

TERRY FOGARTY

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Veterans Compensation and Rehabilitation Inquiry
Productivity Commission
GPO Box 1428
Canberra ACT 2604

Thursday, 7 June 2018

Dear Sir,

This submission requests the Productivity Commission to request the High Court to determine:

- 1. If the following cases are void because of one or more “errors of law”**
- 2. If the purported “delegations” to determine these matters are void because of one or more “errors of law” in the instrument of delegation.**

- 1. Mountford and Repatriation Commission [2013] AATA 13 (14 January 2013)**
- 2. Application for Disability Pension for Afghanistan Veteran Jesse Bird.**

Yours faithfully,

TERRY FOGARTY.

- **Australia’s veterans have fought and died for the preservation of democracy.**
- **An essential part of democracy is the “rule of law”.**
- **To deny veterans the benefits of the “rule of law” is the ultimate betrayal by successive governments.**

This denial is encapsulated, legislatively, by Section 147 of the Veterans’ Entitlements Act 1986, as amended, whereby veterans are denied the right to be represented by a legal practitioner at the Veterans’ Review Board:

147 Parties to review before Board

- (1) The parties to a review by the Board of a decision of the Commission are:
- (a) the applicant for the review; and
 - (b) the Commission.
- (2) A party to a review may:
- (a) appear in person, or be represented at the party’s own expense by a person **other than a legal practitioner**, at any hearing of the review; and
 - (b) make such submissions, in writing, to the Board as the party, or the party’s representative, considers relevant to the review.
- Note: if the Principal Member gives an applicant a notice under subsection 155AA(4) or 155AB(4) and the applicant wants to be represented by another person in relation to it, the applicant must so authorise the representative in writing after receiving the notice (see section 155AC).
- (3) In this section, a reference to a legal practitioner shall be read as including a reference to any person who:
- (a) holds a degree of Bachelor of Laws, Master of Laws or Doctor of Laws or Bachelor of Legal Studies; or
 - (b) is otherwise qualified for admission as a barrister, solicitor, or barrister and solicitor, of the High Court or of the Supreme Court of a State or Territory.

This discrimination against veterans plays a significant part in “dumbing down” the legal knowledge of many of those involved in the claims determination and appeals processes.

Possibly, the best example of this is the AAT Decision of “Mountford and Repatriation Commission [2013] AATA 13 (14 January 2013)”.

The critical details are that, because of the correct application of VEA Sec 120(1), the veteran’s prostate cancer was caused by his army service. This is identical to the case of Deledio which is a landmark precedent (see references following). Yet no one, on either side of the argument, at DVA, VRB, or AAT even made reference to the Deledio case.

Quite clearly an “error of law” (probably more than one) has occurred and also proof that those “delegated” to make decisions, or reviews, had insufficient knowledge to receive those delegations. If so, the “delegations” are void because of “error of law”.

One remedy has been provided by DVA itself in the form of:

**“AN04/1999: THE POWER TO REMAKE A DECISION
Advisory from Disability Compensation Branch
No 4/99”**

This advisory is based on the Full Federal Court Case below:
(BEAUMONT, HEEREY AND FINKELSTEIN JJ)

[Vincent Tze Ching Leung & Anor v Minister for Immigration & Multicultural Affairs \[1997\] FCA 1313 \(28 November 1997\)](#)

The legal consequence of an “error of law” is that the purported decision is void. Veterans are entitled to have their decisions remade, correctly, and in accordance with the date of the original application.

Given the potentially large sums of money involved, the fact that the legal profession has not acted on this reinforces the “dumbing down” of the legal knowledge of decision makers and reviewers.

There are systemic “errors of law” in many disallowed claims that would entitle the veterans concerned to have their decisions remade, correctly, consistent with the date of the original application:

1. Hypotheses intended to become “reasonable hypotheses” are not defined in decisions.
2. Non-compliance with Section 33 (1AA) of the Administrative Appeals Act.
3. Consent declaration does not authorise DVA to provide veterans’ details to others.

The landmark High court precedent on “errors of law” is:

[Australian Broadcasting Tribunal v Bond \("Bond Media case"\) \[1990\] HCA 33: \(1990\) 170 CLR 321 \(26 July 1990\)](#)

What appears to be a systemic “error of law” is the non-compliance with Section 33 (1AA) of the Administrative Appeals Act

The Hon. Justice Garry Downes AM, President of the Administrative Appeals Tribunal delivered a paper on this on 16 June 2005.

Notes concerning paper prepared, and delivered, by The Hon. Justice Garry Downes AM, President of the Administrative Appeals Tribunal

Hyperlink to article: [GovernmentAgenciesJune2005.docx](#)

[Justice Garry Downes' paper of 16 June 2005 is an analysis of the amendment of the Administrative Appeals Tribunal Act 1975 \(Cth\) to require decision-makers to use their “best endeavours to assist the Tribunal to make its decision”.](#)

A new subsection has been introduced into s 33 of the Act (by *The Administrative Appeals Tribunal Amendment Act 2005*) which provides:

*Decision-maker must assist Tribunal
(1AA) In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.”*

The role of a respondent before the Tribunal is:

1. to assist the Tribunal to reach the correct or preferable decision; but
2. not simply to seek to uphold the existing decision, although that might be the approach which would be taken in litigation.

He specifically comments on the following:

1. The making of administrative decisions and the reviewing of them on the merits are functions regulated by Chapter II of the Constitution relating to the Executive Government and not Chapter III relating to the Judicature.
2. Proceedings under the Administrative Decisions (Judicial Review) Act 1977 are no different. Although jurisdiction under the Act is conferred by statute the jurisdiction is part of the judicial power of the Commonwealth and is conferred under Chapter III of the Constitution on courts. Nothing in the Judicial Review Act authorises a court to consider the merits of the decision it is considering. The question remains whether the decision subject to review is lawful or unlawful in accordance with the provisions of s 5 of the Judicial Review Act.

ADJR s 5 is in a separate folder – “DVA Lack of Knowledge”.

11 years after the presentation of Justice Downes' paper it is the modus operandi of Repat/DVA to argue to uphold their original decision. Part of the reason for this is, surely, the reluctance of the Tribunal to enforce s 33 (1AA).

The landmark High Court decision dealing with the Administrative Decisions (Judicial Review) Act 1977 is [AUSTRALIAN BROADCASTING TRIBUNAL v. BOND AND OTHERS.doc](#).

The “law” is the combination of the legislation and any relevant court precedents.

A search on the “Austlii” database, on 12 September 2016, using “Repatriation Commission” as the search term, and searching the “Federal Court” and “Full Federal Court” databases, returned 1,318 results. Far too many cases to analyse and compare for legal precedents. Not only for me, but for decision makers and reviewers.

Legal precedents are hierarchical in nature, the High Court being at the top of the hierarchy. Those involved in the claims determination and appeals processes should be familiar with the following material. Familiar as in studying it rather than just having browsed it.

Case (Hyperlinks over the internet to Austlii files.)	Court	Judges	Year	Pages
Repatriation Commission v Law [1981] HCA 57; (1981) 147 CLR 635 (16 October 1981)	High Court	Gibbs C.J.(1), Stephen(2), Mason(3), Murphy(4) and Aickin(5) JJ.	1981	11
Repatriation Commission v O'Brien [1985] HCA 10; (1985) 155 CLR 422 (27 February 1985)	High Court	Gibbs C.J.(1), Murphy(2), Wilson(1), Brennan(3) and Dawson(1) JJ.	1985	16
Australian Broadcasting Tribunal v Bond ("Bond Media case") [1990] HCA 33; (1990) 170 CLR 321 (26 July 1990)	High Court	Mason C.J.(1), Brennan (2), Deane (3), Toohey (4) and Gaudron (4) JJ	1990	60
Bushell v Repatriation Commission [1992] HCA 47; (1992) 175 CLR 408; (1992) 29 ALD 1 (7 October 1992)	High Court	Mason CJ(1), Brennan (4), Deane (2), Dawson (5), Toohey (3) and McHugh (3) JJ	1992	22
Byrnes v Repatriation Commission [1993] HCA 51; (1993) 177 CLR 564; (1993) 30 ALD 1 (15 September 1993)	High Court	MASON CJ, GAUDRON AND McHUGH JJ	1993	6
Roncovich v Repatriation Commission [2005] HCA 40; (2005) 222 CLR 115; (2005) 218 ALR 733; (2005) 79 ALJR 1366 (10 August 2005)	High Court	McHUGH, GUMMOW, KIRBY, CALLINAN AND HEYDON JJ	2005	35
Ena Mavis Deledio v Repatriation Commission [1997] FCA 1047 (10 October 1997)	FCA	HEEREY J	1997	23
Repatriation Commission v Ena Mavis Deledio [1998] FCA 391 (22 April 1998)	FCA	BEAUMONT , HILL AND O'CONNOR JJ	1998	20
Vincent Tze Ching Leung & Anor v Minister for Immigration & Multicultural Affairs [1997] FCA 1313 (28 November 1997)	FCA	BEAUMONT, HEEREY AND FINKELSTEIN JJ	1997	21
				214

Name Not hyperlinked over the internet	Year	Pages
GovernmentAgenciesJune2005.docx (Sec 33 1(AA) of AAT Act)	2005	19
Power to remake a decision.doc	1999	5
		24

Complete (a) OR (b) - A representative is not required to sign this form unless they are legally authorised to act for a claimant who is incapable of signing due to their physical or mental incapacity.

35 (a) No representative appointed

- I declare that the details I have given in this form are complete and correct.
- I am aware that there are penalties for making false statements.
- I authorise the Repatriation Commission and the Department of Veterans' Affairs to obtain medical or other information needed to process, determine or review this claim.
- I consent to the release of medical, clinical or other information to the Department by any medical practitioner, hospital, clinic, insurance company, Centrelink, the Department of Defence or other organisation, in relation to this claim or its review.

* Claimant's full name (please PRINT)

* Claimant's signature

35 (b) Representative appointed

- I declare that the details I have given in this form are complete and correct.
- I am aware that there are penalties for making false statements.
- I authorise the Repatriation Commission and the Department of Veterans' Affairs to obtain medical or other information needed to process, determine or review this claim.
- I authorise the nominated representative or organisation to act for me in respect of this claim and any reviews in respect of this or subsequent decisions. This authorisation will continue until I:
 - revoke this authorisation; or
 - nominate another representative or organisation to act for me.
- I consent to the release of medical, clinical or other information to the Department by any medical practitioner, hospital, clinic, insurance company, Centrelink, the Department of Defence or other organisation, in relation to this claim or its review.

* Claimant's full name (please PRINT)

* Claimant's signature

* If the veteran is unable to sign, due to physical or mental incapacity, the Declaration must be signed by the person signing the Authority to act on behalf of the claimant at **Question 36** over the page.

I submitted a large submission on 20th September 2016, to the Senate Inquiry, which wasn't published, except for one of the introductory letters. Two USBs which were returned, without any accompanying correspondence, were received by me on Thursday 23rd August 2017.

That submission was about:

1. DVA Corruption
2. DVA Lack of Knowledge
3. Gallantry Awards

That submission included supporting material for those three topics in the form of two USB sticks containing, in total 4010 files. Whilst this was a very large amount of material it was within their guidelines. Repat/DVA is a very large organisation and corruption and/or lack of knowledge are a consideration in, at least, some veterans' suicides.

In my view, non-acceptance of my material is tantamount to suppression of evidence. It must surely cast doubt on the validity of the report.

This submission is only about DVA Lack of Knowledge.

In November 1999, DVA's Disability Compensation Branch issued advice 4/99 titled "The Power to Remake a Decision". It was based on the Federal Court decision in [Vincent Tze Ching Leung & Anor v Minister for Immigration & Multicultural Affairs \[1997\] FCA 1313 \(28 November 1997\)](#).

Key topics are:

1. An "error of law" voids the purported decision. [Vincent Tze Ching Leung & Anor v Minister for Immigration & Multicultural Affairs \[1997\] FCA 1313 \(28 November 1997\)](#)
2. The above "error of law" creates another "error of law" which voids the delegation of authority to the decision maker, thereby voiding all other decisions made by that decision maker.
3. Advisory from Disability Compensation Branch No 4/99 - THE POWER TO REMAKE A DECISION – November 1999
4. Analysis of [Mountford and Repatriation Commission \[2013\] AATA 13 \(14 January 2013\)](#)
5. Analysis of submission from [442 Ms Cassandra Briggs.pdf](#) to Senate Inquiry into Veteran and Military suicides, concerning suicide of Afghanistan Veteran Jesse Bird.
6. ABT v Bond

The essence of my submission in relation to DVA's Lack of Knowledge is that delegated DVA staff are inadequately trained and consequently, because of one or more errors of law, many decisions are void. A further consequence is that delegations to those staff are void and all decisions made by those staff are void.

Additionally, “advocates”, normally members of ex service organisations, are trained by DVA. So, in most cases, the knowledge of “advocates” is no better than that of the DVA staff.

Resolution of these matters can only be properly determined by the High Court, from decisions already made. If the Government can afford the reported \$10 million for politicians involved in the dual citizenship cases, it can surely afford a similar amount in respect of veterans’ entitlements, for veterans who have fought and died for the preservation of democracy, which includes the “rule of law”.

The veterans’ legislation is counter intuitive – “care has to be taken to observe the precise language of the Act.”

30 KIRBY J.
Roncevich v Repatriation Commission (2005) HCA 40 (10 August 2005)
54. The point of this legislative history is that, in every case, care has to be taken to observe the precise language of the Act. It contains its own peculiarities and special features. Problems in the application of the Act cannot be avoided by the invocation of generalities about beneficial construction[53].

I’m not sure that even DVA would have the statistics on this but a majority of veterans achieve a TPI without having to rely on the High Court precedents. Perhaps 60 or 70 per cent.

Rather than the legislation being complex, those involved in the decision-making processes are inadequately trained. The necessary training is probably equivalent to one unit, for one year, at an appropriate university.

A disallowed disability can deny a veteran the “special rate” of pension i.e. TPI.

Veterans’ Entitlements Act 1986 Act No. 27 of 1986 as amended
24 Special rate of pension (1) This section applies to a veteran if: ... (c) the veteran is, by reason of incapacity from that war-caused injury or war-caused disease, or both, alone , prevented from continuing to undertake remunerative work that the veteran was undertaking and is, by reason thereof, suffering a loss of salary or wages, or of earnings on his or her own account, that the veteran would not be suffering if the veteran were free of that incapacity;

Mountford

If you are reading this on a computer, and you are connected to the internet, the hyperlinks below should take you to the “Austlii” copies.

[Mountford and Repatriation Commission \[2013\] AATA 13 \(14 January 2013\)](#)

[Ena Mavis Deledio v Repatriation Commission \[1997\] FCA 1047 \(10 October 1997\)](#)

[Repatriation Commission v Ena Mavis Deledio \[1998\] FCA 391 \(22 April 1998\)](#)

The Mountford case referred to above provides the best example, that I know, that shows how “dumbed down” the legal knowledge of those involved in the claims determination and appeals processes is.

The “Deledio” case is a landmark precedent. All of those involved in the claims determination and appeals processes should know the “Deledio Rules”. Mountford shows that not many have actually read “Deledio” and the appeal (both hyperlinked above).

What is Deledio about?

The claim, by the veteran’s widow, was that the veteran’s prostate cancer, the cause of his death, was attributable to his fatty diet whilst on active service. It was held to be so caused by virtue of VEA Sec 120 (1).

Guess what Mountford was about?

Exactly the same.

There are many cases cited in the AAT case of Mountford.
But not Deledio.

Suicide of Afghanistan Veteran Jesse Bird

Submissions have been made to the suicide inquiry in relation the case of the late Jesse Bird, an Afghanistan Veteran who committed suicide. His family and friends have been unusually open in discussing this matter and have blamed DVA for being the major cause of his suicide. I think they have a very strong case for holding this view and I am providing a detailed analysis of the critical legal aspects of his case.

In Australia the “Separation of Powers” is between “the Executive and the Government” and the “Judiciary”. Whilst there is a technical ability for veterans to appeal to the “Judiciary” costs are very high and there is very little knowledge of veterans’ law within the legal system. This is probably because of the prohibition on veterans being represented by “legal practitioner”. (VEA Sec 147).

Most of the action in veterans’ cases occurs in the “Executive and Government” section of the “Separation of Powers”. Precedents determined by the “Judiciary” are widely ignored, so the fundamental issue is to be able to argue these matters in the High Court. The “Executive and Government” sections of government either don’t know, or don’t apply, the laws (including relevant court precedents) correctly.

Suicide of Afganistan Veteran Jesse Bird

From submission [442 Ms Cassandra Briggs.pdf](#) to Senate Inquiry into Veteran and Military suicides.

I bring your attention to the story of Jesse Bird. Jesse deployed to Afghanistan in 2009, since his return in 2010 Jesse had been trying to get DVA to recognise his PTSD and other injuries, he received a rejection advising the reason “**because there is evidence the impairment you suffer from... posttraumatic stress disorder, major depressive disorder, alcohol abuse, is not considered permanent and stable at this time.**” On the 27th June 2017 Jesse took his own life, he surrounded himself with the letters from DVA so that he would be found with them. A prime example of yet another veteran failed by DVA.

1. The highlighted statement above contains an “error of law”.
2. The decision is void.
3. The correct decision would have been to allow the claim. I’ll explain the reasons in the following material.
4. The veteran is entitled to have the decision remade, correctly. However, in the sad circumstances of this case it, obviously, does not benefit the veteran.

The “error of law” is that the decision maker has not addressed the correct question.

Extract from MRCA Sec 335:

“the Commission must determine that the injury is a service injury, that the disease is a service disease, or that the death is a service death, as the case may be, unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination.”

The method for determining this matter is covered by High Court precedents from Bushell and Byrnes. The decision maker must be satisfied, to the “beyond reasonable doubt” standard of proof, “that there is no sufficient ground for making that determination.”

In Byrnes, no doctor had made a definitive diagnosis of the back injury, but one of them had opined that there was a “one in twenty” chance of that diagnosis. This was sufficient to satisfy the requirements of the legislation. (The legislation was Section 120 (1) of the Veterans’ Entitlements Act 1986 which is the same as Section 335 (1) of the MRCA).

The statement “**is not considered permanent and stable at this time**” does not satisfy MRCA Section 335(1). Obviously, the conditions existed, and, no matter how small, there is a chance that they are permanent.

Explanation

1. The relevant legislation is “**Military Rehabilitation and Compensation Act 2004**”
2. The relevant section of that legislation is “**335 Standard of proof for Commission and service chiefs**”
3. MRCA Sec 335 is identical with VEA Sec 120.

Relevant “Case law” in respect of VEA Sec 120 is:

4. BUSHELL v. REPATRIATION COMMISSION (1992) 175 CLR 408 F.C. 92/035 (1992) 29 ALD 1
5. BYRNES v. REPATRIATION COMMISSION (1993) 177 CLR 564 F.C. 93/037 (1993) 30 ALD 1
6. Ena Mavis Deledio v Repatriation Commission [1997] 1047 FCA (10 October 1997)
7. Repatriation Commission v Ena Mavis Deledio [1998] 391 FCA (22 April 1998)