act of the member⁴⁶. As neither term was defined, it could hardly be much of a deterrent. The writer was certainly not provided on enlistment with a copy of the Act, nor King’s Rules and Regulations either. Enquiry amongst other veterans revealed a similar situation regarding the Australian Armed Forces. In his Independent Enquiry into the

⁴⁴ Australian Soldiers' Repatriation Act 1940 Sections 26(1), 45 AU (I) (a) and 45 (W) (4).

⁴⁵ Supra. n 14a. p 119.

⁴⁶ Morse, W. *The Thin Yellow Line*. Cooper. London. 1974, p 149–155. District Courts–Martial in France in 1916–19 tried 701 Australians for self-inflicted wounds, whether intentional or accidental.

Repatriation System, Mr Justice Toose reported⁴⁷ that before insertion of the word "serious" before "default or wilful act" there had been claims refused "on somewhat tenuous grounds". For example, claims based on disablement resulting from venereal disease, presumably on the grounds that careless or reckless exposure to infection when preventives and prophylactic applications were freely available for the taking, could be regarded as a wilful act of breach of discipline.

- (c) Surprisingly, the Committee found time to busy itself with the conflicting claims to pensions of legal and de facto wives and widows, presumably because of expectation that considerable numbers of men would not or could not resume cohabitation with the legal wife on return, thus giving rise in due course to two eligible claimants and their children to dependant's pension. Their recommendation, duly enacted for 1939–1945 members, was for eligibility to a de facto only if no payment to a legal wife was being paid in respect of the same member⁴⁸. A typical consequential injustice appeared to have been disregarded where, for instance, "a de facto wife was granted a pension and a legal wife who had not been heard of for twenty years came forward to claim pension when she learned of the member's death. The consequences can be imagined, since the de facto widow, by now conditioned to receipt of her pension, suddenly found herself deprived of it at the time when she needed it most",⁴⁹ and when so often it was she who had nursed a desperately sick man night and day for years.

The last six months of 1940 and the first three months of 1941 saw Australian troops taking part in the clearance of the Italian army from its East African colonies and from the eastern coastal strip of Libya. Casualties were relatively small. With the sudden push of the German Afrika Corps into Libya in April 1941 and the parallel invasion of Yugoslavia, a substantial portion of the Australian forces diverted to Greece, and later to Crete. Not enough remained in Libya to halt the

⁴⁷ Supra. n2. p182.

⁴⁸ Proviso added to Section 36 of the Principal Act.

⁴⁹ Supra. n 14a. p 130.

German push eastwards; not enough arrived in Greece to halt the corresponding emergency there. Casualties rose swiftly in regard to those killed, wounded, or taken prisoner. Back in Australia it was clear that preparations were needed to deal with a corresponding rise in claims from veterans and their dependants; and planning commenced. Already, wounded men deemed not likely to be capable of further combat duty, and those suffering from the more serious medical conditions, were being drafted home when Japan entered the war on 7 December of that year. That date saw the bombing of the United States Navy in Pearl Harbour and the start of a push southwards by the Japanese. Nine weeks later, 19 February 1942, saw two air-raids on Darwin, resulting in 238 killed and 355 wounded. The war had reached the Australian mainland. This, plus the entry of Japanese submarines into Sydney Harbour, finally moved the earlier distinction between overseas service and, to some extent, home service. For a time indeed, Darwin had become a more hazardous posting than Cairo⁵⁰.

The time was opportune, therefore, for a thorough revision of the legislation, undertaken in mid-1942 by a Joint Parliamentary Committee. A substantial number of submissions were received from individuals from the ex-service organisations together with a major submission by the Repatriation Commission itself. Most, but not all, the recommendations regarding eligibility were accepted by Cabinet and became part of the Australian Soldiers' Repatriation Act, 1943. Included were:

- (a) Extension of "members of the Forces" to men who were until then only in the militia as volunteers, but who then were liable to be called upon for continuous full-time service for the duration of hostilities and directly in connection with the war⁵¹.

50 General Orders (Service Pensions), November 1992 reprint, records 64 air-raids over Darwin itself. In contrast, the German air-force effort in the Mediterranean was concentrated against Malta and the convoys trying to supply Malta, the main naval depot of Alexandria in Egypt, and "bomb-alley", the shipping lane between Alexandria and the North African ports of Tobruk and Derna.

In "Greece, Crete and Syria", (1986 reprint) p. 32, Gavin Lang records - "a sharp contrast to the gaiety and lavish eating and drinking surrounding headquarters in Cairo." Almost any bomb dropped onto Alexandria docks would do more damage than on a city the size of Cairo containing widely dispersed buildings not noticeably prominent from the air.

51 Section 36, amending Section 45 AT of the Principal Act (and subsequently renumbered as Section 100).

- (b) Definition of "active service within Australia" as service within prescribed combat zones during prescribed periods under prescribed conditions, or where the member suffered injury or contracted disease as a result of enemy action, or in actual combat against the enemy or where, in the opinion of the Commission, circumstances should be deemed to be actual combat against the enemy⁵².
- (c) Implementation of what had been the working policy of the Commission for over 20 years in regard to disabilities existing before enlistment. Whilst the Act allowed only for "contribution to any material degree" by war service resulting in incapacity or death, the Commission had in practice accepted "aggravation" as equally conducive. The 1943 amendment⁵³ allowed both factors without defining either. At the same time, it appears pertinent to recall Mr Justin Toose's comment⁵⁴ that the earlier meaning of "incapacity" was "incapable of manual work", whilst by the early 1940's it had come to mean mental or physical disablement, the result of which was inability to work. War service can aggravate, or contribute to, pre-existing medical conditions leading to incapacity in the later sense, whereas death can be contributed to but hardly aggravated.
- (d) Deleting the word "reasonable" in "shall give to an appellant the benefit of any reasonable doubt", an obligation placed upon the Commission by Section 18 of the **Australian Soldiers' Repatriation Act**, 1935. It is not clear what improvement was intended by this for, surely, unreasonable doubts were not to be entertained. The context, Section 47 of the Principal Act, then became as follows -

Sub-section (1). "The Commission, a Board, an Appeal Tribunal, in hearing, determining or deciding a claim, application or appeal, shall act according to substantial justice and the merits of the case, shall not be bound by technicalities or legal forms or rules of

52 Ibid.

53 Section 37, amending Section 45AO of the Principal Act, (and subsequently renumbered as Section 101).

54 Supra. n 2. p171-5.

evidence and shall give to the claimant, applicant or appellant the benefit of any doubt –

- a) as to the existence of any fact, matter, cause or circumstance which would be favourable to the claimant, (etc), or:
- b) as to any question whatsoever (including the question whether the incapacity from which the member of the Forces is suffering or from which he has died was contributed to in any material degree, or was aggravated by, the conditions of his war service) which arises for decision under his claim, etc."

In comparison with many other spheres of adjudication, insertion of the word "reasonable" could hardly have made the veteran's submission even more likely to achieve success.

- (e) Deleting from Section 45 AU (1)(a) the word directly before "attributable" in directly attributable to his employment, but retaining it in "an accident whilst travelling directly to or from his place of employment". The retention arose from the fact that such travel could hardly incur the risks of combat whilst actual employment commonly could or would incur such risks. (This simple change brought the legislation back to the pre-1940 state of affairs). Ex-service organisations had felt strongly that the 1940 insertion was a deliberate attempt to restrict eligibility to direct injury, visible to all, neglecting the totality of incidents which were an indivisible part of life on active service⁵⁵. The word was indefinable and invited inconsistency of determination.
- (f) Softening of the exclusion from liability by reason of default or breach of discipline by prefixing those two terms by the word "serious", again without definition. How far did a man's conduct have to fall below what was expected of him for it to be labelled "serious"? In later practice, the policy was to equate "serious" with conviction by District Court Martial or higher⁵⁶. Whilst these were

⁵⁵ Supra. n 14. p119.

⁵⁶ Supra. n 2. p171-5

certainly organised on a frequent and regular basis behind the relatively static lines of trench warfare in World War I⁵⁷, the more fluid campaigns of World War II were in general less stupefying on the troops, with only a very small number of alleged breaches going up to a Court-Martial. Of these, the more likely arose from suspicion of self-inflicted injury but, as indicated earlier, suspicion is not proof. The more humane outlook appears in a report from the New Guinea campaign, as arduous as any and more so than many, where "a Director of Medical Services sent out written instruction that a wound was not to be labelled as self-inflicted unless the attending medical officer had actually seen the shot fired. There can be no question that some men were unjustly blamed and, as the experience of individual medical officers was often limited by circumstances, there can be no true statistical measure of frequency and general statements must be misleading"⁵⁸.

In contrast, there were two groups of disease which lent themselves to at least temporary release from front line duty or deferred return to front line duty –

- (i) malaria,
- (ii) venereal disease, more recently entitled sexually transmitted disease.

Malaria is endemic in all tropical and sub-tropical areas where sufficient surface water allows the breeding of the mosquitoes which transfer the disease. Examples include the southern and eastern shores of the Mediterranean, Burma - the scene of operations of the British XIVth Army – and New Guinea. Prophylactic measures included the daily consumption of either quinine or a synthetic substitute, mepacrine (Atebrin to Australian troops). Both are intensely bitter and both have unpleasant side effects, gastro-intestinal upsets in particular⁵⁹.

57 Supra. n 25. p149-155

58 A.S. Walker. Australia in the War of 1939-45. Medical Series. The Island Campaigns. p35.

59 Martindale's Extra Pharmacopoeia 25th Edition. p326.

Unfortunately for those concerned, a small number of men were suspected of taking the opportunity of only pretending to take the medication, allowing themselves to be bitten by the malaria – carrying mosquito and exchanging the battle-zone for the safer base hospital. Within a very short time all men going down with malaria in that zone became subject to disciplinary measures, charged with serious breach of discipline, wilful default and so on. Milder cases were treated but kept within their units, those fancied as extreme offenders served a most unpleasant sentence in a Field Prison before returning to such of their comrades as were still alive. The writer recalls one such prisoner determined never to risk another similar incarceration. (Those men who developed a severe dermatological allergy to mepacrine, commonly known as "jungle-rot" were, of course, posted away altogether, as not in anyway culpable). Part of the problem lay not so much as failure by individuals to maintain full anti-mosquito precautions but by failure to recognise early that quinine was not reliable against all forms of malaria, particularly malignant tertian, so that the incidence of the disease in the Milne Bay area of New Guinea reached 92 per 1000 per week. Even the two most senior medical officers and the General Officer commanding succumbed⁶⁰ and they could hardly be Court-Martialed for serious breach of discipline.

Venereal disease, using the description in the legislation of the time, was for obvious reasons, acquired in rest and recreation areas, rather than in combat zones. Skerman⁶¹ records the concern of the government that every available man should be fit to take his part in the defence of Australia and that scarce medical resources should not be diverted unnecessarily. On the other hand, all three services had a policy of regarding such disease as an indication of human frailty, rather than a basis for disciplinary action unless there was clear proof that a man exposed himself to infection deliberately in the hope of avoiding further combat duty. Such instances were rare. What must be borne in mind is that no serviceman would have contemplated such action in the hope of

⁶⁰ Supra. n 57. p116.

⁶¹ Supra. n 14. p128.

securing life-long pension⁶². Whatever politicians and public servants might have thought from the safety of Canberra, expectation of life for the troops was a joke, death or serious injury of themselves was a daily and nightly occurrence and, if the opportunity came of enjoying the natural instinct of a healthy young male whilst still alive, why not? Lest it be thought that all such advances were made by the troops, the writer recalls Army news-sheets warning of the belief amongst the female population of certain countries that pregnancy to an American, Australian, British soldier guaranteed nationality and residency rights in the relevant country⁶³. Not a few sought by this method to avail themselves of a non-existent privilege by pestering servicemen. The idea seems to persist in a modified form by the willingness of women in certain countries to take their chance as the "mail-order bride" of an Australian man and hope he will be good. (Personal columns of daily newspapers).

- (g) Introducing an apparent catch-all basis of eligibility for pension relating to incapacity or death if, "in the opinion of the Commission, it was due to an accident occurring or to the contraction of a disease or an infection which would not have occurred or been contracted but for his being a member of the Forces or but for changes in his environment consequent upon his being such a member"⁶⁴. The sub-section remains to this day. It is not readily ascertainable whether many claimants used this approach but it would seem to cover instances of men removed from normal family life for up to three years in the Australian Forces and six years in the British Forces, and succumbing to temptation in a weak moment whilst under the influence of alcohol. Typhus and infective hepatitis in Italy in 1943-5 and dysentery almost everywhere would be more obvious examples⁶⁵.

⁶² Section 45 AU, later re-numbered as Section 101(d) provide (a) allowed pension for the widow and children of a man so infected, but not for the man himself. All he received was treatment.

⁶³ Reinforced by printed and verbal warning to troops arriving for a few days relaxation at rest camps – literature not retained, but clearly remembered.

⁶⁴ Section 37, becoming Section 45 AU of the Principal Act, later renumbered as Section 101.

⁶⁵ Supra. n 32.

- (h) Splitting of any dependant's pension between a legal wife and a de facto, a proposal supported by the Commission but rejected by the Cabinet in favour of allowing both widows (but not both wives), to draw the dependant's pension appropriate to the deceased husband. The original Section 36 of the Principal Act had allowed eligibility for pension at the maximum rate to both widows in respect of death, to the legal wife in respect of incapacity and to the de facto wife if she were regarded as the member's wife at the time of the occurrence leading to incapacity. As already mentioned, the 1940 amendment added a proviso to Section 36 precluding a de facto wife from benefit whilst benefit was being paid to a legal wife. This proviso was removed, after a life of only 3 years, by Section 20 of the 1943 legislation by another proviso as Section 36(2) reading – "Any such pension may be allowed to any such person under this provision as well as to the widow of a member of the Forces". A subsequent reprint renumbered Section 36 as Section 42, whilst an even further amendment in 1950 inserted "wife or widow as the case may be" in place of the word "widow".
- (i) Terminating, hopefully for ever⁶⁶, the wrangling over whether pulmonary tuberculosis had been contracted before, during, or after service, by accepting liability irrespective of when the disease had been contracted, irrespective of whether or not the veteran had been cured at the time of his claim, irrespective of whether there was any residual incapacity⁶⁷. Whilst this might seem over-generous to people suffering from one particular disease, it should be remembered that –
- i) tuberculosis was regarded as a serious health hazard, and the cost of preventing its spread would be money well spent,
 - ii) if such cost included a pension high enough for pensioners to move away from over-crowded housing, so be it,

⁶⁶ The hope was not realised as Sections 40 (2) and (3) of the Repatriation Act Amendment Act, 1978, fixed pensions for tuberculosis at the cash rate as at 2 November of that year until the rate for the individuals actual incapacity exceeded that figure. However, Section 85 of the Repatriation Legislation Amendment Act, 1982 restored the pre-1978 position, for current pensioners only.

⁶⁷ Supra. n 14. p126.

- iii) nobody, surely, deliberately sought to become infected in order to be granted a pension,
- iv) the Beveridge plan for a Universal National Health Service had recently been published in Britain,
- v) the Labour Government in Australia at the time favoured such a system for Australia,
- vi) it made little difference whether a pension was paid by the Health Department or the Repatriation Department.

No other disease, not even small-pox, received such attention. Whether the attention would have been so open-handed had it been known that new chemotherapeutic medication would have substantially defeated the disease within 15 years, and closed all the Tuberculosis Hospitals within 20 years, is a different question altogether⁶⁸.

One final point of interest concerning men and women enlisting in Tasmania and crossing Bass Strait by ship when there was a possibility of attack by Japanese submarine. They were, for all practical purposes, merely passengers with fares paid by the Australian Government. If they slipped on a wet surface during boat-drill and incurred permanent injury, the legislation allowed the resulting incapacity to be compensable for life. Furthermore, as noted by paragraph 1.5.1.2 of the Report of the Monitoring Committee into the Veterans' Entitlement Act, 1986, such crossing of Bass Strait allowed subsequent service within Australia proper to come under the definition of operational service, (incurred danger), for the purpose of using the reverse onus of proof to the criminal standard of Section 120(1) of that Act, in relation to claims for injury or disease arising during service on the Australian mainland⁶⁹.

⁶⁸ Disturbing reports of pockets of tuberculosis in over-crowded refugee camps around the world may hinder the rate of acceptance of refugees into Australia in the 1990's.

⁶⁹ A similar situation applied for a time for passage to and from Rottnest Island off Fremantle (General Orders, Pensions).

CHAPTER FOUR

FROM THE RUBICON TO THE RHINE-REPATRIATION STYLE... THE IDEAS WHOSE TIME TOOK FIFTY YEARS TO COME

In their own way, careful planning, adequate allowances for reserves and for the more likely contingencies allowed Julius Caesar at the Rubicon in 49BC and the Allied invasion of France in 1944 AD, crossing the Rhine some eight months later, to convert a mere dream into wildly successful reality.

What then ought to be acceptable planning and maturation periods for repatriation legislation, conceived with the definite purpose of providing compensatory and welfare benefits for certain classes of veterans and dependants in mostly similar circumstances by uniformly fair and consistent determination of their claims? The original War Pension Acts, 1914, as amended, widened by the Australian Soldiers' Repatriation Act, 1917, also as amended, had been consolidated into the Australian Soldiers' Repatriation Act, 1920, itself amended time and again. Purely internal review procedures had been replaced by the War Pensions Entitlement Appeals Tribunal and War Pensions Assessment Appeals Tribunal, yet each amendment to correct an apparent anomaly or shortcoming appeared to do so at the expense of creating one or more further anomalies or exposing one or more further shortcomings. With the benefit of hindsight, the reasons seem clear but hardly excusable, prominent among them being the determination to make the tribunals appear to be fully independent.

For instance:-

- (1) no written guidelines were provided, nor were they bound by their own previous decisions, or those of other tribunals,
- (2) no interchange of membership took place nor were there regular meetings to exchange experiences,

- (3) whilst advice from the Attorney-General was available, it need not be followed,
- (4) there was no ready access to a Court on questions of law,
- (5) before about 1974, reasons need not be given,
- (6) neither claimants nor representatives appeared; decisions were made "on the papers",
- (7) short tenure of office meant that members, unaccustomed to assessing written statements of opinion, much of it using medical terminology, and setting it against complex statutory criteria or uncertain meaning, had finished their term just when they were starting to become effective⁷⁰.

Similar considerations applied to the primary (Board) level but not the single member Commission level, run by experienced senior staff conversant with the Act and its Regulations and moving around at frequent intervals, achieving thereby considerable consistency of decision-making throughout the country. Meanwhile Ministers came and went, often long before they had time to grasp the complexity of the legislation. Meanwhile, too, the ex-service community was becoming restless, justifiably so when the outcome of a claim appeared to depend as much on where it was presented as on its intrinsic merit. (Not a few stories abound, possibly apocryphal - certainly anecdotal - of veterans using an extended holiday interstate to present their claim to a reputedly more sympathetic tribunal, disclosing as their address that of a kindly relative⁷¹).

By the early 1970s, public opinion was beginning to demand reform, not merely in regard to repatriation legislation, but generally. Response followed remarkably quickly for Federal Governments, hampered by

⁷⁰ Supra. n 2. p 202, and personal communication from members not wishing to be re-appointed.

⁷¹ For example, percentage success rates for disability pensions in 1986-7 were 51.4 for New South Wales and 40.0 for Victoria. The data is public, appearing in the Annual Report of the Repatriation Commission. Interested persons could draw their own conclusions. Obviously there can be no direct evidence of how many responded to the possibilities.

State Governments playing politics, and often a hostile Senate, (One State, One Vote), negating attempted decisive action by the House of Representatives (One Voter, One Vote). "When in doubt, set up a committee" has a respected pedigree of at least 2000 years for Governments feeling they are damned if they do, and damned if they don't, in regard to whatever issue has been whipped up in the public mind by vested interests at a particular time. Not surprisingly, therefore, a succession of Commonwealth Governments of the major political parties had instituted a number of committees such as the Kerr Committee of 1971 and the Bland Committee of 1973 and had decided to implement at least some of the recommendations whereby administrative action could be reviewed independently. Nominally, Parliament did this in a minor way by scrutiny and debate of Bills, but competence in this function has never been a prerequisite for election to Parliament, and members of Parliament often displayed only too well an incomplete understanding of what they were debating⁷². Those who could be expected to understand, (senior staff of the departments concerned), and who were making the administrative decisions, occasionally did so beyond authorised limits, ie not in accordance with Cabinet minutes⁷³, yet sought shelter behind such devices as "departmental policy", "Ministerial directive", "not in the public interest to disclose", when called upon to justify their action. Fortunately, but happily, Mr Justice Toose's Final Report of 1975 into repatriation matters became public at about the same time that the administrative process generally became subject to external review. To deal first with the first, major recommendations by Mr Justice Toose included:-

- (1) the necessity at each level of determination for decisions to be accompanied by written reasons, detailed sufficiently for an unsuccessful applicant to assess, or to be advised, whether there were grounds for appeal. In addition, the fact that reasons had to be given would be invaluable training for newer members of determining bodies in grasping the issues involved in a particular claim and applying the law in a logical manner. Whilst reaching a decision and explaining how it was reached would undoubtedly be more difficult for a multi-member Board or Tribunal than a single

⁷² Toose, J. Repatriation Review Tribunal. Fourth Annual Conference. 1983. p 13.

⁷³ Ibid.

member, natural justice and the highly desirable aim of consistency required it.

- (2) Giving statutory force to majority decisions presently lacking such force or, preferably, to insist on unanimity and, if that were not possible, to transfer to a differently constituted Board or Tribunal, together with an appeal procedure to a higher body such as the Administrative Appeals Tribunal, then under substantial discussion within Government and the public generally.
- (3) Reversing the order Board - Commission delegate, since the latter were all senior staff as already mentioned, and who seemed to work more consistently and faster.
- (4) Merging of the Entitlement and Assessment Tribunals, since greater efficiency could be expected of the latter function having determined the former function in regard to any particular claimant.
- (5) Allowing a claimant to appear in person and to have legal representation of his choice⁷⁴. Simple face to face inquisitorial proceedings were invaluable in assessing credibility and in jogging faded memories.
- (6) Re-drafting of Section 47 to remove wording which placed an onus of proof on the person or authority contending that the claim, application, or appeal should not be granted or allowed to the full extent claimed. This suggested an adversarial situation whilst in fact the determination process was clearly intended to be administrative of an inquisitorial character.
- (7) Re-drafting of Section 48 regarding the provision of expert opinion by medical witnesses, since far too many of them had developed

⁷⁴ Ibid. p 18. The point was made that governments were never backward in proclaiming the fact that they made legal aid available for those charged with crime, yet contrived to deny legal aid to those who served their country in time of war. The restriction continues in an even tighter form and to a sillier extent. A legally qualified widow may represent herself at a Veteran's Review Board hearing into her claim for a War Widow's Pension, but could not represent her husband into his own claim for disability pension in respect of the injury or sickness from which later he died. Similarly a legally qualified ex-serviceman may represent himself but not his brother or any of his mates in regard to an incident which incapacitated both or all of them whilst serving in the same unit or ship.

the habit of usurping the function of the determining body instead of confining themselves to what the Act required of them. Lay members of those bodies, out of their depth with medical terminology, had deferred to the experts without understanding the boundary between the two functions.

- (8) Making the relevant personal files available to a claimant or authorised representative, with discretion to withhold where the records contained details likely to be distressing, yet not vital to the claim⁷⁵.

Regrettably not all of the recommendations were accepted. One of those accepted was the merging of the two Appeals Tribunals into a single Repatriation Review Tribunal (RRT). It lasted only six years. Meanwhile on the general front, much legislative activity had come about, including:

- (a) the Administrative Appeals Tribunals Act, 1975,
- (b) the Ombudsman Act, 1976,
- (c) the Federal Court of Australia Act, 1976,
- (d) The Administrative Decisions (Judicial Review) Act, 1977, although that did not come into force till 1980.

The first of these covered the setting up not only of the Administrative Appeals Tribunal itself, but also an Administrative Review Council consisting of the President of the Tribunal, the Commonwealth Ombudsman, the Chairman of the Law Reform Commission and three to ten other members with extensive experience in public administration or administrative law. It functions as the "watchdog" over the entire system⁷⁶ reporting annually on the working of the Tribunal, on those classes of administrative decision not currently subject to review by a court or a Tribunal, and indeed any other matter regarded as coming within its very wide purview.

In hindsight, few would disagree that the Administrative Appeals Tribunal, (AAT), has been a major step forward towards consistency of decision making. It conducts reviews and not merely appeals. Whereas

⁷⁵ Supra. n 2. p 268.

⁷⁶ Whitmore H. and Aronson M. Review of Administrative Action, 1978. p 28.

an appeal may have been brought against a single point of a multiple point decision at a lower level, the AAT has the power to go again through all the evidence submitted at the lower level, to consider also any new evidence brought forward and to affirm, to vary, or to set aside the lower decisions and substitute its own⁷⁷. Its hearings are adversarial, often benevolently so towards an aggrieved citizen, but certainly not merely inquisitorial, and it requires advocates to come fully prepared to argue on both fact and law, and to examine and cross-examine witnesses⁷⁸.

Those of its decisions inducing certain eyebrows to rise painfully can be seen to follow inadequate preparation or presentation by one party or another⁷⁹. Not least, it can and often does refer matters back to an uncomprehending lower level with instructions as to the law to be followed. Where that law contains double negatives and terms of legal art of uncertain meaning in an unfamiliar context, both lawyers and laymen can feel confused. The AAT itself can and does relay uncertainty of its own on points of law further up to the Federal Court, to be heard there first by a single judge, again, if need be, by a full Court of at least three judges and eventually, with leave, to the High Court itself.

In parallel with this lies the alternative route upwards to the Federal Court by way of the **Administrative Decisions (Judicial Review Act)**, 1977, having made sure that the issue is in fact justiciable under the terms of the Act, that the remedy sought lies within those available under the Act, (mostly one or other prerogative writs, but not damages), that full Legal Aid is available, and that the appellant has no assets to be placed at risk in the event of losing the appeal, with costs.

This rare plethora of open avenues by which to seek redress, contrasting sharply with the previous sixty years of only internal procedures, has meant little need for recourse to the Commonwealth Ombudsman on repatriation matters and his role will not therefore be discussed here.

⁷⁷ Discussion of *R H Fitzmaurice and the Repatriation Commission*. Chapter 6. p 87.

⁷⁸ Discussion of *M E Crnkovic and the Repatriation Commission*. Chapter 6. p 82.

⁷⁹ *Mrs MT Doran, Estate of, and the Repatriation Commission*. AAT V89/0523. 27 May 1991. *Verbosity* Vol 7. No 2. p 50.

Every planning authority learns anew the lesson that congestion on a particular road can indeed be lessened by widening the road, but this merely encourages more traffic onto the road, creating even more congestion than before, needing the sacrifice of yet more productive land for the construction of a completely new road. So it was in the early 1980s⁸⁰ with repatriation claims, as shown by rapidly rising numbers of such claims, longer delays in reaching a determination, with more, both absolute and relative, going onto successive levels of review and appeal. With the backing of legal aid, impecunious claimants might reasonably expect eventually to find a sympathetic ear or two. It is certainly no secret that certain high-level decisions favouring an ex-service man appeared indicative more of an expertise in semantic analysis of the statute than in assessing the level of any real merit in the actual claim. The raw figures speak for themselves. Entitlement decisions of the RRT favourable to the veteran or widow were ⁸¹:-

1980-1	34 per cent, (the first full year of operation of the RRT)
1981-2	67 per cent
1982-3	87 per cent.

The sharp increase undeniably arose out of the favourable decision in Repatriation Commission v Law (Mrs Nancy Law)⁸², in which it was laid down that a claimant is entitled to succeed unless the determining body is satisfied beyond reasonable doubt that there are not sufficient grounds for granting the claim. The basis of the claim was death of a veteran from lung cancer and myocardial infarction attributable to the commencement of cigarette smoking on war service. These two diseases were, and are, the two highest causes of ill health and death in elderly males. However, the 87 per cent figure for successful appeals itself covers claims for both incapacity and death, which were respectively 77 per cent and a fraction under 100 per cent. (360 out of 361, the odd 1 being out of jurisdiction)⁸³.

⁸⁰ Supra. n1. p 11.
 New primary claims 1981-2 – 15,100
 1982-3 – 21,000
 1983-4 – 24,000
 1984-5 – 33,000
 with about 11,000 applications for increase each year in addition.

⁸¹ Annual Reports of the RRT.

⁸² Repatriation Commission v Law (1981) 147 CLR 635 Discussed in more detail Chapter 5. Infra p52.

⁸³ Supra. n 71. p 13. D.Volker. Secretary to the Department.

Whilst some of these were appealed in turn successfully by the Commission at the AAT or beyond, such a situation showed a clear need for substantial re-training at primary and secondary level into newly emerging judicial interpretation of the eligibility criteria laid down in the Repatriation Act.

If the decision in that case could have been foreseen, there seems little doubt that the RRT would never have been formed. Its function could have been undertaken by the AAT directly instead of by reference from the RRT where the President of the latter considered that an important principle of general application was involved. Possibly the cost of premature termination of contracts of members of the former War Pensions Tribunals was thought too high compared with absorbing them into an RRT; possibly the fear of over loading the newly created AAT with yet another highly specialised workload of considerable magnitude was over-riding.

If suffices to say that debate continues within the bureaucracy of the virtues of a general administrative review and appeal tribunal with or without specialist divisions as against separate specialist tribunals. What seems rarely to be debated in public is the absolute need for members of any tribunal to understand the background to claims coming forward together with the various issues to be resolved and to demonstrate that understanding by consistent logical reasons for decisions, communicated to the parties and promulgated for the benefit of later potential claimants and their advisers. Even Deputy-Presidents of the AAT have been accused of displaying enormous disparity in their approach to a particular issue, although this was in the field of illegal immigration and deportation⁸⁴. Possibly, just possibly, lack of experience of being an illegal immigrant may have some bearing on this, but few Deputy Presidents under the age of 65 will have had any experience of battlefield conditions either.

As a matter of interest, the resolution of Nancy Law's claim took a full four years passing through seven intermediate stages before reaching the High Court. The cost of the protracted hearings arguably exceeded the

⁸⁴ Second Annual Conference of the repatriation Review Tribunal, 18–20 November 1981. The Hon. Mr Justice M.D. Kirby, Chairman of the Australian Law Reform Commission.

cost of granting her claim at the primary stage, the payment of which in the end was back-dated anyway. To balance it was the saving of delayed payment on thousands of similar claims⁸⁵, some of dubious merit otherwise, held over until the final decision, or not even submitted until the outcome was seen.

The Administrative Review Council already mentioned as coming into existence under the Administrative Appeals Tribunal Act, 1975 had by mid-1981 instituted its own investigation into the complexities of repatriation legislation and administration. Its report, (No 20 of 1983), contained some 21 recommendations, many of them a confirmation of those of Mr Justice Toose around eight years earlier, which had still not been accepted, gathering more dust than acclaim. Probably the most far-reaching, certainly of those found acceptable by the government of the day, was the reversal of the primary 3-member Board – secondary 1-member Commission delegate, and transfer of the RRT review function to a Veterans' Affairs Division of the AAT. Reasons include substantial saving of cost by abolition of an intermediate stage together with the apparent repeated difficulty of some members of the RRT in understanding and applying the admittedly difficult wording of the Act, despite the increasing judicial guidance on its interpretation⁸⁶. The determination process so favoured would involve, in order, a single member delegate of the Commission, a three member reviewing body, entitled Veterans Appeal (or Review) Board, with access under a range of conditions to the AAT - Repatriation Division. This latter hearing would be held at the discretion of the President of the AAT by a single member or triple member panel, again with access to the Federal Court and High Court as before.

Adoption of this modified sequence of decision making might reasonably result not only in faster determination, but in a more ready acceptance by claimants that all levels except the first were independent of the Commission and that their claim had been dealt with openly and fairly. In fairness to the RRT regarding delay, it should be explained that the

⁸⁵ Repatriation Review Tribunal. 2nd Annual Conference p1-2. D Volker.

⁸⁶ Cook C. and Creyke R. Repatriation Claims and the Burden of Proof of the Negative. (1984). ALJ 58. 263-273. See also Evatt Royal Commission Report on the use of and Effects of Chemical Agents on Australian Personnel in Vietnam. 1985 Vol 7. Ch.XIV p 377. "The differing approach adopted by the RRT and the lower Determining Authorities was costly, inefficient and unsatisfactory. More likely than not, it was unfair to claimants who failed to appeal".

practice had grown up of deliberately withholding evidence from the primary (Board) and secondary (Commission) levels, expecting the claim would be rejected no matter what, but presenting it to the RRT hearing where the claimant could appear in person and be represented by an experienced advocate, (other than a legal practitioner). By this means it had been hoped, and with justification, that a border-line or even doubtful claim would succeed even if considerably delayed by this tactic. By the Administrative Review Council's recommendation, a claimant could appear in person at the earlier stage of VA (or R) B, and be represented by the person of his choice. Regrettably this latter factor has not only been rejected both then and up to the present but has been worsened in that refusal of representation has been extended from legal practitioner to law graduate⁸⁷. Technically, at the time of writing, the holder of a combined degree such as B.A., LL.B. or B.Comm., LL.B. could still represent a claimant since combined degrees do not all comprise sufficient relevant law subjects for the holders to be admitted to practice⁸⁸ without further studies.

As already indicated, RRT panels were having difficulty at times in coping with both an immense number of claims for review, the need to provide reasoned decisions, and the need to be convinced beyond reasonable doubt of the absence of enough evidence to support a claim before the claim could be rejected. Annual conferences of RRT members with invited members of relevant organisations showed only too well their concerns. Some of them had bumped into the perennial problem of careless quoting of references as a former president of the AAT, Mr F J Mahoney, saw fit to mention⁸⁹ "The problem is that one text book says one thing and another text book on the same subject-matter says something else, so it's imprudent and unwise for a tribunal to be relying on one text. Secondly, ... in a recent case where we were given a series of textbooks and medical papers to look at, not only was the name of the principal textbook wrongly quoted, but what was in the book was also wrongly quoted. In fact it came from some other text altogether. I think it is imprudent just to rely on what is said to be in a textbook without

⁸⁷ VEA Section 147.

⁸⁸ University of Tasmania. Faculty of Law Handbook.

⁸⁹ Repatriation Review Tribunal 2nd Annual Conference 1981. Mahoney FJ. p 33.

checking it up yourself⁹⁰". General Practice Directions of the AAT, taking effect from 6 May 1991, require earliest possible exchange of "all relevant material and documents on which they intend to rely at the hearing", so that an informal conference may take place at which a settlement could be reached.

So much for the Administrative Review Council's recommendations, but, having been made public, they had to be adopted or, if not, good sound reasons provided for not doing so. They had cost a considerable sum of public money to produce; they pointed to even larger sums unnecessarily being dribbled away by failure to adopt them. Since there had been a shift of power at Commonwealth level to a party avowedly claiming allegiance to a more open style of government, it seemed opportune to go along with most of the recommendations, particularly after a commendable amount of consultation with, notably, a variety of ex-service organisations and other affected parties. Helping the move in that direction was undoubtedly the matter of a number of ex-servicemen, supported by access to Legal Aid, if not by fellow ex-servicemen⁹¹, whose claims appeared to be based on little more than - *post hoc propter hoc* - every physical and mental condition afflicting me now has arisen from the fact of my being within the Army, irksome discipline, domestic worries, absence from home, unaccustomed food, unpleasant living conditions, ad infinitum - ie *but for my service*, I would not now be in this condition therefore I demand to be recompensed by way of pension.

Such an example, commonly quoted, was *Repatriation Commission v O'Brien*, taken as far as the High Court on a point of law and resulting in entitlement to a disability pension by the veteran concerned. In a minority judgment, Brennan J⁹², supported in general terms by Murphy J, brought into use a new term "reasonable hypothesis" connecting the veteran's injury, disease or death with the circumstances of that person's particular service. It enabled determining bodies to

⁹⁰ Sir Winston Churchill, date unknown, to a journalist - "You will find it very good practice, young man, always to check your references". It is of course a major reason why editors of learned journals forward submitted manuscripts to referees before accepting for publication.

⁹¹ Hansard. Representatives. 16 October 1985. p 2181. Minister representing the Minister for Veterans' Affairs - Senator Gietzelt. "While the ex-service community generally accepts that the O'Brien decision went too far, its view is that a provision should be developed that overturns the O'Brien decision while maintaining the effect of the earlier High Court decision in the Law Case.

⁹² *Repatriation Commission v O'Brien* (1985) 8 ALR 119 at 131; RPD 2.356 at 365.

continue to allow for the possibility of records being scanty or no longer available, such as in the case of a ship sunk at sea or the case of incarceration in a prisoner-of-war camp; and for the probability of no surviving witnesses, still able to recall long-past events. It broke new ground in requiring more than abstract theory, speculation or clutching at wind-borne straws.

Unnoticed at the time was the impact of that word reasonable, in daily use by lawyers and general public everywhere in the English-speaking world, commonly with scant attention to its etymological root, requiring a process of reasoning. In the context of Section 120, once all relevant facts had been ascertained, if they supported a reasonable hypothesis of entitlement, the claim must be granted. If a reasonable hypothesis arose on some of those facts, the claim must be granted unless other facts dispelled the hypothesis beyond reasonable doubt. If there was, or remained, no reasonable hypothesis supported by the facts, the claim should be rejected. Where a “reasonably” diligent investigation revealed no material to raise such a connecting hypothesis, such as with a disease of unknown aetiology, the absence of the connection could be inferred beyond reasonable doubt. In retrospect it is not possible to be certain if his Honour had given thought as to the person or body who or which had to feel that a proffered hypothesis was reasonable – hardly the claimant, for that would be tantamount to automatic acceptance of his claim, more likely the determining authority, but more recently the mythical “man in the street”⁹³.

A logical extension of this brings about the interesting proposition that a single member AAT hearing might take more the form of a coronial inquest, with a jury to provide a man in the street response, but with the further conundrum of what size jury, and whether the jury’s view had to be unanimous or only majority, and what size of majority. If the trial of a man by his peers were to be the model, then an ex-serviceman’s claim might be assessed by a panel of ex-servicemen of similar experience. They at least would spot, faster than anyone else, claims of doubtful

⁹³ Repatriation Commission v Kohn (Unreported) G 1258 of 1988, decided 3 July 1989 per Hill J on the issue of whether a voyage as a passenger of a few hours from Townsville to Cairns going a short distance outside the 3-mile limit for part of the time was sufficient to convert the whole of the veteran’s prior and post service within Australia into “overseas” and therefore operational service. The “man in the street” would have no hesitation in deciding in the negative. The claim fell to be decided therefore on the lower civil standard of proof rather than the higher reverse criminal standard.

merit. (The writer is aware of a claim for death from leukaemia where the initial insult suggested by the advocate was undue exposure of the airman concerned to benzene, a substance known now, but not in the 1940's, to be a potent producer of leukaemia. The ex-RAAF service member on the panel demanded to know which type of aircraft flew on benzene. Only after considerable searching by an embarrassed advocate did it turn out that the benzene referred to was a major component of degreasing fluid used extensively in the 1940's in the maintenance of aircraft-engines, and the veteran concerned had served in New Guinea as an engine mechanic). As with other noteworthy events in history, Brennan J's judgement became the basis on which a change of legislation could be placed before parliament as being in the public interest in the sense of being fair and just - in this case a basis on which eligibility criteria could be tightened. They were so tightened, quickly by the Repatriation Amendment Act, 1985, followed one year later by the completely new Veterans' Entitlement Act, 1986. The main provisions regarding entry to entitlement include:-

- (a) substantial adoption of the Administrative Review Council's recommendations especially in the matter of reversing the order of primary and secondary level determination of claims, transferring the function of the RRT to this new secondary level, the Veterans' Review Board (VRB), with appeal to the Administrative Appeals Tribunal, Federal Court and High Court as before,
- (b) replacing Section 47 (2) relating to standard of proof by a much more detailed Section 120 of which:-
 - (i) sub-section (1) requiring a claim to be granted when related to operational service, (approximately equivalent to active service or service where danger was incurred), unless the Commission is satisfied beyond reasonable doubt that there is no sufficient ground for making such a determination, ie reverse criminal standard of proof,
 - (ii) sub-section (3) requiring that the Commission shall be satisfied beyond reasonable doubt that there is no sufficient ground if, after consideration of the whole of the material before it, is of the opinion that the material before it does

not raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person,

- (iii) sub-section (4) requiring in the absence of operational service, that the Commission decide the matter to its reasonable satisfaction, ie normal civil standard of proof,
- (c) replacing the former Section 24 relating to the granting of pensions by new more-detailed Sections 8 and 9 - War-caused death and War-caused injuries or diseases, respectively. The death, injury or disease was to be regarded as war-caused if:-
 - (i) resulting from an occurrence whilst the veteran was on operational service,
 - (ii) arising out of, or attributable to, any eligible war service,
 - (iii) resulting from an accident occurring whilst rendering eligible war service other than on duty, but whilst travelling to or from the veteran's place of duty,
 - (iv) suffered or contracted during, but not arising out of, eligible war service,
 - (v) suffered or contracted before eligible war-service and, in the opinion of the Commission, contributed to in a material degree by, or aggravated by, any eligible war service rendered after suffering that injury or contracting the disease,
 - (vi) retaining the previous catch-all, (worded differently for death, and for injury or disease), if regarded as due to an accident which would not have occurred or a disease which would not have been contracted but for having rendered eligible war service.

Upon these core sections rests the bulk of the compensatory and treatment provisions for veterans and their dependants. In particular, Section 13, the splitting into sub-categories was treated according to whether the veteran's actual death was or was not "war-caused" and the

level of any disability pension received or receivable by the veteran at the time of his death. Most of these would be for a disability assessed at less than 100% by a combination of factors relating both to his physical and mental condition and the effect of these on the quality of life which otherwise he would reasonably have expected to enjoy. Where the veteran had been assessed at 100% and the incapacity was the sole cause preventing him from working as much as 50% of a normal week, or alternatively 20 hours per week, and thereby suffering a loss of income, he might be eligible for a higher rate of pension - the Intermediate Rate. If he fitted within the defined Totally and Permanently Incapacitated category such that he could not undertake more than 8 hours work per week and thereby suffered loss of income, he may be eligible for a higher rate still, the Special Rate. This latter is most attractive to a man nearing the end of his working life, for his subsequent death, from whatever cause, gives rise, automatically, to a War Widow's Pension for his surviving spouse, de jure or de facto (Section 13(1) and 25(1)). In addition, his pension, and his widow's pension in due course, is free of means test, income or assets based, and income tax. Much litigation, understandably, has arisen on the basis of the exact interpretation to be applied to the wording of the Act.

One interesting outcome of the debate on the Bill during its passage through the Senate was the abandonment by the government of a proposed "40 Year Rule"⁹⁴ whereby a claim for war widow's pension would be determined on the civil standard of proof if the veteran died more than 40 years after the end of his war service. Ex-service organisations were able to show very many examples of men in deplorable, prolonged decline of health who had, nevertheless, refrained from presenting a claim for the injury or sickness responsible. Such men, and their equally long suffering widows, it was argued, should not be penalised for carrying their own burdens unaided. Nevertheless, it becomes more difficult each year to put forward a reasonable hypothesis in regard to a veteran dying, for instance, in his middle seventies or beyond from a certified cause equally widespread throughout the non-serving male population unless the initiating event is clearly linked to his war-service.

⁹⁴ Senator Gietzelt. Minister for Veterans' Affairs. Hansard (Senate) 1985. p 1651.

Recapitulation In the sixty-odd years from the original legislation, the **War Pensions Act**, 1914, only one attempt appears to have been made to obtain access to a court of law for an interpretive ruling. That was in 1933⁹⁵. In the words of Mr Justice Toose - "in that case, (Bott), the High Court was no doubt apprehensive of being flooded with similar applications and refused the prerogative writ in the exercise of its discretion, notwithstanding what appeared to be the substantial merit of the case. In my view, had ready access to the courts been available from the inception a decision similar to that which has recently been given in the Law case might well have been given sixty years ago, and that would have been greatly to the advantage of ex-servicemen"⁹⁶.

⁹⁵ R v War Pensions Entitlement Appeal Tribunal and Repatriation Commission; ex parte Bott (1933) 50. CLR. 228.

⁹⁶ Independent Enquiry into the Repatriation System. The Hon Justine PB Toose. AGPS. 1975. pp15,17.

CHAPTER FIVE

THE VETERAN'S ENTITLEMENT ACT 1986 TWO STEPS FORWARD... THREE, FOUR OR MORE STEPS BACKWARD

The two steps forward, respectively the Law⁹⁷ and O'Brien⁹⁸ decisions of the High Court, whilst a welcome improvement for many of the ex-service community, proved just too great a hurdle for the determination system of the Repatriation Commission to overcome. The reverse onus of proof placed upon the Commission the requirement of conclusive demonstration that the basis of the claim could not have been due to war service, however defined. Such proof was almost impossible, even when a claim had little or no intrinsic merit. The flood of consequential claims, with corresponding outpouring of money, clearly could not be expected to continue unchecked irrespective of whichever political party formed government⁹⁹. What was surprising in retrospect was not the number of veterans who took the opportunity whilst it lasted, but the number who found it distasteful to abuse that opportunity¹⁰⁰. Some too, no doubt, were genuinely unaware of the potential for a successful claim, some were past caring, and some preferred to have nothing to do with anything connected with their army service. In many instances also, the attitude of a widow reflected that of her deceased husband, to the extent that she knew it, for very many men never spoke about their war-time experience to anyone, at home, at work, or elsewhere.

However, there were still many hundreds of thousands of veterans, wives and widows still on the electoral roll, and the Commonwealth Government adopted the less damaging plan of attempting to tighten considerably the criteria for eligibility, but seeking prior agreement on as

97 Repatriation Commission v Law (1981). 147 CLR 635. See page 52.

98 Repatriation Commission v O'Brien (1985). 58 ALR 119. See page 55.

99 Parliamentary Debates (Representatives). Vol 142. p 2645.

100 The circumstances were well known to Pension Committees of ex-service organisations, but rarely made public. No one could be forced to make a claim, but no pension could be granted without a claim. See also Parliamentary Debates (Senate). Vol 114. p 1764.

wide a range as possible with the then leaders of the main ex-service organisations. The sudden surge of claims flowing through the lower levels of determination had produced very substantial delays in completion, delays which commonly extended beyond the death of the veteran, necessitating presentation of the claim again in the form of a widow's pension for the spouse, instead of a disability claim for the veteran. The hand-on-heart promise of a faster, fairer and more consistent determination in exchange for compromise on the terms of legislation was certainly attractive. Coupled with the offer of a Monitoring Committee¹⁰¹ to oversee the working of the proposed legislation, and quick reporting to the Minister of any divergence from the stated aims, there seemed to be a level of genuine negotiation not previously experienced. In hindsight, it would have been wiser for the ex-service leaders to try harder to extract a promise that recommendations from the Monitoring Committee would be accepted. As will be shown later, some have been side-stepped, some rejected and many of those accepted were not likely to cost much or to differ greatly from what the Government was willing to introduce anyway¹⁰².

One apparent back-down by the Government referred to a proposed 40 year Rule¹⁰³. Where a veteran first claimed for a disability, or where a veteran died without relevant medical history, 40 years or more after discharge from the Forces, the determination would be made on the basis of the usual civil balance of probabilities¹⁰⁴. This would make acceptance of a claim much more difficult to achieve for many of those veterans who, although in prolonged poor health arising from the service, had nevertheless refrained from claiming previously. It was intended also to debar the few dishonest claims for injury or sickness originating long after discharge, and quite unconnected with war service. The Opposition of the day supported the veterans and had the numbers in the Senate to defeat the proposal. Perhaps it was little more than playing politics since no election was in the offing and the Opposition was therefore not likely to be in the position of having to implement its parliamentary posture, and to finance it whilst maintaining a pledge to

¹⁰¹ Parliamentary Debates (Senate). Vol 114. p 1766.

¹⁰² Government Response to the Recommendations of the Monitoring Committee. AGPS. August 1988.

¹⁰³ Supra. n94.

¹⁰⁴ Parliamentary Debates (Representatives). Vol 144. p 2179.

cut governmental spending. Curiously, the proposal seems never to have been resurrected openly. Those in the position of drafting submissions and appeals on behalf of veterans and widows are fully aware that a similar policy appears, nevertheless, to have been implemented in an annually rising number of instances.

Before considering the Monitoring Committee's recommendations and the Government's response, it is important to discuss the High Court decisions in *Law* and in *O'Brien* for it was these which underlay the introduction of tighter eligibility criteria.

- (a) *Repatriation Commission v Mrs N Law*¹⁰⁵. As already mentioned, the claim took some four years and seven stages to reach the High Court with the Commission being the final appellant and Mrs. Law the respondent. Although the claim was pursued as personal to Mrs Law, it could be regarded as a form of class action, for large numbers of other veterans with similar personal histories, and the widows of such men, awaited the outcome. Whilst the Repatriation Commission was the nominal initial respondent to her claim, the real respondent was undoubtedly the Commonwealth Treasury, on which would fall the need to raise or divert the money to meet the sudden rise in successful claims.

The basic facts which were not in dispute were that James Law had been one of very many thousands of Australian soldiers detained in Japanese prisoner-of-war camps for well over three years. During that time they had all been grossly undernourished, overworked, subjected to physical and mental abuse, and inadequately treated, if at all, for a range of tropical diseases endemic to wherever the prisoners were located. The only relief from barely tolerable strain had been to smoke whatever tobacco they could lay their hands upon. Release from capture gave ready access not merely to food, medical attention and creature comforts in general, but also to cigarettes, just as for the resident population in Australia. Almost to a man, James Law's generation smoked by their early twenties, (but less so in late teens), for the link between that and a variety of serious diseases was not yet recognised. At the

¹⁰⁵ *Supra.* n 97.

time of discharge from the Army, the veteran had become addicted to the extent of about 20 cigarettes per day, continuing until his first myocardial infarction in 1973. Three years later he died from cancer of the lung, but by that time the link between that condition and smoking had become irrefutable to almost all determining authorities. In addition the veteran was encumbered with some half dozen or so diseases and injuries already acknowledged as having arisen out of his war service. In contrast, the points at issue were, using the words of the legislation:

- (i) whether or not commencement of smoking could be regarded as an occurrence which had happened during his service, Section 101(1)(a),
- (ii) whether the incapacity or death had arisen out of or was attributable to his war service, even though not apparent until much later, Section 101(1)(b),
- (iii) whether the disease from which he died was contracted on war service, Section 101(1) and 101(1a).

The three lower levels of determination each appeared to have approached their task by assessing the conditions of prisoner-of-war camps and whether these were the direct cause of Mr Law commencing to smoke, and this in turn of his subsequent death some thirty odd years later. What the legislation really required them to do was to be satisfied beyond reasonable doubt that the conditions were not the cause of his commencing to smoke, and the smoking to lead to cancer of the lungs, otherwise to accept the claim. It is difficult to see why a number of differently constituted sittings of the Repatriation Review Tribunal apparently failed to grasp this simple point, as shown by Cook and Creyke¹⁰⁶, unless there had been interference from the Department or indeed, further back still, the Commonwealth Treasury. In support of this contention was the argument of counsel for the Commission that the opinion of the Commission was overriding in relation to

¹⁰⁶ Cook C and Creyke R. Repatriation Claims and the Burden of Proof of the Negative. ALJ (1984) 58.263-273.

deciding whether or not incapacity or death was due to an accident that occurred or to a disease or infection that was contracted ... on war service, (Section 101(1A)). Furthermore counsel for the Commission had argued that the definition of 'incapacity' in Section 23 disallowed eligibility in relation to a disease contracted after war service.

Aickin J (with whom Gibbs CJ, Stephen and Mason JJ agreed) found otherwise. Section 23 — " 'incapacity' includes incapacity of a member of the forces that arose from disease, not due to the serious default of the member, contracted by him while employed on war service". 'Includes' is not synonymous with 'is'. Other forms of incapacity are readily envisaged, such as incapacity as a consequence of injury, and incapacity as a consequence of a disabling disease contracted whilst still in a very debilitated condition after discharge from the armed forces. Deliberately beneficial legislation, recently made more so, could not be so read as to restrict eligibility in the manner suggested.

The key medical witness for Mrs Law was himself not only a specialist in cancer research but was also a former prisoner of the Japanese. His testimony was therefore personal and direct, drawing attention to the fact that many forms of cancer have a long latency period, in addition to the effect of severe debility on the immune reaction and its normally protective function. There were ample grounds for believing that the veteran's incapacity and eventual death were due to, or accelerated by, his war service.

In so far as the claimant had to prove anything, she had to establish only that the carcinoma from which her husband died was caused by smoking, which was so found by the Review Tribunal, and that the smoking had arisen out of or was attributable to his war service. The legislation required no more of her. By the time that her claim reached the Review Tribunal, the opinion of the Commission was not material because the only question was whether the Tribunal was satisfied beyond reasonable doubt of the negative proposition that there were not sufficient grounds for granting a pension. In that process the opinion of the Commission was irrelevant. The appeal should be dismissed. Murphy J also found in favour of Mrs Law but by a somewhat different route. He

drew attention to the historic tendency to discard former soldiers and sailors after a national emergency. Australia had chosen to spread the cost of physical, social and economic losses of those men over society as a whole. It did so by requiring the government agency concerned to disprove a claim rather than require the claimant to prove it. It was the function of the Commission and the Review Tribunal to implement the onus of proof provision of the legislation and not to frustrate it. In his opinion, the Tribunal had made an "astonishing" decision to reject the opinion of the expert medical witness called by the claimant in favour of the opinions of the Commission's witnesses, but had made serious errors of law in so doing. Its explicit function was to accept the claim unless satisfied beyond reasonable doubt that there were insufficient grounds for so doing. It was common experience that tobacco was highly addictive, the addiction being supported by heavy advertising, and trafficking in the drug was legal. This plus the evidence of her witness was clearly sufficient to establish, by Section 101 (1)(b) that her husband's death had arisen out of or was attributable to war service. This had been found by Mr Justice Toohey, sitting as the Federal Court, and the appeal against that judgement should be dismissed.

In effect, a class action had been fought and won by Mrs Law on behalf of all veterans whose circumstances resembled those of her husband.

- (b) *Repatriation Commission v O'Brien*¹⁰⁷. Over the years Mr O'Brien, despite having no overseas service, no combat experience, but much domestic-type worry, had claimed, mostly successfully, for a variety of ailments including duodenal ulcer, anxiety hysteria and hiatus hernia. By 1974 he had instituted a claim for yet another condition, essential hypertension. In this connection, "essential" indicates that the condition appears to have arisen directly rather than as a consequence of an organic disorder, but the veteran's claim was based on the possibility of the hypertension arising out of his anxiety state. Rejection at the first

¹⁰⁷ AAT (for medical argument) (1983) 5ALN 198.
 FC (1984) 53ALR 477.
 HC (1985) 56 ALR 119.

two levels stimulated him to appeal to the third, the **Repatriation Review Tribunal**, which referred it to the AAT.

The latter body, overlooking the limitation of its powers to reviewing only the matters referred to it, revoked the earlier acceptance of his anxiety state as due to war service, which destroyed the basis of his claim for hypertension arising therefrom. O'Brien's advisers saw the opportunity to appeal on a point of law to the Full Federal Court for the restoration of his previous pension, with extra for the hypertension, and did so successfully. Two consequences flowed, one being an immediate project undertaken by the Commission to devise rewording of the legislation to plug the hole; the other was an appeal by the Commission to the High Court. In contrast to the Law case, the High Court split with only a three-two majority in favour of O'Brien. The minority judgment of Brennan J supported by Murphy J was in effect of greater importance, for its wording formed the basis for transitional amendments to the Repatriation Act in 1985 and a completely new **Veterans' Entitlement Act** in 1986. In extract, Brennan J declared Section 47 (2), the operative section dealing with causation, to be "a piece of legislative legerdemain. It ensures that the fulfilment of the criteria for eligibility is not required, but that the claim be granted unless it is shown beyond reasonable doubt that they are not fulfilled. However, it is not so absurd as to provide that an absence of material tending to prove the existence of the criteria of eligibility must result in the granting of a claim. If, all the relevant facts having been ascertained, they support a reasonable hypothesis of entitlement, the claim must be granted. If a reasonable hypothesis of entitlement arises on some of those facts, the claim must be granted unless other facts dispel the hypothesis beyond reasonable doubt. If there is, or remains, no reasonable hypothesis supported by the facts, the claim should be rejected. Where the investigation has been carried out with reasonable diligence but there is simply no material to raise an hypothesis of the requisite connection, the absence of that connection can be inferred beyond reasonable doubt".

O'Brien got his extra pension by reason of the majority in his favour but, by reason of the tighter eligibility criteria imposed by

the Government purposely to defeat the effect of that decision¹⁰⁸, thousands of erstwhile mates began to see all hope of theirs vanish out of the judicial window, mates whose own personal tragedy would seem to be appreciably greater than that of O'Brien. One can only wonder what flight of fancy led Sweeney J. (Full Federal Court) to declare that O'Brien's service led to his loss of freedom of choice and right to choose where he lived and worked. It did no such thing. O'Brien had volunteered, commendably, for overseas service with the RAAF when invasion by the Japanese Forces seemed imminent. Any loss of personal freedom to choose was surely minimal compared to the likely consequences of defeat by those Japanese Forces. Prisoners-of-war and combat casualties suffered much greater loss.

In contrast, the majority of the Court had found it to be "impossible to lay down the law by saying that if the material does not provide some positive inference in favour of the requisite connection between death or incapacity and war service then the Commission or Review Tribunal as the case may be must be satisfied beyond reasonable doubt that there are insufficient grounds to grant the claim". Claims would therefore have to be allowed even in the absence of facts to suggest such a connection.

Section 47(2) by which the majority of the High Court allowed O'Brien's claim to succeed was quite short – "The Commission or a Board shall grant a claim or application ... unless it is satisfied, beyond reasonable doubt, that there are insufficient grounds for granting the claim or application ... as the case may be". The corresponding standard of proof requirements in the Veterans' Entitlement Act, 1986, appear as Section 120.

(c) Section 120 Veterans' Entitlement Act 1986

This section provides that

- (1) "Where a claim... for a pension in respect of the incapacity from injury or disease of a veteran, or of the death of a

¹⁰⁸ Explanatory Memorandum to the Veterans' Entitlements Bill 1985, p107.

veteran, relates to the operational service rendered by the veteran, the Commission shall determine that the injury ... disease or ... death ... was war-caused, as the case may be, unless it is satisfied beyond reasonable doubt that there is no sufficient ground for making that determination. (Operational service is defined in enormous detail in S.6 but may be taken roughly as service under appreciable risk from enemy action or from living conditions in areas where enemy action was likely, and including specialised service of high risk within Australia such as flying instruction and disposal of unexploded shells and bombs, both of which incurred many instances of serious injury and death).

- (2) (Not relevant to the present discussion).
- (3) In applying Sub-section (1)... the Commission shall be satisfied, beyond reasonable doubt, that there is no sufficient ground for determining that the injury,... disease,... or death... was war caused if the Commission, after consideration of the whole of the material before it, is of the opinion that the material before it does not raise a reasonable hypothesis connecting the injury disease, or death with the circumstances of the particular service rendered by the person.
- (4) Except in making a determination to which Sub-section (1)... applies, the Commission shall... decide the matter to its reasonable satisfaction (ie. for those not having rendered operational service, and therefore only the forward balance of probability level of determination).
- (5) No presumption of entitlement, ie to defeat previous judicial comment to the contrary.
- (6) No onus of proving any matter on any party, (but of negligible effect since any claimant obviously has to produce material sufficient to sustain a "reasonable hypothesis" in support of a claim)."

Clearly, the reasoning of the minority of the High Court in the O'Brien appeal had been adopted, beneficial intent of repatriation legislation in general notwithstanding. On the basis of Section 120 (4) it would seem to be extremely unlikely that O'Brien would have achieved as much as he did on the earlier legislation. The tightening-up has been substantial, and the financial haemorrhage staunched. What then has happened in practice?

In *Repatriation Commission v East*¹⁰⁹ a claim for War Widow's Pension had followed the system of appeal up to a sitting of the Full Federal Court. Counsel for the widow argued that, whatever may have been the intention of the Government, Section 120, in effect, retains the O'Brien position, provided that there is a real possibility of a causal relationship between war service and incapacity or death and, in the absence of proof beyond reasonable doubt of facts negating that relationship, the claim must succeed. Using the settled meaning of 'reasonable doubt' in the criminal law as excluding only fantastic and unreal possibilities, the wording of Section 120 excludes a determination adverse to the claimant where there exists a possibility which is not fantastic or unreal, that is, real. Where the cause of incapacity or death or the aetiology of the disease causing incapacity or death is unknown, there must be a real possibility of connection; hence the claim must be allowed".

In its rejection of the argument and the appeal, the Court referred to both the history of the legislation and the meaning of reasonable doubt. In its view, Parliament required something by way of a causal link, but which fell short of the link - even *prima facie* - as a fact. Furthermore "a reasonable hypothesis must possess some degree of acceptability or credibility - it must not be obviously fanciful, impossible, incredible, or not tenable or too remote or too tenuous. For it to be raised by the material, it must find some support in the material - that is, the material must point to, and not merely leave open a hypothesis as a reasonable hypothesis. It may be reasonable without having been proved, (either on balance

¹⁰⁹ (1987). 74 ALR 518.

of probability or beyond reasonable doubt), to be correct as a matter of fact".

(Mrs East sought leave to appeal to the High Court, but without success¹¹⁰. No written reasons were given, but the oral judgement ran, in part, - "We perceive no obvious error of law in the construction which the Full Federal Court placed on the relevant provisions of the Veterans' Entitlements Act 1986").

The Monitoring Committee's assessment of the first two years of operation of the new legislation¹¹¹ gives an overview. It should be clearly understood that it was not to be merely Parliament by another name, nor yet a consultative body through which to consider what, if anything, should be done to develop a more appropriate thrust to repatriation legislation. Its function was to assess the extent to which stated objects of Government policy were being met by the Veterans' Entitlement Act 1986. These objects included, inter alia:-¹¹²

- (a) counteracting the effect of the majority decision in the O'Brien case,
- (b) preventing claims from succeeding without positive evidence to link a veteran's war service with his incapacity or death,
- (c) subject to the establishment of a "reasonable hypothesis" in (b), the retention of the "reasonable doubt" (criminal) standard to be reached for claims to be refused in relation to veterans with operational service,
- (d) confirmation of the absence of any onus on any party to prove relevant matters, and the removal of any onus on the Commission to disprove any proposed link of causation

¹¹⁰ P17/1987.

¹¹¹ The Veterans' Entitlement Act Monitoring Committee Report. May 1988. AGPS.

¹¹² Parliamentary Debates (Representatives). Vol 142. p 2645.

between the war service rendered by a veteran and his later incapacity or death.

In the course of its deliberations the Monitoring Committee had the benefit of the Full Federal Court's decision in the East case above, as well as the refusal of the High Court of leave to appeal. As a result it appeared to have little difficulty in finding that the stated intentions of the Government in regard to standard of proof, and including onus of proof, had been fulfilled by Section 120 of the Act. Following closely behind was the *Webb* case¹¹³ in which the Full Federal Court confirmed the finding in the *East* case but extended it so that the essential facts submitted in support of a claimed reasonable hypothesis are also required to be negated beyond reasonable doubt for the claim to be rejected. On the basis of the above two cases, the Committee made no recommendation of amendment to Section 120 of the Act.

An earlier chapter has given consideration to the additional requirement for Intermediate and Special (TPI) Rate pensions, both of these incorporating the matter of assessment of the extent of incapacity, itself having changed its meaning over the years. Whereas earlier interpretations had confined themselves to physical losses, severe and continuing inconsistencies had led to a published Guide to the Assessment of Incapacity in 1973, but which was indeed merely a guide, to be superseded in 1986 by a more comprehensive set of criteria with legislative basis, (Section 29 of the Veterans' Entitlement Act).

The main improvement was to combine levels of impairment with their effect on the domestic, social and other activities coming under the umbrella title of "Lifestyle Rating". A conversion table was then used to indicate a proportion of the 100% General Rate pension to be paid. The importance of such rules in the present connection is the fact that entry to Intermediate and Special Rates of pension were to be restricted to those eligible to receive 100% of the General Rate, as well as being incapable of working only intermittently or part-time (Intermediate), or more than 8 hours

¹¹³ *Repatriation Commission v Webb* (1988) 76 ALR 131.

per week (Special), and suffering loss of income by reason of the service-related incapacity alone. It was intended deliberately to exclude those who had worked full-time to the usual retirement age for their particular type of employment, (possibly with employment related superannuation as well), and those who, for whatever reason, had decided to take early voluntary retirement. These latter were, from any rational standpoint, not comparable with the earlier TPI pensioners, men who had suffered grievous injuries or debilitating disease during World War I and then, or as a result of the 1929 Depression, had become quite unable to compete on the general labour market¹¹⁴.

The Monitoring Committee, took the more practical approach of considering employability from the standpoint of a potential employer. "Very few employers would continue to employ, let alone take on, a poorly educated, middle-aged man to do manual work if, for example, he had lost more than half the usual range of movement in a hip or a leg. He may suffer only minor inconvenience in his domestic and social activities but his ability to work would be minimal. In all likelihood, he would have to cease work and would be both unemployed and unemployable. However, under the system of assessment now in force, it would be virtually impossible, in those circumstances, for a veteran to be assessed at the 100% General Rate level"¹¹⁵. The Report continued in similar vein, emphasising that once the first limb of the scale of exclusion had been applied and found to debar a veteran, no attempt was made to assess limbs two and three. Such an outcome "is clearly contrary to the spirit of beneficial and compensatory legislation and indicates that such an outcome could not therefore have been intended". The Committee recommended that the relevant sections be repealed. (Recommendation 2.1). Preliminary arguments that, if this were done, corresponding tightening of other aspects of eligibility for Special Rate pension would be needed were, in the end, not persisted with by the Department, but a compromise level of 70% disability pension as the threshold put

¹¹⁴ Parliamentary Debates (Representatives) Vol 144. p2180.

¹¹⁵ Monitoring Committee Report. Supra n.12. p10.

forward instead¹¹⁶. Subsequent to the setting up of the Committee, its terms of reference were extended to include the issue of higher compensation to 100% General Rate pensioners whose disabilities had worsened after retirement, normally at age 65, ie which would preclude any chance of getting Intermediate or Special Rate pension but whose disabilities could be as severe, or more so, than men who had achieved the higher rate of pension before reaching 65.

In brief, the Committee did indeed find much to be commended in the proposal and recommended that 150% General Rate be paid to those over 65 with impairment rating of at least 70%, of which the lifestyle rating component was high, (6 or 7 on a numerical scale, indicating substantial detrimental effect). The recommendation was adopted and incorporated into the **Veterans' Entitlement Act** as an Extreme Disability Adjustment. The move had indeed been anticipated during an election speech by the Prime Minister, but euphoria should be contained by the disclosure that only 1866 Extreme Disability Adjustments were being paid as at 30 June 1992¹¹⁷. The pity is that it took so long to achieve.

¹¹⁶ Government Response to the Monitoring Committee Report 1988. AGPS p9.

¹¹⁷ Annual Report of the Repatriation Commission for 1991-2.

CHAPTER SIX

JUNE 1986 AND INTO THE HOME STRAIGHT

In practical terms, much of the new Veterans' Entitlement Act had seen the light of day as transitional legislation the previous year. Its introduction was urgent in order to reduce the financial drain of irresistible claims pouring in after the O'Brien decision¹¹⁸. The avowed aim was to limit not only the number of successful claims¹¹⁹, but also the extent of success in those claims. Whilst it is true that claims for War Widow's Pension are rejected or accepted in full, claims by veterans for their own disabilities are either rejected or placed on a scale ranging from 0 - 100%, depending on an assessment of the degree of incapacity suffered. The higher Intermediate and Special rates¹²⁰ are more difficult to secure, necessarily so, but are then usually payable for life. An original ANZAC of 1915 could still be drawing his Special rate (TPI) pension during his return to Gallipoli as a member of the 75th anniversary contingent in 1990, when it was surely no longer sensible to blame his death some time later still on war-caused injury or disease.

However, regarded dispassionately from afar, the Office of the Parliamentary Draftsman must be commended for the tidying up of seventy years of repatriation legislative bits and pieces, whilst under severe pressure to complete the job in minimum time. Getting the lower House to accept it was relatively easy, since the ruling party had the numbers. The Senate could, as often, be appeased by offering to abandon a small proportion of the proposed new hurdles, such as the 40-year rule, already mentioned. The relative ease by which the Veterans' Entitlement Act was passed would have surprised former stalwarts of the Returned Services League, accustomed to twisting the arm of governments. A prominent reason may well have been the age factor. In

¹¹⁸ Supra. n 107.

¹¹⁹ Parliamentary Debates (Representatives). Vol 142. 16 & 17 May 1985.
p 2645. Expenditure on disability pensions and war widow's pensions had increased by 55% and 70% respectively over the past three years.

¹²⁰ p 2647. Claims for pensions and increased pensions had risen by 120% in four years, whilst the number of surviving veterans had fallen by 12%.

the two or three immediate decades after World War 2, very many members of Parliament and the judiciary, senior public servants and captains of industry and commerce, and men of influence were generally themselves ex-servicemen. Those days have gone. By 1990, the recruit aged 20 in 1940 has reached the age of 70 and is well into retirement. With the passage of time has also gone an understanding of, and empathy with, the inarticulate "digger" and his naval and air force counterpart, far too proud to claim his due until almost at death's door, if then, and still denied the help of an ex-serviceman lawyer to represent him in person, only on paper.

The legislation, therefore, which it was hoped could hardly be interpreted more generously than intended, has at least been scrutinised in depth. Words and phrases, hitherto of imprecise meaning in the context of repatriation type compensation, have acquired a measure of precision, though still far more qualitative than quantitative. Five years of practice seem to have brought substantially to an end the possibility of litigation on points of law achieving much more than reiteration of previous pronouncements, possibly refined somewhat¹²¹.

In contrast, points of fact, particularly those involving recently published medical and scientific research, remain much more fluid. More of this later¹²².

The sweetener to the ex-service community in the form of the Monitoring Committee into the initial working of the Act has reported, extensively so¹²³, but few of the recommendations have been acted upon, other than those which the Government was already prepared to concede, costing very little to do so. Some of the more far-reaching were side-stepped as being matters for the Attorney-General or for the ex-service community to consider and possibly implement. Whilst the Attorney-General has access to funds for implementation, veterans and widows do not, and whilst ever veterans and widows may have costs of (higher) appeal awarded against them, few can afford to take the risk in the absence of full cover through Legal Aid, itself currently being wound

¹²¹ See Chapter 7. *Infra* pp118–119.

¹²² *Infra*. p 70 *et seq.*

¹²³ *Supra*. n 111.

down across the country. Apropos "justice delayed is justice denied", the Monitoring Committee's Report may usefully be quoted. It "estimated¹²⁴ that by 1995 about one-third of the veteran community will be aged 75 or over and many will be in poor health... It should also be appreciated that an increasing number of appellants (to the AAT) will, by then, have a life expectancy shorter than the time it now takes to finalise an appeal". Taking the above statements further, it appears evident that:

- (a) appreciable numbers of successful appeals to the AAT by veterans aged 75 and over implies a failure of the determining system at an earlier stage, requiring remedial action.
- (b) the remaining two thirds of veterans under 75 years of age will be composed of relatively small numbers from the Korean, Malayan and Vietnam theatres of war with far greater numbers from World War II. The youngest of these to have been involved in actual combat operations would have enlisted early in 1945 aged 18, and would barely have completed training and been drafted overseas by September 2nd of that year, the date of formal surrender of the Japanese Imperial Forces in Tokyo Bay.

This group will therefore be aged 68-74 many of them also in declining health. Apart from a few self-employed professionals, they will be at least three years into retirement, voluntary or involuntary, and quite unable to demonstrate that war-caused sickness or injury alone prevented them from continuing in remunerative employment. Consequently the number of Special Rate pensioners has been falling steadily since 1986¹²⁵. The trend is irreversible. Intermediate Rate pensioners whilst still fairly steady in numbers will soon begin to follow that same trend. The vastly greater number of veterans on proportional General Rate has of course also been falling. Hardly any new claimant from World War II can hope to receive more than the 100% General

¹²⁴ Para 4.10.1. Timeliness p70.

¹²⁵ Repatriation Commission Annual Reports. At 30 June 1992:

Special Rate Pensioners totalled	19,426
Intermediate Rate Pensioners totalled	951
General Rate (10-95%) Pensioners totalled	116,265
General Rate (100%) Pensioners totalled	19,282
General plus Extreme Disability Adjustment	1,866
War Widows totalled	79,844
Service Pensioners totalled	371,613

Rate, plus means-tested Service Pension, but no automatic War Widow's Pension for his wife in due course if she survives him.

(c) The bulk of claims coming forward will be from:

- (i) veterans in regard to a newly developing disability or deterioration of an already-accepted disability,
- (ii) newly-widowed wives who believe, or who have been advised, that the death of their husband might be sufficiently related to his war service for a War Widow's Pension to be granted,
- (iii) a dwindling number of veterans aged 60 and over coming for the first time beneath the upper limits, income and assets, of the means test pertaining to the Service Pension. Enforced redundancy arising out of the recession of the early 1990's will be responsible for some of these at the younger end of the age range.

Apart from relatively small numbers of men involved in Peace-keeping Forces, all veterans with eligible war service are aged 40 years and upwards, with the majority aged over 60. In contrast to the early post-war years, only a small proportion of their adult life has been under the hazards of combat. All are subject to the degenerative effects of advancing age. It has become increasingly difficult to assess fairly how much of a veteran's present state of ill-health can be attributed to events during his time in the Armed Forces.

Thus veteran RE Bendy¹²⁶ claimed disability pension in the mid-1980's for his skin cancer, alleged to have been initiated by excessive exposure to the sun during his two years service in Darwin. Not until his claim reached the AAT was it accepted, partly on the basis that such cancers were much more prevalent in Northern Australia than in Victoria and Tasmania. The Commission appealed to the Federal Court. Davies J

¹²⁶ Repatriation Commission v RE Bendy (Federal Court) (1989). 18 ALD 144. Bendy RE and the Repatriation Commission, (AAT), N87/1062. Verbosity Vol 4, No 2, p76 and Vol 5, No 5, p128.

directed the AAT to re-hear the claim, taking account of the fact that modest exposure to sunlight was a normal feature of life in Australia, and that only the additional exposure in Darwin beyond that received whilst wearing a suit in Sydney should be regarded as the initiating factor for the skin disorder. The AAT re-heard the claim and re-awarded the veteran his pension. If the veteran had earned his living post-war as a professional surfer he may not have done so well.

Whilst bad news has long been reputed to travel faster than good news, it is clear that the more stringent assessment of claims under the 1986 **Veterans' Entitlement Act**, compared with the later years of its predecessor, has still not got through to the whole veteran community. As the Monitoring Committee Report states¹²⁷ "where, only a few months earlier, acceptance of a claim was virtually automatic, it was now more likely than not that the appeal would be unsuccessful, and the chances of success in obtaining a Special Rate Pension even worse". "The ex-service community should recognise that the major factor in denying them certain benefits is the Act itself, not the Tribunal, the Commission, its advocates, determining officers, medical officers, etc, whatever faults those bodies and individuals may demonstrate from time to time", emphasis added.

Ignoring for a moment the proposition that a major factor can mean anything between 51 % and 99% of the total, if it were indeed true that the Act itself is the major reason why certain benefits are denied, then simple application of the Act at a single determining level would usually give a correct decision. Little need would arise for a secondary review body, with appeal to a Tribunal, the Federal Court, single judge or full bench and, with leave, to the High Court for judicial interpretation of the Act. The number of amending Acts placed before Parliament since 1986 confirms the view that the original VEA was insufficient for its purpose. More specifically, available figures¹²⁸ show that of almost 22,000 primary level decisions involving full or partial rejection of a claim for pension, or assessment of rate of pension, some 34% led to an application for review to the **Veterans' Review Board**. This body through its various panels allowed 36% of entitlement claims and 49% of assessment matters.

¹²⁷ Para 4.9.1. Conduct of hearings at the AAT. p66

¹²⁸ Repatriation Commission Annual Report 1989-90. p49.

Admittedly rejection at primary level may well reflect an inadequately prepared submission from the actual claimant or applicant, whilst the better response at secondary level is more likely to arise from a submission prepared by Legacy or the Returned Services League (RSL), neither of which receives financial support from the Government. Modest assistance to bodies such as these, rather than the Claims Advisory Service suggested by the Monitoring Committee¹²⁹ should reduce the combined cost of these two levels. VRB Annual Reports disclose that the average cost per hearing had risen from \$711 in 1988-89 through \$918 in 1989-90 and still as high as \$878 in 1992-93. There seems much scope for improvement at primary level, whatever the reason may be for the current state of affairs.

That, however, is not the end of the matter. Whilst it is true that the first three levels of decision-making may stretch over more than one financial year, of 7965 matters dealt with by the VRB, in 1991-2 17.7% were appealed to the AAT, 1405 by applicants and 5 by the Commission. Since the AAT set aside or varied 67.3% of these, (61% of those regarded as important enough to warrant formal publication with reasons)¹³⁰, there is room for improvement at the second level also.

Disturbing as these figures are, it should be remembered also that there exists an unknown number of claimants and applicants whose submission or application for review was not sufficiently persuasive to be accepted at first or second level of determination respectively, but could have done so at third level. One disappointment can be emotionally upsetting; two in succession even more so. The risk of yet a third is daunting to more than a few veterans or widows, whilst a perceived lack of consistency inevitably colours the advice to them by the volunteer members of Pensions Committees of ex-service organisations, on whether or not to appeal.

¹²⁹ Recommendations 4.10; 4.11; 4.24.

¹³⁰ VRB Annual Report 1991-2. p33.

MEDICAL ASPECTS

The Auditor-General's Report No 8 of 1992 makes the point that veterans in general died at ages, and from similar conditions, as non-veterans. A case-file analysis of causes of death accepted as due to war service showed:-

- (i) atherosclerotic diseases, including ischaemic heart disease, about 50%,
- (ii) cancers, with lung cancers contributing more than half - about 50%,
- (iii) chronic obstructive airways disease - about 10%.

(Claims for disability pension on behalf of veterans themselves cover a much wider range, including injury as well as disease). The above mentioned causes of death are never instantaneous despite "heart-attack" and "stroke" appearing to be so. Post-mortem examinations usually reveal that the terminal occurrence could well have taken place months, if not years, earlier despite the veteran having noticed nothing untoward beforehand, or at least not having mentioned it to anyone. This type all have a development period or latency stretching in some instances over decades, and certainly not predictable in the early post-war years¹³¹. It takes at least that passage of time and a number of sufferers from the disease for a latency period to become capable of assessment, much as a newly-introduced medication needs to be taken by quite large numbers of patients before it can become known what proportion of the population appears to be allergic to it.

On what grounds then can the widow of a veteran, on the basis of his certified cause of death, or indeed a veteran in relation to his own disability, claim a pension when large numbers of men of similar age, but without war-time service in the Armed Forces, die from the same cause of death or suffer from the same disability? One answer is that she, or he, cannot unless - to paraphrase Section 120(3) - sufficient evidence be produced to raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the veteran. Examination of Section 8 in relation to death and Section 9 in relation to injury or disease shows "connecting" to be exemplified

¹³¹ Repatriation Commission and Gwendoline Cruise, AAT. V87/0057. 8 May 1990. Two medical witnesses agreed that "polycythaemia could have a long course, 30 years or so".

variously as "arisen out of", "attributable to", "contributed to in a material degree by" and "aggravated by". Clearly the determination of claims must be expected to turn on the application of the above terms to medical evidence, for and against, with the expectation that the evidence will be understood by the Determining Officer, the VRB or the AAT concerned. It is impossible not to sympathise therefore with lay members, (ie the majority), of a VRB or AAT listening to conflicting opinion from apparently equally eminent or knowledgeable medical specialists, not all of whom will have examined the veteran even once, if at all, and whose opinion may well have been distilled mainly from the published studies of others. Those studies may in turn carry their own weaknesses in methodology and subjective interpretation. The suggestion occasionally heard that determination of claims be made by VRB panels composed entirely of medical specialists is equally flawed as they can disagree as members of a panel to the same extent as they can, and do, disagree as reputedly expert witnesses. Furthermore, a medical specialist is so only in relation to his or her specialty. Outside that specialty, an opinion would be rated little higher than that of an average general practitioner. Whilst the possibility of such panels might just work reasonably in the case of a veteran with a single simple disease, many veterans have multiple disabilities, some bodily, some mentally and some afflicted simultaneously by both. How large would an appropriately constituted panel have to be in order to deal adequately and fairly with veterans suffering a range of conditions? The following examples illustrate, at the various levels, how adequate and fair dealings have been attempted. They also illustrate how independence gives rise to desirable flexibility along with undesirable but inevitable inconsistency on occasion.

A major factor in determination is the extent to which a veteran's present state of ill-health may be regarded as attributable to his war service. In *Repatriation Commission v Law*¹³² the Full Court of the Federal Court said "It seems clear that the expression "attributable to" in each case involves an element of causation. The cause need not be the sole or dominant cause; it is sufficient to show 'attributability' if the cause is one of a number of causes provided it is a contributing cause. Under Section 101 (1)(b) of the Repatriation Act 1920, it is sufficient to show

¹³² (1980) 31 ALR 140 at 151.

'attributability' if a member's war service is a contributing cause to the incapacity or death in respect of which the claim is made".

Ten years later in FJ Kenny and Repatriation Commission¹³³ (after quoting from *Repatriation Commission v Law* above) the AAT concluded that :-

Para 14 - The expression "is attributable to his war service" in Section 101(1)(b) of the Repatriation Act 1920 is effectively the same as the expression "was attributable to, any war service rendered by the veteran" in Section 9(1)(b) of the Veterans Entitlement Act.

Para 15 - Having considered the evidence before us in the light of the authorities to which we have referred, we are satisfied, on the balance of probabilities, that Dr. Kenny's condition of ulcerative colitis was attributable to his eligible war service.

The disability forming the basis of Dr Kenny's claim was the disease ulcerative colitis, a condition of uncertain origin and uncertain pathological development (ie unknown aetiology). Before the High Court decision in favour of Mrs. Law, the Commission would have been able to deny liability. It still tried against Dr Kenny and lost.

Briefly, the claimant served for about 3 years from early 1942 as a medical officer in the RAAF. His service records showed such frequent episodes of severe disabling diarrhoea as to warrant his eventual invaliding from the Service. The diarrhoea continued on and off throughout his working life, with a diagnosis in 1986 of chronic ulcerative colitis probably dating back to 1942 ie soon after enlistment. Factors sometimes implicated in this disease include viral and bacterial infections such as those carried by airmen returning from the tropics and who came under the direct personal care of the claimant. A further factor was said to be a high level of stress, such as that experienced by a conscientious, over-worked and inadequately supported professional such as the claimant who, although only a recent graduate from medical school, was still loaded with responsibility for maintaining large numbers of men in good health as well as restoring to health those who were sick. Although the decision

¹³³ AAT. V89/0151. 29 March 1990.

was awarded, as already stated, on "attributability" - Section 9(1)(b), it could equally well have been given on Section 9(2) - "incapacity... due to a disease that would not have been contracted but for his having rendered eligible war service or but for changes in the veteran's environment consequent upon his having rendered eligible war service", ie no need for the Tribunal to attempt to identify the initiating factor(s).

From lack of mention in the published Decision and Reasons, there appears to have been little opposing argument or medical evidence to impress the Tribunal, yet within four weeks the Commission appealed to the Federal Court on five points of law, in particular that the Tribunal was wrong in finding against the weight of evidence.

One cannot help but wonder if the Legal Services Group of the Commission as a whole has heard of traveller's diarrhoea, or other less delicate terms of description signifying biological response to change in biological environment. Individual variation being what it is, some will succumb whilst others remain quite unaffected. Examination in the early stages does not necessarily disclose any abnormality especially in a quiescent period between intense attacks. In addition, the disease may well be incapable of positive diagnosis by the only available methods of examination at that time, such as under conditions of active service. (A further example of that was microscopic examination for eggs of the schistosoma parasite in a single smear slide of faeces, instead of multiple smears over a period with concurrent count of eosinophil cells in the patient's blood. Apparent absence of visible eggs on a single occasion definitely does not equate to absence of disease)¹³⁴.

In the end, Dr. Kenny was fortunate in that the Commission withdrew its appeal. Possibly the Legal Services Group felt that few other veterans were in circumstances close enough to use this decision as a persuasive argument towards their own claim, and thus no great avalanche could follow. Mrs. Wallace some 12 months earlier, was not so fortunate.

¹³⁴ Details extracted by the author from the Medical Records of a local veteran.

The Commission appealed successfully against a VRB decision to grant Mrs. Wallace a War Widow's Pension for the death of her husband from cancer of the colon¹³⁵. Argument for the Commission included:

- (a) absence from the veteran's medical service records of any significant diarrhoea, dysentery or ulcerative colitis.
- (b) absence of evidence linking diarrhoea or dysentery of undefined type with cancer of the colon.
- (c) absence of evidence that the veteran suffered from any of the three forms of inflammatory bowel disease, being long-standing ulcerative colitis, Crohn's disease and schistosomiasis, where there was a known risk of cancer of the colon.

A medical witness for the Commission stated that he saw no sign of chronic ulcerative colitis when he examined the veteran internally or when he operated for the cancer. In contrast a medical witness for the widow denied that such examination would necessarily reveal ulcerative colitis since this was a disease which waxed and waned with quite long remissions during which the bowel would appear normal. A further medical witness for the Commission denied any connection between infective dysentery acquired whilst serving in New Guinea and subsequent cancer of the colon, since "there is a low incidence of colonic cancer in that country but a high level of infective dysentery". What appeared not to have been commented upon was the fact that cancer of the colon is a disease of upper middle and old age, by Australian standards of age. The expectation of life of indigenous males of New Guinea is commonly thought to be appreciably shorter than that of Australian males of European stock¹³⁶. It is, therefore, at least possible that New Guinea males on the whole die from some other cause before reaching the age where cancer of the colon could become noticeable. Furthermore, no sensible comparison can arise in regard to diet, water supply, general lifestyle and the effect of other diseases including infective dysentery, endemic in tropical New Guinea, but rarely in the

¹³⁵ Repatriation Commission and MA Wallace. AAT V87/0721. 2 February 1989.

¹³⁶ Impression confirmed by enquiry from the Life Federation of Australia but no reliable expectancy figures obtainable from that source or the Australian Bureau of Statistics.

cities where most Australians live. One final comment linking Dr Kenny with Mrs Wallace: with no disrespect to Dr Kenny, frequent diarrhoea would certainly be expected to appear in the records of someone serving in an established camp within Australia, but not in the tropics where almost everyone suffered almost continuously. All ranks put up with it as best they could and got on with the job, including medical officers¹³⁷.

From the pension aspect, a veteran suffering from cancer of the colon or the widow of a veteran who died from cancer of the colon, might be advised to attempt to put together evidence, as strong as possible, pointing to a probable diagnosis of ulcerative colitis as a precursor to the cancer of the colon. It will be interesting to see how many do. Hitherto, the only sufferers from cancer of the colon who appear to have won a claim for this condition are those who have been able to show a diet of low meat, low fat, high home-grown vegetables before and after service, but substantially canned food especially high in fatty, bully-beef during service. Research is continuing.

*Repatriation Commission and Maree Smith*¹³⁸ represents another example of unknown aetiology. Maree Smith was the widow claimant for the death of a Vietnam veteran from a rare type of malignancy a matter of seven years after he returned to Australia. During his four months in Vietnam, there was much circumstantial evidence, but not by direct evidence, that he was frequently exposed to herbicides, pesticides and other toxic substances, and that he took by order a daily dose of an anti-malaria prophylactic drug, withdrawn later on suspicion of its carcinogenic potential to susceptible takers. The connection between the above and the cause of death was also far from clear and direct.

Possibly by reason of the number of other likely claimants, the Commission had denied liability repeatedly over some nine years up to 1986 when a VRB accepted the veteran's death as war-caused. On appeal by the Commission to the AAT, liability was confirmed with effect from June 1980. The time lapse between the two decisions, VRB and AAT was an astonishing three years and seven months.

¹³⁷ Verbosity Vol 1. No 1. VRB hearing N82/0237 dated 18 March 1985 "took official notice of the fact soldiers generally had unreported dysentery on tropical service".

¹³⁸ AAT (1990) 19 ALD 464.

From the published reasons for decision, in favour of the widow, the hearing could have been mistaken for a conference of medical scientists in the general field of environmental carcinogens, some of them being unaware that a good rule of thumb in medical and scientific debate as well as legal is never to say 'never', and 'not yet' is a safer response to a question than 'no'. At the hearing a physician appearing for the Commission said: "there was no likelihood that the veteran's schwannoma was the result of any contact he had with chemical substances". The same used to be said in relation to cigarette smoking and lung cancer.

Appearing for the widow were an appreciable number of medical specialists, whose contributions included the following:

- 1) Development of cancers had been shown in laboratory animals exposed to at least some of the herbicides, pesticides and insecticides used extensively throughout the camp areas of the troops in Vietnam, including their clothing, and food and water storage areas.
- 2) The use of the principle of synergism had been widespread in which the combined effect of a multiple preparation was more effective than the mere additive effect of the separate components. The principle applied to human tissue as well as insects and other pests.
- 3) The initiator-promoter concept was thought to apply in which prior exposure to a non-carcinogenic irritant followed by a mild carcinogen commonly led to faster and more severe development of cancers than would have been expected by exposure only to the mild carcinogen.
- 4) The particular rare cancer from which the veteran had died was known to be accompanied in some victims by an unusual skin discoloration. The veteran had indeed shown such a discoloration soon after return from Vietnam, diagnosed as another condition, but not necessarily correctly so.

Opposing the claim, a number of medical scientists appearing for the Commission, denied the existence of firm data linking any of the chemicals concerned with confirmed human cancer. They claimed, further, that an international cancer research organisation had not yet classified any of those chemicals as definite carcinogens. However, they were not able to produce definite evidence absolving any of those chemicals from risk.

Considering all the evidence before it, the Tribunal felt bound to uphold the earlier decision of the VRB to grant a war widow's pension. No doubt many more widows of Vietnam veterans dying from a cancer, or veterans suffering from a cancer, will wish to claim or to re-open a claim previously rejected.

Turning now to cardio-vascular examples, the wife of a diabetic veteran became concerned at the discoloration of one of her husband's legs¹³⁹. After a few days of ineffective treatment with an ointment prescribed by the Local Medical Officer, she insisted on taking her husband to the nearest public hospital. The medical officer in charge of 'Out-Patients' recognised the man's leg to be gangrenous and arranged for emergency amputation, but death occurred four days later. The certified cause was septicaemia. The widow's own claim for pension was rejected at first instance, but a belated request for help from an ex-service organisation revealed that a post-mortem examination had shown that most of the veteran's peripheral arteries, as well as the coronaries, were seriously narrowed by atheroma of long-standing. Although the diabetes was also a factor, the above information coupled with an appropriate smoking and oversea service history was sufficient to secure a belated grant of war widow's pension. The post-mortem report was therefore crucial for success.

The above case history has been discussed at gatherings of veterans to discourage any high level of smoking. It is followed by information that the Director of Vascular Surgery¹⁴⁰ at a large Melbourne Hospital has dropped the diagnosis of 'peripheral vascular disease' in favour of 'smoker's foot' when he tells patients, preferably in the presence of their

¹³⁹ Details supplied by the ex-service organisation concerned.

¹⁴⁰ Dr John Royle, Austin Hospital, reported in the Sydney Morning Herald June 1989.

spouse, that they have a 1 in 10 chance of losing one or both legs unless they quit, promptly. Those that laugh it off with the quip that 9 in 10 will not need to face an amputation are then asked to consider the following. If they are told that 10 planes set off each day to fly from Melbourne to Sydney but one of those planes crashes on the way, would they still choose to fly or would they switch to surface transport? Few patients have the actuarial background to spot the flaw in the apparent logic, but the means surely justifies the end if those patients hand over their remaining cigarettes for disposal before walking away, still on their own two legs.

Amongst the thousands of patients dealt with, an occasional mis-diagnosis may happen. A veteran¹⁴¹ had experienced a number of attacks of malaria whilst in the tropics. Some time after discharge from the Army he began to suffer irregular but frequent bouts of mental disorientation with a limited resemblance to petit mal type epilepsy. No malarial parasites could be found in his blood; the recorded diagnosis was 'possible epilepsy of unknown origin' and a modest disability pension was paid. Treatment was with two anti-epileptic drugs, phenobarbitone and carbimazole, but his condition remained static until his eventual death from myocardial infarction in the early 1980s. Shortly before that time a research study at a London hospital on patients with non-characteristic epilepsy had taken simultaneous electro-encephalograph and electro-cardiograph recordings over several days. The results indicated that the temporary lapses into unconsciousness were due to irregular cardiac function cutting off the normal supply of oxygenated blood to the brain. Furthermore, cardiac dysfunction was an absolute contra-indication to the use of carbimazole, even for confirmed epilepsy. Faced with a submission constructed on this basis, the Commission readily conceded liability, without any blame lying upon anyone. No finding was made as to the origin of the dysfunction, it being sufficient that authorised treatment for an accepted disability contributed, to a sufficient extent, to the final cause of death.

One insoluble cardio-vascular problem is the apportionment of attributability for unduly high blood pressure to some aspect of war service as against a mere consequence of increasing age. Reduced

¹⁴¹ Details supplied as in Supra. n 134.

elasticity of arteries produces a gradually rising blood pressure with age for servicemen and civilians alike, so at what level does a figure become 'undue'? Claims for reduced capacity to work because of high blood pressure, induced by a high intake of coffee commenced on active service, appear to have been rejected on the grounds that continuance post-war was a matter of personal choice, there being no longer any need, for instance, to stay awake for very long hours at a stretch. Similar claims based on a high intake of salt have mostly, but not all, been rejected. Cutting the intake of salt certainly appears to produce a small decrease in blood pressure, but direct evidence linking intake with increasing blood pressure appears to be lacking, possibly because the effect is small, or apparent only after many years during which it is overtaken by other factors. One successful exception has been reported as follows:

In *Repatriation Commission and W.H.Quinn*¹⁴² the veteran was a stoker in the Navy serving mostly in the tropics and subject therefore to permanently very hot humid conditions. Evidence was led that the men were under orders to consume considerable amounts of salt and water to replace losses from perspiration. Sailors showing signs of dehydration would be disciplined for having disobeyed orders. Not surprisingly the veteran had developed a liking for salty foods and had continued his high intake post-war. Sufficient specialist medical evidence was called upon to support his claim for essential hypertension attributable to war service, using the decision in *Repatriation Commission v Webb*¹⁴³ as precedent for the meaning of 'attributable'.

Most claims for damage to the cardio-vascular system appear to have been based on addiction to tobacco, either started or greatly increased, during war service. There appears no longer to be any dispute that tobacco consumption, particularly cigarette smoking, is a substantial risk factor in the development of atherosclerosis of the arteries, including the coronary arteries of the heart itself, the cerebral arteries of the brain, the pulmonary artery to the lungs, and inevitably to a varying extent to the remainder of the body¹⁴⁴. What remains in dispute is the level of

¹⁴² AAT N88/0737. 23 April 1990. Verbosity Vol 6. No 2, p40.

¹⁴³ Federal Court (1988). 8 AAR 274.

¹⁴⁴ Statements of Principle, published by the Commission, accepting liability, generally, when evidence is led of defined levels of cigarette smoking over defined periods of time with a diagnosis of atherosclerosis.

consumption to be shown for the description 'addicted' to be applicable, whether the veteran served under conditions of severe personal stress, and to what extent the effects may be reversible when the smoking is decreased or stopped altogether.

The claim of Mrs JI Parkes¹⁴⁵ illustrates the situation where a deceased veteran started his smoking habit whilst in the army during World War 2, continuing until 1951. Severe chest pains, manifesting in 1972, and death from coronary heart disease in 1983, were claimed to have arisen from his seven years of smoking. Medical evidence for the Commission resisted the suggestion that seven years of smoking could have been responsible for coronary heart disease some twenty one years later, and death eleven years further on still. This contention ignored the probability that deposits of atheromatous plaque are there for ever - the arteries are permanently damaged, much as aircraft components weakened to the level of detectable metal fatigue do not recover by leaving the aircraft in the hangar. Unless those components are replaced, passengers and crew using that aircraft are at risk for that reason. Mrs. Parkes' claim was accepted.

Paradoxically, a veteran who continues to smoke on the grounds of inability to stop appears usually more likely to have his claim accepted for cardio-vascular disease than his brother who made a successful effort to stop ten, fifteen and, certainly, twenty years previously. Parkes was an exception. Even more paradoxically, the veteran who stopped for a few years then started again, is likely to be refused on the grounds that his alleged smoking-initiated disability or death is related far more closely to the more recent second period of smoking, having no connection with the tension of war service, than to the first period. Any residual disability from that, he or his widow may be told, dwindled and disappeared within a few years at the most.

Imponderables in the total assessment are numerous. The question "When did you start to smoke?" is not the same as "When did you become an habitual smoker?" The first encompasses a single cigarette shared between a group of boys behind the school gymnasium once or twice a week. None of them had the money to become an habitual

¹⁴⁵ AAT. N87/0798, 31 January 1989. Verbosity Vol 5, No1, p21.

smoker, whatever minimum level is needed to reach that category. One a day, two a day, five? Inhaled or dangled between the fingers with an occasional puff 'like everyone else'? Pity the poor man who admitted being convicted in 1937 of smoking in prohibited premises, to wit Newcastle City Hall, on Saturday night, when all he did was to hold a lighted cigarette between his fingers to avoid being the 'odd man out'¹⁴⁶. He just happened to be nearest the door when the janitor appeared. Fortunately for him the AAT which heard his appeal had itself experience of being a boy trying to become a man in a man's world, and remembering it. His claim to have acquired a steady habit of smoking only during active service overseas was accepted as more likely than not to be true.

A number of recent studies have tried to link seriousness of effects with quantity of toxic material ingested e.g. units of pack-years. Presumably the assumption is that a man on active service would smoke about the same number of cigarettes each day, year after year, and that a community pack size of 20 cigarettes is a reasonable unit of consumption for comparison purposes. In fact, Woodbines by retail were in 5s and 10s, the rather more 'up-market' brands were sold in 10s and 20s, whilst in the British Army the standard issue overseas was a metal container of 50, commonly issued also to Australian troops. Furthermore, as smoking during war-service as such has not always been sufficient to establish eligibility, but requires a demonstration that it commenced or increased in response to severe personal stress, such as with infantrymen and air-crew, then logic dictates a varying consumption, higher during periods of combat, less in between such periods¹⁴⁷. Yet again, if it be accepted that concentration of a toxic substance in circulating blood be a reliable measure of ability to afflict damage, then allowance must be made for the fact that proportionality between amount ingested and blood concentration tends not to occur until a threshold has been reached with saturation of the body's detoxifying metabolic processes towards that substance, a very individual matter indeed. The concept of pack-years is further flawed in its assumption that the toxicity of all brands of cigarettes and, indeed, the tobacco used for 'roll-your-own' cigarettes is equal. Those in a position to

¹⁴⁶ FC (1990) 13 AAR34; FFC (1991) 23 ALD 270.

¹⁴⁷ Current Commission policy is to refuse, where possible, a mere temporal link as distinct from a probably causal link.

know would deny any similarity, let alone equality, between for instance V for Victory, Lucky Strike, Cape to Cairo brands available to the troops at various times and places.

Lastly, a man's memory of his cigarette consumption half a century ago may be unreliably vague, as shown by his varying answers to the same question on different occasions. When apparently serious studies are published in which smokers are grouped into band widths of e.g. light (one to nineteen per day), moderate (twenty to thirty nine per day), and heavy (forty or more per day), the results and statistical interpretations therefrom can have only limited value. For example, in the light band the highest level of nineteen is nineteen times the lowest level of one, whereas in the medium band the highest level of thirty nine is rather less than twice the lowest level of twenty, and consumption of up to eighty cigarettes per day is not unknown. It is no wonder, therefore, that one academic statistician¹⁴⁸, has made public his criticism in turn of another academic statistician's¹⁴⁹ criticism of the alleged shortcomings of the British Regional Heart Study by Cook et al¹⁵⁰. A more recent compendium is the US Surgeon-General's 1990 Report on Cessation of Smoking and the Effect on Heart Disease, a summary of the major reports published since 1986. It draws attention to the undesirability of comparing incomparables, such as different end-points, where one study uses a 'heart attack' and another study actual death from coronary heart disease. It acknowledges also that either of these represents the combined effect of narrowed arteries by deposition of atheromatous plaque and diminished physiological and biochemical function of affected blood. It displays also a number of anomalous results showing non-uniform benefit with time after cessation of smoking. In practical terms the Repatriation Commission appears recently (mid-1991)¹⁵¹ to have adopted the position that:

¹⁴⁸ Jarrett R, Professor of Statistics, University of Adelaide – Article published 8 March 1991. Comments on 'Smoking and Heart Attack' by Professor AE Doyle.

¹⁴⁹ Doyle AE. Published Statement to the Department of Veteran Affairs. Revised 30 May 1990.

¹⁵⁰ Cook et al. Lancet. 13 December 1966. p1376.

¹⁵¹ DVA Seminar for Determining Officers and Legacy National Pensions Committee. May 1991.

- (a) where a veteran with eligible war-service acquired an 'appreciable' smoking habit after enlistment,
- (b) did so in response to acknowledged severe physical and mental stress,
- (c) continued the habit for at least ten years,
- (d) that no more than twenty years has elapsed since he stopped smoking,
- (e) if, in particular, there has been an indication of cardio-vascular disease of a type associated with smoking within that time lapse, then there would appear to be a foundation for one or other levels of determination to conclude that a link existed between the smoking and the current state of his cardio-vascular system.

In *Repatriation Commission and A.I. Smith*¹⁵² attention was drawn to the fact that smoking is not the only type of insult to human tissue where recognisable damage becomes apparent only very many years later. Exposure to radio-activity, is another example whether in a workshop situation, or whilst on active service in the vicinity of Hiroshima or Nagasaki, the two Japanese cities where atom bombs were exploded.

The veteran, an Instrument Maker and Mechanic in the RAAF, using radio-active radium and thorium, died in 1983 from cancer of the liver, spreading to lungs and abdomen some six months after diagnosis. A full blood count on discharge in December 1945 had shown nothing abnormal. However, the medical witness for the veteran gave evidence that "an enormous dose would have been needed to produce an abnormality in blood soon after exposure ... and in that case Mr Smith would have been dead long ago... When used formerly by injection for medical diagnosis it had been found to produce liver cancer, starting within about fifteen years, increasing exponentially with a mean latency period of twenty to thirty years... The dose required to cause cancer was so small that it would not necessarily show up on X-ray thirty years later. With such a long latency period it would often be difficult to trace people

¹⁵² AAT (1990) 20 ALD 237.

who had worked in a particular industry and see whether they had developed cancer from industrial exposure to thorium. The longer a person lived after exposure, the more likely that person was to develop cancer."

Similarly in the matter of *CE Redenbach (Estate of) and the Repatriation Commission*¹⁵³ where the veteran, as a member of the RAAF, was based near Hiroshima for a month in early 1946, eating locally produced food and exposed to wind-borne dust, both sources of radio-active contamination. He claimed in March 1988 that his chronic myelomonocytic leukaemia had derived from that period. A medical expert in the field of nuclear medicine testified that "ingestion of even a minute amount of radio-active Strontium 90, of very long persistence, could produce cancer. The accepted latency period had been extended from six years to beyond thirty years."

Earlier similar examples decided in the same way include *Repatriation Commission and IV Clements*¹⁵⁴ and *Repatriation Commission and P Thorne*¹⁵⁵.

It is difficult to see why the Repatriation Commission persists in denying the connection between exposure to nuclear radiation and the development of particular forms of cancer within a scientifically assessed latency period. In three of the four cases noted, the Commission was the appellant, when surely it had the resources to check the current scientific view of such matters and to seek advice from a wider range of experts in the field before deciding to mount an appeal. Perhaps not surprisingly, the Commission, by way of its Legal Services Group, appears to be attracting a level of criticism for so doing. For example "It appears that there are more resources available to attempt to disprove a reasonable hypothesis, than there are to establish such a hypothesis in the first place, although the duties of the Repatriation Commission under Sections 17 and 18 of the Act are to investigate and determine claims rather than to

¹⁵³ AAT (1990) 21 ALD 738.

¹⁵⁴ AAT (1989) 16 ALD 628.

¹⁵⁵ AAT (1989) 17 ALD 251.

The above three veterans had all been stationed near Hiroshima shortly after the bombing with ample opportunity to be exposed to radio-active dust on the ground and in the air.

defend against them"¹⁵⁶. Four decades of experience of nuclear physics enabled the above claims, in the end, to be accepted, since there was no other apparent contact with a carcinogenic agent that could be blamed for the condition from which the veterans died. Where the chain of causation is only indirect, success is far less likely, as shown in the following two examples.

In *NF Jelfs and the Repatriation Commission*¹⁵⁷ the AAT discussed the distinction between 'contributed to' and 'aggravated by'. In ordinary parlance, the condition claimed for did, or did not, exist before enlistment. If it did, and its natural progression became accelerated as a result of an injury during service, then the end result is an aggravation. If it did not, and a number of causes, none of them sufficient of themselves to set the deterioration process in train, but together they did, then if one of them came within the purview of eligible service, the appropriate route for determining the claim would be through the prescribed 'contributed to'. The applicant, a member of the RAAF, injured his neck in 1964 and again in 1978. He claimed that his present condition of cervical spondylosis was 'defence-caused'. In its decision the Tribunal regarded the condition to be already in existence at the time of the 1978 injury, but that the symptoms were quiescent. The fall with the consequent injury made the symptoms manifest earlier than would have become apparent by the underlying degeneration of the cervical spine, (to which we are all subject), ie neither aggravation nor contribution. "Although the definition (of injury) in the VEA purports to be inclusive, I consider that the term is wide enough to encompass pain resulting from a traumatic effect, even though the underlying condition which is the basal cause of that pain is autogenous". The condition claimed for was accepted by reason of the concomitant pain.

In the case of *BA Adshead and the Repatriation Commission*¹⁵⁸, which was in substantial contrast to Jelfs, a World War 2 veteran had suffered poliomyelitis as a child, was allowed to enlist in war-time, but was soon found to be unfit for usual infantry service whilst in New Guinea. By

¹⁵⁶ AAT Repatriation Commission and Mrs LM Baker V 88/879. 18 October 1990 Para 19 of Reasons for Decision.

¹⁵⁷ AAT N 87/0173. 3 August 1988. Verbosity. Vol 4 No 2 p64.

¹⁵⁸ AAT N88/23. 10 September 1990.

1953, a claim for 'claw toes due to old paralysis, but aggravated by war service' and for 'a cyst on his right foot' had been accepted as war-caused. The current claim was for 'permanent weakness in both legs'. Competing medical evidence from two specialists was that the condition of the veteran's service, including twelve months in New Guinea did, and did not respectively, impose a level of "stress which contributed to the aggravation or acceleration of the veteran's complaints and pains". The tribunal referred to the decision in *Commonwealth Banking Corporation v Percival*¹⁵⁹ in which a symptom of an injury was declared to be an essential part of a condition in respect of which compensation may be granted, under both compensation law and veterans' law. As there was no documentary evidence of symptoms to the required standard of proof in 'weakness in both legs' during or after service, the claim could not be allowed.

Each of the above two appeals were conducted by a different single member of the Tribunal. It is open to conjecture whether a three (other) member hearing would necessarily have reached the same decisions.

TREATMENT OF INJURY AND DISEASE AS A CONTRIBUTING FACTOR

It is by no means uncommon for a veteran to die many years after demobilisation from circumstances bearing little relation to anything recorded in his files within the Department. His wife would have only a modest chance of establishing a link of cause and effect, sufficient to secure a War Widow's pension, unless those files are examined on her behalf by someone with appropriate specialist knowledge extending back over a considerable time. The following examples illustrate the progression.

A veteran received severe burns to his forearms whilst attempting to extinguish a fire in a RAAF workshop in Papua New Guinea¹⁶⁰. At the time, (around 1942), one of the standard treatments for burns was tannic acid jelly which encourages coagulation of the burnt tissue but has the disadvantage that the resulting scar contracts over a period of time. This may be tolerable for a small area of the back or on the buttock, but is

¹⁵⁹ (1988) 9AAR 206.

¹⁶⁰ Details by courtesy of an ex-service organisation.

disastrous on the face or any jointed areas such as hands, wrists, elbows, shoulders. Furthermore the scarred, contracted skin commonly itches, especially at night. The veteran concerned, who had become a dairy farmer, rarely had a full night's sleep. From experience, he had found that the fastest way to lessen the itch was to arise and smoke two or three cigarettes in quick succession, before returning to bed to attempt a bit more sleep. By 1970 he had acquired lung cancer for which he received treatment from Veterans' Affairs, but no disability pension. Upon his death in 1972 from lung cancer his widow was informed that she had no hope of getting War Widow's Pension. Some fifteen years later, and some seven years after the decision in the Law¹⁶¹ case, the claim was reopened on her behalf by someone who had seen the files and knew the consequences of using tannic acid. As the second wife of a widower veteran she was quite unable to testify as to her husband's smoking habits prior to and during the war. None of his relatives could be traced. The chance of establishing a claim on the basis of commencing to smoke on service was remote, but the record on his file of using tannic acid for a war-related injury proved irresistible. Few medical or pharmaceutical graduates, post about 1945, would have been aware that tannic acid was ever used and why that use had been abandoned.

In another case a veteran had received a gun-shot wound to his shoulder¹⁶². Frequent episodes of shoulder pain in the 1950s were treated with phenylbutazone, the usual analgesic at that time, but long since abandoned, except as a drug of last choice and under close hospital supervision. In particular it has unacceptable side-effects, especially a liability to cause blood disorders and gastric ulcers in susceptible persons. Other non-steroidal anti-inflammatory analgesics had been used after they became available but most of these have a similar but less powerful tendency, as indeed does aspirin, in those unfortunate people who need such medication but cannot tolerate it for long. His death occurred from massive gastric haemorrhage arising from a burst ulcer. Questioning revealed that his bowel motions had, on numerous occasions, been very dark, almost black, indicating internal haemorrhage, high up in the gut. Again it was inspection of the files by someone aware of the history of the introduction, widespread use, and abandonment of phenylbutazone as

¹⁶¹ Supra. n 82.

¹⁶² Details supplied by the widow's representative and the veteran's general medical practitioner.

medication of first choice for analgesia of joint pains, which enabled a successful claim to be mounted for War Widow's Pension.

A similar, but not identical, successful claim based on the alleged unfortunate consequences of taking phenylbutazone for an accepted war-related disability appears as *DJ Mayne and the Repatriation Commission*¹⁶³ The Tribunal found that Mr Mayne had died from leukaemia arising from suppression of bone-marrow as a consequence of treatment with the above medication.

*BG Dalton and the Repatriation Commission*¹⁶⁴, represents an interesting example in clinical pharmacology where the veteran was already receiving pension at 50% of the General Rate for hypertension and a damaged knee. In January 1983 he applied for an increase because he had developed diabetes. For quite some time he had taken Chlotride, prescribed in good faith by his doctor for the hypertension. Unfortunately this drug has the ability to render manifest in susceptible patients the condition of diabetes, until then both latent and quite unsuspected. At the time, Chlotride had been a standard treatment for 30 years either alone or in combination with other drugs. Argument was led by the Commission that there had been mistreatment in the form of **novus actus interveniens**, thus breaking any possible chain of causation between the diabetes and war service. An attempt was made also to blame the disease on his alcohol consumption, admittedly heavy on leaving the Navy but considerably reduced after marriage and the following 40 years.

On the balance of probabilities, the Tribunal found that:

- i) the Chlotride was a significant cause of the disease,
- ii) the alcohol consumption was only another contributing factor,
- iii) the diabetes was related to war service in a sufficiently proximate way

¹⁶³ AAT (1990) 20 ALD 236.

¹⁶⁴ AAT (1988) 15 ALD 251.

- iv) there was no negligence in prescribing or taking Chlotride
- v) there remained a reasonable hypothesis in accordance with Section 120(3).

SUBSTANCE ABUSE (SUBSTANTIALLY ALCOHOL)

Judging from frequent references in ancient manuscripts, such as the Old Testament¹⁶⁵, alcohol seems to have been the sedative in longest use in the history of mankind, not least as an aid to coping with the tension, anxiety, worry and depression inseparable from military service. Horrific experiences may be banished temporarily to the back of the mind, but a variety of stimuli, sights, sounds, smells in particular have the ability to bring the memories flooding back. Not surprisingly, the anodyne found to have been at least partly effective in the past is seized upon to deal with the present. Many thousands of wives and widows can testify to the destructive effect of frequent nightmares on their husband's endeavours to achieve relative mental peace and, in the end, the equally destructive effect of alcohol on him when finally he became addicted¹⁶⁶.

Generally, habituation to alcohol, or alcoholism, is not regarded as a pensionable disease, although its effects may become so. Over the years the Commission, various VRB panels and differently constituted Administrative Appeal Tribunals have seemed to be floundering when endeavouring to extract a set of principles upon which to base their decisions. Consistency of decision-making appears not yet to have been reached. The following examples demonstrate that fact.

*Repatriation Commission and NM Carroll*¹⁶⁷ Firstly, the veteran's dipsomania, arising out of particularly severe experiences in war-time, had been accepted as war-caused as early as 1955. Whilst under the influence of alcohol he had assaulted his wife and her sister, ordering the latter and her husband to leave the house immediately, despite their long-term residency. When the assault became dangerously violent, the

¹⁶⁵ eg Isaiah 28.7.

¹⁶⁶ The Medical Consequences of Alcohol Abuse, Royal College of Physicians, 1987. Alcohol and Service. General approach to Reasonable Hypothesis. JR Douglas, Director Compensation, Department of Veterans' Affairs. 25 March 1993.

¹⁶⁷ AAT (1988) 14 ALD 581.

sister-in-law's husband intervened with the only weapon to hand, which was a kitchen knife. The veteran died later of stab wounds. When prosecuted on a charge of murder, the sister-in-law's husband was acquitted. Some thirty years later, the veteran's widow claimed and was granted War Widow's Pension on the grounds that her husband's death came about as a result of the condition already accepted as due to war-service.

On appeal, the Commission argued unsuccessfully for the fatal fracas to be regarded as a **novus actus interveniens**, but the Tribunal found that this would require a far less direct chain of events between the accepted war-caused disability and the circumstances immediately before the veteran's death.

*FE Small and the Repatriation Commission*¹⁶⁸ The veteran enlisted in the Navy in November 1939, aged 18, serving almost seven years. His blood pressure was normal on discharge and still normal for his age in 1971, but started to rise about one year later. Fifteen years beyond that the veteran claimed that his essential hypertension was attributable to a pattern of heavy drinking established whilst in the Navy and substantially continued ever since. In rejecting the claim the Tribunal found that the drinking, although starting during service, was "no part of the condition or quality of being a sailor. The fact that it was done off duty, away from naval premises, without encouragement from the Navy, and with no other naval connection, except that it was done in the company of other sailors, was not sufficient to render it part of the circumstances of the particular service rendered by the applicant", as required by Section 120 (3), but merely a matter of personal choice. In addition, most heavy drinkers were not hypertensive and heavy drinking was not a prominent factor in the development of hypertension.

The logic, with respect, is unimpeachable. It parallels that of Pincus J. in *Repatriation Commission v SE Keenan*¹⁶⁹ in which he declared that it was not sufficient for a veteran to show that he started smoking out of sheer boredom whilst in a military hospital, and especially if he stopped

¹⁶⁸ AAT (1989) 17 ALD 678.

¹⁶⁹ 19 ALD 509.

for a considerable time before starting again. As the veteran had entered hospital for treatment for a condition unrelated to his (non-operational) army service, the effects of his smoking could not be said to be attributable to or having arisen out of that service. It was more a matter of personal decision.

The AAT hearing into the claim by the veteran's widow in *ME Crnkovic and the Repatriation Commission*¹⁷⁰ took place simultaneously with the hearing into a slightly similar claim by a veteran *JH Brown and the Repatriation Commission*¹⁷¹. Both claims alleged habituation with alcohol, especially beer, to have been the precipitating cause, and that the habituation arose out of the conditions of operational service, but there the similarity ended. In particular, Mr Crnkovic was a Vietnam veteran undergoing all the usual discomforts and dangers of an infantryman on active service together with the considerable additional hazards peculiar to that theatre of war. Like many other Vietnam veterans he found recourse to the ample supplies of beer which were available to him to become a prop upon which he could lean. Unfortunately, the prop became a necessary part of his life post-service, with a continual substantial intake ending only when death intervened. The certified cause of death was cancer of the sigmoid colon, spreading to the liver, which latter organ is also highly susceptible to the deleterious effects of beer. Medical epidemiological evidence in support of a causal link was sufficient for the Tribunal to award a War Widow's Pension.

It is not at all clear why Mr Brown's claim became part of the joint hearing. The Tribunal had grave doubts as to what its finding should be. The veteran's disability was cancer of the rectum, a disease known more definitely to be a consequence of a long continued intake of beer as discussed in depth at the hearing. But what does seem to have been overlooked, with all possible respect, was that this veteran served only from October 1945 to January 1949. Officially World War 2 did not end until 1951, but in practical terms it had finished by the surrender of the Japanese forces on 2nd September 1945, i.e. before the veteran enlisted, whilst the Korean War did not start until after his departure from the Navy. His service, therefore, unlike that of Small (above) was under

¹⁷⁰ AAT (1990) 20 ALD 131.

¹⁷¹ AAT loc. cit.

peace-time conditions, with none of the risks, stresses or fears pertaining to war-time. Whilst he did not claim to have been drinking heavily when at sea, confirmed by his 'clean' service record, once ashore, in his own words, he "could not get into the nearest pub quick enough", consuming five to six 26 ounce bottles at a sitting, which was close enough to Small's admitted intake. Perhaps cancer of the rectum invites more sympathy than hypertension but it is difficult to see any stressful conditions which could allow the Tribunal to interpret Section 120 (3) of the Act in his favour. Most, but not all, other claims for non-psychiatric consequences of habituation to alcohol commenced during war-time appear to have been unsuccessful.

In *Repatriation Commission v Mrs. LL Lowerson*¹⁷² the veteran had enlisted at age 17 when it was hardly likely that he would have had the means to become a heavy drinker, (although there was a family history of such). After a particularly stressful period of service, the Army released him back to civilian life in mid-1944 (a full year before the end of hostilities). By then he had succumbed to full-blown alcoholism from which he never recovered. Death occurred in 1969 from injuries received after being thrown from his car whilst he was driving at high speed at 2 a.m. on a Saturday morning. Although no sample of blood was taken for analysis, the Tribunal declared that "since it had not been established beyond reasonable doubt that the veteran was not under the influence of alcohol at the time of the crash, then the Tribunal was obliged to find that the veteran was under the influence. The circumstances were merely and probably only the latest of a long series of similar but less drastic occurrences for a man of "vulnerable personality susceptible to a disease like alcoholism. There was thus a direct line of causation between the veteran's war-time experiences and his eventual death and the widow's claim must be granted". On appeal, Morling J. of the Federal Court declared the Tribunal to have misunderstood the law to be applied and referred the appeal back to be re-considered in accordance with the true requirements of Section 120 (1) and (3)¹⁷³.

Curiously the Commission appears not to have considered Section 8 (3) of the Act which would have allowed a denial of liability for "the death

¹⁷² (1989) 18 ALD 153.

¹⁷³ G1405/1988 dated 29 August 1989, Verbosity Vol 5 No 4. p 112.

of a veteran if the death of the veteran resulted from the serious default or wilful act of the veteran that happened after the veteran ceased to render eligible war service". Driving at high speed whilst under the influence of alcohol, so that the vehicle crashed, could well be regarded as either serious default or wilful act or both, showing little regard for the safety of other occupants of the car or other users of the road. Fortunately no other persons were killed or injured. Furthermore, if the driver had been an equally inebriated friend of the veteran, there could have been no possible claim for War Widow's Pension, likewise if the accident had arisen from the bursting of a very badly worn front tyre. If the veteran had survived the crash, but had killed or injured an occupant of his or another vehicle, there is little doubt that he would have been charged with, at the very least, dangerous driving and driving under the influence (assuming that his blood alcohol exceeded the statutory permissible maximum). A veteran suffering from alcoholism cannot expect to be exempt from the laws restricting the rest of the population, and especially those designed to protect the public at large. Perhaps the award of a disability pension for alcoholism should be accompanied by the withdrawal of the veteran's driving licence.

LEGAL ASPECTS

The very nature of a claim for disability pension by a veteran, or a War Widow's pension by a widow, requires consideration of both medical matters and legal matters by whoever is determining the claim. All cases discussed so far have exemplified this, but with medical aspects predominating, more or less. In others there is little or no dispute over the medical component, but the problem to be resolved is essentially legal in nature. A selection of such cases follows, illustrating the range of such problems.

a) APPEAL OR REVIEW, AND JURISDICTION

Despite the obvious anomaly caused thereby, a veteran who has been granted Special Rate Pension, (TPI) before the age of 65 usually retains it for life. Reaching the age of (65 for males, 60 for females) is a secondary barrier against securing employment, the primary barrier being the effect of war-caused incapacity to do a job requiring attention for more than 8 hours per week, thereby losing income, (Section 24 (b) and (c)). The World War 1 veteran aged 93 making a return trip to Gallipoli is an extreme example. A second is the veteran making a claim for Special Rate pension at 64 years

and a few months when, until the date of his claim, he had been apparently in full-time employment for a considerable time. It seems at least possible that either he had merely attended his place of employment without seriously earning his wage, maybe shielded by his mates, or that he really was still capable of much more than the statutory minimum 8 hours work per week. Whether part-time employment in his usual occupation and within reasonable distance from his home was available is not the point. Rather is it the fact that, by delaying his claim until he reached 65, he was likely to be refused on the grounds of having reached the normal retirement age for males, self-employed professionals excepted.

General Rate disability pensions, on the other hand, have always been liable to periodic review, downwards as well as upwards, such as when treatment for injury or disease has enabled the veteran to resume his employment, if below retirement age. (Such downward revisions have been rare). Originally, too, a pension for diminished eye-sight was assessed on the ability to see with the naked eye(s), even though spectacles had been provided. When the assessment was altered to take sight with the spectacles into account, many veterans lost some of the pension previously paid to them.

With this historical background in mind, the ex-service community should not have been taken by surprise when the name of the second level of determination proposed by Mr. Justice Toose in his 1975 Report was altered from Veterans' Appeal Board to Veterans' Review Board. What's in a name, anyway? Section 135(a) of the Act, (so far as relevant), runs:-

"Where a person who has made ... a claim or application for a pension ... is dissatisfied with **any** decision of the Commission in respect of the claim or application, the person may make application to the Board for a **review of the decision** of the Commission" (Emphasis added).

Despite the absence of the word appeal, the ex-service community has taken the sub-section to mean that if a person claimed for the acceptance of two conditions, but was successful in regard to only

one of them, he could then go to the Board in respect of the rejected condition. The condition already accepted would not be at risk. Similarly, if he claimed successfully for one or more conditions, but was disappointed at the relatively low assessment of pension to be paid, he could attempt to get a higher rate without risking the acceptance. But sub-section 135(2) continues:—

"It is the duty of the Board, in reviewing a decision of the Commission, to satisfy itself with respect to, or to determine, as the case requires, all matters relevant to the review."

It may be argued that entitlement and assessment are so closely linked that a review of assessment requires the reviewer to be satisfied also that the decision to award entitlement was correct. Similarly that a review of rejection of a consequential medical condition required satisfaction that acceptance of an originating condition was correct. Indeed, the VRB was brought into existence to replace the Repatriation Review Tribunal. That body had been brought about by merging the War Pensions Entitlement Appeals Tribunal and the War Pensions Assessment Appeals Tribunal seeking to improve the efficiency of the process, in particular, to lessen inconsistency of decision making. When certain VRB panels began to re-determine matters not before them, local pension committees had to be extremely cautious when advising a veteran to go ahead with an application for review of a claim which had been successful only in part. Otherwise they could have faced a possible civil claim for negligence. Incorporation of the organisation plus adequate insurance relieved the financial risk from individual members of the committee, but the odium remained. One alternative was to let the matter drop for 12 months and then re-apply as for a primary claim, using the time to accumulate as much farther supporting evidence as possible. That way, at least part of the pension would have been paid¹⁷⁴. Where a State had multiple panels of the VRB operating, 'panel-shopping' or successive adjournments were requested until a panel was available having a known favourable outlook¹⁷⁵.

¹⁷⁴ Report of the VEA Monitoring Committee, p 62, para 4.7.3, where a similar matter of interpretation was resolved by changing the membership of the Board.

¹⁷⁵ Ibid p26 para 2.6.1

If review of Commission decisions by the VRB had an uncertain basis, corresponding review of VRB decisions by the AAT were also subject to uncertainty. Section 175(1), so far as relevant, runs:

"Where a decision made by the Commission has been reviewed by the Board upon a request made under Section 135 and affirmed, varied or set aside, then ... application may be made to the Administrative Appeals Tribunal for a review –

- a) of the decisions of the Commission that was so affirmed,
- b) of the decision of the Commission as so varied; or
- c) of the decision made by the Board in substitution for the decision so set aside;

as the case may be."

The claim of *R H Fitzmaurice and the Repatriation Commission* illustrates the situation¹⁷⁶. A pension of 100% of the general rate was already being paid when the veteran applied for the acceptance of two more conditions, and Special Rate of pension arising therefrom. Rejection by the Commission enabled review by the VRB, successful as regards acceptance of the two new conditions, but unsuccessful in that they did not incapacitate the veteran appreciably more, ie retention of his pension at the 100% rate. On advice he lodged his application for review to the AAT in regard only to the rate of pension. The Commission itself made no application for review but sought to raise the matter of entitlement at the hearing.

Counsel for the veteran invited the AAT to refer the interpretation of Section 175(1) to the Federal Court by way of Case Stated. The Full Court which dealt with the matter could not reach unanimity, but the majority accepted in essence the

¹⁷⁶ (1989) ALD 297.

submission by the Commission that the words "the decision made by the Board in substitution for the decision as set aside" meant the totality of such decision, rather than a single part of it. These parts were:

- a) a decision not to affirm the initial decision of the Commission,
- b) a decision to accept the two conditions as war-caused, and;
- c) a decision as to the extra pension, if any, to be payable.

This finding of the Court became binding upon the AAT as shown in *WJ Quonoey and the Repatriation Commission*¹⁷⁷.

Mr Quonoey was already receiving pension at 40% of the General Rate for a number of conditions when he applied unsuccessfully for the acceptance of three more. Application for review to the VRB confirmed rejection of two of the conditions, but accepted the third, thalassaemia minor, as arising out of war-service, and referred assessment of pension rate payable back to the Commission. Three consequences arose. Firstly, the veteran applied for review to the AAT in respect of the two rejected conditions. Secondly, the Commission, instead of itself applying for review, informed the veteran that it intended to ask the AAT to reconsider the acceptance of thalassaemia minor. Thirdly, the Commission had started to pay the veteran a higher rate of pension, 50%, in respect of the extra condition. Counsel for the veteran submitted that the Commission could hardly seek to overturn acceptance whilst paying out in respect of the acceptance. If it succeeded, the veteran may find himself having to pay back the money thereby incurring considerable hardship. It is difficult to understand why the VRB concerned did not adequately inform itself that thalassaemia was a genetically acquired blood disorder¹⁷⁸ and could not be due to war service. One partial reason could be that the Commission's medical witness was described as a

¹⁷⁷ AAT. V88/558. 21 May 1991.

¹⁷⁸ Harrison's Principles of Internal Medicine. 12th Edition. p1551.

Professor of Oncology without disclosing also that his previous appointment was Professor of Haematology and thereby knowledgeable on blood disorders as well as cancers.

On the basis of the interpretation of Section 175(1) by the Federal Court, the AAT decided that it could indeed review acceptance of the thalassaemia. Faced with the possible loss of his extra 10% pension the veteran sought to withdraw his application for review¹⁷⁹. Counsel for the Commission urged that withdrawal required leave from the Tribunal and that such leave ought not to be granted. Consideration of the precedents led the Tribunal to find that such leave was not required and allowed withdrawal to take place. It noted also that the veteran now "wished to have the best of both worlds" by claiming yet again at primary level for the two unaccepted conditions, a procedure which would "deprive the Commission from ever having re-consideration of the veteran's entitlement to extra pension for his thalassaemia minor". "If it had the power to do so, it would not have allowed withdrawal".

With respect, pension is payable only on the basis of a veteran's total incapacity arising from all his accepted conditions. It is not an arithmetical sum of the separate assessments, but a consolidation and, in any case, the rule of *de minimis* applies whereby a small extra incapacity can be assessed as worth no higher rate of pension¹⁸⁰.

Interestingly, and apparently without jurisdiction, a VRB panel has recently assumed power to decide whether or not a veteran died from war-caused cancer when the only application before it was to review a decision by the Commission that a named lady was not the de facto widow of the veteran, within the meaning of the Act, as amended¹⁸¹. Legal opinion within DVA was that such power existed. As the entitlement decision was, in the end, favourable to the lady, there the matter ended. If otherwise, she

¹⁷⁹ AAT V88/558, 18 May 1992.

¹⁸⁰ See *EG Meenahan and the Repatriation Commission*, AAT P29/300. 23 December 1992 for a clear exposition by Purvis, J of the steps to be followed between primary and secondary levels, and secondary and tertiary levels. See also *Supra* n174. p26. para 2.6.1.

¹⁸¹ Details supplied by the ex-service organisation representing the lady.

would have lost one level of possible acceptance. One further item of interest arising from the *Quonoey* decisions was the reminder that Section 34(2) of the Administrative Appeals Tribunal Act allowed for concessions to be made by the parties, which then bind the Tribunal. Further, that one, or two if required, preliminary conferences may be held as well as a hearing for directions. Greater use of these procedures could be exceptionally useful when, as remarked by Davies J in the *Fitzmaurice* Federal Court hearing¹⁸², "the proceedings before the AAT are required to be conducted with as little formality and technicality ... as the requirements of this Act and every other relevant Act permit and for the very reason that the provisions of the Administrative Appeals Tribunal Act are simple and direct and lack the sophistication and complexity of provisions in other jurisdictions". At least one ex-service organisation has applied for the benefit of a preliminary conference procedure before a VRB hearing, so far without success. Perhaps, in view of the above, the Administrative Appeals Tribunal may more aptly be renamed the Administrative Review Tribunal, leaving the concept of "appeal" on points of law to the Federal Court and High Court, whilst leaving determination of fact to the lower levels.

As already mentioned, the impetus for abandoning the former Repatriation Act, replacing it with the stricter limits of liability to pay pension, came from the High Court decision in the *O'Brien* case. It should be remembered that Mr O'Brien was able to appeal successfully to the Federal Court and continue on, only because the AAT had, in the view of the majority of the five-member High Court, gone beyond current jurisdiction in reviewing acceptance at primary level of an earlier medical condition without being invited to do so by the Commission by way of appeal, and likewise a primary level decision to raise the assessment of disability arising therefrom from 0 to 20% . So much for the lessons of legal history.

182 Supra. n 176.

b) **ADVOCACY BEFORE THE AAT**

The declared aim of both the Veterans' Entitlement Act 1986 and its predecessor has been beneficence towards veterans and their dependants. On example is the reverse onus of proof for veterans having operational service. Insistence that proceedings before the VRB and AAT are to be inquisitorial of an administrative character and not adversarial is a second example. A third is the statutory requirement for the Commission to make allowance for the passage of time, absence of records (such as when a ship is sunk), lack of witnesses still alive, and so on. Overall, in the words of Section 119(1):

"In considering, hearing or determining and in making a decision in relation to a claim or application; the Commission:

- f) is not bound to act in a formal manner and is not bound by any rules of evidence but may inform itself on any matter in such manner as it thinks just,
- g) shall act according to substantial justice and the substantial merits of the case without regard to legal form and technicalities; and ..."

In *EG Meenahan and the Repatriation Commission*¹⁸³ attention was drawn to the apparent lack of explicit requirement for the AAT to be similarly bound. In his Reasons for Decision, Purvis J (Presidential Member) declared "If a matter is properly before the Tribunal then it may be that the Tribunal can put aside legal form and technicality and act according to substantial justice and the substantial merits of the case. It seems to me, however, that the Section cannot be used to enable an applicant to overcome statutory impediments". It would seem to follow, conversely, that the Commission ought not to seem to be placing non-statutory impediments in the way of applicants, already experiencing difficulty arising from death of witnesses and destruction of records.

¹⁸³ Supra. n 180.

It is surprising therefore to find a tendency developing in what is now called the Legal Services Group of the Department of Veterans' Affairs to treat proceedings before the AAT as a contest to be won. (The Commission, as a matter of policy, is rarely represented before the VRB). The fact that a number of differently constituted sittings of the Tribunal have felt driven to reprimand various advocates for the Commission for their conduct of their side of the proceedings would seem to indicate that younger advocates are being trained in this way. Confirmation comes from the wording of Case Notes written up by the advocates themselves.

Thus in *ME Crnkovic and the Repatriation Commission*¹⁸⁴ Reasons for Decision "It is a matter profoundly disturbing to the Tribunal that an officer of the Department of Veterans' Affairs who has been assigned the role of counsel should attempt to maintain her case without referring the Tribunal to the existence of Dr McLennan's report of 14th February 1990". That report was before the Tribunal previously in another matter which the Commission had conceded. The Tribunal was therefore able to declare - "The Commission and its officers were thus well aware of the existence of the said report and its contents and, at page 136 of the transcript in this matter, counsel for the Respondent, (the Commission) acknowledged she was aware of Dr McLennan's opinion. Proceedings before this Tribunal are not adversarial but even in adversarial proceedings certain ethical obligations exist. This is not the first time the Tribunal has had occasion to be critical of the manner in which representatives of the Repatriation Commission have conducted their cases before the Tribunal - see the remarks of Deputy President Breen in *EW Lukeman and the Repatriation Commission*"¹⁸⁵ where the Commission's advocate had, without notice, invited the Tribunal to go behind an accepted disability to look at the causality of a rejected disability and thereby affirm the rejection and deny increase in pension. In response, the Tribunal declared that the failure of the Commission to give any,

184 (1990) 20 ALD 131.

185 (1989) 18 ALD 300.

or adequate, notice of its proposal to pursue that course, (if it were permitted to do so), would either:

- (a) deprive the applicant of a proper opportunity to gather evidence to support the acceptance of ischaemic heart disease and hypertension conditions and thus persuade us not to 'go behind' that acceptance; or
- (b) force upon him further lengthy delays in order to meet this late emerging tack in the course being charted by the respondent's representative. The Tribunal found itself able to decide in favour of the veteran.

Similarly, in *Repatriation Commission and M Hadfield*¹⁸⁶ where the Commission had not, in the words of the Tribunal, "deigned to appear" before the VRB, (as is usual), it brought an application for review to the AAT, wishing to re-litigate not any error of law, but the facts, and was severely criticised for so doing. Para 7 of the Reasons for Decision runs as follows:- "Furthermore the representative of the Repatriation Commission at the hearing of this review proceeded with a total lack of sensitivity to the feelings of the aged widow concerned and the family of the deceased veteran", *et seq.* It should be noted that the veteran was reported to have declined frequent urgings to apply for upwards assessment of his disability pension, saying 'I will not be a bludger on my country'.

In what has become a leading case, *WF Webb and the Repatriation Commission*, joint comment from staff of the then Advocacy Branch and Legal Branch¹⁸⁷ runs: "We see this as a very bad decision, not only because of its many errors, but because of its possible repercussions. Advice is being sought from Counsel about the prospects of a successful appeal". Historically, that appeal did go forward to the Federal Court, was successful before a single judge, but reversed in favour of the veteran by a Full Bench. The Full Bench followed the mental processes underlying the reasoning of

¹⁸⁶ (1990) ALD 425, para 7 on 426.

¹⁸⁷ (1987) ALD 421.

the AAT rather than the 'unhappy' wording of the reasoning, and appeared to have no difficulty in reaching its decision. In its view, administration of justice took precedence over inflexible administration of the Act, and strict adherence to the way in which the Act was worded.

Further comment from staff of the Advocacy Branch appears regarding N88/766 dated 19th July 1989.- "This is a **very unsatisfactory** decision, both for the lack of careful appraisal of the evidence about the heart condition, and because of the Tribunal's findings relevant to circumstances of service and notions of causation, so far as drinking and smoking were concerned".

Since an AAT hearing is essentially an inquiry, rather than a trial to be conducted on adversarial lines, it is suggested that a description of its finding to be 'very unsatisfactory' could hardly be less appropriate.

A further example from staff of the Advocacy Branch regarding the AAT decision in *Bendy and the Repatriation Commission*¹⁸⁸ "A poor decision and one which is on appeal to the Federal Court". The Federal Court found that the Tribunal erred only in assessing the veteran's total exposure to sunlight in Darwin; it should have been merely the excess sunlight compared with the veteran's likely exposure as a civilian in Sydney. However the Court did not substitute its own decision but referred the matter back to the AAT. Poor or not, the AAT re-assessed, and then confirmed its original decision.

Comment regarding N87/1158 dated 21 March 1989. - "This case adds nothing to the pool of knowledge about the interpretation, and is useful only in identifying the idiosyncrasies of the Senior Member". Reference to the Administrative Appeals Tribunal Act Section 63 - Contempt of Tribunal, shows - a person shall not:

- (a) insult a member in or in relation to the exercise of his powers or functions as a member,

¹⁸⁸ (1989) 18 ALD 144 (Federal Court).

- (b) do any other act or thing that would, if the Tribunal were a court of record, constitute a contempt of that court.

It is not known whether any action was taken in this regard. An impartial observer could be forgiven for thinking that, notwithstanding the clear wording of Section 119(1), that a group within the Legal Services Division appears at times to display hostility towards veterans and widows. Having risked their life to keep an invading army out of Australia, veterans wonder why they now seem to have to fight yet again, this time their own bureaucracy, in order to establish eligibility for compensation. The over-reaction to the High Court decision in the *Bushell* case, discussed in Chapter 7, is widely held by veterans to support the above belief.

c) **SERIOUS DEFAULT. WILFUL ACT AND SERIOUS BREACH OF DISCIPLINE**

These have all, traditionally, been regarded as reasons for refusing claim for incapacity or death arising therefrom. As already mentioned, Mrs Lowerson's claim¹⁸⁹ could have been resisted on the basis of Section 8 (3), the veteran's own personal conduct after he left the service. A similar provision, Section 8 (2) covers the situation where the conduct in question took place whilst a veteran was still in the service. Its history goes back to the early days of the Repatriation Act where the intention was to avoid payment to the dependant(s) of a man who had deliberately mutilated himself with the intention of avoiding any, or further, military service. Subsections (3) and (4) of Section 9 contain similar wording for injury or disease instead of death.

One such example is *JG McGrath and the Repatriation Commission*¹⁹⁰ where the veteran claimed for his cervical spondylosis. In evidence he claimed to have been in New Guinea at the date of the Japanese surrender. Almost the whole unit went

¹⁸⁹ Supra. n 172.

¹⁹⁰ (1984) 87 ALR 275 and (1990) 20 ALD 166.

on an alcoholic binge for days. When supplies ran low, the veteran and a mate took a jeep to procure more, but overturned it into a creek bed and were injured. It was held that whilst there was an element of wilful misconduct, the circumstances were not such as to warrant serious condemnation. Clearly, there was no intention on the part of the veteran to render himself unfit for normal military duty. As before, the absence of the laying of a charge is taken to mean that the prefix 'serious' before 'default' and 'breach of discipline' is of no effect, and charges could not have been laid against the veteran at the time without bringing into question also the abandonment of any attempt to maintain discipline by the officers of that unit. In other words, the Act has to be applied, not literally, but with knowledge of the history of the wording, its purpose, and the circumstances of the claim to be considered.

Similarly in the matter of *RJ McPherson v Repatriation Commission*¹⁹¹ where the veteran had suppressed information about his club feet and had signed a form on enlistment acknowledging that he would forfeit any rights to a pension in respect of any disability which he had not disclosed. The club feet, (and unsuccessful surgery to correct as a child), had been sufficient to deny him enlistment into the Army in 1940. A more cursory examination by the RAAF medical authorities, plus silence on his part, enabled him to enter that part of the Armed Forces in 1941. Not surprisingly the exigencies of service, even in the RAAF, worsened the condition of the veteran's feet, a clear case of aggravation. However, the Repatriation Commission had regarded the failure by the veteran to disclose the condition of his feet on enlistment as evidence of, in the wording of the Act, "serious default or wilful act". All primary, secondary, and tertiary levels of determination had resisted the veteran's claim on this basis. Furthermore the signed forfeiture was declared to be absolute. His Honour, Morling J, however, preferred to regard 'wilful' as referring to blameworthy conduct, deserving of censure such as self inflicted injury to avoid further service. From this alternative standpoint, a handicapped man trying to join the Armed Forces at a time when the war was going badly for Australia was anything

¹⁹¹ (1989) 87 ALR 275.

but blameworthy. He preferred to follow the precedent of *RC Lynch and the Repatriation Commission*¹⁹². "It was inconceivable that Parliament could have intended that a man who gave false information about his medical condition in order to enlist was thereby to be deprived of a repatriation pension". In so doing he referred the claim back to the Tribunal to decide on the application of Section 9 (6). (If the veteran had operational service, or at least 6 months of eligible war service, other than operational service, he may be considered for disability pension by the "aggravated by" route. Presumably gun-shot wound injury or amoebic dysentery **would** have been pensionable without question.) In any case, medical examination preceded attestation. At the time that Mr McPherson did not disclose the problem of his feet he was not subject to military law and could not be charged with serious default.

It might be recalled also that the Armed Forces in general had two standards of medical fitness, a higher standard for those joining and a lower standard for those no longer fit for combat activity. Large numbers of men, badly wounded in combat, obtained personal satisfaction from continued service in a less active role nearer base. One may wonder how many of those refusing Mr McPherson's claim had themselves volunteered for service in war-time and understood his outlook¹⁹³. (The circumstances of Mr Lynch are very close indeed to those of Mr McPherson, his second attempt at enlistment having been into the army and the more severely demanding role of an infantryman having even greater damaging effects upon him).

d) "DOCTOR - SHOPPING"

An almost inevitable phenomenon which is likely to occur in all matters of compensation for injury, whether civilian or military, it refers to a party trying one medically qualified person after

¹⁹² (1989) 8 AAR 240.

¹⁹³ If McPherson had been charged with a criminal offence in a civilian court, he could have expected to be tried by his peers. Only those whose own enlistment had been refused on medical grounds would have understood the pressure upon him to volunteer his services. Knowledge of school mates already killed, barbed comments from older work mates and a white feather in the mail can each be destructive when based on ignorance.

another until one is found who is willing to testify in support of the party's claim. After a time, it may be possible to construct a list of such persons who may confidently be expected to come forward again. The practice has not gone unnoticed by the AAT which appears to have objected strongly to its use by the Repatriation Commission. Examples follow:

- (a) As far back as December 1987¹⁹⁴ an AAT disagreed very strongly with a clinical psychologist appearing for the Commission in his submission that peer-pressure was neither unique to the Armed Forces nor was it of more than minor significance in commencing to smoke, likewise boredom and stress also were to be regarded as only minor factors. It appeared that the witness had not studied in depth veterans of World War II, neither was he such a veteran. Notwithstanding, that same witness was called again by the Commission¹⁹⁵ making a similar submission, with the following result:

"Paragraph 24 - I found the evidence of Dr in regard to an increased smoking habit to be particularly unhelpful. The task of the Tribunal is to decide what caused this particular veteran to increase his smoking, not what might be the psychological explanation for the bulk of the populace. Needless to say, there was no evidence that Dr 's opinions had been formulated on data obtained for servicemen in the second World War or even later".

"Paragraph 25 - Whether or not the applicant suffered stress factors in the army, it is a matter of common knowledge and sense, and not a matter for expert evidence to determine whether or not bored persons start smoking".

"Paragraph 28 - Dr also opined that, acknowledging that cigarette smoking is addictive, the statistics show that the rate of consumption will plateau in less than 9 years. On this

¹⁹⁴ *JO Marshall and the Repatriation Commission* AAT, 22 December 1989 (unreported).

¹⁹⁵ *Repatriation Commission and FJ Cavanagh* (1990) 21 ALD 560.

basis, he was emboldened to say that the veteran's cigarette consumption would have peaked before enlistment. This is contrary to the veteran's own evidence. Having seen and heard the veteran give evidence and be cross-examined I accept his evidence, corroborated as it is by documents made before litigation was conceived".

Whether that particular witness will be used again by the Commission is not known, but his evidence would seem to be rather less absurd than that of Professor some years earlier who maintained that men tended to smoke less under severe personal stress, but whose evidence was nevertheless considered excellent by a Commission advocate hoping to "win"¹⁹⁶.

- (b) A further example appears in the decision of Einfeld J. in *CJ Byrnes v Repatriation Commission*¹⁹⁷. In that case he denied the suggested interpretation of the legislation that a single favourable report by a medical practitioner supporting an alleged causal nexus between an occurrence on service and subsequent disability was itself sufficient to raise a "reasonable hypothesis" by Section 120 (1) and (3). Such an interpretation, he said, would encourage "doctor shopping". In the particular instance, there were effectively opposing views from two eminently qualified experts. But the Tribunal had to consider all the material to decide whether a reasonable hypothesis did or did not exist. The decision was for the Tribunal to make and, if a decision was legally open to be made, then the Court could not interfere. Further appeal to a Full Court confirmed this stance. With hindsight, the veteran would have helped himself enormously by complaining of painful neck and shoulders, if such existed, at the time of his discharge and as soon as the condition became difficult to live with, instead of doing nothing about it for a further 20 years (See Chapter 7, p 114-118 for a full discussion of *Bushell AW v Repatriation*

¹⁹⁶ Lennell and the Repatriation Commission AAT (1981). 3ALN 27 Transcript pp 420-421.

¹⁹⁷ (1991) 23 ALD 35.

Commission up to and including the High Court which did accept the contrary proposition).

- (c) Let it be acknowledged, however, that a specialist known to be willing to testify on behalf of a veteran will receive frequent invitation to do so. Why bother "shopping around" if you know of a doctor who will support you? The oncologist, Dr X...¹⁹⁸ could be regarded as helpful where there was evidence on which to base the help. One of his interests happens to be cancer of the stomach. His long-held belief is that one initiating factor can be the chemical preservative used when canning food, especially meat, for the Armed Forces. A single opinion, especially when apparently unsupported by a scientific study, rarely succeeded at any of the determining levels. So confident was the Commission's Legal Services Branch that it failed to call any evidence at all in a recent AAT hearing. "I'd just like to urge the Tribunal in listening to the evidence of Dr X... to-day to bear in mind that the previous (six, named) Tribunals have not been able to find a reasonable hypothesis, and would urge that this Tribunal find similarly". Unfortunately for Legal Services Branch, Dr X... **could** show that the Commission's opposition was based on a 1977 study, whilst he produced favourable studies dated 1981, 1983 and two of 1988. The Tribunal - "It is our view that the Commission's submission, (ie of six rejected claims), is not only bold but overlooks the reality that we are charged with the responsibility of reviewing the facts of this case and the evidence heard...We heard evidence from Dr X... with which we were impressed as we were also impressed by the research data provided by him". Interestingly, the Tribunal drew attention to the fact that the absence of a generally held theory in favour of something is not equivalent to the existence of a generally held theory dismissing that something. The appeal was allowed, pursued as it turned out, by the executor of the estate of the widow who had died before the hearing and some three years after her husband.

¹⁹⁸ Mrs MT Doran, Estate of, and Repatriation Commission. AAT V89/0523. 27 May 1991.

e) **POSTSCRIPT**(a) **GETTING IT RIGHT FIRST TIME**

The claim of C J Byrnes above is noteworthy, even notorious, for one further aspect, commented upon most severely by Einfeld J in regard to the lapse of time. "It is a matter of deep concern that in the time from the original decision to this one, the applicant veteran has aged from 57 years to 68. The Act has been changed several times in that period. It really is appalling ... I know of no other area of the law where an applicant for a statutory benefit could be required to wait 11 years for the matter to be determined and there is still the Full Court and the High Court to go".

It is known, from material circulated by the current Shadow Minister for Veterans' Affairs, that the Opposition is also concerned over examples of this type. Whether a change of composition of government would achieve much is far from certain. However, credit should freely be given where due and a recent improvement in Western Australia is one such instance¹⁹⁹. Before a rejection of a claim is made at primary level, a draft "Reasons for Decision" is made available to the claimant with an invitation to supply any further relevant evidence in support of the claim. This revised procedure has enabled a higher rate of acceptance to be achieved at the cost of lengthening the time to complete the primary process. But as the successful resolution of an initially doubtful claim clearly obviates any perceived need for an appeal, the overall cost and time should be substantially lessened. The procedure is not expected to be adopted nationwide. Unfortunately, its place has been taken by an attempt to computerise the determination of claims.

(b) **TEMPORAL AS DISTINCT FROM CAUSAL**

Until recently there has always been a requirement upon an applicant to provide evidence pointing to a causal link between, for instance, personal survival under severe service

¹⁹⁹ October 1992. Annual meeting between senior executives of the Department, the three Repatriation Commissioners and Legacy National Pensions Committee.

conditions and commencing to smoke and, until recently, smoking and fatal lung cancer. In *Mrs SM Hughes v Repatriation Commission*²⁰⁰, their Honours Beaumont, Einfeld and Hill confirmed acceptance of the widow's claim by the AAT and by a single judge of the Federal Court whose decision was quoted as follows:

- (i) "Prior to enlistment, Mr Hughes was a non-smoker or not a regular smoker ... He became a regular smoker during the period of his war service".
- (ii) "There was no direct evidence as to when or in what circumstance Mr Hughes acquired the smoking habit during his war service".
- (iii) "But if a serviceman commences smoking during war service, then a hypothesis will readily arise that the development of the smoking habit was causally related to the war service. The connection will be pointed to by the facts of the particular serviceman's case. Proof as to precisely how and in what circumstances smoking commenced and was continued is not required. A reasonable hypothesis is sufficient".

The outstanding pity is that such a commonsense approach was not adopted decades earlier, for no questions about smoking were asked on enlistment other than for potential air-crew, and none on discharge. Fifty years on and the evidence of friends and relatives is always difficult, commonly impossible, to obtain.

²⁰⁰ (1991) 13. AAR 34.

CHAPTER SEVEN

1992-3 AND ON TO 2000

The Budget Review Papers for 1992-3 brought into existence proposals for a number of relatively modest changes to access to pensions for a few more veterans and dependants. More far reaching changes, affecting much greater numbers appeared later from quite different directions.

1 PRISONERS OF WAR

Prisoners in camps controlled by the Japanese forces already had automatic grant of disability pension for such diagnosed conditions as peptic ulcers and psychiatric disturbances. The same easier access was now to be extended to prisoners detained in European camps.

Automatic acceptance was regarded as appropriate for the known prisoners on the grounds that having to construct a detailed submission was a harrowing exercise, bringing up memories best left undisturbed. Their numbers were not known. Many had already died.

Similarly unknown were the number of widows of prisoners whose claim had previously been rejected or who had preferred never to make a claim. These widows were to be granted a pension approximately equivalent to War Widow's Pension but by some other name. Fortunately, and before it took effect, the undesirability of creating yet another class distinction in the repatriation system was recognised and these widows were now granted the same standard benefits as applied to all other War Widows, carrying the same description, and long overdue.

2 QUANTIFICATION

Meanwhile an attempt has been made to fix a standard for exposure below which a claim for adverse consequences leading to disability will not generally be accepted. Two such substance exposure limits have been introduced.

a) TOBACCO

The smoking of 20 cigarettes per day for 1 year is classified as a single 'pack-year'. Similarly 10 cigarettes per day for 2 years or 40 cigarettes per day for a half-year would also be classified as 1 pack-year. For certain diseases such as smoking-related cancers and smoking-related cardiovascular diseases, evidence is increasingly being demanded that the veteran had a history of at least X pack-years. It seems not to matter that a cigarette may have spent more time between a smoker's fingers than between his lips, or even in the ash-tray on his desk. Neither does it seem to matter that the carcinogenic components of different brands produced from different varieties of tobacco grown in different locations will be different. Certainly, a person under stress may be expected to smoke more than when not under stress. It will not be a regular daily consumption, especially whilst on active service. Above all is the imponderable variation in individual susceptibility.

So, if the Department wants evidence of a history of pack-years, from where can it come? A veteran's widow may guess what he smoked at home, but not at work, in the garden, at the football match, or in the RSL Club. Yet the writer holds a letter requiring evidence of how many cigarettes per day were smoked by a particular veteran in the 1980s, the 1970s, the 1960s, 1950s and 1940s! There is only one person who might know, if he could remember, and he is dead! He married only in the mid 1950s.

b) ALCOHOL

A similar development is understood to be on the way in regard to beer consumption and cancer of the rectum. The basis will be X "standard drinks" per day, even though different brands of beer vary in composition, nobody orders standard drinks at a bar, customary volumes vary around the country, and personal consumption is not necessarily anywhere near the same each day. Section 119(1)(h) of the Act says that the Commission:- "shall take into account any difficulties that, for any reason, lie in the way of ascertaining

the existence of any fact, matter, cause or circumstance, including any reason attributable to –

- i) the effects of the passage of time, including the effect of time on the availability of witnesses; and
- ii) the absence of, or a deficiency in, relevant official records, including an absence or deficiency resulting from the fact that an occurrence that happened during the service of a veteran ... was not reported to the appropriate authorities".

Demands for evidence of cigarette smoking and beer drinking in terms of daily intakes appear to sit most uneasily with the practical appreciation of Section 119(1)(h). There will be few older civilians who could truthfully state their daily consumption of tea or coffee four decades previously and even fewer who would have any idea of the grams of caffeine corresponding to that intake.

3) **BILL BUSHELL AND THE BUSHELL BILL**

Allen William Bushell served in the RAAF from June 1941 until January 1946, including about 12 months in New Guinea and a few months on Morotai Island. Towards the end, sickness plus physical and mental exhaustion brought him to the attention of a service psychiatrist. The outcome included a recommendation for early discharge on the grounds of temperamental instability and advice to avoid stress in his post-war life. He did not apply for a disability pension and therefore received none. By 1972 he had been diagnosed as having essential hypertension, with evidence, not known to him, that such was recorded as having become noticeable to his general practitioner from 1956 onwards. In 1982 after reaching the minimum age of 60 for drawing service pension the veteran applied for both service pension and disability pension for hypertension, based upon a contribution towards it of his war-caused anxiety state.

Service pension was granted, amendment of temperamental instability to anxiety state was allowed, but assessment of degree of incapacity was at the moderate level of 40%. The veteran thought

he should have been granted a higher rate and therefore applied for review in successive stages to the Administrative Appeals Tribunal. By the time of the hearing in mid-1987, the **Veterans' Entitlement Act** 1986 was in force. In particular, eligibility had become much tighter and the standard of proof more closely defined. Section 120(1) and (3) provided the framework for decision-making:-

- (1) "Where a claim under Part II for a pension in respect of the incapacity from injury or disease of a veteran, or of the death of a veteran, relates to the operational service rendered by the veteran, the Commission shall determine that the injury was a war-caused injury, that the disease was a war-caused disease or that the death of the veteran was war-caused, as the case may be, unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination",
- (2) (not relevant to Mr Bushell's claim)
- (3) "In applying subsection (1) or (2) in respect of the incapacity of a person from injury or disease, or in respect of the death of a person, related to service rendered by the person, the Commission shall be satisfied, beyond reasonable doubt, that there is not sufficient ground for determining:
 - (a) that the injury was a war-caused injury or a defence-caused injury.;
 - (b) that the disease was a war-caused disease or a defence-caused disease; or
 - (c) that the death was war-caused or defence caused;

as the case may be, if the Commission, after consideration of the whole of the material before it, is of the opinion that the material before it does not raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the veteran".

The Tribunal found itself faced with diametrically opposed medical opinion that stress on war-service leading to anxiety state could, or could not, make a material contribution to hypertension many years later. Each of the two medical experts admitted that his view had not become conclusively established as a general proposition. On this basis the Tribunal ruled that it "was not satisfied beyond reasonable doubt" that the hypothesis relied upon by the veteran was reasonable and the claim must fail²⁰¹.

In truth, it did not have to be so satisfied. Rather did it have to be satisfied of the negative proposition, but judicial interpretation of Section 120 was still in the future.

Meanwhile the veteran appealed successfully to the Federal Court²⁰² whose *ex tempore* decision drew attention to the Tribunal's error and referred the claim back for re-hearing, with or without further evidence. This time the Tribunal was constituted by Deputy President CJ Bannon, sitting alone²⁰³. One item of further evidence was the alleged advice from the service psychiatrist to "keep away from doctors, avoid medication, and have a few beers every afternoon after knocking-off, and to have them with people other than the people I worked with". The advice on beer was stated to have been followed to the extent of four middies each afternoon until his first myocardial infarction in 1985 when it was reduced.

At this Tribunal hearing, the previous single medical expert on each side was replaced by two each side, again supported by a mass of material of varying relevance from a selection of journals and text books. It is easy to sympathise with Deputy-President Bannon's plaint - "It is a matter of regret for me that the decision of disputed matters between well-

²⁰¹ AAT. 14 August 1987 Verbosity Vol 3. p123: 13 ALD 156..

²⁰² Full Federal Court. 8 February 1988. Verbosity Vol 4. p45.

²⁰³ AAT. 7 April 1989. Verbosity Vol 5. p51.

respected physicians is left to a layman such as myself, who has no expertise in medical matters. It is also a matter of regret that elderly and ill veterans who have rendered service to their country are denied a war-pension because of the terms of the Act. However I must apply the Act as I see it". Unfortunately, as assessed from the reasons for decision, the Tribunal overlooked the fact that neither of the two witnesses for the Commission was prepared to say that the view contrary to their own was unreasonable. Despite reservations about the greater reliability of clinical observations, (on such subjects as medical students), over tests on laboratory animals, (but, let it be noted, no studies on stressed ex-servicemen), the Tribunal reached its decision to reject the claim as not providing a reasonable hypothesis connecting the veteran's service with his hypertension.

In addition, he found no need to address an alternative hypothesis that the essential hypertension had arisen from the intake of alcohol prescribed by the service psychiatrist.

Legal Aid came forward to support another appeal to the Federal Court²⁰⁴. On this occasion Wilcox J prepared an exhaustive analysis of Deputy-President Bannon's findings. This led to his conclusion that the "evidence accepted by the Tribunal, as identified in his reasons for decision, does not negative the reasonableness of the hypothesis advanced on behalf of the applicant, that is that it leaves open the possibility for a reasonable hypothesis, even though this hypothesis is not the preferable view of the matter, but there was other evidence before the Tribunal, upon which no findings were made. It is theoretically possible that this evidence does contain material upon which the Tribunal could properly find that the postulated hypothesis is not reasonable. As the possibility cannot be excluded, the matter must be returned once again to the Tribunal. ... it cannot be

²⁰⁴ 13 August 1990. Verbosity Vol 6. p100.

said that, as a matter of law on the present findings, the applicant must succeed in his claim".

Back therefore to the Tribunal, but before the hearing the Repatriation Commission itself instituted an appeal to the Full Federal Court²⁰⁵ against the order of Wilcox J. Only partial unanimity came from the Court. Davies J rejected the Commission's appeal in total; Morling and Neaves JJ only to the extent that the Tribunal should determine whether or not the material before it raised a reasonable hypothesis connecting the veteran's condition of hypertension with his consumption of alcohol and consequently, with his war service.

Rather than acquiesce in yet another spin of the merry-go-round Tribunal-Federal Court-Tribunal, Legal Aid decided to fund an appeal upwards to the High Court to dispose of the matter absolutely and finally. That disposal brought profound approval and relief to the ex-service community, at least in the short term, as the ratio decidendi (partially quoted), shows²⁰⁶;

"The material will raise a reasonable hypothesis within the meaning of Section 120(3) if the material points to some fact or facts, (the "raised facts"), which support the hypothesis and if the hypothesis can be regarded as reasonable if the raised facts are true. Clearly enough, a relevant consideration is whether, as a matter of common or medical experience, the occurrence of an injury, etc of the kind sustained by the veteran is commonly accompanied by or associated with the occurrence of raised facts of the kind which constitute the relevant incidents of the service of the veteran. However, a hypothesis may still be reasonable even though such an accompaniment or association is not demonstrated or even if it is shown to be uncommon. So, in determining whether a hypothesis is reasonable for the

²⁰⁵ (1991). 23 ALD 13.

²⁰⁶ (1992) 109 ALR 30.

purpose of Section 120(3), it is not decisive that a connection has not been proved, ... nor is it decisive that the medical or scientific opinion which supports the hypothesis has little support in the medical profession or amongst scientists ... The case must be rare where it can be said that a hypothesis, based on the raised facts, is unreasonable when it is put forward by a medical practitioner who is eminent in the relevant field of knowledge".

Continuing:- "If the material does raise a reasonable hypothesis, the claim must be dealt with in accordance with Section 120(1). That is to say, the Commission must determine that the injury, disease or death was war-caused 'unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination'". So, back to the Tribunal, having occupied a full ten years since the veteran's initial claim. Galvanic would not be an inappropriate description of the response by the Government for within four weeks it had drafted an amending Bill with the declared intention of overturning the effect of the High Court's decision²⁰⁷.

Although titled the **Veteran's Entitlement Amendment Bill, 1992** it quickly acquired the name of the Bushell Bill. On the basis of crude estimates, shown later to be inaccurate, of the likely cost of failing to act, the Minister insisted that it went only to bring the determining system back to where it was before the High Court's ruling. Nevertheless, when the Bill reached the Senate it was handed to the Standing Committee on Legal and Constitutional Affairs to be examined in detail. Furthermore, that committee used its power to bring spokespersons for the ex-service community into the discussion. Major objection arose to the proposed alteration to the standard of proof provisions. They included, for instance, a new Section 120(3A):-

²⁰⁷ Hansard (Representatives) 4 November 1992, p2615 and 10 November 1992, p3054 for the debate on the Second Reading.

"In deciding under Subsection 3 whether a reasonable hypothesis has been established, the Commission must evaluate each item of material before the Commission that is relevant to the causation issue for:–

- (a) consistency (both internal and with other material before the Commission) ...
- (b) credibility; and
- (c) persuasiveness and weight".

Section 120(3D) – "... an hypothesis that corrects an injury, disease or death with particular service is not reasonable:–

- (a) if the hypothesis is fanciful, specious, unreal, tenuous or remote, or
- (b) if the hypothesis is merely left open by the material; or
- (c) merely because it cannot be disproved; or
- (d) merely because it is rationally based; or
- (e) if the hypothesis is not grounded in the particular circumstances of the case; or
- (f) if the hypothesis depends on a medical or scientific opinion and that opinion:
 - (i) is not generally accepted as reasonable by a substantial body of expert medical or scientific opinion, or
 - (ii) is out-weighed by a substantially greater body of expert medical or scientific opinion that is of approximately the same persuasiveness as that opinion; or

- (iii) is not out-weighted by expert medical or scientific opinion that is substantially more persuasive than that opinion".

It is difficult to see how the present administrative grade officers of the Department, who function as delegates of the Commission, ie Determining Officers, can achieve this with a high level of accuracy and consistency around the country. They are not usually doctors or lawyers, but honest public servants trying conscientiously to do a difficult job. Yet, 'persuasiveness', 'credibility', 'weight', 'substantially' are all highly subjective terms. Moreover, trials are already in place whereby computers manned by relatively junior grade staff will attempt partially to function as Determining Officers. Computers cannot handle subjective assessments. The likeliest result will be an increase in the number of appeals from computer-driven rejections.

Subsequent to the Report of the Senate Committee on Legal and Constitutional Matters²⁰⁸, a meeting was held as a result of which the Minister of Justice announced that "the Government would not proceed with these provisions in the Bill dealing with the Burden of Proof"²⁰⁹. Parliament resumed in 1993 only for the purpose of calling a general election on 13 March. Following that election came an announcement from the Secretary of the Department that the Veterans' Entitlement Amendment Bill 1992 "had lapsed and that the Government had no intention of re-introducing it in the new Parliament"²¹⁰. Euphoria is not warranted for mid-August 1993 saw the establishment of a Veterans' Advisory Council and a Review Committee, both bodies charged with examining, inter alia, the High Court decision on the Bushell Case²¹¹. Meanwhile Bushell-type

²⁰⁸ Weekly Hansard (Senate) 24 November 1992. P 3346.

²⁰⁹ Circular letter from the Minister for Justice, copy to hand, dated 22 December 1992.

²¹⁰ Circular letter forwarded to Pensions Committees, copy to hand, dated 23 April 1993.

²¹¹ News Release from the Minister for Veterans' Affairs, 13 August 1993.

claims are understood to remain in the Pending Tray, no intention of re-introduction notwithstanding.

4 Australian National Audit Office Report No 8 of 1992-3 (ANAO)

In April 1991, the Auditor-General began an examination of the compensation program as applied by the Department of Veterans' Affairs to veterans and their dependants, mainly widows. Although expected to produce its report within 6-7 months, the report did not reach Parliament until December 1992. Surprisingly, the Auditor-General saw no reason to consult with veterans or widows, either individually or through ex-service organisations. A cynic might wonder if such consultation might have forced the production of recommendations substantially different from those which were published and wonder further at the extent of internal guidance towards reaching those recommendations. To be fair, 44 of the 50 recommendations refer to the detail of administration by Departmental staff, leaving only a handful relating to eligibility for pension. Only the latter will be discussed.

- a) Calls for volunteers in times of national emergency usually include assurances that those responding will be looked after by a grateful nation, and so too will their dependants. In terms of Section 13 of the Act "pension by way of compensation will be payable in respect to death, or incapacity by way of injury or disease".

Incapacity and death to civilians arising out of employment is compensated under civil law or by negotiation between the parties with a right to seek redress in the Courts. In the absence of such right to sue by veterans and widows, compensation to them must surely be at least as fair and generous as compensation to civilians. Men accepted the risk of injury, disease and death arising from service in the Armed Forces in war-time. No civilian occupation entails risks to anything like the same extent and a civilian is always free to leave an intolerable job. No such freedom is

available to servicemen. The word 'generous' appears to imply a higher standard than merely 'fair' but nowhere in the ANAO Report is there any indication of the standard of comparison for deciding that current disability pensions are 'generous'. On what basis anywhere, anytime, does a calculation take place on the value of a missing leg, or a permanently ulcerated stomach or, more so, a life?

- b) In relation to war widows – "most grants of War Widows Pensions are made to widows of veterans who died at unexceptional ages of causes which are unexceptional by community norms". Indeed! But all potential recruits are accepted only after medical examination. If the average standard of health be X, those below X are likely to be rejected and only those above X to be accepted. If, many years later, the survivors of those who were accepted, ie of standard higher than X, are compared with those who were rejected, ie of standard lower than X, and the details of morbidity and mortality are about the same, then something must have happened to the men who were accepted to bring them down to the level of those who were rejected. There must have been a reason and the likeliest reason is the result of the privation and undue stresses of various kinds associated with, particularly, 'active service' as usually understood. Without those stresses these men could have expected a longer and more pleasant life. The effects of age on a body already weakened by undue exposure to extremes of weather, lack of sleep, inadequate nutrition, physical and mental exhaustion must inevitably be greater than on a body not so weakened. The basis for compensation is clear.
- c) The 'smoking hypothesis' – "the one dominant driving force behind War Widow and Disability Pension grants, ie the acceptance of a causal link between the veteran's disease/cause of death and a smoking habit, and a relationship between the veteran's war service and the initiation or exacerbation of the smoking habit".

It is the writer's experience that a pack of 50 cigarettes was usually issued free each week to each man on overseas service, with more available at little more than nominal prices. 'Ration packs' for emergency use invariably contained them. The reason is that smoking helped a man to keep going in extreme circumstances when nothing else could do it, or as cheaply. The adverse consequences were not so well known and, in any case, the immediate benefit far out-weighed what little realisation there might be of future health cost. Fifty years later and employers must, by law, provide safe working environments for their employees or risk heavy penalties. No army or navy on active service ever considered banning smoking from tanks, tents, mess-decks or aircraft in order to safeguard 1990s style working conditions. It is far too late now for the ANAO to cavil at the cost of pensions for incapacity or death arising from smoking-related diseases.

- d) Permanency of damage. One can readily understand that a knee or shoulder, smashed by gun-shot, never recovers from the incident. Less readily evident is a similar extent of incapacity arising from disease, whether it be atherosclerosis from many years of smoking, or recurrent diarrhoea from tropical bacterial infection. Such medical problems do not suddenly cease upon retirement, or reaching the age of 65. Whatever level of compensation was assessed at an earlier age would seem still to be appropriate at the later age when earned income virtually ceases yet the need for help in maintaining a reasonable quality of life can be expected to rise.
- e) One aspect of the report is, however, commendable and that is the need for much greater effort in dealing with psychiatric casualties. Whilst appearing to be more pronounced amongst Vietnam veterans, pension committees of ex-service organisations are well aware of considerable numbers of such men from previous wars whose state of mind was even less understood and even less well-treated.

- f) Completely overlooked in the report is the fact that so many men, incapacitated to various extents, delayed making any claim, or even made no claim at all. Savings to the Government from that source are rarely mentioned publicly. In total they must be substantial. Perhaps it is not too late for a supplement to the Report to acknowledge this, together with a similar acknowledgment of the unpaid support to a disabled veteran, husband and father, by his caring wife and children. Institutional care would have cost much, much more.

As already mentioned, mid-August 1993 has seen a News Release²¹² from the Minister announcing the formation of a Veterans' Advisory Council and a Review Committee. The ANAO Report will also be considered by these two bodies. The contribution from the Advisory Council should secure the necessary input of experience from the ranks of those most directly affected. It is awaited with interest, not least to see the extent to which that contribution is acted upon.

212 Ibid.

CHAPTER EIGHT

THE VETERANS' COMPENSATION REVIEW COMMITTEE REPORT AND RESPONSE

By its terms of reference, the committee was required to report to the Minister by 18 March 1994, and did so, by which time there was yet another change of Minister and, by which time also, the committee had acquired the shorter title of the Baume Committee, from the name of its Chairman, the Hon Peter Baume AO. Despite a number of requests, the Minister declined to make the report public, and the ex-service community became aware of any of its contents only from the Budget speech of the Treasurer on 10 May. Included in that speech was an outline of part of the Government's response to the Baume Committee's report and recommendations.

The report itself appeared on 11 May as a 156 page booklet entitled "A Fair Go" and containing a summary of the findings of previous similar investigatory and advisory committees and a comparison of provisions for veterans and their dependants in Canada, New Zealand, the United Kingdom and the United States. It appeared that over 100 submissions had been received from organisations and individuals, most of whom could be expected to be veterans or widows with a point of view on which they had strong feelings. In successive chapters, the report expressed "Repatriation Principles" including Provision of Compensation and the principles by which such compensation should be governed, followed by discussion of Standard of Proof, Causation, Decision Making, TPI payments, Rehabilitation and Health, War Widows, Australian Mariners and Administration.

Only some of the recommendations have been accepted, at least for the 1994-5 financial year, and, of those rejected, only some have been accompanied by reasons such as "administratively and politically unacceptable". Interestingly, only in the week commencing 30 May did the 124 page Bill incorporating the intentions of the Government in legislative form reach national headquarters of ex-service organisations for distribution round State delegates to relevant Committees. Yet the

Minister required considered responses within 10 days, ie 8 June. The reason for this quite inadequate time is not clear. Meanwhile senior staff of the Department have toured major centres to explain the proposals to local representatives of veterans and widows. In response to a query, the answer was given that if all the proposals were passed by Parliament, there would be a saving of some \$28 million from a current annual compensation expense of about \$1.6 billion, or rather less than 2%. As departmental estimates have been found in the past to be unreliable, this figure of \$28 million should be regarded as optimistic. A financial breakdown appeared on page iv of the Explanatory Memorandum which accompanied the Bill. A further query provided the response that about 250 TPI pensions were awarded annually and only about 20 would be affected. Generally, the Baume Committee's report claims to be founded on a principle of fairness – fairness to veterans in the way of adequate compensation, fairness to taxpayers and fairness to other recipients of community support. Within this is included the need to maintain a comprehensive and generous Repatriation Scheme in relation to any war-caused disability and incapacity. The word "generous" begs the question of 'in comparison to what?', but the Report, with respect, falls far short of a sensible answer. It discusses in some depth the statutory and common law methods of dealing with workers' compensation type claims but fails to show an understanding of the most fundamental difference between civilian employment and combat conditions in the Armed Forces. There is no civilian employment in which the employees are being hunted down by large numbers of other men, intent upon maiming or, preferably, killing those employees by bomb, bullet or bayonet. Neither do civilian employees, except in very isolated instances overseas, run any risk of capture and indefinite detention, subject to beating, malnutrition, untreated disease, mostly in an unpleasant climate and subject to a multitude of insect pests. With all possible respect, genuinely expressed, if an offer were to be made to the Australian taxpayer to submit voluntarily to loss of sight or loss of two limbs, in exchange for a TPI pension, there would not be a single person coming forward to take up the offer. The word 'generous' in this context is an insult to veterans and ought to be dropped. In this connection also, the additional comment in the Report (page 39) that "the veterans' pension is frequently far in excess of what the veteran may have been able to obtain in paid employment unrelated to war service" is objectionable. It is over 20 years since Australia abandoned the British method of adjusting rates of pension according to rank in the Forces at the date of

death or injury, on the grounds that the perception of pain is common to prince and peasant alike, and death by drowning and injury and death by high explosive is no respecter of persons. Shame on the Committee!

MAJOR RECOMMENDATIONS AND GOVERNMENT RESPONSES

1 General

"No change to the general principles underlying the strong continuing obligation to recognise adequately the special contribution made by the veterans and to compensate them by a comprehensive and generous scheme for the effects of any war-caused disabilities."

Response – Agreed.

2 Standard of Proof

(i) "To be fair and generous while consistent in its application and legally unambiguous."

Response – Agreed.

(ii) (a) "To establish an Expert Medical Committee to resolve general medical issues and to formulate Statements of Principle for application to all decision making".

(b) Also, "that the Standard of Proof be based on the legally accepted "civil standard" with the provision that the "benefit of doubt" be in favour of the veteran who had operational service."

Response – Agreed with (a), with the Statements of Principle to be backed by legislation making them binding on all decision makers.

Disagreed with (b).

3 Causation

(i) "The present scheme was designed to compensate for conditions of war service, not conditions due to ageing, nor conditions due to other lifetime incidents which the wider community may experience".

Response – Agreed.

- (ii) "Compensation should be reduced by half wherever service is not the major cause of a disability or death".

Response – Not agreed, administratively and politically unacceptable (The writer is aware of veterans who died from a combination of ischaemic heart disease, conceded as being due to heavy smoking commencing on overseas service and rectal cancer possibly arising from alcohol abuse, also commencing on service. Autopsies, even if carried out, do not apportion relative impact of multiple causes, and Death Certificates indicate only what seem to be the direct and contributing causes).

- (iii) "Assessment of incapacity to cover only the extent of incapacity above the norm for a particular age".

Response – Agreed. (A norm has to be a wide range to allow for individual variation).

- (iv) "Acceptance of smoking related diseases as war-caused has been a justifiable development".

Response – Agreed but Statements of Principle issued by the Medical Committee will deal with unreasonable hypotheses purporting to link certain diseases with smoking and ways will be examined to prevent falsification of smoking histories.

4 TPI Pensions

- (i) "Provisions to be consistent with original intent, ie pensions to compensate totally and permanently incapacitated veterans unable to work because of war-related disabilities".

Response – Agreed.

- (ii) "TPI pensions to be split into a basic compensation component for pain, suffering and inability to work and an income support component related to community standards".

Response – Disagreed.

- (iii) "Compensation component to be 150% of the general rate, payable for life irrespective of rehabilitation or return to work, and exempt from tax and income means testing".

Response – Disagreed about a compensation rate of 150% but agreed on the remainder.

- (iv) "Income support component to be income tested."

Response – Disagreed in principle to any income support component.

- (v) "TPI pension structure to provide positive financial incentive for rehabilitation".

Response – Agreed, especially for younger veterans.

- (vi) "TPI and intermediate rate pensions not to be granted to veterans over 65 unless it can be shown that they would have continued in the same bona fide full-time employment, in which they have worked for the last ten years, but for their service-related disability".

Response – Agreed.

5 War Widows

- (i) "War widows to receive full pension if their spouses die solely or predominantly from war-caused conditions".

Response – Disagreed. There should be no distinction between major and minor causes of death.

- (ii) "War widows whose spouses die from conditions not predominantly war caused to receive only a modified rate pension".

Response – Disagreed.

- (iii) "War widows payments to consist of two components:

- (a) compensation at a lower rate than at present,
- (b) income support according to financial need, but higher than the present 'frozen rate' (which has ignored inflation for many years)

Response – Disagreed. (The cost of this provision was estimated to cost about \$50 million over four years).

6 Decision making

Improvement and increase of communication between primary level decision makers and claimants. This should raise the number of correct decisions at primary level and result in fewer appeals".

Response – Agreed.

DISCUSSION

In the limited time available so far to consider the implications of the above, national executive committees of the ex-service organisations are relieved that the government has declined to proceed with some of the more harsh recommendations of the Baume Committee, designed to reduce significantly present expenditure on Veterans' Affairs pensions. Major concern is felt about the Expert Medical Committee, mentioned under Standard of Proof (ii) above, and re-titled Repatriation Medical Authority (RMA) by a new Part XIA, Section 196. In the Explanatory Memorandum accompanying the Bill, a major purpose is stated (p3) to prevent acceptance as a reasonable hypothesis an opinion held by a single medical practitioner, however eminent, that does not have sound medical-scientific support". But how many eminent practitioners speaking in concert would suffice, and how is 'eminent' to be defined in a legal context? (Would, for example, a specialist paediatric oncologist be regarded as eminent in relation to cancers in elderly veterans?). Sound medical-scientific evidence is itself defined in Clause 5 as information which is:-

- (a) (i) consistent with material relating to medical science that has been published in a medical or scientific publication and has been, in the opinion of the Repatriation Medical Authority, subjected to a peer review process; or
- (ii) in accordance with generally accepted medical practice, would serve as the basis for the diagnosis and management of a medical condition; and

- (b) in the case of information about how that kind of injury, disease or death may be caused – meets the applicable criteria for assessing causation currently applied in the field of epidemiology.

It seems unlikely that the Chairman of the Baume Committee was consulted on the wording of the above, for he would have been aware that there are a vast number of medical and scientific publications but that not all have anything like the same reputation. There are reports of conferences sponsored by pharmaceutical companies, there are national and international conferences on professional ethics or a particular disease, there are text-books and journals, with what has been described as a ranking order amongst them. Peer review itself is ill-defined. Editors of journals have to find someone to do the job who may be regarded by the editor as knowledgeable in the field, but whose name(s) is (are) seldom disclosed in the journal or to the author of the article. Letters to the Editor in later issues may indicate the depth of disagreement to an article but not all concerned will have read the article or feel inclined to take the trouble to respond, while conferences are often the scene of substantial disagreement towards a presentation.

Equally disturbing is the fact that, whilst ex-service organisations were invited to comment on the members of a provisional composition of the RMA, they were not allowed to put forward their own suggested members. For the first time, therefore, claimants no longer will have the right to call their choice of medical witness. From Section 196T, the RMA may engage named outside consultants for expert advice but only with the approval of the Minister. It seems to leave the Minister open to the charge that such consultants may be limited to those whose views on causation are already known to be favourable to the Commission. As the Minister can do no more than take heed of advice from his Department, the effect could be in line with the whole rationale of the legislation, which is to reduce expenditure on pensions. From experience over the last 2–3 decades, there has been a protracted resistance against the acceptance of one disabling, or fatal, medical condition after another, of which smoking related cancers of prostate and colon are the two most recent finally to be conceded, the latter on the basis of a 35-year smoking history²¹³.

²¹³ Giovannucci et al. J Nat. Cancer Institute. Vol 86. No 3. February 2, 1994.

Whilst the RMA may be able to construct "Statements of Principle" satisfactory to itself, linking war service with a particular condition, it can be expected to find much more difficulty in claims from veterans with multiple conditions or in circumstances where the present condition came about as a consequence of the treatment prescribed for an earlier condition. But whereas, until now, there has been an appeal or review process for dealing with claims rejected at a lower level, Section 196E allows only for a request to the RMA to investigate the injury, disease or death claimed for, or to review its own Statement of Principle or to review its own earlier decision not to make a Statement of Principle. The Explanatory Memorandum (page i) states that the legislation has been developed to address the "most pressing needs of veterans and dependants". A major need has been to minimise the time taken to determine a claim, and indeed, by incorporating computerised processing during 1994, some improvement seems likely for the simpler straightforward claims. What is far less likely is a reduction in time for the processing of appeals from the current system to what appears to be an equally cumbersome investigation by the Repatriation Medical Authority. It seems to have a lively future, but many more veterans, all in their 70's, will be dead before their claims reach final determination. Elsewhere in the Explanatory Memorandum (page 4) appears the statement that the medical content of Statements of Principle will be binding on decision makers at all levels including the courts. One wonders if the High Court may be willing to accept its own exclusion. Its decision in the Bushell case, discussed above, was one of the matters leading to the new legislation, and it may have other ideas on the appropriateness of this latest move. It is regretted that Sir Edward Dunlop is no longer alive to express his opinion. Unlike the people invited to constitute the RMA, he was not only highly eminent in his specialty, but also had six years of service in war-time, five of them overseas and three and a half years as a prisoner of the Japanese army. His contribution in support of Mrs Nancy Law was a major milestone in repatriation compensation, and benefitted many thousands more.

CHAPTER NINE

SUMMARY

Repatriation legislation began in earnest in 1914 when the expectation of life was fairly close to the Biblical three score and ten. Eighty years on and the expectation is many years longer²¹⁴. The reasons are multiple, including better ante-, peri- and post-natal care, better nutrition, far better medical and surgical practice, safer work-places and, not least, a better organised system of social welfare for those in need. Coupling the above with a lower birth-rate and a lower migrant intake of young adults means that Australia has become an ageing nation. More of us are living not just longer, but longer past the usual age of retirement. A recession with high unemployment produces higher expenditure on unemployment benefits with fewer people producing tax revenue from their salaries and wages, at the same time as rising expenditure on pensions such as those for veterans and their widows, and civilians alike.

On the one hand is a Department of Veterans' Affairs trying commendably to improve the quality of life for its clients in their last few years, whilst the longer life arising from an improved standard of care brings in its train a higher cost in pensions. It is not surprising, therefore, that the Department, more strictly the Commission, appears to be under substantial pressure to limit not only the number of successful claims by veterans and dependants, but also the size of an average successful claim. The morality of restricting eligibility by legal technicality, whilst members of Parliament and senior public servants are not seen to be belt-tightening themselves, produces resentment. The situation is not helped by a Prime Minister declaring – "No Australian child will be living in poverty by 1990," and "a TPI pension will continue to be payable for life", (untaxed and not means-tested and with part service pension as well).

²¹⁴ Life expectancy as at early 1993 for an Australian male born 1920 is 81.4 years (Life Insurance Federation of Australia).

Increasingly, pension committees of ex-service organisations are checking abstracts of the world's medical journals for reports which might be useable to support a claimed link between a veteran's ill-health or death, and one or more diseases which he appears to have contracted during war-time. Each new discovery of such a report, if leading to more than the odd successful claim, is likely to meet strong opposition from the Commission, with no expense spared in trying to produce refuting evidence. The medical aspects of the claim may well be understood in full only by the medical witnesses who can, and commonly will, disagree. The legal aspects may be understood only by the lawyers and then only after grasping the unique nature of the legislation. Much of this newly emerging material is epidemiological data such as a comparison of the incidence of a particular cancer in continuing smokers, lapsed smokers and never-smokers. If the incidence is in line with these three categories and, especially, if it is higher still within the group of smokers with higher levels of smoking, then the evidence is compelling. A veteran presenting with that particular cancer and with a corresponding smoking history, commencing on operational service, would have a fair expectation that his claim will be accepted. Lack of actual proof that smoking causes that cancer is no longer decisive. What is essential, however, is for the study to cover large numbers of patients using unchallengeable methodology. In essence, a supposed inquiry system of determination is acquiring the appearance of an expensive adversarial contest. In the middle is the uncomprehending veteran or widow wondering what happened to all those governmental assurances of 1939-45.

Perhaps the recent greater willingness to consult beforehand with the ex-service community, as shown in the establishment of a Veterans' Advisory Council, may yet produce a sensible compromise acceptable to all concerned. It will require, in the writer's opinion, a substantial move away from years of slogging matches on whether or not a particular medical condition has arisen from the effect of war service on individual veterans. Instead it may be better directed towards the realisation that abnormal physical and mental stress does not necessarily produce immediate noticeable weakening of the individual's resources, but may well lessen the resistance to stress of whatever kind much later. There is such a thing as a long latency period, recognised recently by the concept of pack-years for a smoking history related to, for instance, lung cancer and

ischaemic heart disease. Equally likely is a lowered expectation of life and quality of life towards the end.

Neither of these concepts are new to the pension field. Taxation of private pensions, such as annuities, is calculated in some instances on the basis of actuarially assessed expectation of life of the policy holder and also of the survivor, if the annuity is transferable to a spouse. Extension of the concept to the award of disability pensions to elderly veterans, irrespective of their state of health at the time could well be the basis of consideration. Any extra direct cost of pensions could come from abandonment of the present expensive system of determination, including appeal and review, of claims, and save much heartburn on the part of disappointed veterans, particularly those who could, but did not, claim years earlier. Similarly, new claimants are now invited to answer a questionnaire as to how their condition has affected the extent to which they can continue a normal social and domestic life. The response, whether self-assessed or assessed with help from Veterans' Affairs medical officers, gives rise to an impairment rating and this in turn leads to so many points on a predetermined scale for calculating rates of disability pension. It appears to work reasonably well, providing that deterioration in health is reported periodically for re-assessment. In exchange, it must be admitted that some claims should never have been made and pursuing them up the appeal system has been a substantial disservice to other veterans. Examples include a claim for high blood pressure arising from addiction to the drinking of coffee during the war, and commencement of smoking solely to deal with boredom whilst stationed in central Australia²¹⁵. In contrast the British system, so far as known, still regards smoking as a matter of personal choice. Both, with respect, are indefensible stand points.

Lastly, in relation to widows of veterans whose husbands had operational service but who died from other than war-caused diseases, currently they receive no acknowledgement of their husband's service. It is true that they may continue to receive whatever service pension they enjoyed before their husband's death, but it remains at half the married rate.

²¹⁵ The official publication VETAFFAIRS for May 1994 (p 4) records a number of 'malenlistments' – such as Frederick X whose enlistment was accepted despite stricture of the urethra, delusional insanity, infected tonsils, nasal obstructions, gastric conditions, chest and kidney abnormalities and deafness. Could there have been impersonation by a friend willing to help out a mate by being examined in his stead? From:– The Last Shilling. C Lloyd and J Rees. 1994. DVA. Canberra.

Switching to a Social Security Age Pension gives access to a higher single rate, but they would much prefer that it came through Veterans' Affairs, for that simple fact gives them, in their own mind at least, a higher status. A long overdue minor proposal in the new legislation will allow this to be done with effect from March 1995. There still remains the irritation, for those concerned, of the date of re-marriage. Those widows who remarried before a certain date lost their war widow's pension whilst those who re-married later do not. It parallels the circumstances of a family, well known to the writer, of the children of an Australian veteran who married a Scottish lady and brought her home in 1945 as a war-bride. After a short time in Sydney they returned to Scotland permanently and had two children. One was born before the 1948 Australian Citizenship Act came into force and the other a couple of years later. Only the second has achieved automatic right of residence in Australia, yet both have exactly the same parentage. Efforts to move the bureaucracy to grant residence to the older child have been unsuccessful.

A long held legal maxim is that "Hard Cases make Bad Law". Indeed they do. The history of repatriation legislation is ample evidence in support, as shown in this thesis. Perhaps there will be fewer hard cases coming forward in the future but, within the next decade, there will be hardly any new cases to come forward at all, be they hard or soft, for all surviving World War II veterans will be octagenarians. Above all, it ought to provide a cheap, quick and consistent handling of claims without causing resentment between those claimants who just fall over the line and those who do not. Regrettably the new legislation, as proposed, will have little expectation of achieving any of the declared aims. Fifty years on and the citizens of those countries which think they won World War II are celebrating the D-Day Landings. The time has surely come to bring an end to this drawn out war of attrition on medical matters between the Government and the veterans. As a pension committee chairman for a number of years, the author is leaning strongly towards a flat rate compensation for all surviving wartime veterans and their dependants, with a supplement for those who incurred direct additional risk on operational service. It need cost no more than the present process and conceivably could cost less.

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