VeRBosity **Special Issue 2003**

Special rate of pension

Analysis of the legislation and case-law concerning the special rate of pension

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with Nicky Langhorne

The cases discussed in this paper were delivered before November 2003.

This special issue of *VeRBosity* is published by the Veterans' Review Board to assist practitioners in one of the more complex areas of the jurisdiction. It surveys over 70 court cases as well as some of the more significant AAT cases that have considered the legislation relating to the special rate of pension. It is hoped that this issue of *VeRBosity* will be of assistance to practitioners and may be the forerunner of future special issues on various topics. These special issues will be in addition to the usual quarterly issues of *VeRBosity*.

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The views expressed in this paper are those of the authors and should not be attributed to the Veterans' Review Board.

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History of the special rate

The special rate of pension was first introduced in the *Australian Soldiers' Repatriation Act 1920* upon the introduction of that Act in 1920. The test to be applied in that Act was:

> The Special Rate of Pension may be granted to members of the Forces who have been blinded as the result of War Service, and to members who are totally and permanently incapacitated (*i.e.* incapacitated for life to such an extent as to be precluded from earning other than a negligible percentage of a living wage).[1]

This test did not change until 1985 when certain Federal Court decisions interpreting these words appeared to be undermining the original intention of those provisions such that veterans who had had a full working life were able to fulfil these requirements, and the special rate of pension began to be seen by some as a type of superannuation scheme for veterans. Clearly, when this rate of pension was introduced in 1920, this was not envisioned. In the Second Reading Speech to the Australian Soldiers' Repatriation Bill 1920, the Minister, Senator Millen said:

> I pass from that to refer to what is done for the benefit of those most seriously stricken men, the totally and permanently incapacitated. These terms are used with varying meaning, but are interpreted literally by the Department of Repatriation. In view of the nature of the war, the number of our men totally incapacitated is fortunately smaller than might have been expected. These men include men who are hopelessly crippled or paralyzed—spine cases—men to whom we can offer no hope of restoration to health.
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> …
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> There is a special schedule in the new Bill for the blinded, and for that class to whom I referred earlier, that is, the totally and permanently incapacitated. Provision is made to allow these a pension of £4 per week. In view of the severity of their affliction, I venture to believe that the Senate will not regard that sum as out of the way.
>
> … the number of those so seriously injured is very much less than one might have expected, bearing in mind the character of the war. The total number of blinded is not more than 100. … The maximum number of the totally and permanently incapacitated will not exceed 150.

The Federal Court first examined the special rate provisions in any detail in *Bowman v. Repatriation Commission*.[2] In that case, Ellicott J held that the legislation required an assessment of the effect the applicant's incapacity had on his or her ability to earn, and that this could be gauged by reference to the labour market reasonably accessible to the applicant. In some cases it may be obvious that a person's incapacity renders him or her incapable of earning a living wage. In others what a person could earn would depend on evidence of opportunities in the market place. It was not enough simply to form the view that in a physical sense the veteran could still undertake work. The incapacity may have destroyed or impaired the veteran's earning capacity in the market place.

[1] First paragraph of the Second Schedule to the *Australian Soldiers' Repatriation Act 1920*.

[2] (1981) 34 ALR 556

On appeal, the Full Federal Court in *Repatriation Commission v. Bowman*[3] clarified the special rate test by saying that, in assessing the extent of disablement by reference to earning ability it is fundamental that any inability to earn should be due to the war related disability. If the circumstances proved in a particular case that the veteran could not earn even if he or she were not suffering from the war related disability, then the veteran's claim for the special rate of pension would fail. It would be sufficient in testing whether an veteran's inability to earn is due to his or her war related disability to consider whether the veteran would be equally unable to earn if he or she were free of that disability.

In *Smith v. Repatriation Commission*,[4] Davies J held that the test looks to the effect that the war related incapacity has upon the particular veteran. The question was not what a hypothetical person would have been able to do but what incapacity the particular veteran had to earn in the light of the particular veteran's war related incapacity. If there was remunerative work of a type that the veteran could reasonably obtain, then it was proper to identify what type of work that was and to investigate whether the veteran physically could do the work and whether the veteran would be paid for it. If the veteran could not obtain remunerative work, it was proper to consider whether this was due to his or her war related disabilities or to some other cause, such as age.

In *Delkou v. Repatriation Commission*,[5] Wilcox J held that a veteran did not have to be totally incapacitated within the meaning of Schedule 1 to the Act (the equivalent of 100% degree of incapacity under the *Veterans' Entitlements Act 1986*) to qualify for the special rate pension. This was because the concept of total incapacity in Schedule 2 was not the same as that in Schedule 1.

In 1985, the special rate test was replaced with substantially the same tests that currently apply. These amendments were in the context of an Economic Statement by the Treasurer in which it was indicated that a tightening up of the criteria for special rate was required. Those tests were first inserted into the *Repatriation Act 1920*, and were then re-enacted in the Veterans' Entitlements Act in 1986.

The special rate tests introduced in 1985 required that a prerequisite to obtaining this rate of pension was that the veteran had to have a degree of incapacity of 100%. In 1988, legislation was enacted to reduce the requisite degree of incapacity to 70% (with effect from 22 December 1988).

The next major amendments were in 1994 (also in a restrictive budgetary context). Prior to the 1994 amendments of section 24, there were no special rules for veterans who were over 65 years of age. The 1994 legislation introduced restrictive rules for over 65s. However, those rules only apply to claims or applications made on or after 1 June 1994. The pre-1994 rules apply to claims or applications made before that date. Those pre-1994 rules still apply to veterans who are under 65 at the application day (that is, the date on which the claim or application for increase in pension was made) but who turn 65 during the assessment period.

Further amendments were made in 1997 upon the introduction of the Veterans' Vocational Rehabilitation Scheme.

The legislation

The sections directly relevant to the special rate of pension are sections 24, 24A, 25 and 28. They provide as follows:

[3] (1981) 38 ALR 650

[4] (1981) 1 RPD 238

[5] (1984) 2 RPD 327

Special rate of pension

24. (1) This section applies to a veteran if:

(aa) the veteran has made a claim under section 14 for a pension, or an application under section 15 for an increase in the rate of the pension that he or she is receiving; and

(aab) the veteran had not yet turned 65 when the claim or application was made; and

(a) either:

(i) the degree of incapacity of the veteran from war-caused injury or war-caused disease, or both, is determined under section 21A to be at least 70% or has been so determined by a determination that is in force; or

(ii) the veteran is, because he or she has suffered or is suffering from pulmonary tuberculosis, receiving or entitled to receive a pension at the general rate;

(b) the veteran is totally and permanently incapacitated, that is to say, the veteran's incapacity from war-caused injury or war-caused disease, or both, is of such a nature as, of itself alone, to render the veteran incapable of undertaking remunerative work for periods aggregating more than 8 hours per week; and

(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; and

(d) section 25 does not apply to the veteran.

(2) For the purpose of paragraph (1)(c) —

(a) a veteran who is incapacitated from war-caused injury or war-caused disease, or both, shall not be taken to be suffering a loss of salary or wages, or of earnings on his or her own account, by reason of that incapacity if —

(i) the veteran has ceased to engage in remunerative work for reasons other than his or her incapacity from that war-caused injury or war-caused disease, or both; or

(ii) the veteran is incapacitated, or prevented, from engaging in remunerative work for some other reason; and

(b) 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 he or she has been genuinely seeking to engage in remunerative work, that he or she would, but for that incapacity, be continuing so to seek to engage in remunerative work and that that incapacity is the substantial cause of his or her inability to obtain remunerative work in which to engage, the veteran shall be treated as having been prevented by reason of that incapacity from continuing to undertake remunerative work that the veteran was undertaking.

(2A) This section applies to a veteran if:

(a) the veteran has made a claim under section 14 for a pension under section 14 for a pension, or an application under section 15 for an increase in the rate of the pension that he or she was receiving; and

(b) the veteran had turned 65 before the claim or application was made; and

(c) paragraphs (1)(a) and (1)(b) apply to the veteran; and

(d) the veteran is, because of incapacity from war-caused injury or war-caused disease or both, alone, prevented from continuing to undertake the remunerative work ("last paid work") that the veteran was last undertaking before he or she made the claim or application; and

(e) because the veteran is so prevented from undertaking his or her last paid work, the veteran is suffering a loss of salary or wages, or of earnings on his or her own account, that he or she would not be suffering if he or she were free from that incapacity; and

(f) the veteran was undertaking his or her last paid work after the veteran had turned 65; and

(g) when the veteran stopped undertaking his or her last paid work, the veteran:

(i) if he or she was then working as an employee of another person—had been working for that person, or for that person and any predecessor or predecessors of that person; or

(ii) if he or she was the working on his or her own account in any profession, trade, employment, vocation or calling—had been so working in that profession, trade, vocation or calling;

for a continuous period of at least 10 years that began before the veteran turned 65; and

(h) section 25 does not apply to the veteran.

(2B) For the purposes of paragraph (2A)(e), a veteran who is incapacitated from war-caused injury or war-caused disease or both, is not taken to be suffering a loss of salary or wages, or of earnings on his or her own account, because of that incapacity if:

(a) the veteran has ceased to engage in remunerative work for reasons other than his or her incapacity from that war-caused injury or war-caused disease, or both; or

(b) the veteran is incapacitated, or prevented from engaging in remunerative work for some other reason.

(3) This section also applies to a veteran who has been blinded in both eyes as a result of war-caused injury or war-caused disease, or both.

(4) Subject to subsection (5), the rate at which pension is payable to a veteran to whom this section applies is $571.70 per fortnight.

(5) If section 115D applies to a veteran, the rate at which pension is payable to the veteran is the amount specified in subsection (4) less the pension reduction amount worked out under that section.

Continuation of rates of certain pensions

24A.(1) Subject to subsection (2), if the Commonwealth is or becomes liable to pay a pension to a veteran at the rate applicable under section 23 or 24, that rate continues, while a pension continues to be payable to the veteran, to apply to the veteran unless:

(a) the decision to apply that rate of pension to the veteran would not have been made but for a false statement or misrepresentation made by a person;

(b) in the case of a veteran to whom section 23 applies:

(i) the veteran is undertaking or is capable of undertaking remunerative work of a particular kind for 50% or more of the time (excluding overtime) ordinarily worked by persons engaged in work of that kind on a full time basis; or

(ii) in a case where subparagraph (i) is inapplicable to the work which the veteran is undertaking or is capable of undertaking—the veteran is undertaking or is capable of undertaking that work for 20 or more hours per week; or

(c) in the case of a veteran to whom section 24 applies—the veteran is undertaking or is capable of undertaking remunerative work for periods aggregating more than 8 hours per week.

(2) Paragraphs (b) and (c) do not apply to a veteran if the veteran is undertaking a rehabilitation scheme under the Veterans' Vocational Rehabilitation Scheme or section 115D applies to the veteran.

Temporary payment at special rate

25. (1) Where the Commission is satisfied that:

(a) a veteran is temporarily incapacitated from war-caused injury or war-caused disease, or both; and

(b) if the veteran were so incapacitated permanently, the veteran would be a veteran to whom section 24 applies;

the Commission shall determine the period during which, in its opinion, that incapacity is likely to continue and this section applies to the veteran in respect of that period.

(2) Where this section applies to a veteran in respect of a period, the rate at which pension is payable to the veteran in respect of that period is the rate specified in subsection 24(4).

(3) The Commission may, under this section:

(a) determine a period that commenced before the date on which the determination is made; and

(b) determine a period in respect of which a veteran that commenced or commences upon the expiration of a period previously determined by the Commission under subsection (1) in respect of the veteran.

Capacity to undertake remunerative work

28. In determining, for the purposes of paragraph 23 (1) (b) or 24 (1) (b), whether a veteran who is incapacitated from war-caused injury or war-caused disease, or both, is incapable of undertaking remunerative work, and in determining for the purposes of section 24A whether a veteran who is so incapacitated is capable of undertaking remunerative work, the Commission shall have regard to the following matters only:

(a) the vocational, trade and professional skills, qualifications and experience of the veteran;

(b) the kinds of remunerative work which a person with the skills, qualifications and experience referred to in paragraph (a) might reasonably undertake; and

(c) the degree to which the physical or mental impairment of the veteran as a result of the injury or disease, or both, has reduced his or her capacity to undertake the kinds of remunerative work referred to in paragraph (b).

General comments

In introducing new special rate legislation in 1985, the Acting Minister for Veterans' Affairs said:[6]

> Since 1920, there has been a special rate of disability pension payable in circumstances where, because of total and permanent incapacity resulting from war service, a veteran has been unable to resume or to continue in civil employment. The

[6] *Parliamentary Debates, House of Representatives*, 17 May 1985 at pp.2645-6.

special or TPI rate pension was designed for severely disabled veterans of a relatively young age who could never go back to work and could never hope to support themselves or their families or put away money for their old age. It was never intended that the TPI rate would become payable to a veteran who, having enjoyed a full working life after war service, then retires from work possibly with whatever superannuation or other retirement benefits are available to the Australian work force. Determining authorities have found the application of the present legislative provisions difficult because the provisions, unchanged since 1920, contain outmoded and imprecise terms. The amendments clarify the eligibility criteria and make it clear that to qualify for a TPI pension a veteran must be eligible for the 100 per cent general rate pension. In addition, the TPI rate pension can become payable only when a veteran is totally and permanently disabled by accepted disabilities and is thereby precluded from continuing to engage in remunerative work. If a person has had the usual span of a working life or has retired voluntarily or has left employment for reasons other than accepted disabilities, a TPI pension is not payable. It would be in only very rare cases that any veteran beyond the normal retirement age could be eligible for this pension. Special provision is made by the Bill to cover veterans who are under 65 years of age, are unemployed, and are genuinely seeking to engage in remunerative work.

For a person to be eligible for the special rate of pension, all of the criteria set out in subsection 24(1) must be met at the same time at any point in time within the "assessment period": *Ridyard v. Repatriation Commission*[7]; *Servos v. Repatriation Commission*[8]; *Birtles v. Repatriation Commission*[9].

the assessment period

Subsection 19(9) defines the "assessment period" as the period starting on the "application day" and ending when the claim or application is determined. The "application day" is the day on which the claim (under s.14) or the application for increase in pension (under s.15) was made. The date on which the claim or application is determined is the date on which either the Repatriation Commission, the Veterans' Review Board, or the Administrative Appeals Tribunal determines the matter before it. Thus the assessment period is of a different length, but has the same starting point, depending at which level of review the matter is being determined.

It is irrelevant that the veteran might have met the criteria before the assessment period. Unless the veteran meets the criteria at a time during the assessment period, the veteran cannot be entitled to the special rate of pension: *Banovich v. Repatriation Commission*[10]; *Repatriation*

[7] The case note on this case at (1990) 21 ALD 727 does not contain the text of the judgment. The relevant passage from the judgment is at page 1 of the published reasons for judgment, where Davies J stated, "It is an established principle which is now enshrined in the definition of 'assessment period' and 'application day' and other provisions of s.19 of the VET Act (sic) as amended by Act No.134 of 1988 that compliance with the specified criteria must be established as at the date of the lodgment of the claim or during a relevant time in the assessment period thereafter."

[8] (1995) 129 ALR 509 at pp.518-519 (Spender J)

[9] (1991) 33 FCR 290 at p.299, 105 ALR 359 at 368

[10] (1986) 69 ALR 395

Commission v. Smith, M. J.[11]. In *Repatriation Commission v. Braund*[12], Pincus J said:

> It was not enough to hold that in 1975 the applicant was prevented from continuing to work because of his war-caused disabilities. The critical question, on these facts, was whether, as at 28 February 1984 [the application day], the respondent was within the description set out in s.24(1)(c) of the VE Act. He might well have retired because of war-caused incapacity in 1975, but nevertheless not have been able to show that his situation at the age of 70, nine years later, was that he was prevented from working by that incapacity alone. If the respondent's position in 1984 was that, incapacity or no, he would probably not have worked for a living, then in my opinion the Tribunal should not have held him entitled to the special rate pension.

A new section 19 was introduced into the Act in 1988. The Explanatory Memorandum to the Bill that introduced that section stated:[13]

> [30] Eligibility for pension at the intermediate or special rate under sections 23 or 24 of the Principal Act must be established as at the 'application day' — the date a claim for pension or an application for an increase in the rate of pension is made. This requirement was inserted by the *Social Security and Veterans' Entitlements Amendment Act (No.2) 1987* as part of a package of measures intended to ensure, amongst other matters, that grants of intermediate and special rate pensions could not be made for limited periods.
>
> [31] In response to the Reports of the VEA Monitoring Committee, it is now proposed to replace this framework with provision for the assessment of pension during the period from lodgement of a claim or application up to and including the date of determination by the Repatriation Commission or relevant review body. Subject to the protective provisions of section 24A of the Principal Act in relation to intermediate and special rate pensions, all eligibility factors would be taken into account in assessing the rate or rates of pension payable from time to time during the assessment period.
>
> [32] In other words, a claimant for intermediate or special rate pension would qualify where he or she met all the eligibility criteria at some day between the date of lodgement and the date of the decision, subject only to improvement in health and the capacity to work.
>
> ...
>
> [35] These changes to the powers and procedures of the Repatriation Commission would not alter the nature of the existing eligibility criteria for the intermediate and special rate pensions provided for in sections 23 and 24 of the Principal Act, as interpreted in the AAT and Federal Court decisions of *Banovich* and *Lucas*.

These amendments also effectively reversed an obiter statement in *Repatriation Commission v. Smith, M. J.*[14] that incorrectly indicated that the special rate criteria were to be assessed as at the earliest date from which pension could be paid (up to three

[11] (1987) 15 FCR 327, 74 ALR 537

[12] (1991) 23 ALD 591

[13] at pp.10-11

[14] (1987) 15 FCR 327, 74 ALR 537

months before the claim was made). *Smith's* case purported to rely on *Banovich* for this view, but there is nothing in *Banovich* that tends to support it. In the Minister's Second Reading Speech to the Bill introducing these amendments in 1988, he said:

> The Federal Court took the view that the eligibility criteria must be met by a veteran on a continuing basis and that such a pension was not payable after attaining normal retirement age or indefinitely.
>
> In order to overcome this interpretation, the Bill provides two related changes. The first will ensure that initial eligibility for the grant of T&PI or intermediate rate pension is not to be determined on a continuing basis.
>
> Eligibility is to be determined by reference to whether a veteran meets the requirements of section 23 or 24 on the date of lodgement of a pension claim or application.
>
> The amendments will prevent account being taken of alterations in the veteran's circumstances, subsequent to lodging the claim or application, which might adversely affect eligibility. This will avoid the possibility of a grant of T&PI or intermediate rate pension that is made being limited by the determining body to a specified period, up to say retirement age, as was adverted to by the Federal Court in the *McGuire* case.

These amendments (made after *Smith's* case) clearly indicate that the special rate criteria are to be assessed as at the application day and not the earliest date from which pension could be paid. Nevertheless, subsection 20 (which permits payment of pension up to three months before the claim was made) provides, in subsection (3) that "Nothing in this section empowers the Commission to approve payment of a pension to a person from a date before the person became eligible to be granted the pension." Thus, for special rate pension to be backdated to a date within the three month period before the claim was made, the person would have to have been eligible to receive that rate of pension at that time. This means that the special rate criteria need to be met at this earlier time, but the veteran is not eligible to be granted pension at that rate unless the veteran also met all of the special rate criteria on or after the application day.

Subsection 19(9) had a minor amendment in 1995 and a more substantial amendment was made to the section in 2000, to bring the pension payment scheme for disabililty pension in line with that applying for service pensions. The amendments changed the date of effect rule so that grants and variations of disability pension would commence, or would be varied from the actual date on which liability was determined to arise rather than from the next pension payday. Previously the legislation provided for payments to be calculated and made from the pension payday following the actual date of effect of acceptance of liability or variation in pension rate.

<u>incapacity from war-caused injury or disease</u>

The criteria in section 24 relate to incapacity from war-caused injury or war-caused disease, or both. The section presupposes that a determination has already been made that an injury or disease has been war-caused. Assessment of the criteria within the section does not permit a new decision to be made in respect of whether or not an injury or disease is war-caused for the purposes only of that section. Where it is suggested that a new injury or disease is war-caused (for example, because it is causally related to, or has been contributed to by, an already accepted

war-caused injury or disease), the veteran must make a new claim in respect of that new injury or disease. It cannot be taken into account for the purposes of the section unless it has been the subject of a claim and has been determined under the Act to be war-caused: see *Owen v. Repatriation Commission*[15]; *Meade v. Repatriation Commission*[16].

Degree of incapacity

Subparagraph 24(1)(a)(i)

(i) the degree of incapacity of the veteran from war-caused injury or war-caused disease, or both, is determined under section 21A to be at least 70% or has been so determined by a determination that is in force; or

The 70% degree of incapacity requirement only applies in relation to assessment periods on or after 22 December 1988, the date of commencement of amendments made by s.15 of the *Veterans' Legislation Amendment Act 1988*. For periods prior to that time 100% degree of incapacity is required: see *Walshe v. Repatriation Commission*[17].

It is important to note that it is a "degree of incapacity" *not* a rate of pension within the general rate that is required by subparagraph 24(1)(a)(i). They are not the same. Despite its name, it is the function of the *Guide to the Assessment of Rates of Veterans' Pensions* (GARP) to determine a degree of incapacity, not a rate of pension: see ss.21A and 29.

The Act requires that a degree of incapacity be determined before any rate of pension is decided. The next step is to determine whether or not the veteran is entitled to the intermediate or special rate of pension. Only if that question is answered in the negative is a rate of pension within the general rate determined: see subsection 22(1) and section 21A. Therefore, a decision-maker cannot make an interim assessment of pension within the general rate pending resolution of an issue concerning eligibility for the special or intermediate rate of pension.

Pulmonary tuberculosis

Subparagraph 24(1)(a)(ii)

(ii) the veteran is, because he or she has suffered or is suffering from pulmonary tuberculosis, receiving or entitled to receive a pension at the general rate;

Subparagraph (ii) is an alternative to the 70% degree of incapacity test. Prior to November 1978, veterans who suffered from pulmonary tuberculosis were automatically eligible for pension at 100% of the general rate, notwithstanding that their actual degree of incapacity might have been less than that rate. Legislation introduced in 1982 preserved their eligibility to pension at that rate provided that pension had been granted before November 1978.

At the end of this paper is a reprint of a 1986 article concerning the pulmonary tuberculosis provisions. Note that para 24(1)(a) was amended in 1988 to insert this subpara 24(1)(a)(ii), thus the discussion at the end of that article concerning para 24(1)(a) and the effect of the transitional provisions is now irrelevant.

[15] (1995) 38 ALD 241, at p.249

[16] (1997) 13 *VeRBosity* 30, Emmett J, where the Tribunal found that the veteran's alcoholism (which resulted in him losing his job) had not been accepted as being war-caused, while there was medical evidence that it was secondary to the veteran's war-caused anxiety state.

[17] (1989) 18 ALD 285

The 8 hour work test

Paragraph 24(1)(b)

(b) the veteran is totally and permanently incapacitated, that is to say, the veteran's incapacity from war-caused injury or war-caused disease, or both, is of such a nature as, of itself alone, to render the veteran incapable of undertaking remunerative work for periods aggregating more than 8 hours per week; ...

This test requires an examination of the veteran's incapacity from war-caused injury or disease to determine whether or not that incapacity is such, of itself alone, to render the veteran incapable of undertaking remunerative work for more than 8 hours per week. This does not require an examination of other causes that might render the veteran unable to undertake remunerative work, but merely whether the war-caused disabilities, on their own, are sufficient to render him or her incapable of undertaking such work.

There is a distinction between "incapacity" used in this sense and the way in which it is used in paragraph 24(1)(a). In paragraph (b), it is only concerned with the veteran's incapacity to undertake remunerative work, whereas, the degree of incapacity determined for the purposes of paragraph (a) "is not concerned primarily with incapacity for work but looks to incapacity which takes into account the effect of the relevant disability upon the whole of the veteran's life, not only his working life, but also his social and family life": *Apthorpe v. Repatriation Commission*[18]; *Chambers v. Repatriation Commission*[19], *Hill v. Repatriation Commission*.[20]

Section 28 provides assistance in determining whether a veteran is incapable of undertaking remunerative work by setting out the *only* matters that regard can be had to in deciding that question. The section provides as follows:

Capacity to undertake remunerative work

28. In determining, for the purposes of paragraph 23 (1) (b) or 24 (1) (b), whether a veteran who is incapacitated from war-caused injury or war-caused disease, or both, is incapable of undertaking remunerative work, and in determining for the purposes of section 24A whether a veteran who is so incapacitated is capable of undertaking remunerative work, the Commission shall have regard to the following matters only:

(a) the vocational, trade and professional skills, qualifications and experience of the veteran;

(b) the kinds of remunerative work which a person with the skills, qualifications and experience referred to in paragraph (a) might reasonably undertake; and

(c) the degree to which the physical or mental impairment of the veteran as a result of the injury or disease, or both, has reduced his or her capacity to undertake the kinds of remunerative work referred to in paragraph (b).

Paragraph 28 (a)

(a) the vocational, trade and professional skills, qualifications and experience of the veteran; ...

The word, "experience" in paragraph 28(a) is not limited to job experience, and "vocational qualification" may encompass a person's physical fitness. Thus, even

[18] (1987) 77 ALR 42 at p.49

[19] (1995) 129 ALR 219 at p.230

[20] [2000] FCA 929

though a veteran's job experience has not included physical labour, if he or she is physically and mentally able to do such work, then the veteran could be said to have the skills, qualifications and experience to undertake particular remunerative work involving physical labour: *Chambers v. Repatriation Commission* (Whitlam J)[21]; *Chambers v. Repatriation Commission* (Davies, Moore and Sackville JJ)[22]. While a veteran might be psychologically unable to continue to undertake a particular job, he or she might still be physically fit to undertake a low stress job involving manual labour.

In *Chambers v. Repatriation Commission*[23], Moore and Sackville JJ (with whom Davies J agreed) said:

> The phrase 'remunerative work' is defined in the widest terms, to mean 'any remunerative activity'. Thus the ultimate inquiry to which s.28 is directed is whether the veteran's war-caused capacity (sic), of itself, has rendered that veteran incapable of undertaking *any remunerative activity*. … The ultimate inquiry is not expressed to be whether the veteran's war-caused incapacity has rendered him or her incapable of undertaking employment of the kinds for which his previous work history provided training or relevant experience. (the Court's emphasis)

In the *Chambers'* case, their Honours indicated that paragraph 28(a) is to be given a broad meaning. They said[24]:

> A person's skills are not confined to those acquired in formal training or by virtue of experience in particular employment. They include innate aptitude for tasks and abilities acquired or developed independently of employment or training. … Similarly 'qualifications' … is not confined to qualifications obtained as the result of formal training or work experience. Again a person's experience is not necessarily restricted to that acquired in employment or formal training.
>
> Of course the only skills, qualifications and experience that may be taken into account for the purpose of determining the veteran's opportunities for remunerative work are those that can be described as 'vocational, trade and professional' in character.

In considering the application of section 28, it is important to consider the reasonableness of the veteran undertaking the remunerative work for which he or she is notionally skilled, qualified or experienced. In *Chambers'* case, their Honours said:[25]

> A broad view of s.28(a) does not produce the result that opportunities for remunerative work must be considered, even where it would be unreasonable for a person with the veteran's skills, qualifications and experience to undertake that work. Section 28(b) requires the question of reasonableness to be addressed.

Paragraph 28 (b)

(b) the kinds of remunerative work which a person with the skills, qualifications and experience referred to in paragraph (a) might reasonably undertake; ...

It is important to recognise that this test is not concerned merely with the particular kind of work that the veteran had been undertaking (compare with s24(1)(c)), but

[21] (1994) 33 ALD 473

[22] (1995) 129 ALR 219

[23] (1995) 129 ALR 219 at p.231

[24] ibid, at p.234

[25] ibid, at p.236

it requires an examination of all of the different kinds of work that a hypothetical person with the relevant skills and experience of the veteran might reasonably undertake.

In *Repatriation Commission v. Buckingham*[26], the Federal Court noted that paragraph 28(b) is a test concerning a hypothetical person possessing the veteran's skills and experience. The Court also indicated that the kinds of remunerative work that could be postulated must be types of work that would be reasonably available, but that this did not require considerations as to the state of the labour market. The Court said:

> Section 28(b) requires the decision-maker to undertake a different kind of inquiry into the types of employment which a hypothetical person with the veteran's skills, qualifications and experience, as found under s.28(a), could reasonably undertake. Unlike that under s.28(a), this inquiry is not directed to the actual subject veteran, but to a hypothetical individual possessing the subject veteran's skills and experience. …
>
> That consideration cannot be undertaken in a vacuum. In order to decide what kinds of remunerative work the postulated hypothetical person might reasonably undertake, the Tribunal has to ask itself what kinds of remunerative work are reasonably 'available' to a person in the position hypothesised'. This entails the taking of some notice of the general level of demand by employers for the performance of work of the kind under consideration.
>
> The Tribunal made no comment at all on its perception of the prevailing state of the labour market. Rather, it seems to have concluded that Mr Buckingham was incapable of reasonably obtaining remunerative work in the open market whatever might be the fluctuations in demand in that market from time to time. By simply referring to the open market as the context in which the reasonably availability of remunerative work for somebody with Mr Buckingham's skills and experience has to be assessed, the Tribunal was not, in my view, erroneously having regard to a factor like 'depressed labour conditions', which Moore and Sackville JJ identified in *Chambers* at p.218 as excluded by s.28

In assessing the reasonableness of whether the veteran might undertake certain kinds of remunerative work, the AAT has, on occasion, held that it would be unreasonable to expect a person to undertake work that was demeaning. *Re W. D. Davis and Repatriation Commission*;[27] *Re McVilly and Repatriation Commission*;[28] *Re K. F. Martin and Repatriation Commission*.[29]

Paragraph 28 (c)

(c) the degree to which the physical or mental impairment of the veteran as a result of the injury or disease, or both, has reduced his or her capacity to undertake the kinds of remunerative work referred to in paragraph (b).

Paragraph 28(c) requires an examination of the degree to which the physical or mental impairment of the veteran from war-caused injury or disease has reduced his or her capacity to undertake remunerative work. Thus the impact of the war-caused disabilities on the

[26] (1996) 12 *VeRBosity* 19

[27] (1987) 3 *VeRBosity* 51

[28] (1987) 3 *VeRBosity* 52

[29] (1987) 3 *VeRBosity* 143

capacity to undertake the remunerative work for which the veteran is skilled, qualified and experienced must be determined by reference to how many hours per week he or she can undertake such kinds of work.

If the veteran cannot perform such kinds of work for more than 8 hours per week then para 24(1)(b) will be met.

The 'prevented from continuing' test and the 'loss' test

Paragraphs 24(1)(c)

(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.

Paragraph 24(1)(c) contains a number of important concepts. Two of these are further defined in subsection 24(2), namely:

- "prevented from continuing to undertake remunerative work that the veteran was undertaking"; and
- "suffering a loss of salary or wages, or of earnings on his or her own account".

In *Forbes v. Repatriation Commission*,[30] R D Nicholson J said:

> [Paragraph 24(1)(c)] is best understood by dividing it into its two limbs and relating those limbs to the relevant portions of what follows in s 24(2).
>
> The first limb of s 24(1)(c) … must be read subject to the application of s 24(2)(b) …
>
> The second limb of s 24(1)(c) … is to be read in conjunction with s 24(2)(a) …

Paragraph 24(2)(a) further defines the second limb, and paragraph 24(2)(b) deems the first limb to have been met in respect of certain veterans under the age of 65 in certain circumstances. Both of limbs must be met in every case: *Repatriation Commission v. Boyle*.[31]; *Fry v. Repatriation Commission*[32]. However, para 24(2)(b) only applies to those cases where the veteran has been genuinely seeking to obtain remunerative work and has been unable to continue so to do substantially because of incapacity from war-caused injury or disease. It is not a further test, but an alternative to the first limb of s 24(1)(c) in such cases: *Re Hornery and Repatriation Commission*;[33] *Re Sanfead and Repatriation Commission*;[34] *Re Harris and Repatriation Commission*;[35] *Magill v. Repatriation Commission*.[36]

In *Moorcroft v Repatriation Commission*,[37] Dowsett J said:

> [T]he two paragraphs of s 24(2) are quite independent and relate to different aspects of s 24(1)(c). Paragraph 24(2)(a) relates to the circumstances in which a person will be taken to be suffering a loss of

[30] (2000) 171 ALR 131

[31] (1997) 47 ALD 637

[32] (1997) 47 ALD 776 (note only), 13 *VeRBosity* 82

[33] (1998) 52 ALD 317

[34] (1986) 11 ALN 77

[35] (1998) 51 ALD 790

[36] [2002] FCA 744

[37] (1999) 29 AAR 482, 58 ALD 143, 15 *VeRBosity* 45

> salary, wages or earnings, for the purposes of the second aspect of s 24(1)(c). Paragraph 24(2)(b) deems a person to be incapacitated from continuing to undertake remunerative work which he has previously undertaken in certain circumstances, despite the fact that he has not actually undertaken such work. This relates to the first aspect of s 24(1)(c).

alone

The incapacity referred to in paragraph (c) is the same incapacity referred to in paragraph (b): *Banovich v. Repatriation Commission*[38]. It must be that incapacity, "alone" (ie, the *only* cause), that prevents the veteran (at the relevant time in the assessment period) from continuing to undertake remunerative work that he or she was undertaking. In *Cavell v. Repatriation Commission*[39], Burchett J held that:

> [T]he true task [of the tribunal is] to make a practical decision whether the veteran's loss of remunerative work is attributable to his service-related incapacities, and not to something else as well. It is a decision that should not be made upon nice philosophical distinctions, but with an eye to reality, and as a matter in respect of which common sense is the proper guide.

In that case, the Court criticised the Tribunal for substituting for the word, "alone", the phrase, "sole, unique and absolute cause". At p.540, the Court indicated that a theoretical, "no matter how small" test would be wrong. Thus some other reason that was insignificant might not disentitle a person to the special rate. Also see *Magill v. Repatriation Commission*.[40]

In *Jackman v. Repatriation Commission*[41], Tamberlin J said that war-caused disabilities must be the "only reason" for not being in remunerative work and that the approach to this question is to be guided by commonsense. The Court said:

> The AAT had to determine, to its reasonable satisfaction, whether the applicant's war-caused disabilities were the only reason for him not being in remunerative employment. Burchett J in *Cavell* stated that this determination is not to be made upon 'nice philosophical distinctions', equally it is not to be made upon complex calculations of the probability that an intervening event may have occurred. The approach is to be guided by commonsense with an 'eye to reality'.[42]

In *Turnbull v. Repatriation Commission*[43], the Federal Court stated:

> If the veteran has ceased to engage in remunerative work for reasons other than the incapacity from the war-caused injury or disease, or is incapacitated or prevented from engaging in remunerative work for some other reason, the veteran shall be taken not to have met the requirements of s.24(1)(c).

The Court in *Turnbull v. Repatriation Commission*[44] noted that the AAT had found that "the pain and disability in the applicant's shoulders and wrists played a part in preventing the applicant from engaging in remunerative work; that pain and disability did not result from a war-

[38] (1987) 69 ALR 395 at p.402

[39] (1988) 9 AAR 534 at p.539

[40] [2002] FCA 744

[41] (1997) 13 *VeRBosity* 73, Tamberlin J

[42] at p.11 of the judgment

[43] (1997) 13 *VeRBosity* 56, Merkel J

[44] at p.7 of the judgment

caused injury; although the applicant's war-caused injuries had a more substantial effect than the non-war caused injuries in preventing the applicant from engaging in remunerative work, both contributed to his loss of earnings". The Court then said that the "findings were open on the evidence and, as a matter of law, warranted the refusal of the application under s.24(1)(c)". The Court also accepted the statement in *Cavell v. Repatriation Commission*[45] quoted above as stating "the true task for the AAT".[46] Thus, if some other factor has "played a part" in preventing the veteran from continuing to undertake remunerative work, the veteran cannot meet s.24(1)(c).

In *Forbes v. Repatriation Commission*,[47] R D Nicholson J said that it was correct to say that, "any factor having employment consequences which played a part in the applicant's inability to work or to obtain and hold remunerative employment, is sufficient to displace the applicant's case for pension at the special rate." He rejected a submission that a finding that a war-caused injury or disease was of such a nature that, on its own, it rendered the veteran incapable of working more than eight hours a week did *not* mean that "the threshold is crossed for the purposes of s 24(1)(c) and it does not matter that there may be other non war-caused conditions". He said:

> The fact that a non war-caused condition is not alone causative of [preventing the veteran from continuing to undertake work that he had undertaken] does not prevent it having that effect in combination with the war-caused condition. …
>
> [I]t is possible that the war-caused condition will be by far and away the more dominant of the causes of the preventative effect where there is also present a non war-caused condition having such effect in combination. The result is tha the presence of the latter will deny to a veteran qualification for the special rate of pension.

In *Repatriation Commission v. Hendy*,[48] a Full Court reaffirmed the law according to *Cavell* and *Forbes* that a factor that plays a part or contributes to preventing a veteran from continuing to undertake the kind of work he or she had been undertaking will preclude a person from receiving the special rate of pension. Special leave to appeal to the High Court was refused in *Hendy v. Repatriation Commission*[49].

In *Repatriation Commission v. Alexander*,[50] Spender J said:

> [22] The test under s.24(1)(c) is not, "would Mr Alexander's war-caused conditions alone prevent him from undertaking the relevant remunerative work?", as the Tribunal indicated in pars [47] and [48] was the test it applied. As par [48] in particular indicates, the Tribunal concluded that if Mr Alexander did not suffer from war-caused difficulties, "he still would have been working". This is not the test for which s.24(1)(c) calls. It is whether war-caused conditions, alone, prevent the respondent from continuing to undertake remunerative work that he had been undertaking. It seems to me the Tribunal has not addressed the question of causation that s.24(1)(c) calls for, but has, in

45 (1988) 9 AAR 534 at p.539

46 (1997) 13 *VeRBosity* 56, Merkel J, at p.6 of the judgment.

47 (2000) 171 ALR 131

48 [2003] FCAFC 424, (2002) 18 *VeRBosity* 115

49 [2003] HCATrans 358, (2003) 19 *VeRBosity* 80

50 [2003] FCA 399, (2003) 19 *VeRBosity* 51

> effect, applied the requirements of s.24(1)(b). The conclusion that "a combination of war service and non-war service related conditions preventing Mr Alexander from working is a non-issue" is simply wrong. If the non-service related conditions were a factor in preventing Mr Alexander from continuing to undertake remunerative work, albeit those conditions were "of secondary importance", the "alone" requirement of s.24(1)(c) would not be satisfied.

In *Repatriation Commission v. Van Heteren*,[51] the Federal Court criticised the AAT for substituting a "sufficiency" test for the "alone" test in s.24(1)(c). The Court said:[52]

> Mr Van Heteren's heart condition alone may have been sufficient to prevent him from continuing to engage in his previous remunerative work. But it may not necessarily have been the only reason preventing him from so doing ... The Tribunal did not consider that question even though it was aware of Mr Van Heteren's non war-caused disabilities and of their earlier significance in preventing him from continuing to engage in remunerative work.

Similarly, in *Leane v. Repatriation Commission*,[53] the Court said:

> [27] If the submission of the applicant on s.24(1)(c) was meant additionally to suggest that the proper test to be applied in construing the word "alone" in that paragraph was whether the war-caused conditions *alone were sufficient* to prevent Mr Leane from engaging in work irrespective of other causes, I must reject the submission.

[51] [2003] FCA 888

[52] [2003] FCA 888 at para [24]

[53] [2003] FCA 889

Non-war-caused conditions prevented the veteran meeting the alone test in *Rendell v. Repatriation Commission*.[54]

In *Flentjar v. Repatriation Commission*[55], the Full Federal Court again emphasised that the war-caused disabilities must be the *only* factor preventing the veteran from continuing to undertake the remunerative work that he or she had been undertaking. It set out the issues concerning paragraph 24(1)(c) in four questions:

> 1. What was the relevant 'remunerative work that the veteran was undertaking' within the meaning of s.24(1)(c) of the Act?
>
> 2. Is the veteran, by reason of war-caused injury or war-caused disease, or both, prevented from continuing to undertake that work?
>
> 3. If the answer to question 2 is yes, is the war-caused injury or war-caused disease, or both, the only factor or factors preventing the veteran from continuing to undertake that work?
>
> 4. If the answers to questions 2 and 3 are, in each case, yes, is the veteran by reason of being prevented from continuing to undertake that work, suffering a loss of salary, wages or earnings on his own account that he would not be suffering if he were free of that incapacity?

This approach was also approved in *Repatriation Commission v. Boyle*,[56] and *Forbes v. Repatriation Commission*.[57]

[54] [2001] FCA 1881, (2001) 17 *VeRBosity* 120

[55] (1997) 48 ALD 1, Beaumont, Branson and Merkel JJ, at pp.4-5

[56] (1997) 47 ALD 637

[57] (2000) 101 FCR 50, 171 ALR 131, 58 ALD 394, 31 AAR 381

The High Court refused special leave to appeal in *Flentjar's* case.[58].

age

Often a factor that at least in part prevents a veteran from continuing to undertake remunerative work is the veteran's age. It has been held to be a disentitling factor in many cases. In *Repatriation Commission v. Strickland*[59], Davies and Ryan JJ said:

> Age 65 [is] not an irrelevant matter. It is common retiring age for employees and can be taken to reflect somewhat arbitrarily the community general understanding of the effect of age upon ability to undertake gainful employment. Thus ... 65 years is the age at which a male person qualifies for the grant of an age pension. It follows that, if nothing more were known of an applicant for a pension that that he was over the age of 65 years when the application for a pension was lodged, a tribunal would not be likely to be satisfied that the veteran was then suffering a loss of earnings by reason only of his war caused incapacity. Of course, that is only a hypothetical case and, invariably, more is known about the matter than that ... But the point is that a tribunal, especially a tribunal which deals with issues of this nature regularly, might reasonably proceed with the premise that applications for pensions made after that age would fail, unless the facts were disposed which tended to the conclusion that the veteran would still be continuing to undertake remunerative work, but for his war-caused incapacity.
>
> Of course, age 65 is not an age which is directly applicable to a person who is running his own business or who controls the affairs of a company which conducts the business in which he is engaged. But that is not to say age is irrelevant to such a person.

Other cases in which the Federal Court has reaffirmed the relevance of age include: *Lucas v. Repatriation Commission*[60], *Starcevich v. Repatriation Commission*[61], *Repatriation Commission v. Braund*[62], *Gauntlett v. Repatriation Commission*[63], *Sherman v. Repatriation Commission*[64], *Hamilton v. Repatriation Commission*[65], *Meade v. Repatriation Commission*[66], *Repatriation Commission v. Flentjar*[67], *Repatriation Commission v. Wilson*[68], *Jackman v. Repatriation Commission*[69], and *Repatriation Commission v. Fox, W. H.*[70].

In *Gauntlett v. Repatriation Commission*[71], Pincus J, after referring to *Repatriation Commission v. Braund*[72] and the Full Court's reference in that case to age as a disentitling factor, said:

> The Tribunal … has rightly treated the circumstance that the application

58 (1998) 195 CLR 685 (note only)

59 (1990) 12 AAR 343

60 (1987) 69 ALR 415 at p.422

61 (1987) 77 ALR 449, per Neaves J at p.460

62 (1991) 23 ALD 591

63 (1991) 32 FCR 73, 24 ALD 79

64 (1991) 7 *VeRBosity* 60

65 (1991) 7 *VeRBosity* 123

66 (1997) 13 *VeRBosity* 30, Emmett J, where the Tribunal found that the veteran's alcoholism (which resulted in him losing his job) had not been accepted as being war-caused, while there was medical evidence that it was secondary to the veteran's war-caused anxiety state.

67 (1997) 48 ALD 1

68 (1996) 43 ALD 777

69 (1997) 13 *VeRBosity* 73, Tamberlin J

70 (1997) 13 *VeRBosity* 81, at p.5 of the judgment

71 (1991) 32 FCR 73, 24 ALD 79

72 (1991) 23 ALD 591

> for the special rate pension was made just before the applicant reached the age of 65 as a most material point.

In *Repatriation Commission v. Flentjar* [73], Spender J said:

> Having regard to all the circumstances, including the fact that he would, at that time, be aged more than 77 years (a time when almost all workers have retired from remunerative employment), there is nothing in the reasons of the decision to lend any support for a conclusion that the circumstances of Mr Flentjar were so remarkable that he would, but for his war-caused disabilities, be engaged in remunerative work, unlike almost everybody else in the community.

labour market considerations

In *Chambers v. Repatriation Commission*[74], Moore and Sackville JJ (with whom Davies J agreed) said that while such matters as depressed labour market conditions are excluded from consideration for the purposes of paragraph 24(1)(b), "some of these may be relevant to the separate determination required by s.24(1)(c) … as to whether the war-caused incapacity has prevented the veteran from continuing to undertake remunerative work". Thus, if one of the factors that prevents a veteran from continuing to undertake remunerative work is the depressed state of the labour market, then it cannot be said that it is his or her war-caused incapacity alone that is preventing the veteran from continuing to undertake remunerative work.

In *Turnbull v. Repatriation Commission*[75], the Federal Court indicated that economic factors which played a part in preventing the veteran from continuing to undertake remunerative work would exclude the veteran from meeting paragraph 24(1)(c).

time out of the work force

In *Berry v. Repatriation Commission*[76] it was held that the time that a veteran had been out of the work force was relevant to determining the reasons that prevented the veteran from continuing to undertake remunerative work. Gray J said:

> Counsel for the applicant was concerned to suggest that the tribunal had erred in law by taking into account the fact that the applicant had been out of the work force for eighteen years. In my view it is plain that, as a matter of logic, the fact that an applicant for a special rate of pension under s.24 of the *Veterans' Entitlements Act 1986* has been out of the work force for a considerable period of time has relevance. The tribunal could not be criticised for making a finding of that fact or for taking it into account.

However, it must be recognised that merely because a person has been out of the work force for some period of time will not always be a relevant consideration. It depends on the nature of the remunerative work and whether or not, in that veteran's case, a lengthy time out of the work force would have contributed to preventing him or her from continuing to undertake remunerative work.

In *Hendy v. Repatriation Commission*,[77] Madgwick J indicated that where the incapacity from war-caused injury or disease had been the direct cause of the

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[73] (1997) 47 ALD 67, 13 *VeRBosity* 52

[74] (1995) 129 ALR 219 at p.231

[75] (1997) 13 *VeRBosity* 56, Merkel J, at p.7 of the judgment.

[76] (1992) 27 ALD 330 at pp.332-333,

[77] [2002] FCA 602 at para 40. (2002) 72 ALD 112, 18 *VeRBosity* 47

veteran's time out of the work force, then it could not be used as a bar to satisfying s.24(1)(c). He said:

> It seems clear however that it is not within the intendment of the legislation that decision-makers might resort, under the rubric of labour market factors, to the mere consequences of a veteran's service-related disability for the purpose of defeating the veteran's claim. Among other things, if a service-related condition incapacitates a veteran for particular work, it will be more or less true in every case that, as time goes by, the veteran's ability to re-enter the workforce will tend to be impaired on account of lack of recent experience of that work, absence from the workplace generally and, for older veterans, their increasing age. There would have been little point in providing for a work incapacity pension if the direct consequences of the incapacity could defeat the right to the pension.

Time out of the workforce and time out of the relevant business field was also held to be relevant considerations in *Repatriation Commission v. Flentjar*[78], *Jackman v. Repatriation Commission*[79], and *Repatriation Commission v. Fox, W. H.*[80].

other relevant factors

In *Jackman v. Repatriation Commission*[81], the Court identified:

- retirement intentions (also see *Tomlin v. Repatriation Commission*[82]);
- financial position; and
- family circumstances,

as factors relevant to a consideration of meeting the "alone" test in s.24(1)(c).

In *Grant v. Repatriation Commission*,[83] Sundberg J noted that the "alone" test was not satisfied where being prevented from continuing to undertake remunerative work was a result of a combination of "the effects of … war-caused disabilities and the economic slump in the wool industry."

remunerative work

Subsection 5Q(1) defines "remunerative work" as including any remunerative activity. The phrase "remunerative work that the veteran was undertaking" does not refer to the particular job that the veteran had, but to the *type* of work that the veteran previously undertook: *Banovich v. Repatriation Commission*[84]; *Repatriation Commission v. Sheehy*[85]; *Doig v. Repatriation Commission*[86]; *Flentjar v. Repatriation Commission*[87], *Magill v. Repatriation Commission*.[88]

Indeed, the relevant remunerative work need not be the last remunerative work that the veteran was undertaking, but it is necessary that it be remunerative work that the veteran would have been undertaking (at the relevant time in the assessment period) had the veteran not been incapacitated from undertaking it by his war-caused disabilities: *Starcevich v.*

78 (1997) 47 ALD 67, 13 *VeRBosity* 52

79 (1997) 13 *VeRBosity* 73, Tamberlin J

80 (1997) 13 *VeRBosity* 81, at p.5 of the judgment

81 (1997) 13 *VeRBosity* 73, Tamberlin J, at p.13 of the judgment

82 [1997] FCA 705, (1997) 13 *VeRBosity* 78, at p.2 of the judgment.

83 (1999) 15 *VeRBosity* 68

84 (1987) 69 ALR 395 at p.402, 6 AAR 122, 2 *VeRBosity* 112

85 (1995) 133 ALR 654 at p.660, 39 ALD 286, 11 *VeRBosity* 91

86 (1996) 12 *VeRBosity* 94, Lindgren J, at pp.8-10 of the judgment

87 (1997) 48 ALD 1, Beaumont, Branson and Merkel JJ, at p.4, 13 *VeRBosity* 111

88 [2002] FCA 744, (2002) 18 *VeRBosity* 50

Repatriation Commission[89] (also see *Fry v. Repatriation Commission*[90]). Fox J in *Starcevich* indicated that it must have been "substantial" remunerative work (p.454). (This question was further discussed in *Counsel v. Repatriation Commission*,[91] but care needs to be taken with this case as it was reversed on appeal.)

Sackville J agreed with this in *Repatriation Commission v. Sheehy*,[92] where he held that a finding that a veteran over the age of 65 who was employed as a storeman for periods totalling three weeks was not enough, of itself, to establish that the veteran undertook "remunerative work", as that phrase is used in paragraph 24(1)(c). He said[93]:

> Fox J stated that the loss sustained by the veteran had to be 'real', indicating that his Honour had in mind remunerative work that had continued for more than a very short period. This interpretation of the judgment is reinforced by his Honour's reference to 'substantial remunerative work ... undertaken in the past' (emphasis added). Jenkinson J's formulation also suggests, albeit tentatively, that past remunerative work does not satisfy s.24(1)(c) unless it continues for more than a very short period. ...
>
> The statutory context supports the view that a very short period of work in a new field, undertaken by a veteran over the age of 65, will not necessarily constitute 'remunerative work that the veteran was undertaking' for the purposes of s.24(1)(c). Section 24(1)(c) is satisfied only if the veteran is prevented from continuing to undertake 'remunerative work'. When the veteran is under the age of 65, it is enough if he or she is prevented from obtaining remunerative work by reason of the war-caused incapacity: 24(2)(b). ... Section 24(1)(c) does not say that it is enough for a veteran simply to show that the war-caused incapacity prevented that veteran from undertaking remunerative work. The veteran must show that he or she is prevented from continuing to undertake remunerative work. ...
>
> If the veteran could never perform the duties for which he or she was employed, it may be accurate to say the war-caused incapacity prevented the veteran from undertaking the work. It is much more difficult to say that the veteran has been prevented from continuing to undertake the remunerative activity.
>
> Even so, depending on the circumstances, a relatively short period of employment might satisfy the legislative requirement. (His Honour's emphasis)

Tamberlin J, in *Repatriation Commission v. Fox, W. H.*[94], also agreed that "substantial remunerative work" was the relevant test.

In *Birtles v. Repatriation Commission*[95], Hill J considered *Starcevich's* case and said:

> What is involved in each case is ultimately a question of fact, namely, has the veteran by reason of his war incapacity been prevented from

89 (1987) 18 FCR 221, 76 ALR 449, 7 AAR 296

90 (1997) 47 ALD 776 (note only), 13 *VeRBosity* 82, at p.10 of the judgment

91 [2001] FCA 1032, (2001) 33 AAR 163, 17 *VeRBosity* 82

92 (1995) 133 ALR 654 at p.665

93 (1995) 133 ALR 654 at pp.663-664

94 (1997) 13 *VeRBosity* 81, at p.5 of the judgment

95 (1991) 33 FCR 290 at p.299, 105 ALR 359 at 368

> '*continuing*' a type of remunerative work which he previously undertook (not being work undertaken only for a short period)? The word 'continuing' in this context is used to encompass the case where a veteran may be unable to find a similar kind of work by reason of that incapacity and as a result suffers the loss to which the paragraph refers. If the answer to the question be yes and the other subparagraphs apply, then s.24 is applicable to that veteran.

Hill J also indicated that "remunerative work" in paragraph 24(1)(c) is not to be construed narrowly as the same work that the veteran had previously undertaken, but it refers to work in the same field of endeavour as the veteran had previously undertaken: *Birtles v. Repatriation Commission*[96].

In *Sherman v. Repatriation Commission*[97], Gray J stated:

> I am by no means convinced that any work for which a veteran has skills or qualifications has to be regarded as 'remunerative work that the veteran was undertaking', within the meaning of s.24(1)(c) of the Act.

Thus, merely because a veteran has the necessary skills or qualifications to do a particular type of work, it does not necessarily mean that because he or she is unable to do that work (which might have been available to the veteran to do) by reason of incapacity from war-caused disabilities, he or she satisfies the provision. Sackville J, in *Repatriation Commission v. Sheehy*[98], confirmed that this was the law in respect of persons over the age of 65, where he said:

> [I]t is not enough for a veteran over the age of 65, who has never been engaged in a particular kind of remunerative work, to show that, but for the incapacity, he or she would have obtained that kind of remunerative work. An illustration is a veteran over the age of 65, who has never worked as a farmer because of war-related injury. That veteran could not successfully claim to come within s.24(1)(c) merely by showing that, but for the injury, he or she would have taken up employment as a farmer for the first time at age 66.
>
> If, however, the veteran is under the age of 65, the fact that he or she has not engaged in a particular kind of remunerative work does not necessarily prevent that veteran from satisfying s.24(1)(c).

Sackville J made this distinction between those over 65 and those under 65 years of age based on paragraph 24(2)(b)—see below—and the objectives of the legislation as stated in the Minister's Second Reading Speech in 1985.

The Full Federal Court, in *Sheehy v. Repatriation Commission*[99] held that the veteran must have successfully performed the remunerative work referred to in paragraph 24(1)(c). The Court (Wilcox, Whitlam and Lindgren JJ) stated:

> In our opinion, the words 'undertake' and 'undertaking' in s.24(1)(c) import the notion of 'performance' or of a 'successful' or 'effective' undertaking of work. …
>
> It is inappropriate to attempt to define a minimum period during which work of any kind must be performed before it can be said that it qualifies as

[96] (1991) 33 FCR 290 at pp.299-300, 105 ALR 359 at 368-369

[97] (1991) 7 *VeRBosity* 60

[98] (1995) 133 ALR 654 at p.660

[99] (1996) 137 ALR 223, 41 ALD 205, 23 AAR 126

'remunerative work that the veteran was undertaking'. …

Fox J stated that the loss sustained had to be 'real' and this indicates that his Honour had in mind remunerative work that had been successfully undertaken. Even more to the point is his Honour's reference to '*substantial* remunerative work … undertaken in the past' (emphasis supplied). Similarly Jenkinson J suggested, although tentatively, that past remunerative work does not satisfy the terms of s.24(1)(c) unless it continued for more than a very short period. …

Although it is perhaps understandable that there have been references in the cases to a 'short' or 'very short' period of work, we would prefer to say that the 'remunerative work that the veteran was undertaking' must have been 'performed' or 'successfully undertaken' or 'effectively undertaken'.[100]

In *White v. Repatriation Commission*,[101] Conti J said that work could be remunerative even if a person was not paid money. He said at para [27]:

I would have found myself unable to accept the view that the undertaking of work by a professionally qualified person in return for the provision, without monetary charge, of goods and services *in specie*, was incapable in principle of satisfying [the] statutory expression ['remunerative work'].

In *Hill v. Repatriation Commission*,[102] Wilcox J considered whether the veteran's dog breeding activities were regarded as "remunerative work" for the purposes of s.24(1)(c) of Act and if the remunerative work the veteran was now prevented from undertaking because of his incapacity, was the veteran' s most recent work or employment. Wilcox J found that the tribunal had failed to consider the veteran' s earlier work as a public servant which had ceased in 1989.

<u>no presumption of continuance</u>

In *Jackman v. Repatriation Commission*[103], the Federal Court held that there is no presumption that the reason for ceasing work will continue to apply such that it must be said that if the veteran ceased work for war-caused reasons alone then the veteran must be taken at the application day to be prevented from continuing to undertake the remunerative work that the veteran was undertaking by reason of war-caused disabilities alone. The Court said:[104]

A presumption of continuance is not appropriate to the determination the AAT has to make under s.24(1)(c). It is well accepted that the relevant date of assessment is the date of application, not retirement: *Banovich v. Repatriation Commission* (1986) 69 ALR 395. The AAT must make its determination as at the time of application, taking into account all considerations relevant to the specific case in question. Where the application date is close to the retirement date the weight to be given to the applicant's circumstances at the time of retirement will be greater than in cases, such as the present, where there is a lengthy period of time between the dates. In such cases other significant factors such as age

[100] (1996) 137 ALR 223 at 228-229

[101] [2001] FCA 1585, (2001) 114 FCR 494, 34 AAR 151, 17 *VeRBosity* 112

[102] [2000] FCA 929, (2000) 16 *VeRBosity* 76

[103] (1997) 13 *VeRBosity* 73, Tamberlin J

[104] (1997) 13 *VeRBosity* 73 at pp.12-13 of the judgment

> and time out of the work force can become important and relevant considerations: *Repatriation Commission v. Wilson* (1996) 43 ALD 777; *Repatriation Commission v. Braund* (1991) 23 ALD 591. It is not sufficient for the AAT to be satisfied that at the date of retirement the applicant satisfied s.24(1)(c): *Braund* at 595.

<u>loss of salary or wages, or of earnings on his or her own account</u>

Not only must the veteran be prevented from continuing to undertake the remunerative work that he or she was undertaking, but such circumstances must have resulted in a loss of salary or wages, or of earnings on his or her own account.

In *Banovich v. Repatriation Commission*[105], the Court stated:

> In the usual case a loss of salary, wages or earnings will follow any prevention from continuing to undertake the remunerative work which the member was undertaking but there may be exceptional situations under which a person unable to continue that work continues to receive a salary, wages or earnings; in which exceptional case [para 24(1)(c)] would not be satisfied.

In *Repatriation Commission v. Smith, M. J.*[106], the Court stated:

> [T]he question posed by s.24(1)(c) is one of hypothetical fact. The Tribunal must attempt an assessment of what the [veteran] probably would have done if he had none of his service disabilities.

This explanation of the test was affirmed in *Repatriation Commission v. Flentjar* [107].

In *Tomlin v. Repatriation Commission*[108], Whitlam J discussed the hypothetical test in *Smith's* case and said:

> In *Smith* Beaumont J described (at 337) the question posed by s24(1)(c) as 'one of hypothetical fact'. But his Honour continued: 'The Tribunal must attempt an assessment of what the [veteran] probably would have done if he had none of his service disabilities.' Counsel for the applicant relies on a particular formulation of the 'hypothetical position' that a Full Court of this Court said it was necessary to inquire into for the purposes of s24(1) in *Repatriation Commission v. Maley* (1991) 24 ALD 43 at 51. But that statement was made in the context of a specific submission, and the Full Court had earlier (at 50) referred to the prospects of the veteran's employment being considered 'on the requisite statutory assumptions'.
>
> Counsel for the respondent submits, correctly in my view, that neither of these cases suggests that the decision-maker must construct an imagined life for an hypothetical man. The hypothetical fact identified by Beaumont J reflects the language of s.24(1)(c) …
>
> The Tribunal was bound to engage in speculation as to what the applicant would have done at the application date if he had none of the war-caused disabilities. In doing so, it may have regard to all the evidence before it, including the fact that the applicant did move to Nambucca Heads.

105 (1987) 69 ALR 395

106 (1987) 15 FCR 327, 74 ALR 537

107 (1997) 47 ALD 67, 13 *VeRBosity* 52

108 [1997] FCA 705, (1997) 13 *VeRBosity* 78, at p.3 of the judgment

To some extent, the hypothetical test stated in *Smith's case* is an over-simplification of the matter. In *Repatriation Commission v. Maley*[109], the Full Court said:

> For the purposes of s.24(1) it is necessary to inquire, *inter alia*, into the hypothetical position which would have obtained if Mr Maley had not suffered his war injuries and had retired at the time when, in that case, he would have retired. (emphasis added)

The Full Court recognised, by the words, "inter alia" that this was not the only test contained in paragraph 24(1)(c). Clearly, if the veteran fails this hypothetical test, then special rate is not payable, but there are two tests within paragraph 24(1)(c) and that they are elaborated in subsection 24(2).

The phrase, "loss of salary or wages, or of earnings on his or her own account" does not equate with "income". In *Greenwood v. Repatriation Commission*[110] and *Thomas v. Repatriation Commission*[111], the Federal Court agreed with a statement in *Re Fahey and Repatriation Commission*[112] in which it was stated that:

> The phrase here relevant, namely, 'earnings on his or her own account', was in our opinion clearly inserted to cover the case of a person who derived not salary or wages, but rather the earnings of a business, profession or trade as a result of remunerative work. ... It would not be correct to subvert the legislative intent by giving 'earnings on his own account' an interpretation so expansive that it, together with 'wages and salary', adds up to mean 'income'.[113]

In *Brydon v. Repatriation Commission*,[114] the Federal Magistrates Court adopted a definition of "earnings" from *Rogers v. State Mines Control Authority* (1964) 81 WN(Pt.2)NSW 120 at 123, as being "what is earned by the worker – the rewards which he receives for his efforts – in employment or in some business which he carries on".

In *Counsel v. Repatriation Commission*,[115] the Full Court held that the veteran has suffered a loss of earnings on his own account in circumstances where the business partnership in which he was involved had operated at a loss for a number of years. The Court held that "earnings" in this context meant gross earnings to which the partners had access from time to time rather than net earnings.

Paragraph 24(2)(a) elaborates on the "loss of salary or wages, or of earnings" criterion as follows:

109 (1991) 24 ALD 43 at p.51

110 (1990) 12 AAR 408 at 413

111 (1994) 50 FCR 112

112 (1986) 5 AAR 274

113 (1986) 5 AAR at pp.277-278

114 [2003] FMCA 299, (2003) 19 *VeRBosity* 91

115 [2002] FCAFC 201, (2002) 122 FCR 476, 72 ALD 204, 18 *VeRBosity* 55

Paragraph 24(2)(a)

(a) a veteran who is incapacitated from war-caused injury or war-caused disease, or both, shall not be taken to be suffering a loss of salary or wages, or of earnings on his or her own account, by reason of that incapacity if —

(i) the veteran has ceased to engage in remunerative work for reasons other than his or her incapacity from that war-caused injury or war-caused disease, or both; or

(ii) the veteran is incapacitated, or prevented, from engaging in remunerative work for some other reason; ...

In *Magill v. Repatriation Commission*,[116] Drummond J said:

> Unlike s 24(2)(b), which ameliorates the operation of the first limb of s 24(1)(c), s 24(2)(a) only explicates the second limb of s 24(1)(c) by emphasising that a veteran will not be able to satisfy that limb if, though suffering a loss of earnings that may be causally related to a war-related injury or disease, there are other reasons that are also causally related to the vetrean's having ceased to engage in work or related to the veteran's being prevented from engaging in work.

The "loss" test is additional to the "prevented from continuing to undertake remunerative work" test: *Repatriation Commission v. Boyle*.[117]. The "loss" test requires that the veteran must not have ceased to engage in remunerative work for some reason other than incapacity from war-caused injury or disease. If something else contributed to the veteran's cessation of remunerative work, then the veteran's consequent loss of salary, wages or earnings cannot be said to be solely due to that incapacity.

Therefore, notwithstanding that a veteran might, at the application day be prevented from *continuing* to undertake remunerative work that the veteran had been undertaking solely due to his or her incapacity from war-caused injury or disease, if the veteran had already ceased to engage in remunerative work (but not necessarily a particular job) for reasons other than that incapacity and at least partly for that other reason continues to have ceased to engage in that work, then there has not been the requisite loss of salary, wages or earnings solely due to that incapacity. That loss is then also due to the other reason. It should also be noted that paragraph 24(2)(b) does not ameliorate the loss test. It only applies to ameliorate the "prevented from continuing to undertake remunerative work" test.

Subparagraph 24(2)(a)(i) does not mean that a person is *necessarily* disqualified from a pension at the special rate if that person ceased to engage in remunerative work for a reason other than incapacity from war-caused disabilities. It is important to note that the subparagraph uses the phrase "*has* ceased to engage", indicating that a non-war-caused reason for ceasing to work *continues* to apply to the fact that the veteran has ceased to engage in remunerative work: see for example, *Hall v. Repatriation Commission*[118]. In *Banovich v. Repatriation Commission*[119], it was stated:

> [T]he loss referred to in [para 24(1)(c)] may be caused either by a loss of existing employment or by an inability to obtain new employment. ... [T]he phrase 'remunerative work

[116] [2002] FCA 744, (2002) 18 *VeRBosity* 50

[117] (1997) 47 ALD 637

[118] (1994) 33 ALD 454

[119] (1987) 69 ALR 395 at p.402

> which the [veteran] was undertaking' should be reads as a reference to the type of work which the member previously undertook and not to any particular job. It follows that a member's loss of particular employment for a reason unrelated to a war disability would never destroy a member's subsequent entitlement to claim a special rate pension; the question would remain, at the relevant date for determination of a claim, whether the member was prevented by his or her war-related incapacity—and by that incapacity alone—from continuing in that field of remunerative activity.

Thus, a veteran whose remunerative work involved, for example, short term contracts for different employers may have stopped working in his or her last job because that contract came to an end. In this case, the veteran did not cease working in that last job because of service-related incapacity, but for some other reason. But that does not mean that the veteran would be unable to meet the relevant special rate test if, for example, before the veteran was able to commence the next contract, the service-related incapacity prevented the veteran from working. This is a case, then, where the veteran's normal pattern of work was to go from contract to contract, and it was service-related incapacity, alone, that caused the cessation of that pattern of remunerative work.

However, if a veteran ceased working in his or her normal line of work for some other reason, and has not worked since, unless there is evidence that, at the time the veteran left that job he or she has definite plans to go to another job, but that service-related incapacity intervened to prevent that happening, and it was for that reason alone, that the veteran did not proceed to that other job, it will be very difficult to say that, at the application day, this other reason is not one of the reasons why the veteran has ceased to engage in remunerative work.

In *Re Reilly and Repatriation Commission*,[120] the AAT said:

> 'Ceased' in para 24(2)(a) did not mean merely the short term cessation of work as occurs eg, during a holiday, imprisonment or a temporary illness. Cessation must be the final termination of employment after which time the applicant no longer undertakes remunerative work for which he has suitable skills and experience for more than 8 hours a week: see para 24(1)(b). The intention of para 24(2)(a) was not, however, to exclude an applicant who was dismissed from particular employment, eg, for a criminal offence, which meant he stopped engaging in remunerative work for reasons other than his war-caused injury, if at the time of his dismissal he was also suffering from a war-caused disability which would have rendered him incapacitated for that work at or about the time of his dismissal.

In *Cavell v. Repatriation Commission*[121], Burchett J held that the question posed by paragraph 24(2)(a) is, "whether, if he was so prevented [from continuing to undertake remunerative work that the veteran was undertaking], he was by reason thereof suffering a loss of earnings that he would not be suffering if he were free of that incapacity".

In *Thomas v. Repatriation Commission*[122], Beazley J held that, "The test under s.24(1)(c) is ... that it is necessary to enquire into the hypothetical position which would have obtained if the applicant was not

[120] (1987) 6 AAR 575, 12 ALD 533

[121] (1988) 9 AAR 534

[122] (1994) 50 FCR 112

incapacitated due to his war-caused disabilities." See also *Repatriation Commission v. Boyle*,[123] *Counsel v. Repatriation Commission*.[124]

In *Starcevich v. Repatriation Commission*[125], Fox J stated that the loss had to be substantial. His Honour said[126]:

> It seems to me that the intention of para. 24(1)(c) is that the applicant must have suffered substantial loss of remuneration consequent alone upon the incapacity referred to in paras 24(1)(a) and (b). The loss must be real, in the sense that the applicant cannot rely upon any remunerative work that he has undertaken in the past, but it would be unnecessarily restrictive to assess the loss by reference only to the last remunerative work undertaken before the applicant's inability to work became complete. In my opinion, a veteran's entitlement to a pension under s.24 may be based on his being prevented from continuing to undertake substantial remunerative work that he has undertaken in the past, even if that work was followed by work of a different type before the veteran ceased work altogether.

However, Pincus J, in *Gauntlett v. Repatriation Commission*[127], was not necessarily prepared to accept that qualification. He said, "the extent to which the section should be read down so as to exclude from its scope insubstantial or trivial losses, in order to avoid absurdity, is still an open one, and it is unnecessary to determine it in this case."

In *Repatriation Commission v. Fox, W. H.*[128], Tamberlin J said:

> The *alone* test requires that the applicant must have suffered substantial loss of remuneration solely as the result of the war-caused incapacity or disease.

In *Woodward v. Repatriation Commission*,[129] Kiefel J said:

> [13] The applicant's principal submission was that there was no evidence to support the finding that the amount of $65 per week was not remuneration paid for work. The amount of work undertaken varied between one and three days over the period in question. It was, clearly, a small amount of money paid to a senior solicitor. Looking at the question whether it could be said to be some recompense or reward for services, it seems to me to have been open to the Tribunal to infer that it was not, and in drawing that inference it does not appear to have been guided by any incorrect appreciation of what remunerative work meant. There were two additional aspects of the evidence which the Tribunal, as it was entitled, took into account. The effect of the evidence was that the sum was calculated, not by reference to any work undertaken, but by the amount Mr Woodward was able to earn without affecting his pension; and Mr Woodward himself said that it did reflect the use of his established name while at the same time providing him with an activity or interest.

In *Moorcroft v Repatriation Commission*,[130] Dowsett J noted that the

[123] (1997) 47 ALD 637

[124] [2001] FCA 1032, (2001) 33 AAR 163, 17 *VeRBosity* 82

[125] (1987) 18 FCR 221, 76 ALR 449, 7 AAR 296

[126] (1987) 76 ALR at p.454

[127] (1991) 32 FCR 73

[128] (1997) 13 *VeRBosity* 81, at p.5 of the judgment

[129] [1999] FCA 1647, (1999) 58 ALD 675

questions posed in subparas 24(2)(a)(i) and (ii) are separate questions which must be answered in addition to whether the applicant was prevented from continuing to undertake remunerative work that he had been undertaking and whether the applicant was suffering a loss of salary, wages, or earnings because of his being unable to undertake that work.

Paragraph 24(2)(b)

(b) 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 he or she has been genuinely seeking to engage in remunerative work, that he or she would, but for that incapacity, be continuing so to seek to engage in remunerative work and that that incapacity is the substantial cause of his or her inability to obtain remunerative work in which to engage, the veteran shall be treated as having been prevented by reason of that incapacity from continuing to undertake remunerative work that the veteran was undertaking.

The principal effect of paragraph 24(2)(b) is to permit veterans, who are under 65 years and who would have met the special rate tests at the time that they ceased working, to retain that eligibility while their service-related incapacity remains the substantial cause of their inability to obtain remunerative work. In *Re Hornery and Repatriation Commission*, the AAT indicated that it is ameliorative of the "alone" test in s.24(1)(c). The Tribunal said:

> [40] Section 24(2)(b) has long been interpreted as an ameliorative provision, compliance with which excuses the veteran from having to meet the "alone" requirement contained in s.24(1)(c). The Tribunal does not consider that the 1994 amendment alters the effect of the provision. Its life started as a special provision for certain veterans, namely those who were under 65 and were genuinely seeking to engage in remunerative work. The first element of its special provision – namely the age factor – has effectively been removed by the 1994 amendment which has the effect that all of s.24(1) now applies only to veterans under the age of 65. The second element of its special provision however remains. If a veteran falls within s.24(2)(b), the veteran is relieved from the "alone" requirement in s.24(1)(c). In order to fall within s.24(2)(b) the veteran must satisfy the Commission (and now this Tribunal standing in the shoes of the Commission) that he or she "has been genuinely seeking to engage in remunerative work ..." and the Tribunal must also be satisfied that the veteran would, but for the incapacity, be continuing so to seek to engage and that war-caused incapacity "is the substantial cause of his or her inability to obtain remunerative work".
>
> [41] The Tribunal is satisfied that Mr Hornery would genuinely be liking to work, that is that he would genuinely like "to engage in remunerative work". The wording of the provision however requires that the Tribunal must be satisfied that Mr Hornery "has been genuinely seeking to engage in remunerative work". The Tribunal agrees with Deputy President McMahon in *Re Bonner and Repatriation Commission* (1989) 17 ALD 680 as reported at 681 that "the use of the word 'genuinely' in the paragraph indicated the necessity for

[130] [1999] FCA 862, (1999) 29 AAR 482, 58 ALD 143, 15 *VeRBosity* 45

> some objective signs of active pursuit of remunerative work". Mr Hornery's active pursuit of remunerative work ceased in 1986 when he was granted invalid pension.

The usual circumstance is where a veteran ceases working because of incapacity from war-caused injury or disease alone, but still thinks that he or she might be able to do other work. The veteran does not apply for an increase in pension to the special rate but tries to get employment. However, the veteran finds that he or she is unable to do so. As time goes by, other factors, such as time out of the work force or age or the state of the labour market, may begin to impact on the veteran's capacity to obtain remunerative work. Provided that the service-related incapacity remains the substantial cause, the veteran will remain entitled to receive the special rate of pension. Thus this provision is a protection for this class of veteran.

In *Re Martin and Repatriation Commission*,[131] the AAT said:

> If s 24(2)(b) were not in the Act, veterans who had been unemployed at the time when their incapacity became so severe as to remove their capacity for work would never be able to qualify at the special or intermediate rate.

In *Hoskins v. Repatriation Commission*[132], it was held that, "The effect of paragraph (2)(b) of s.24 of the VE Act is to provide an extension of the meaning of the expression 'prevented from continuing to undertake remunerative work that the veteran was undertaking', which is to be found in paragraph (1)(c)."

It should be noted that paragraph 24(2)(b) does not extend the meaning of both elements of paragraph 24(1)(c). That is, "the loss of salary or wages, or of earnings of his or her own account" test is *not* covered by paragraph 24(2)(b), but must still be met in accordance with paragraph 24(2)(a). In *Fry v. Repatriation Commission*[133], Spender J agreed with a finding of the Tribunal in which it was said:

> [E]ven if the ameliorating provision of s.24(2)(b) is applied to s.24(1)(c), the applicant was not entitled to the special rate of pension because of the effect of s.24(2)(a)(i), which provides that a veteran shall not be taken to be suffering the loss of salary or wages if the veteran ceased to engage in remunerative work for reasons other than his incapacity from war-caused injury or disease, or both."

Paragraph 24(2)(b) requires that incapacity from war-caused disabilities be at least *the* substantial cause of the veteran's inability to obtain remunerative work. A prerequisite to its operation is that the veteran has been genuinely seeking to engage in remunerative work. In *Hall v. Repatriation Commission*[134], Spender J said:

> It seems to me that the question of whether a veteran has been 'genuinely seeking to engage in remunerative work', that he or she would, but for that incapacity, be continuing to so seek has to be addressed in a realistic way, having regard to the nature and extent of the incapacity. Many veterans are permanently incapacitated by war-caused injury or disease for any form of remunerative work, and the requirement that such persons should be genuinely seeking work

131 (1987) 13 ALD 95

132 (1991) 32 FCR 443

133 (1997) 47 ALD 776 (note only), 13 *VeRBosity* 82, at p.10 of the judgment

134 (1994) 33 ALD 454

> seems to involve something of a charade. While it may be that Mr Hall was advised to pursue his attempts at seeking employment through the CES by advice which focussed on the desirability of efforts to seek remunerative work rather than on any realistic prospect that such work might be obtained, the report by the CES does not seem to cast doubt on the willingness of Mr Hall to accept work if any might be found for him.

In this statement, His Honour is not saying that genuine attempts are not necessary. Indeed, he indicates that there was evidence that Mr Hall's attempts to find work were genuine in that he had sought the assistance of the CES and was prepared to work if suitable work could be found. This passage from *Hall* was quoted and commented upon by Dowsett J in *Conway v. Repatriation Commission*:[135]

> [8] That passage was quoted with apparent approval by Madgwick J in *Hendy v. Repatriation Commission* [2002] FCA 602 at [52]. I am not entirely sure that I understand the significance of the passage. As I understand par 24(2)(b), there must be an inquiry as to whether or not the relevant applicant has been genuinely seeking to engage in remunerative work in the past, that is prior to his becoming incapacitated for the purposes of s 24. Then it is necessary to enquire whether or not he would be continuing to seek to engage in remunerative work had he not been incapacitated, and whether the incapacity is the substantial cause of his inability to obtain remunerative work. The "genuinely seeking" test relates to the work history of the applicant rather than to efforts which he might make after he becomes incapacitated. Although the construction of the section is not an easy matter, this appears to have been the view taken by the Tribunal in *Re Hornery and Repatriation Commission* (1998) 52 ALD 317 at 331. I consider it to be correct.
>
> [9] If this is so, then the observations made by Spender and Madgwick JJ mean only that a realistic approach must be taken to the efforts made by any particular applicant to find employment. There can be no objection to such a proposition, but it is of little assistance for present purposes. I do not consider that to assert that the Tribunal failed to take a realistic approach to the application of par 24(2)(b) raises a question of law.

In *Leane v. Repatriation Commission*,[136] the Court considered the meaning of "seeking", and indicated that there was no error of law in the AAT requiring evidence of objective signs of active pursuit of work:

> [28] Turning to the s 24(2)(b) ground, one of the preconditions to be satisfied before that provision can be invoked is that the veteran "satisfies the Commission that he or she has been genuinely seeking to engage in remunerative work". The word "seeking" in my view is used here in its dictionary senses of "attempting to" or "trying to": see *Shorter Oxford English Dictionary*, "seek" (3rd ed). The Tribunal was not satisfied that there were any "objective signs of active pursuit of remunerative work" on the evidence before it. That conclusion is not reviewable in this court there being no error of law that infected it.

[135] [2003] FCA 704, (2003) 19 *VeRBosity* 54

[136] [2003] FCA 889, (2003) 19 *VeRBosity* 89

In *Byrne v. Repatriation Commission*,[137] Gyles J noted:

> In my opinion, the applicant has established that the AAT misdirected itself as to the proper application of s 24(2)(b). The issue is not limited to the question as to why the incapacitated person is in fact unable to obtain employment in the particular place, although that may be relevant. In order to judge the effect of the relevant incapacity, it is necessary to compare the position of the applicant as he is with the position he would be in without the relevant incapacity. In the present case, that requires the formation of an assessment of the work prospects of the applicant as a fifty-one year old man with his characteristics and abilities, who had never suffered from PTSD, ... [etc.] ... and who is probably not living in Kempsey. That process enables the true effect of war-caused incapacity upon the ability of the applicant to obtain work to be assessed.

Thus, the Court held that the AAT had erred in its consideration of the argument that the reason why the veteran moved to an area with low employment prospects and was unable to obtain work was because of his incapacity from war-caused disease.

In *Forbes v. Repatriation Commission*,[138] R D Nicholson J noted that there was no challenge to the Tribunal's conclusion that "the applicant was not genuinely seeking work as he had rejected an offer of part-time work on the basis he would not be paid in cash."

In *Repatriation Commission v. Sheehy*[139], Sackville J said that if a veteran is under the age of 65, the fact that he or she has not engaged in a particular kind of remunerative work does not necessarily prevent that veteran from satisfying paragraph 24(1)(c). He said that this is because paragraph 24(2)(b) specifies three criteria applicable to a veteran under the age of 65 that do not apply to veterans 65 years or over. They are:

(i) that the veteran has been genuinely seeking to engage in remunerative work;

(ii) that the veteran, but for the incapacity, would be continuing to seek to engage in remunerative work; and

(iii) that the incapacity is the 'substantial cause' of the veteran's inability to obtain remunerative work in which to engage.

In *Repatriation Commission v. Sheehy*[140], Sackville J also indicated that while a short period of employment might not constitute "remunerative work" for a veteran over the age of 65 years, this might not be the case for a veteran under the age of 65 because of the effect of paragraph 24(2)(b).

In *Fox, A. v. Repatriation Commission*,[141] Kiefel J explained what was meant by "the substantial cause". He said:

> The words 'the substantial cause' require that, if the incapacity is not of itself productive of the inability to obtain work, it is nevertheless the operative factor which, more than any other, explains it. That something might be 'a substantial cause' has regard to the situation where there may be a number of factors operating which are of sufficient causal significance to qualify as 'substantial' (the phrase which was contained in

[137] [2001] FCA 1134, (2001) 33 AAR 410, 17 *VeRBosity* 83

[138] (2000) 101 FCR 50, 171 ALR 131, 58 ALD 394, 31 AAR 381

[139] (1995) 133 ALR 654 at p.660

[140] (1995) 133 ALR 654 at p.664

[141] (1997) 45 ALD 317, 24 AAR 527, 13 *VeRBosity* 25, Kiefel J

> the legislation dealt with in *University of Tasmania v. Cane* (1994) 4 Tas R 156, 163, to which I was referred in argument). The definite article in s.24(2) of the 1986 Act (compare *Repatriation Act 1920*, Schedule 2, as amended in 1985), requires a stronger and more direct causal connexion between the incapacity and the inability to obtain remunerative work.[142]

The equivalent provision in the Repatriation Act 1985 merely required "a substantial cause". The change from the indefinite article ("a") to the definite article ("the") indicates a deliberate change in legislative policy.

The over 65 criteria

The *Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Act 1994* amended the special rate criteria for persons over the age of 65 years and who had made their claim or application for increase on or after 1 June 1994.

The criteria for persons under 65 at any time during the assessment period remained unchanged. Therefore, everything within the first part of this paper still applies to those cases.

The only amendments to the provisions relating to persons under 65 are the two paragraphs, (aa) and (aab), which set out to whom these provisions apply: namely persons who have made a claim or application for increase and who were under 65 at the time of making the claim or application.

Section 3 of the *Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Act 1994* provides that the new special rate provisions apply to claims for pension or applications for increase that are made on or after 1 June 1994. Subsection 2(2) of that Act provides that the amendments are taken to have commenced on 1 June 1994.

The effect of the amendments is that subsections (1) and (2) apply to those who are under 65 years on the application day and subsections (2A) and (2B) apply to those who are 65 years or over on the application day.

Subsections (2A) and (2B) provide as follows:

(2A) This section applies to a veteran if:

(a) the veteran has made a claim under section 14 for a pension under section 14 for a pension, or an application under section 15 for an increase in the rate of the pension that he or she was receiving; and

(b) the veteran had turned 65 before the claim or application was made; and

(c) paragraphs (1)(a) and (1)(b) apply to the veteran; and

(d) the veteran is, because of incapacity from war-caused injury or war-caused disease or both, alone, prevented from continuing to undertake the remunerative work ("last paid work") that the veteran was last undertaking before he or she made the claim or application; and

(e) because the veteran is so prevented from undertaking his or her last paid work, the veteran is suffering a loss of salary or wages, or of earnings on his or her own account, that he or she would not be suffering if he or she were free from that incapacity; and

(f) the veteran was undertaking his or her last paid work after the veteran had turned 65; and

(g) when the veteran stopped undertaking his or her last paid work, the veteran:

[142] (1997) 45 ALD 317, 24 AAR 527, 13 *VeRBosity* 25, Kiefel J, at p.4 of the judgment

(i) if he or she was then working as an employee of another person—had been working for that person, or for that person and any predecessor or predecessors of that person; or

(ii) if he or she was the working on his or her own account in any profession, trade, employment, vocation or calling—had been so working in that profession, trade, vocation or calling;

for a continuous period of at least 10 years that began before the veteran turned 65; and

(h) section 25 does not apply to the veteran.

(2B) For the purposes of paragraph (2A)(e), a veteran who is incapacitated from war-caused injury or war-caused disease or both, is not taken to be suffering a loss of salary or wages, or of earnings on his or her own account, because of that incapacity if:

(a) the veteran has ceased to engage in remunerative work for reasons other than his or her incapacity from that war-caused injury or war-caused disease, or both; or

(b) the veteran is incapacitated, or prevented from engaging in remunerative work for some other reason.

It is important to note that where a veteran turns 65 after making a claim or application but before the claim or application is determined, subsections (1) and (2) continue to apply to that person for the entire assessment period and not subsections (2A) and (2B)—this is why there remains a reference to age 65 in paragraph (2)(b).

For a person who is 65 or over at the application day, all of the paragraphs in subsection (2A) must be met. In *Re Cowper and Repatriation Commission*[143], the Administrative Appeals Tribunal said:

> Section 24(2A) has eight heads, (a) - (h), and it is clear that each of those headings must be satisfied by an applicant if a special rate pension is to apply to that person. It is not sufficient to satisfy six out of eight or even seven out of eight. The criteria are made quite stringent and quite limiting and that clearly was the intention of the legislature, for better or for worse. [144]

In *Rose v Repatriation Commission*,[145] Weinberg J rejected an argument that because a veteran had a pre-1994 claim previously rejected, the 1994 amendments did not apply when a post-1994 claim relating to the same matter was being considered. His Honour agreed with Mathews J in *Re Clements and Repatriation Commission*,[146] in which Her Honour said:

> When the applicant made his first claim in December 1992 he was not able to fulfil the requirements of s 23. It was not until his generalised anxiety state was added to his accepted disabilities that he became eligible for consideration under s 23. This arose only as a result of his claim made on 11 November 1995, well after the amendments came into force. Accordingly I must find that his claim for the intermediate rate of pension falls to be determined under the 1994 amendments.

[143] unreported, 11 October 1996, Deputy President Chappell

[144] unreported, 11 October 1996, Deputy President Chappell, at p.6

[145] [2001] FCA 992, (2001) 64 ALD 695, 17 *VeRBosity* 12

[146] (1997) 49 ALD 798

Paragraph 24(2A)(c)

(c) paragraphs (1)(a) and (1)(b) apply to the veteran; …

Paragraph (2A)(c) provides that paragraphs (1)(a) and (b) must apply. Thus, the 70% degree of incapacity (or 100% pension due to pulmonary tuberculosis) must apply and the veteran's incapacity from war-caused injury or war-caused disease, or both, must be of such a nature as, of itself alone, to render the veteran incapable of undertaking remunerative work for periods aggregating more than 8 hours per week. The discussion in the first part of this paper relating to those paragraphs applies equally to the effect of paragraph (2A)(c). Thus, section 28 applies by setting out the *only* matters that regard can be had to in deciding whether a veteran is incapable of undertaking remunerative work.

Paragraph 24(2A)(d)

(d) the veteran is, because of incapacity from war-caused injury or war-caused disease or both, alone, prevented from continuing to undertake the remunerative work ("last paid work") that the veteran was last undertaking before he or she made the claim or application; …

Paragraph (2A)(d) provides a test similar to that in the first part of paragraph (1)(c), but it relates to the veteran's "last paid work". This effectively overrules, for persons over 65, the main effect of *Starcevich*[147] and an important aspect of *Banovich*[148]. Instead of looking at the reasons for the veteran being prevented from undertaking remunerative of a type that he was undertaking at some time in the past, it is the particular work that the veteran was last undertaking that is the focus of the provision. Indeed, it is this particular last paid work that is the focus of each of the succeeding paragraphs.

While the Act does not expressly say so, it might be that a Court would find, similarly to Fox J in *Starcevich*[149], that the last paid work means the last *substantial* remunerative work undertaken by the veteran. Thus a veteran who had ceased his usual employment but who attempted for a short time, but unsuccessfully, some other enterprise, might not be excluded by a characterisation of that enterprise as his or her last paid work.

In *Repatriation Commission v. Haskard*[150] the veteran carried on a business as a property valuer on his own account, at the time of application the veteran was still undertaking about six valuations a year. Mr Haskard argued that an examination of the sections concerned with the immediate rate as well as special rate showed there was no requirement of a complete cessasation of remunerative work. The Commission submitted that under the provisions of 24(2A)(d), the last paid work of the veteran was as a self-employed valuer and therefore although he now only carried out limited valuations it could not be said that his incapacities had prevented him continuing to undertake the last paid work. His Honour agreed with Branson J in *Carter v. Repatriation Commission* [151] where doubts were expressed about full time work being characterised as work of the same kind as limited or irregular work undertaken and that it also requires a process of characterisation of the work to determine

147 (1987) 18 FCR 221, 76 ALR 449, 7 AAR 296

148 (1986) 69 ALR 395, 6 AAR 122

149 (1987) 18 FCR 221, 76 ALR 449, 7 AAR 296

150 [2002] FCA 1493, (2002) 36 AAR 257, 71 ALD 29, 18 *VeRBosity* 104

151 (2001) 33 AAR 343, 66 ALD 139, 113 FCR 314, 17 *VeRBosity* 80

whether remunerative work in fact ceased. *Banovich* was also referred to wherein the term "remunerative work" was used in the context which indicated an intention to refer to work generally and that the phrase "remunerative work which the veteran was undertaking" should be read as referring to the type of work which the person previously undertook rather than any particular job. In this case, the type of work characterised was the making of property valuations by Mr Haskard on his own account. Therefore, the conclusion was reached that Mr Haskard never actually ceased work and it was ongoing as at the hearing date. The Court held that s.24(2A)(d) did not apply to him and so he was ineligible for either the special rate or intermediate rate of pension.

In *Woodward v. Repatriation Commission*,[152] Kiefel J said:

> [7] The requirement of s 24(2A) is that *only* war-caused injuries or diseases operate to prevent the continuance of the work for which the veteran had been paid. …
>
> [9] The question posed by para (d) of the subsection in the present circumstances was whether the skin condition and ulcer were the only factors which prevented Mr Woodward from continuing to undertake the consultancy. The question is not one which looks to loss of, or impairment to, earning capacity. Whilst appearing to be a different question, an inquiry as to what caused Mr Woodward to cease that association wit the firm in this case was logically capable of providing the answer to the para (d) question." (the Court's emphasis).

In *Grant v Repatriation Commission*,[153] Sundberg J noted that the "alone" test in s 24(2A)(d) was not satisfied where being prevented from continuing to undertake the last paid work was a result of a combination of "the effects of … war-caused disabilities and the economic slump in the wool industry."

In *Grant v Repatriation Commission*,[154] the Full Federal Court (Merkel, Goldberg and Weinberg JJ) said:

> In order for a decision maker to be satisfied that the criterion in s 24(2A)(d) has been met the decision maker must determine:
>
> - the 'remunerative work' that the veteran was last undertaking before he or she made the claim or application;
> - whether the veteran is, at any time during the assessment period, because of incapacity from war-caused injury or war-caused disease or both, alone, prevented from continuing to undertake *that* remunerative work.
>
> [9] Determination of the 'remunerative work' referred to in s 24(2A)(d) requires the character-isation of the specific remunerative activity or activities that the veteran was last undertaking before making the claim or application rather than of the capacity in which that work was undertaken. The particular capacity in which the work was undertaken is dealt with as a separate criterion in s 24(2A)(g). Thus, whether or not the work was undertaken as an employee or as a self employed person is irrelevant to the characterisation to be given to that work under s 24(2A)(d). That conclusion follows from the definition of 'remunerative work' in s 5Q, the recognition in s 24(2A)(g) that the

[152] [1999] FCA 1647, (1999) 58 ALD 675

[153] (1999) 15 *VeRBosity* 68

[154] (1999) 57 ALD 1, 15 *VeRBosity* 99

capacity in which work is undertaken is to be treated as a matter separate from the work that was undertaken for the purposes of s 24 and is consistent with the purpose of s 24(2A) of providing for payment at the special rate where a person is prevented solely by war-caused incapacity from continuing to undertake the work that the veteran was last undertaking before making the claim or application. In our view it would be inconsistent with that purpose for the characterisation of that work to include, or to be made to depend upon, the capacity in which that work was undertaken.

[10] Section 24(2A)(d) can be contrasted with s 24(1)(c) which provides for a pension at the special rate for veterans under the age of s 65 who are prevented by war-caused injury or disease from undertaking 'remunerative work that the veteran was undertaking'; a term which has been construed as referring to the type of work that the veteran previously undertook: see *Banovich v Repatriation Commission* (1987) 69 ALR 395 at 402. Although by focusing upon the *last* paid work s 24(2A)(d) may be more restrictive than s 24(1)(c), which focuses upon remunerative work of the type the veteran previously undertook, neither sub-section is concerned with the capacity in which that work is undertaken.

[11] Having identified the last paid work for the purposes of s 24(2A)(d) the decision maker is then required to determine whether at any time during the assessment period because of incapacity from war caused injury or disease or both, alone, the veteran was prevented from continuing to undertake *that* remunerative work. Thus, the reason why the veteran may have ceased to undertake the last paid work *prior* to the date of the claim is relevant to, but not determinative of, the inquiry required by s 24(2A)(d).

[12] A veteran who has satisfied the requirements of s 24(2A)(d) must also satisfy the criterion in s 24(2A)(e) that, because the veteran was so prevented from undertaking his or her last paid work, the veteran is suffering a loss of salary or wages, or of earnings on his or her account, that he or she would not be suffering if he or she were free from the incapacity.

See also *Carter v. Repatriation Commission*.[155]

[155] [2001] FCA 992, (2001) 33 AAR 343, 66 ALD 139, 113 FCR 314, 17 *VeRBosity* 80

Paragraph 24(2A)(e) and subsection 24(2B)

(e) because the veteran is so prevented from undertaking his or her last paid work, the veteran is suffering a loss of salary or wages, or of earnings on his or her own account, that he or she would not be suffering if he or she were free from that incapacity; …

(2B) For the purposes of paragraph (2A)(e), a veteran who is incapacitated from war-caused injury or war-caused disease or both, is not taken to be suffering a loss of salary or wages, or of earnings on his or her own account, because of that incapacity if:

(a) the veteran has ceased to engage in remunerative work for reasons other than his or her incapacity from that war-caused injury or war-caused disease, or both; or

(b) the veteran is incapacitated, or prevented from engaging in remunerative work for some other reason.

It is important to note that where a veteran turns 65 after making a claim or application but before the claim or application is determined, subsections (1) and (2) continue to apply to that person for the entire assessment period and not subsections (2A) and (2B)—this is why there remains a reference to age 65 in paragraph (2)(b).

Paragraph (2A)(e) provides a test similar to that in the second part of paragraph (1)(c), but, again, it relates to the veteran's "last paid work". Thus, the veteran must be suffering a loss of salary or wages, or of earnings on his or her own account that he or she would not be suffering if he or she were free from the incapacity from war-caused disabilities because the veteran is prevented from undertaking his or her last paid work.

The operation of this paragraph is affected by subsection (2B), which operates in a similar fashion to paragraph (2)(a). Similar considerations as are expressed in relation to that paragraph in the first part of the paper apply, except that it must be read in the context of paragraph (2B)(e) applying only in relation to the veteran's last paid work.

Paragraph 24(2A)(f)

(f) the veteran was undertaking his or her last paid work after the veteran had turned 65; …

Paragraph (2A)(f) requires the veteran to have been working after the age of 65 years. If he or she did not do so, the person will be ineligible for the special rate of pension. In *Rose v Repatriation Commission*,[156] the Court said:

> [42] I turn next to Mr De Marchi's submission that the AAT failed to provide adequate reasons in its judgment for rejecting the claim for special or intermediate rate of pension. The reasons given on that issue were as follows:
>
> > "Section 24 was amended, with effect from 1 June 1994, which provides that a veteran is not qualified to receive payment of the pension at the special rate if he/she was not undertaking paid work after turning 65 years of age (s.24(2A)(f)). It is undisputed in this case that Mr Rose ceased work at the age of 60 years. Accordingly, if the current s 24 is applicable, Mr Rose is not able to qualify to receive payment of pension at the special rate.
> >
> > A fresh application, being the matter before the Tribunal, was lodged on 25 May 1995, ie the

[156] [2001] FCA 245 , (2001) 64 ALD 695, 17 *VeRBosity* 12

application was lodged after the commencement of the amendments introduced in 1994. Whilst acknowledging the history of the matter, the Tribunal is, in this case, concerned with the particular claim which could, or would, give rise to a veteran qualifying to receive payment of the pension at the special rate. It is the application lodged after 1994 which must be determinative (*Re Clements and Repatriation Commission* (1997) 49 ALD 798). In those circumstances it is the Tribunal's view that Mr Rose is not able to succeed in his application for payment of the pension at the special rate."

[43] Mr Rose put his case on one basis only before the AAT. That basis was that he should be eligible for the intermediate or special rate of pension because of the finding that lumbar spondylosis was war-caused. It is clear that the AAT considered the matter on this basis and correctly determined that the relevant claim having been lodged after 1 June 1994, meant that the amended s 24 was the applicable provision. The AAT stated that it was not satisfied that Mr Rose could meet the requirement of s 24(2A)(f) and that as a result he was not eligible for the special rate. I do not think the AAT needed to go any further than that.

Paragraph 24(2A)(g)

(g) when the veteran stopped undertaking his or her last paid work, the veteran:

(i) if he or she was then working as an employee of another person—had been working for that person, or for that person and any predecessor or predecessors of that person; or

(ii) if he or she was the working on his or her own account in any profession, trade, employment, vocation or calling—had been so working in that profession, trade, vocation or calling;

for a continuous period of at least 10 years that began before the veteran turned 65; …

Paragraph (2A)(g) applies a 10 year rule to the veteran's last paid work. An essential element of this paragraph is that the veteran must have stopped working. If the veteran is still performing remunerative work of any kind, the paragraph cannot be met: *Carter v. Repatriation Commission*[157]; *Repatriation Commission v. Haskard*.[158]

The veteran must have been working, in his or her last paid work, for the same employer (or the predecessor of that employer) both before and after he or she turned 65 years. The veteran must have been in that employment for a continuous period of at least 10 years.

If the veteran was not an employee, then he or she must have been working, in his or her last paid work, in the same field of work both before and after he or she

[157] [2001] FCA 992, (2001) 33 AAR 343, 66 ALD 139, 113 FCR 314, 17 *VeRBosity* 80

[158] [2002] FCA 1493, (2002) 36 AAR 257, 71 ALD 29, 18 *VeRBosity* 104

turned 65 years, and have been doing so for at least 10 years.

The question as to whether a veteran was an employee or working on his or her own account is to be determined on the basis of the common law definition of employee. The main High Court authority is the decision in *Stevens & Gray v. Bodribb Sawmilling Co Pty Ltd*[159] where the Court examined the nature of the control which an employer would exercise or could exercise over the worker and said that this was not the sole consideration. Other factors were to be considered. These included:

(a) whether it is the employer or the worker who provides the equipment or machinery — if it is the latter it tends to suggest the person is an independent contractor (ie, working on his or her own account);

(b) who determines working hours — if the workers determine their own working hours this would suggest an independent contractor relationship;

(c) the nature of payment — is the payment made by time or according to results? If payment is the latter it is more likely to be an independent contractor relationship. If payment is made according to a set number of hours worked per week, this is an indication that the worker is normally an employee;

(d) the extent to which actual work is guaranteed;

(e) the extent to which the workers can freely exercise their own skill and judgement in carrying out the work — the greater the freedom the more likely the worker is an independent contractor;

(f) the deduction of PAYE tax instalments from any payments made to the worker, suggesting the worker is an employee;

(g) whether the worker can delegate further the work to another person — if there is the power to delegate, this suggests the person is an independent contractor.

In *Re Courtney v. Repatriation Commission*[160], the Administrative Appeals Tribunal held that:

> [T]he 'continuous period of 10 years that began before a veteran turned 65 years' must be continuous 'when the veteran stopped undertaking his … last paid work'. That is, the period of paid work, which must have been continuous — that is, uninterrupted — must have been for at least 10 years at the time a veteran last worked.[161]

In *Carter v Repatriation Commission*[162] Branson J appears to accept this position. At paragraph [29], the Court stated that a break of 12 months "broke the continuity of his work in the accounting profession".

In *Thomson v. Repatriation Commission*,[163] the Full Federal Court qualified the nature of the "continuity" of work by permitting some short gaps. The Court said:

> [S]ub-section (g) of s 24(2A) is concerned with the capacity in which the last paid work was undertaken. A veteran meets the requirements of the sub-section if the last paid work has been undertaken in the relevant capacity for a continuous period of at

159 (1986) 160 CLR 16

160 unreported, 16 January 1997, Senior Member Handley

161 unreported, 16 January 1997, Senior Member Handley, at p.5

162 [2001] FCA 992, (2001) 33 AAR 343, 66 ALD 139, 113 FCR 314, 17 *VeRBosity* 80

163 [2000] FCA 204, (2000) 61 ALD 58, 16 *VeRBosity* 12, Ryan, North and Merkel JJ

least 10 years. If the capacity is as an employee, the veteran must have been employed by the same employer (or its predecessor) continuously for the 10 year period. If the veteran is self-employed, then the last paid work must have been undertaken in that capacity continuously for the 10 year period. When sub-clause (ii) refers to the requirement that the self-employed veteran must have been "so working" continuously for the 10 year period, the reference is to the capacity in which the veteran worked.

[11] Thus, the enquiry mandated by the sub-section in the present case required consideration of whether the appellant had been working as a medical practitioner on his own account for a continuous period of at least 10 years prior to his cessation of work during July 1996. Continuity of the appellant's medical work throughout the period is relevant to, but not determinative of, that matter. Continuity of a doctor's work as a self-employed medical practitioner in a case such as the present would also, usually, be expected to involve consideration of whether indemnity insurance, medical registration, AMA membership, medical journal subscriptions and the requisite medical equipment continued to be maintained throughout the relevant period.

[12] Furthermore, if there were gaps in the continuity of work during the relevant period the reason for the gaps will be relevant. For example, if the gaps occurred solely as a result of a temporary unavailability of work, that could not, properly, lead to a conclusion of lack of continuity under s 24(2A)(g)(ii). This is particularly the case if the doctor had been actively, but unsuccessfully, seeking work during the relevant period. However, if the gaps occurred because the doctor had decided to retire, or the unavailability was more permanent, that would support a conclusion that he or she had ceased to continue working as a medical practitioner on his or her own account. Plainly, questions of fact and degree will be involved.

…

[15] … [S]ubparas (i) and (ii) make it quite clear that s 24(2A)(g) is concerned with the capacity in which the last paid work was undertaken. The purpose of those sub-clauses in s 24(2A)(g) appears to be to prevent claims by veterans over 65 years of age that are based on new or recent employment or self-employment (ie, in the present context, less than 10 years in duration).

In *White v Repatriation Commission*,[164] Conti J discussed *Thomson's* case and the idea of short gaps of continuity of work and noted:

> Mr White sought to cover contentious time gaps by reliance upon his accounting work undertaken for the two private companies over the lengthy period of time which spanned at least the period of time from his retirement in 1958 from Travelodge to the year 1997 when Mr White moved to Murwillumbah, but the findings of the AAT, particularly in [15] above, do not allow room for legitimate reliance upon that latter activity as remunerative work, despite its accountancy nature, or else as work engaged in continuously in any relevant sense.

[164] [2001] FCA 1585, (2001) 114 FCR 494, 34 AAR 151, 17 *VeRBosity* 112

Blinded veterans

Veterans who are blinded as a result of a war-caused injury or war-caused disease do not need to satisfy any of the other criteria in section 24. If they meet the blinded requirement, then section 24 applies to them and they are entitled to pension at the special rate.

The subsection provides as follows:

Subsection 24(3)

(3) This section also applies to a veteran who has been blinded in both eyes as a result of war-caused injury or war-caused disease, or both.

Subsection 5D(3) provides a definition of blinded in an eye. It provides:

> **(3)** For the purposes of this Act, a person is taken to have been **blinded in an eye** if:
> (a) the person has lost the eye; or
> (b) in the opinion of the Commission, the eyesight of the person in that eye is so defective that the person has no useful sight in that eye.

Continuation of special rate pension

Section 24A provides for the continuation of pension at the special rate even though the veteran might not continue to meet all of the special rate criteria. This section was introduced into the Act following representations from the veteran community after the Federal Court had held, in *Repatriation Commission v. Smith, M. J.*[165] that the special rate of pension continued to be payable only while the veteran continued to meet all of the criteria specified in section 24.

In *Gauntlett v. Repatriation Commission*,[166] Pincus J said:

> [I]t may seem an oddity that if this applicant had succeeded in establishing the existence of the conditions in paragraph (b) and(c) at the date of application—only a few days before he turned 65—he would have been entitled under s.24A(c) to continue to receive the special rate of pension unless he undertook or was capable of undertaking remunerative work for periods aggregating more than eight hours per week. To this extent, there is now a degree of incompleteness in the statement of the Tribunalthat: 'Parliament intended sections 23 and 24 to assist veterans who suffered relevant economic loss during the course of their working life and not after they reached the generally accepted retirement age'. Accepting that this was originally the intention, it must have changed sharply in 1987, when s.24A was added; that section can produce the result that an elderly veteran who establishes an initial entitlement by showing the necessary conditions, including a loss of earnings, can continue to receive the special rate, perhaps for many years, after the loss of earnings has ceased.

Section 24A provides:

Continuation of rates of certain pensions

24A.(1) Subject to subsection (2), if the Commonwealth is or becomes liable to pay a pension to a veteran at the rate applicable under section 23 or 24, that rate continues, while a pension continues to be payable to the veteran, to apply to the veteran unless:

> (a) the decision to apply that rate of pension to the veteran would not have been made but for a false

[165] (1987) 15 FCR 327, 74 ALR 537

[166] (1991) 32 FCR 73, 24 ALD 79

statement or misrepresentation made by a person;

(b) in the case of a veteran to whom section 23 applies:

(i) the veteran is undertaking or is capable of undertaking remunerative work of a particular kind for 50% or more of the time (excluding overtime) ordinarily worked by persons engaged in work of that kind on a full time basis; or

(ii) in a case where subparagraph (i) is inapplicable to the work which the veteran is undertaking or is capable of undertaking—the veteran is undertaking or is capable of undertaking that work for 20 or more hours per week; or

(c) in the case of a veteran to whom section 24 applies—the veteran is undertaking or is capable of undertaking remunerative work for periods aggregating more than 8 hours per week.

(2) Paragraphs (b) and (c) do not apply to a veteran if the veteran is undertaking a rehabilitation scheme under the Veterans' Vocational Rehabilitation Scheme or section 115D applies to the veteran.

Paragraph 24A(1)(a)

24A.(1) Subject to subsection (2), if the Commonwealth is or becomes liable to pay a pension to a veteran at the rate applicable under section 23 or 24, that rate continues, while a pension continues to be payable to the veteran, to apply to the veteran unless:

(a) the decision to apply that rate of pension to the veteran would not have been made but for a false statement or misrepresentation made by a person;

false statement or misrepresentation

The first exception to the continuation of the special rate of pension is where the decision to assess pension at the special rate would not have been made but for a false statement or misrepresentation. The provision applies even if that false statement or misrepresentation was not made by the veteran but by some other person. Additionally, the section does not require that the false statement or representation have been intentionally made. In *McAuliffe v. Secretary, Department of Social Security*[167], the Federal Court held that, where the relevant Act provided that where a benefit was paid in consequence of a false statement or representation and the amount would not have been paid but for that false statement or representation:

> [A] statement or representation which is untrue in fact, is 'false'. Liability to the Commonwealth for overpayment of benefit is not dependent on proof that the statement or representation was deliberately or intentionally untrue.

However, the fact that the veteran or some other person has made a false

[167] (1991) 23 ALD 284 at p.296 (affirmed by the Full Court: (1992) 28 ALD 609)

statement or misrepresentation does not necessarily mean that the pension can be reduced or cancelled. It is necessary that the false statement or misrepresentation was essential to the decision to grant pension at the special rate, but it need not be the primary or dominant reason for the pension being granted at the special rate: *McAuliffe v. Secretary, Department of Social Security*[168].

A misrepresentation can be made by failing to provide the complete picture and by only providing some of the facts such that a misleading impression of the true situation is provided.

Paragraph 24A(1)(c)

24A.(1) Subject to subsection (2), if the Commonwealth is or becomes liable to pay a pension to a veteran at the rate applicable under section 23 or 24, that rate continues, while a pension continues to be payable to the veteran, to apply to the veteran unless:

...

(c) in the case of a veteran to whom section 24 applies—the veteran is undertaking or is capable of undertaking remunerative work for periods aggregating more than 8 hours per week.

capacity to undertaking remunerative work

The second exception to the continuation of the special rate of pension is where the veteran is undertaking or is capable of undertaking remunerative work. It is important to note that section 28 states that the only matters that may be taken into account in determining this issue are:

(a) the vocational, trade and professional skills, qualifications and experience of the veteran;

(b) the kinds of remunerative work which a person with the skills, qualifications and experience referred to in paragraph (a) might reasonably undertake; and

(c) the degree to which the physical or mental impairment of the veteran as a result of the injury or disease, or both, has reduced his or her capacity to undertake the kinds of remunerative work referred to in paragraph (b).

Subsection 24A(2)

(2) Paragraphs (b) and (c) do not apply to a veteran if the veteran is undertaking a rehabilitation scheme under the Veterans' Vocational Rehabilitation Scheme or section 115D applies to the veteran.

Veterans' Vocational Rehabilitation Scheme

If a veteran is undertaking a rehabilitation program under the Veterans' Vocational Rehabilitation Scheme or if section 115D applies to the veteran, then even if the veteran is undertaking remunerative work or is capable of undertaking remunerative work, the veteran retains the special rate of pension. Section 115D provides for the rate of the special rate of pension to be reduced over time where a person has completed a rehabilitation program under the Scheme until it reaches a rate equivalent to 100% of the general rate: see section 115D and subsection 24(5).

Subsection 24A(2) does not prevent paragraph 24A(1)(a) applying where the special rate of pension was granted because of a false statement or misrepresentation.

[168] (1991) 23 ALD 284 at pp.295-296 (affirmed by the Full Court: (1992) 28 ALD 609)

Temporary payment at the special rate

The special rate of pension can be payed on a temporary basis if the veteran is incapacitated to such an extent that, he or she can meet all of the tests within section 24 except that instead of requiring that the incapacity be permanent (paragraph 24(1)(b)) it is only temporary. Section 25 provides:

Section 25

25. (1) Where the Commission is satisfied that:

(a) a veteran is temporarily incapacitated from war-caused injury or war-caused disease, or both; and

(b) if the veteran were so incapacitated permanently, the veteran would be a veteran to whom section 24 applies;

the Commission shall determine the period during which, in its opinion, that incapacity is likely to continue and this section applies to the veteran in respect of that period.

(2) Where this section applies to a veteran in respect of a period, the rate at which pension is payable to the veteran in respect of that period is the rate specified in subsection 24(4).

(3) The Commission may, under this section:

(a) determine a period that commenced before the date on which the determination is made; and

(b) determine a period in respect of a veteran that commenced or commences upon the expiration of a period previously determined by the Commission under subsection (1) in respect of the veteran.

Subsection 25(1) requires the Commission to determine a period during which the relevant incapacity is likely to continue. This means that the Commission cannot merely fix a commencement date for payment of special rate, but must fix an end date. Paragraph 25(3)(b) provides that the Commission can determine a further period that extends beyond an end date that has previously been fixed.

While the section does not expressly provide that the Repatriation Commission set a 'reversion' rate of pension upon the expiration of the temporary special rate period, it is implicit in the fact that the period must come to an end that the Commission should fix such a rate based on what evidence it has at the time of its decision as to the likely degree of incapacity and the rate of pension that is likely to be applicable at that time.

Clearly, the preferable course of action is to arrange for the veteran to be re-assessed close to the end of the period fixed under subsection 25(1), and a new rate of pension determined or the temporary period extended as envisioned by paragraph 25(3)(b). In practice, the Repatriation Commission does not, as a matter of course, reassess pension at the end of a period of temporary total incapacity, and pension is automatically reduced to the rate at which the veteran had previously been receiving pension or the rate provided for in the determination if a reversionary rate had been fixed. If, near the end of a period of temporary special rate, a veteran believes his or her rate of pension should be higher than the reversionary rate, it is in their interests to lodge an application for increase in pension in order that the Commission is then required to determine an appropriate rate (including the possibility that the temporary special rate period might be extended or the relevant incapacity might be determined to be permanent).

There have been very few cases on section 25 in the Tribunal and none in the

Federal Court. However, similar legislation exists within the Social Security context, and it is submitted that manner in which the words "temporary" and "permanent" have been interpreted by the Tribunal and Court in that context is equally applicable to sections 24 and 25.

temporary or permanent

The words "temporary" and "permanent" take their meaning from the context in which they appear. It is clear from the context of sections 24 and 25 that "permanent" means that the relevant incapacity is likely to continue for an indefinite period, and "temporary" means that the incapacity is likely continue for a limited period that may be reasonably estimated.

In *Re Tiknaz and Director-General of Social Security*,[169] the Tribunal (President Davies J, Senior Member Ballard and Member Dr Garlick) said:

> In the context of ss.23 and 24 of the *Social Services Act 1947*, the word 'permanent' does not refer to an incurable condition but rather to one that is static or constant, one that will not persist only for a temporary period, one that will persist at least for an indefinite time in the future. A person who is temporarily incapacitated is entitled to a Sickness Benefit. He is entitled to an Invalid Pension if he is permanently incapacitated. In the context, the word 'permanent' does not refer to a condition which will necessarily continue for the remainder of the person's life. It refers to a condition which is established and continuing, a condition which is not temporary or transitory. See *Henriksen v Grafton Hotel Ltd.* [1942] 2 KB 184 at 196, *Applegate v Federal Commissioner of Taxation*, 18 ALR 459 at 463, the remarks of Mr A N Hall and Dr M Glick in *Re Panke and Director-General of Social Services* (delivered 23 July 1981), paragraph 50, and the remarks of Mr E Smith, Dr M Glick and Mr W B Tickle in *Re Bradley and Director-General of Social Services* (delivered 19 August 1981), paragraphs 37 and 38.

The Full Federal Court, in *McDonald v. Director-General of Social Security*,[170] agreed with this passage from *Re Tiknaz*. Woodward J said:[171]

> In my view the true test of a permanent, as distinct from temporary, incapacity is whether in the light of the available evidence, it is more likely than not that the incapacity will persist in the foreseeable future. (Cf. *Re Tiknaz and Director-General of Social Services* (1981) 4 ALN N44.)
>
> This test involves two questions. The first is whether it is more likely than not that the disability will terminate (or fall below 85% in the sense referred to above) at some time in the future. Even if the answer to this question is 'Yes', I think it would be inaccurate in the context of employment to describe as 'temporary' a condition which was likely to last for a number of years. Hence the two elements of degree of likelihood of improvement and time-span for that improvement, should be weighed together in determining what is permanent and what is temporary. The greater the likelihood of substantial improvement and the earlier that it is likely to occur, the more accurate will be a 'temporary' label. The longer the period and the less probable the improvement, the

[169] (1981) 4 ALN N44

[170] (1984) 1 FCR 354; 6 ALD 6

[171] (1984) 1 FCR 354 at p.360

more appropriate will be a finding of permanent incapacity.

I do not regard what I have just said as conflicting in any way with the passage from *Re Panke and Director-General of Social Security* (above), quoted by the AAT. The choice is indeed between incapacities 'likely to last indefinitely' — meaning for a long and indeterminate time but not necessarily forever — and incapacities 'likely to last only for a time' — meaning a time which is predictable and capable of being quantified, though not necessarily with any precision.

Northrop J said[172]

The phrase 'permanently incapacitated for work' appears in social welfare legislation which also makes provision for sickness benefits to be paid to a person 'incapacitated for work' being 'an incapacity of a temporary nature'; see s.108 of the Act. A distinction of a temporal nature is thus drawn, even though in this context, of necessity, 'permanent' must be limited in time. In some workers' compensation legislation, another type of social welfare legislation, reference is made to 'permanent' disablement. In the context of that type of legislation, the High Court has characterised the concept of "permanent" as being forever. Thus, in *Wicks v. Union Steamship Company of New Zealand Ltd* (1933) 50 C.L.R. 328 , the Court comprising Gavan Duffy CJ, Rich, Starke, Dixon, Evatt and McTiernan JJ at pp.338 said:

'The sub-section then excepted from the limitation cases of permanent and total disablement. The Commission was, therefore, called upon to decide whether the worker had been permanently and totally disabled, an expression which, in our opinion, means physically incapacitated from ever earning by work any part of his livelihood.'

To some extent the absolute nature of 'forever' in relation to an incapacity for work is eased by the statement of principles enunciated in *Panke's* case, supra, that under the Act, 'permanent incapacity must be taken to refer to an incapacity which is likely to last indefinitely as opposed to one which is likely to last only for a time'. I agree with the opinion of Woodward J that under the Act the true test of whether incapacity for work is permanent as distinct from being of a temporary nature is whether, in the light of all the evidence and material before the Director-General, or his delegate, or the AAT, the incapacity for work is more likely than not to persist in the foreseeable future.

<u>possible medical treatment</u>

In *Dragojlovic v. Director-General of Social Security*,[173] the Federal Court held that a "disability which can be relieved by treatment which is reasonably available is not permanent". However, Smithers J went on to say that "where the claimant is a person who actually cannot, for fear, or religious beliefs, for example, or for some other reason of a genuinely compulsive nature, accept that treatment, the question is whether his disability is one which can, in fact, be relieved".

[172] (1984) 1 FCR 354 at pp.364-365

[173] (1984) 1 FCR 301 at p.304.

Standard and onus of proof

Reasonable satisfaction

In *Repatriation Commission v. Smith, M. J.*[174], the Court considered in some detail the relevant standard of proof that applies in relation to special rate matters. The Court held as follows:

> s.120(4) speaks in terms of a reasonable satisfaction. This expression has a settled meaning, at least in a curial context. In *Briginshaw v. Briginshaw* (1938) 60 CLR 336, Dixon J, dealing with the civil standard of persuasion, said (at p 362):
>
> > '... it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.'
>
> Similarly, in *Rejfek v. McElroy* (1965) 112 CLR 517, the Full High Court spoke of the civil standard of proof (at p.521):
>
> > 'No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied ...'

Difficulties have arisen because of the use of different expressions in describing the civil standard but, as the learned authors of *Cross on Evidence* (Third Australian Edition—DM Byrne QC and JD Heydon) say of this standard (at p.246):

> 'In ordinary civil cases it is usually expressed as involving the "preponderance of probability", the "balance of probabilities", or the "preponderance of evidence". It might be argued that the last of these seems to involve no more than the preponderance of the evidence produced by the proponent of an issue over that produced by its opponent. It is more common, however, to regard all of these terms as synonymous, and as connoting not really relative preponderance over the evidence of the opponent but satisfaction of a prescribed level of probability. The possibility of a contrary finding does not prevent a finding reached on that standard from being appropriate. It is not enough for a plaintiff to fail that his account "may not be correct".'

The foregoing is, of course, dealing with the standard required in court proceedings where the rules of evidence are applicable. The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit (*Administrative Appeals Tribunal Act 1975* s.33(1)(c); *McDonald v. Director-General of Social Security* (1984) 1 FCR 354, 6 ALD 6). Yet, whilst the Tribunal was not bound by the technical evidentiary rules, especially the exclusionary rules, natural justice may require that it act

[174] (1987) 15 FCR 327, 74 ALR 537

on material that is relevant and logically probative (see *Mahon v. Air New Zealand Ltd.* (1984) AC 808; *Minister for Immigration and Ethnic Affairs v. Pochi* (1980) 31 ALR 666; Enid Campbell, *Well and Truly Tried* (Ed. by Campbell and Waller) at pp 70-1, 86; Cross, op. cit. at pp.11-13; Aronson and Franklin, *Review of Administrative Action* at p.95; p.174).

Even if the Tribunal is not bound by the traditional evidentiary principles, s.120(4) constitutes a clear direction to the Tribunal that it must be reasonably satisfied before it makes any decision. In my opinion, this could only have been intended to introduce the standard of proof required in civil litigation. *McDonald's* case, supra, dealing with social security legislation is not authority to the contrary. Rather, it is a case of s.120(4) introducing the civil standard for our purposes (see *Minister for Health v. Thomson* (1985) 60 ALR 701 at p 712; Campbell, op. cit. at p 53; see *East v. Repatriation Commission*, unreported, 22 July 1987, per Jenkinson, Neaves and Wilcox JJ. at p 32; cf. under the English legislation, *Miller v. Minister of Pensions* (1947) 2 All ER 372 per Denning J. at p 374).

It follows, in my view, that the Tribunal erred in adopting the Bishop test. Instead, it should have asked itself whether on the facts of the case, it was persuaded on the civil standard. There is, in this connection, a distinction of substance to be drawn between the probabilities on the one hand and mere possibilities, even if they are real as distinct from fanciful, on the other (see *Re Repatriation Commission and Delkou* 9 ALD 358; *Easton and Repatriation Commission*, Administrative Appeals Tribunal, unreported, 29 June 1987; *Repatriation Commission and Faulkner*, Administrative Appeals Tribunal, unreported, 22 May 1987).

While there is no onus of proof on either party (see subsection 120(6)), it remains for the Tribunal to be satisfied that there is sufficient material to comfortably satisfy it that the veteran meets all of the relevant criteria. In *Cavell v. Repatriation Commission*[175], Burchett J said[176]:

> [I]t was for [the veteran] to make his case and to elect whether to go into evidence, and what evidence to adduce. A party cannot present material to the tribunal step by step, demanding at each step to know whether what has been adduced is sufficient.

In *Epeabaka v. Minister for Immigration and Multicultural Affairs*,[177] Finkelstein J spoke of the standard of proof applying to the Refugee Review Tribunal, but his comments are applicable to any administrative decision-maker. He said[178]:

> Thus, the tribunal must simply listen to all of the evidence and decide the case on the basis of that evidence. … Most usually the evidence will be adduced by the applicant, but the tribunal has power to require the secretary to provide it with information … and can also inform itself of relevant facts. In considering the evidence the tribunal is 'under a duty to arrive at the correct or preferable decision in the case': compare Bushell at CLR 425. …
>
> When deciding a case the tribunal must have regard to what is an appropriate standard of persuasion. In *Sodeman v. R* (1936) 55 CLR 192 at 216 Dixon J said that the common

175 (1988) 9 AAR 534

176 ibid, at p.541

177 (1997) 47 ALD 555.

178 (1997) 47 ALD 555, at pp. 557-558.

law only knew of two such standards, that applicable to criminal cases, beyond a reasonable doubt, and that applicable to civil cases, the preponderance of probability. However, Dixon J pointed out that 'questions of fact vary greatly in nature and, in some cases, greater care in scrutinising the evidence is proper than in others, and a greater clearness of proof may be properly looked for'. … It is more likely to arrive at the correct or preferable decision if its obligation is to determine the existence of facts in accordance with the civil standard except in respect of those matters where the nature of what must be decided makes this inappropriate.

Material on which a decision maker may act

Evidence

In *Repatriation Commission v. Smith, M. J.*[179], the Court stated:

> Yet, whilst the Tribunal was not bound by the technical evidentiary rules, especially the exclusionary rules, natural justice may require that it act on material that is relevant and logically probative ...
>
> The general position is well explained by Professor Campbell (op. cit. at pp. 49-50):
>
> > 'The curial rules of evidence differentiate between those matters of fact which can only be proved by evidence and those facts which may be judicially noticed, i.e. which are not required to be proved by evidence. Tribunals which are not bound by the rules of evidence are certainly not constrained by the doctrine of judicial notice and may take 'official' notice of a much wider range of facts than the facts which may be judicially noticed. This facility is especially important to those tribunals whose members include experts in a particular field whose expertise has a direct bearing on the work of the tribunal, e.g. medical practitioners in relation to the assessment of claims for compensation or pensions for physical disability or incapacitation. Facts which may be officially noticed by a tribunal, may nonetheless be facts which, if noticed, must be disclosed to interested parties, for the sake of natural justice, in order to give those parties an opportunity to controvert the facts noticed.'

It is often the case that the only evidence concerning the veteran's intention is the veteran's own evidence. The fact that there is nothing against which that testimony can be tested does not prevent a decision maker from finding against the veteran having regard to all the circumstances of the case as they are known, including the applicant's age and time since last working: *Flannery v. Repatriation Commission*[180]; *Cavell v. Repatriation Commission*[181]. However, there is no rule that there must be corroborative evidence in such circumstances before a claim can succeed: *Maley v. Repatriation Commission*[182]; *Repatriation Commission v. Maley*[183].

In *Repatriation Commission v. Strickland*[184], Jenkinson J stated:

[179] (1987) 15 FCR 327, 74 ALR 537

[180] (1992) 8 *VeRBosity* 72

[181] (1988) 9 AAR 534

[182] (1991) 23 ALD 29

[183] (1991) 24 ALD 43, 14 AAR 278, 7 *VeRBosity* 130

[184] (1990) 22 ALD 10, 12 AAR 343

> The Tribunal expressed its willingness to accept the suggestion by the respondent's counsel that many 'self-employed' persons work beyond the age of 65 years, but indicated, in my opinion, by its references to the absence of evidence about the proportion of such persons who work beyond that age, its unwillingness in the particular instance to use in its reasoning to a finding any belief the members of the Tribunal may have held about the incidence of that behaviour in the Australian community. This in my opinion they were legally free to do.

This statement was approved by Gray J in *Sherman v. Repatriation Commission*[185]. Thus, given that the decision maker must be reasonably satisfied that an applicant meets the relevant criteria, a veteran who merely makes unsubstantiated assertions as to usual or common work practices or probabilities of obtaining employment at a particular age, runs a serious risk of not satisfying the decision maker to the relevant standard.

In *Epeabaka v. Minister for Immigration and Multicultural Affairs*, Finkelstein J said [186]:

> In the course of deciding whether it has been persuaded, on the balance of probabilities of the existence of a particular fact or event the tribunal is not bound by the rules of evidence. That is to not say the rules of evidence should be set aside. In *R v. War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256 Evatt J pointed out that those rules were developed 'to prevent error and elicit truth'. Nevertheless, because it is not bound by rules of evidence the tribunal can act on any material that is helpful in coming to a decision. That includes material that might be admissible in a court of law. It includes hearsay that might not be admissible in a court; presumably the hearsay must be reliable: *Kavanagh v. Chief Constable of Devon and Cornwall* [1974] 1 QB 624 at 633. But in all cases the evidence relied upon must be logically probative of the fact to be determined.

Pulmonary tuberculosis pension provisions (reprint from (1986) 2 *VeRBosity* 62)

In 1924 the Royal Commission on War Service Disabilities recommended that a permanent pension should be paid where tuberculosis had resulted from war service. Cabinet approved the recommendation in 1925 and, in order to give its decision "the force, permanency and protection derivative only from a statutory provision", the Australian Soldiers' Repatriation Act was amended in 1934 to provide that:

> The rate of pension payable ... in respect of incapacity caused by pulmonary tuberculosis shall not be less than [100% of the General Rate].

The next major amendment to this provision was in 1943 when a motion to amend the Australian Soldiers' Repatriation Act 1943 by Mr Francis, the member for Moreton, was accepted by the Government. This amendment provided:

> [W]here a member of the Forces served in a theatre of war ... and pension in respect of [pulmonary tuberculosis] would not, but for this sub-section, be payable, the Commonwealth shall ... be liable to

185 (1991) 7 *VeRBosity* 60

186 (1997) 47 ALD 555, at p. 558.

> pay ... pension ... as if the incapacity ... resulted from an occurrence happening during the period he was a member of the Forces.

Therefore, from 1943 any veteran who had contracted pulmonary tuberculosis and who claimed a pension, received 100% of the General Rate whether or not it was determined to be a service related incapacity and regardless of the actual degree of incapacity.

By 1978 there were many veterans receiving the General Rate pension when their actual incapacity from pulmonary tuberculosis was negligible. Therefore the Government decided to repeal the pulmonary tuberculosis provisions, the main one being s.37 of the Repatriation Act, and to freeze the pensions. In the Second Reading Speech of the *Repatriation Acts Amendment Act 1978* the Minister said:

> While recognising that pulmonary tuberculosis is a horrible disease and those who suffered from it have had to endure a great deal, the Government is firmly of the view that there is no longer any reason for these people to be in a privileged position, particularly when the disease is no longer active. In future, only service-related pulmonary tuberculosis will attract a disability pension and the amount of pension paid, as with any other illness or injury, will be determined according to the degree of actual incapacity. Veterans in receipt of benefits for pulmonary tuberculosis at the 100 per cent general rate will not lose their pensions, but will have these pensions frozen from 2 November 1978 at the 1978 cash level of that rate.

The pensions were to be frozen at that rate until the rate of pension for actual incapacity became greater than the frozen rate.

Sub-section 40(2) of the 1978 Act provided that the Commission would conduct a review of all pensions payable in respect of incapacity from pulmonary tuberculosis and determine the actual degree of incapacity.

Sub-section 40(3) said that:

> Where a pension is the subject of a review in accordance with sub-section (2), the incapacity (if any) in respect of which the pension is payable shall, for the purposes of that review and thereafter for all purposes of the Repatriation Acts, be treated as if it had resulted from an occurrence that happened during the war service or special service of the member of the Forces concerned.

Therefore, from that time onwards, incapacity from pulmonary tuberculosis for those veterans who had been granted pensions under s.37 of the Repatriation Act, would be deemed to be a service related incapacity for all purposes of the Act.

In 1982, following representations from the Federated TB Sailors, Soldiers and Airmen's Association of Australia and other ex-service organisations the Government decided to restore to veterans who were in receipt of a pension prior to November 1978 in respect of pulmonary tuberculosis, the 100% General Rate pension irrespective of the actual assessment of their condition. This became effective on 6 January 1983, by which time the frozen rate had declined in value to about 70% of the General Rate. The restoration of 100% General Rate pension was brought about by s.85 of the *Repatriation Legislation Amendment Act 1982*. However, new grants of pension could still only be made if incapacity from pulmonary tuberculosis was determined as service related and such new pensions were to be assessed at actual incapacity.

When the VE Act commenced on 22 May 1986 it repealed most of the previous Repatriation legislation but it did not repeal s.40 of the Repatriation Acts Amendment Act 1978. In order to ensure that veterans receiving a pension for pulmonary tuberculosis continue to receive a pension under the VE Act, s.4(9) of the VE(TP&CA) Act provides:

> **(9)** Where
>
> (a) a pension had been granted to a person under a repealed Act from a date before 1 November 1978 in respect of incapacity caused by pulmonary tuberculosis; and
>
> (b) that pension continues to be payable to the person on and after the commencing date as if it had been granted under the Veterans' Entitlements Act,
>
> the rate of that pension shall not be less than the maximum rate specified in sub-section 22(7) of the Veterans' Entitlements Act.

The pulmonary tuberculosis provisions have caused some special problems since the Special Rate and Intermediate Rate have had the prerequisite that:

> there is in force ... a determination ... determining that the degree of incapacity of the veteran from war-caused injury or war-caused disease, or both, is 100 per centum.

Where a veteran is in receipt of a pension at 100% because of the pulmonary tuberculosis provisions, can it be properly said that there is a determination in force determining the degree of incapacity of war-caused disease or injury at 100%?

It has been argued that a determination continuing pension at the General Rate because of s.4(9) of the VE(TP&CA) Act does not go to the degree of incapacity of the veteran but merely the rate of pension and therefore s.24(1)(a) of the VE Act is not met.

Section 4(9) of the VE(TP&CA) Act says that the pension is deemed to have been granted under the VE Act. The only ground for eligibility for pension to a veteran under the VE Act is found in s.13(1)(b) which says that "Where a veteran has become incapacitated from a war-caused injury or a war-caused disease the Commonwealth is liable to pay pension." Does the deeming provision (s.4(9)) mean that the pension is deemed to have been paid for incapacity and, because pension cannot be paid at less than 100% of the General Rate, the degree of incapacity is deemed to be 100%?

This situation seems to be analogous to those cases caught by s.7(3) of the VE(TP&CA) Act where an artificial assessment as to degree of incapacity is imposed on the determining authority because of a previous determination made under earlier legislation.

Section 7(3) may also provide another solution to the problem. It says:

> in the course of reassessing the rate at which a pension to which this sub-section applies, [the Commission shall not] determine, as the degree of incapacity ... a percentage that is less than the percentage of the ... pension constituted by the rate at which that pension was, immediately before the commencing date, paid ...

It could be argued that this section deems the degree of incapacity to be 100% given that all pulmonary tuberculosis pensioners were receiving at least 100% of the General Rate immediately before the commencing date. The section is not reliant on any previous assessment as to degree of incapacity, but only on a previous rate of pension. However, s.7(2) says that s.7(3) only applies to cases to which Part II of

the VE Act applies by virtue of s.4(2) or s.4(4). For the purposes of pulmonary tuberculosis cases, s.4(4) does not apply. The vital question here appears to be whether or not the cases covered by s.4(2) are exclusive of those covered by s.4(9). If they are, then s.7(3) does not apply, but if s.4(2) is a general provision and s.4(9) is a specific provision merely adding extra conditions to the pulmonary tuberculosis cases otherwise covered by s.4(2), then s.7(3) would apply. Section 4(2) says:

> Where a person ... was, immediately before the commencing date, in receipt of a pension under a repealed Act in respect of incapacity from an injury suffered, or disease contracted, by the person, the [VE Act] applies ... as if that pension had been granted under Part 11 of the [VE Act].

It appears, in the Editor's[187] opinion, that s.4(2) is a general provision covering all pensions including the pulmonary tuberculosis cases. Its terms are broad and could even be taken to include pensions in respect of incapacity from non-service related pulmonary tuberculosis. As a result, all pulmonary tuberculosis pensioners automatically meet the requirements of s.23(1)(a) and s.24(1)(a) in light of ss.7(3), 4(2) and 4(9) of the VE(TP&CA) Act. However this issue had yet to be dealt with in any depth by the Board or Tribunal and there may be more persuasive arguments for the contrary point of view which have not as yet come to light.

[187] The Editor of *VeRBosity* (and the author of this article in 1986) was Bruce Topperwien.