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Description Notes Also includes a copy of the judgment of the High Court of Australia in the Nancy Law case, a set of graphs showing the acceptance rate of the repatriation board during 1981, and House of Representatives Question No. 5648 regarding the repatriation boards, the Repatriation Commission, and Repatriation Review Tribunals.

The following is the response to questions put by staff of the U.S. Senate Veterans' Affairs Committee about Vietnam veterans' compensation arrangements in Australia.

(A) Have Australian authorities developed a list of ailments on the basis of which an automatic presumption is made that the ailments are service-related (assuming all other conditions of eligibility for compensation are met)?

- The Australian Repatriation legislation does not provide for automatic acceptance of any condition for pension purposes. Each claim is examined on its merits by a Repatriation Board (an independent determining authority), which must grant the claim unless it is satisfied beyond reasonable doubt that the disability is not service-related. The determining authorities are required to assess the evidence (including medical evidence as to the nature and extent of disability and the possibility of its having resulted from a claimant's service).

  Appeals against a Repatriation Board determination can be made to the Repatriation Commission. If the decision is still adverse, there is a further right of application for review to the Repatriation Review Tribunal. In certain circumstances there is a right of reference to the Administrative Appeals Tribunal and, on a point of law, to the Federal Court and, ultimately, to the High Court of Australia. Copies of the latest Annual Reports of the Repatriation Commission and of the Repatriation Review Tribunal are enclosed and they provide further information on current activities.

(B) Has a compensation schedule been developed in respect of such ailments? Could this schedule be made available to the Senate Committee?

- No. The rate of compensation (i.e. disability pension) in accepted cases depends upon the extent of incapacity, irrespective of the nature of the ailment. When a claim has been accepted as service-related, the extent of incapacity is assessed by the determining Board (see A above) and a pension granted in accordance with the rate prescribed for the assessed extent of incapacity.

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The Committee staff were also seeking information about the Nancy Law case. A copy of the judgment of the ... High Court of Australia in that case is at Attachment A. References to it are made in the enclosed Annual Reports of the Repatriation Commission (page 10) and Repatriation Review Tribunal (page 4). Since the Nancy Law decision there has been an increase in the acceptance rate of claims by Repatriation Boards and of appeals by the Repatriation Commission and the Repatriation Review Tribunal. These ... are shown graphically at Attachment B. Some further information relevant to the consequences of the Nancy Law decision is contained in an answer to a recent Parliamentary ... Question, a copy of which is at Attachment C.

HIGH COURT OF AUSTRALIA

GIBBS C.J.
STEPHEN, MASON, MURPHY and AICKIN JJ.

REPATRIATION COMMISSION — APPELLANT

AND

NANCY LAW — RESPONDENT

ORDER

Objection to competency overruled.

Appeal dismissed with costs.

16 October, 1981

Solicitor for the Appellant: *B.J. O'Donovan, Crown Solicitor for the Commonwealth*
Solicitors for the Respondent: *Muir, Nicholson, Williams & Co. (Perth)*

GIBBS C.J. I have had the advantage of reading the reasons for judgment prepared by my brother Aickin. I agree with them, and could not usefully add anything to them.

An objection to the competency of the appeal was lodged by the respondent but was rightly abandoned, since the value of the respondent's entitlement to a pension, which is in issue, exceeds $20,000. I would accordingly overrule the objection to competency, but would dismiss the appeal.

STEPHEN J. I would dismiss this appeal for the reasons stated by Aickin J.

MASON J. I would dismiss the appeal for the reasons given by Aickin J.

MURPHY J. The *Repatriation Act* 1920 (as amended) requires that a claim or application be granted by the Repatriation Commission or an appeal allowed by the Repatriation Review Tribunal unless the Commission or Tribunal is satisfied beyond reasonable doubt that there are insufficient grounds to grant the claim or application or allow the appeal (ss.47(2), 107VII(2)(a)). Thus the Commission and Tribunal are bound to grant claims even if they are satisfied there are probably insufficient grounds, unless they are so satisfied beyond reasonable doubt. The Act thus effectively imposes on the Commission an onus of disproof, or proof of a negative, beyond reasonable doubt.

In ancient and modern civilisations the treatment of former soldiers and sailors has been an important social issue. Historically the tendency has been to discard them and ignore the physical, social or economic damage to them by military service. The Australian solution to the problem of ensuring that the costs of war-related losses were borne by society rather than fall on the injured persons or their dependants was the adoption (along with other measures) of the "onus of proof" section in war veterans legislation which requires the Commonwealth or its agency to disprove a claim rather than to require the claimant to prove it. It has been obvious that this remedial section would result and has resulted in many claims being allowed which in truth were not well-founded. This was the price of ensuring that no valid claim was rejected because of insufficiency of proof.

The present legislation establishes the standard of proof by the Commonwealth or its agent as proof beyond reasonable doubt. In criminal law the onus of proof beyond reasonable doubt has often been justified on the basis that it is better that many guilty escape than that one innocent be convicted. Section 107VII of the Act (which applies to appeals) and s.47 (which applies to all claims, applications or appeals) reflect the view that it is better that some invalid claims be allowed than that valid ones be rejected.

The provision for onus of disproof creates certain problems analogous to ones which have arisen in criminal law and in income tax law (see *Gauci v. The Commissioner of Taxation of the Commonwealth of Australia* (1975) 135 C.L.R. 81; *Macmine Pty Ltd v. Commissioner of Taxation* (Cth) (1979) 53 A.L.J.R. 362; *McCormack v. Commissioner of Taxation* (Cth) (1979) 53 A.L.J.R. 436). It is an error to require that where the onus of disproof lies on one party, the other party must first establish something in the nature of a prima facie case on the issue (unless this is required by statute as in the earlier *Australian Soldiers Repatriation Act* s.45W). In the income tax law that error (in *Gauci's* case) was corrected in *Macmine* and *McCormack*. However it persists in the criminal cases, for example in the area of provocation, (see *Lee Chun-Chuen v. The Queen* (1963) A.C. 220, 233; *Da Costa v. The Queen* (1968) 118 C.L.R. 186; *Reg. v. Callope* (1965) Qd. R. 456). The Commission and Tribunal seem to have made a similar error in this case. Also the Tribunal seems wrongly to have considered its duty was to determine whether it was

open to the Commission to decide as it did rather than to form its own opinion on the matter. Mr Justice Toohey in the Federal Court was correct in holding that the decision of the Tribunal was erroneous in law.

The *Repatriation Act* 1920 (as amended) s.107VZZII(4) provides:

> "The Federal Court of Australia shall hear and determine the appeal and may make such order as it thinks appropriate by reason of its decision."

Mr Justice Toohey was therefore entitled to substitute his own decision for that of the Tribunal. On the facts, the onus being on the Commission, a conclusion in favour of the claimant was amply justified. It is unnecessary to consider whether the claimant was entitled under s.101(1)(a). It is enough to decide that she should succeed under s.101(1)(b), that is on the ground that the deceased's death has arisen out of or is attributable to his war service.

Although the claimant did not have to adduce proof, there was formidable support for her case. The evidence, together with common experience, was enough to establish that tobacco is a drug of addiction, and that once addicted it is extremely difficult to be cured, especially in a society in which trafficking in this drug is legal and addiction is reinforced by extensive advertising and other promotion. There was strong evidence to prove the deceased's original addiction on war service and his continued addiction and heavy smoking for many years afterwards. The expert evidence by an eminent medical authority, Sir Edward Dunlop, fully supported the attribution of the death from lung cancer to his war service. Mr Justice Toohey's judgment for the applicant and its affirmation by the Full Federal Court was correct.

The role of the Commission and of the Tribunal should not be misunderstood. Their function was to decide a question of fact or of mixed fact and law. They were not, on the evidence, bound in law to find for the claimant. Even where experts differ, as here, it is open to the Tribunal to be satisfied beyond reasonable doubt that there were insufficient grounds. A conflict of testimony (expert or otherwise) does not require that the claim be upheld (anymore than in a criminal trial it would require an acquittal) although often it would have that result. Nevertheless, it is not enough that the Tribunal prefer the evidence (including opinion evidence) which tends to disprove the claim. Even if it rejects the evidence in favour of the claim, the claimant is entitled to succeed unless the Tribunal is satisfied beyond reasonable doubt that there are insufficient grounds for the claim. In the light of Sir Edward Dunlop's opinion I find the Tribunal decision astonishing, but in law, because there was evidence which if accepted disproved the claim, the Tribunal was entitled to be satisfied beyond reasonable doubt that there were insufficient grounds, and, were it not for its errors of law, it is difficult to see how the decision could be disturbed. For this reason it should be stressed that the duty of the Repatriation Commission and the Repatriation Review Tribunal is to implement the onus of proof section not to frustrate it.

The respondent's objection to competency of the appeal should be overruled and the Commission's appeal should be dismissed.

AICKIN J. This is an appeal from a decision of the Full Court of the Federal Court of Australia (Bowen C.J., Brennan and Lockhart JJ.) in which an appeal by the Repatriation Commission from a decision of Toohey J. at first instance was dismissed. The history of this litigation is long and complicated and during its progress through various Repatriation tribunals the legislation has undergone some changes. It is necessary to set out the material facts and the nature of the legislation as it stood from time to time.

James Law, who was the husband of the respondent, died on 15 September 1976. His death certificate stated that he was then aged 67 years and that the cause of death was carcinoma of the lung (9 months) with myocardial infarction (3 years) as a contributory cause. On 15 October 1976 the respondent (his widow) lodged a claim for a pension under the *Repatriation Act* 1920 (Cth), as amended, ("the Act").

James Law had enlisted in the Australian Military Forces in June 1940. He served first in the Middle East and later in Java, where he became a prisoner of war of the Japanese in March 1942. He was recovered from the Japanese in Thailand in August 1945 and in March 1946 he was discharged.

During the period in which he was a prisoner of war he underwent severe hardship and suffered from enteritis, bacterial dysentery, malaria, otitis externa, beriberi and hookworm. When discharged from the Forces he was in a wretched physical condition and remained in poor health for the rest of his life. During the period from his discharge in 1946 until October 1971 it was accepted for the purposes of the Act that the following were due to war service, namely, fibrositis of the back, dysentery, worm infestation, sigmoid diverticulitis with colectomy, perceptive deafness, bilateral nerve deafness and tinnitus and sarcoidosis of liver and spleen. None of those diseases could be regarded as a direct cause of his death.

When he joined the Army he had not smoked cigarettes but by the time he was repatriated to Australia from a prisoner of war camp he had begun to smoke heavily. After his discharge he smoked 20 cigarettes a day until 1973 when he had a heart attack after which he reduced his smoking to some extent.

The respondent's claim for a pension was based on the view that her husband's smoking was due to war service and that such smoking had caused the carcinoma which led to his death. The respondent's claim was rejected by a Repatriation Board on 11 January 1977 on the ground that her husband's death was not related to his war service and not within s.101. The material parts of s.101 at the relevant time were as follows:

"(1) Upon the incapacity or death –

(a) of any member of the Forces who was employed on active service, whose incapacity or death has resulted from any occurrence that happened during the period from the date of his enlistment to the date of the termination of his service in respect of that enlistment; or

(b) of any member of the Forces whose incapacity or death has arisen out of or is attributable to his war service,

the Commonwealth shall, subject to this Act, be liable to pay to the member, or his dependants, or both, as the case may be, pensions in accordance with Division 1:

..."

"(1A) For the purposes of paragraph (b) of sub-section (1) but without affecting the generality thereof, the incapacity or death of a member shall be deemed to have arisen out of his war service if it ... was, in the opinion of the Commission, due to an accident that occurred or to a disease or an infection that was contracted, and that would not have occurred or been contracted but for his being on war service or but for changes in his environment consequent upon his being on war service."

It was not disputed that the deceased was a "member of the Forces who was employed on active service" within the meaning of s.101. The respondent appealed to the Repatriation Commission under s.28 but that appeal was disallowed on 19 April 1977. On 2 February 1978 the respondent lodged an appeal to the War Pensions Entitlement Appeal Tribunal under s.64 and provided additional material which had not been before the Board or the Commission. It consisted of a report dated 16 January 1978 of Sir Edward Dunlop, a consultant to the Peter McCallum Cancer Institute in Melbourne, together with an extract from a report in "Cancer Forum" of 1976 and letters from 4 persons concerning her husband's smoking. The Entitlement Tribunal considered the new evidence and then referred it back to the Commission for reconsideration pursuant to s.64(4). Between the date on which the Commission had disallowed her first appeal and the institution of the appeal to the Entitlement Appeal Tribunal on 2 February 1978 the Act had been amended by Act No. 56 of 1977 which inserted a new s.47 and made other significant changes.

It is necessary to note the changes made in the 1977 version of s.47. Prior to the 1977 amendment, s.47, which had been enacted as s.39B in 1943, was as follows:

"(1) The Commission, a Board, an Appeal Tribunal and an Assessment Appeal Tribunal, in hearing, determining or deciding a claim, application or appeal, shall act according to substantial justice and the merits of the case, shall not be bound by technicalities or legal forms or rules of evidence and shall give to the claimant, applicant or appellant the benefit of any doubt --

(a) as to the existence of any fact, matter, cause or circumstance which would be favourable to the claimant, applicant or appellant; or

(b) as to any question whatsoever (including the question whether the incapacity from which the member of the Forces is suffering or from which he has died was contributed to in any material degree, or was aggravated, by the conditions of his war service) which arises for decision under his claim, application or appeal.

(2) It shall not be necessary for the claimant, applicant or appellant to furnish proof to support his claim, application or appeal but the Commission, Board, Appeal Tribunal or Assessment Appeal Tribunal determining or deciding the claim, application or appeal shall be entitled to draw, and shall draw, from all the circumstances of the case, from the evidence furnished and from medical opinions, all reasonable inferences in favour of the claimant, applicant or appellant, and in all cases whatsoever the onus of proof shall lie on the person or authority who contends that the claim, application or appeal should not be granted or allowed to the full extent claimed."

It will be observed that the onus of proof was placed on the person or authority contending that the claim, application or appeal should not be granted or allowed. In relation to appeals that meant in substance that the onus of proof was placed on the Commission. The nature of the onus was not stated specifically but there can be no doubt that it was the ordinary civil onus, i.e. that of proving the material facts on the balance of probabilities, but it was an onus which required that degree of proof of a negative proposition. The precise operation of the "benefit of any doubt" in such a context is not altogether clear but presumably it meant no more than a doubt as to the balance of probabilities in respect of each of the matters on which entitlement depended.

The amended section inserted in 1977 involved some changes in sub-s.(1), including the removal of the reference to the "benefit of any doubt". The former s.47(2) was replaced by a new sub-section as follows:

"The Commission, Board, Appeal Tribunal or Assessment Appeal Tribunal shall grant the claim or application or allow the appeal, as the case may be, unless it is satisfied, beyond reasonable doubt, that there are insufficient grounds for granting the claim or application or allowing the appeal."

Section 12(2) of the 1977 Act provided that the terms of the new s.47(2) applied whether or not the hearing or consideration of the claims or appeals had commenced before the amendment came into operation.

The significant difference between the old and the new provision is that the standard of proof is specified. The new provision provided that the Commission, Board or Tribunal must be satisfied beyond reasonable doubt of the negative proposition that there were insufficient grounds for allowing the claim or appeal. The new section did not use the expression "onus of proof" but the fact that the Tribunal was placed under a duty to grant a claim or allow an appeal unless so satisfied is enough to place the onus of proof to the specified standard on the Commission.

On 24 April 1978 the Commission, having considered the new evidence and also a medical report from Dr Perkins, the Senior Medical Officer (Appeals), adhered to its previous determination of 19 April 1977. It made no express reference to the provisions of the new sub-s.(2) of s.47.

The respondent made a further submission to the Entitlement Appeal Tribunal together with certain additional information. In December 1978 the Tribunal decided that the new evidence had a substantial bearing on the claim and directed that it be referred again to the Commission for reconsideration under s.64(4). The Commission considered the further material and also two further medical reports, one from an Acting Senior Medical Officer (Appeals) and another from Dr Perkins. On 9 May 1979 the Commission gave its decision stating that it adhered to its previous determination in respect of the cause of death. It again made no reference to s.47(2).

I agree with the observation of the Full Court of the Federal Court that the Commission's decisions were expressed in terms indicating that it regarded the issue as being whether its original decision had been right, and that that tends to confirm the impression that it did not advert to s.47(2).

In 1979 there were further amendments of the Act by the *Repatriation Acts Amendment Act* 1979 (No.18 of 1979). It abolished the Entitlement Appeal Tribunals and the Assessment Appeal Tribunals and inserted a new Part, Part IIIA, establishing the Repatriation Review Tribunal. Section 47 was amended by in effect deleting references to the old Tribunals, but it was not otherwise amended. Section 107VC provided that, where the Commission had refused a claim, applications could be made to the Review Tribunal for a review of such refusal on or after 1 July 1979.

Sections 107VG and 107VH are as follows:

"107VG. The Tribunal, in conducting a proceeding, or the hearing of a proceeding, or in making a decision in a proceeding, on a review –

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) shall act according to substantial justice and the merits and all the circumstances of the case, and, without limiting the generality of the foregoing, shall take into account any difficulties that, for any reason, lie in the way of ascertaining the existence of any fact, matter, cause or circumstance, including any reason attributable to –

(i) the effects of the passage of time, including the effect of the passage of time on the availability of witnesses; or

(ii) an absence of, or a deficiency in, relevant official records, including an absence or deficiency resulting from the fact that an occurrence that happened during the service of a member of the Forces was not reported to the appropriate authorities.

107VII. (1) In a proceeding on a review, the Tribunal shall have regard to the evidence that was before the Commission or a Board when the decision the subject of the review was made and to any further evidence before the Tribunal in the proceeding that was not before the Commission or the Board but would have been relevant to the making of a decision in the proceeding before the Commission or the Board.

(2) On the completion of its consideration in a proceeding on a review –

(a) where the decision the subject of the review was a decision refusing a claim or application for pension – the Tribunal shall set aside the decision unless it is satisfied, beyond reasonable doubt, that there were insufficient grounds for granting the claim or application; or

(b) in any other case – the Tribunal shall set aside the decision the subject of the review unless it is satisfied, beyond reasonable doubt, that the decision is the decision that the Tribunal would have made if it had conducted the proceeding in which the decision was made.

(3) Where the Tribunal sets aside a decision the subject of a review, it shall substitute for that decision such decision as the Tribunal considers to be in accordance with this Act.

(4) Where the Tribunal does not set aside a decision the subject of a review, it shall affirm that decision."

Although those sections are not expressed in the same words as s.47, the material provision in s.107VII(2) is identical. The Tribunal is required to set aside a decision refusing a claim unless satisfied beyond reasonable doubt of the negative proposition that there were insufficient grounds for granting the claim or application.

In September 1979 a written submission, attaching a letter from Dr Heymanson, a Clinical Physiologist, on the respondent's behalf was made to the newly-established Repatriation Review Tribunal ("the Review Tribunal") which also had before it the material which had been before the Commission, the other boards and tribunals. On 10 September the Review Tribunal gave its decision and its reasons. It said:

> "The issue to be determined is whether the Commission's decision was correct."

It then gave its reasons which concluded with findings as follows:

> "a. Mr. Law died from a carcinoma of the lung caused by his smoking habits.
>
> b. Mr. Law did not smoke before he joined the Army but by the time of his repatriation from P.O.W. camp he had begun to smoke.
>
> c. There is no evidence to indicate that Mr. Law started to smoke because of the conditions and demands of his particular war service or because of the conditions in general pertaining to prisoners of war.
>
> d. Mr. Law was not psychologically incapable of reducing his smoking in the post war period."

and said:

> "Accordingly, the Tribunal is satisfied beyond reasonable doubt that there were insufficient grounds for granting the claim, and affirms the decision of the Repatriation Commission."

Although in its conclusion the Review Tribunal used the words of s.107VII(2)(a), its reasons appear to me to demonstrate a misunderstanding of the operation of that provision. It referred to statements by Sir Edward Dunlop concerning smoking by prisoners of war during internment and what they referred to as "ready availability of cigarettes on their release", though what Sir Edward had said in his report was that "On recovery [i.e. from the Japanese] cigarettes were handed out at every turn by well meaning and sympathetic people." It went on to say: "However, such evidence is of a general nature and in the opinion of the Tribunal, does not establish that Mr. Law in fact first smoked whilst a prisoner or was required to smoke." It said: "However, there is no evidence to suggest that Mr. Law in the post war period was psychologically incapable of ceasing to smoke" and after referring to conditions in Japanese prisoner of war camps it said: "However, the Tribunal is not convinced that these conditions were the direct cause of prisoners of war

in general, and Mr. Law in particular, taking up smoking." The second of those observations appears to be irrelevant and the third to reverse the statutory onus of proof. The Review Tribunal did not have to be so convinced; it had to be satisfied beyond reasonable doubt of the contrary proposition.

The respondent appealed to the Federal Court pursuant to s.107VZZII of the Act which authorizes appeals "on a question of law". That appeal was heard by Toohey J. who allowed the appeal. Toohey J. said that in the light of the findings of fact concerning the cause of death and commencement of smoking the Review Tribunal could not properly have been satisfied beyond reasonable doubt that the death did not arise out of or was not attributable to war service within s.101(1)(b). He said that it was a heavy burden for the Commission to discharge for it must exclude the possibility of any reasonable inference from any of the evidence given which would support a decision in favour of the claimant. He described it as a "heavy burden of disproof" and concluded that there was no clear and cogent evidence to justify the conclusion that there was no causal connexion between war service and the death.

Toohey J. took the view that the respondent's case did not come within par.(a) of s.101(1) but that it did come within par.(b) as being a death which had arisen out of or was attributable to war service. He held that in the light of the Review Tribunal's findings regarding the cause of death and the commencement of smoking it should have concluded that it could not be satisfied beyond reasonable doubt that the death did not arise out of or was not attributable to the war service and therefore could not properly have been satisfied that there were insufficient grounds for granting a pension.

The Commission appealed to the Full Court of the Federal Court which dismissed the appeal. The Full Court agreed with Toohey J.'s conclusion and pointed out that the question was not whether the Review Tribunal was satisfied that a causal relationship existed between war service and the death but whether that relationship was excluded beyond reasonable doubt. They agreed with Toohey J. that it was not possible to regard the formation of the habit of smoking or of repeated acts of smoking as an occurrence or occurrences within par.(a) of s.101(1) and also that the claim fell within par.(b). They said that the words "arising out of" in that paragraph require a consequential relationship of the incapacity or death with the service out of which it is said to arise. They also said that the expression "arising out of" or "arisen out of" is satisfied by some less proximate causal relationship than the expression "caused by" or "resulting from" and that it was not useful "to put a gloss upon the words of the Act by saying that the causal relationship must be 'immediate', 'direct' or 'proximate' . . ." They also took the view that the expression "attributable to" involved some element of causation but that it was sufficient if the cause was one of a number of causes provided that it was a contributing

cause in the sense of contributing to the death. They concluded that "Where the death of an erstwhile member of the forces might have arisen out of war service or might be attributable to it, a pension cannot be refused unless it is proved beyond reasonable doubt that his death was not so related to his war service." They then referred to s.107VII(2) and held that it was obviously intended to operate in favour of claimants and that it could not operate sensibly unless the prescribed standard of proof was applied to each stage of the inquiry into the facts.

For the Commission it was argued that a disease contracted after war service did not fall within sub-s.(1) of s.101 nor within sub-s.(1A) at all, and that when the definition of "incapacity" in s.23 is, by the operation of s.99(1), read into s.101(1)(b) the result is that incapacity which has arisen out of or is attributable to war service is confined to the case of disease contracted during war service. Thus it was said that s.101(1A) restricts rather than expands the right to compensation. This argument however is based on a misconstruction of the definition in s.23 which is as follows:

> " 'Incapacity' includes incapacity of a member of the Forces that arose from disease, not due to the serious default of the member, contracted by him while employed on war service;"

and relies on that for the proposition that incapacity means only such diseases as answer that description. That definition cannot be read as excluding other forms of incapacity. Incapacity may arise from injury such as the loss of an arm or a leg or from disease, and in such a context as this it would be fanciful to exclude incapacity due to injury, rather than disease. A modified version of the argument was that the express inclusion of diseases contracted while on war service impliedly negatived any other form of disease causing incapacity. An example put to the Solicitor-General for the Commonwealth in the course of argument was that of a member of the Forces who returned from war service in a very debilitated condition, and who by reason of that condition, contracted a disabling disease which he would not otherwise have contracted at all. He agreed that his argument would require the denial of a pension in those circumstances. It would however be a very odd intention to attribute to legislation of this kind, especially when used, as in this argument, to narrow the operation of s.101(1A) which was plainly inserted to extend the area of compensation.

It was also argued that the use of the definition as so read showed that s.101(1)(b) was also confined to disease contracted while on war service. That too is a very odd intention to attribute to the legislation and indeed it involves a contradiction between the word "incapacity" so read and the operative words of the paragraph, i.e. "whose incapacity or death has arisen out of or is attributable to his war service". If the definition does have the operation contended for by the Solicitor-General for the Commonwealth, the word "in-

capacity" in s.101(1) cannot have been used in its defined sense, for the context demonstrates a contrary intention because of the words "resulted from any occurrence that happened" during the period of war service in par.(a) and the words "arisen out of or is attributable to his war service" in par.(b). Moreover the section cannot be read as confined to death on war service and there is no reason for regarding incapacity as if it were treated in a different manner.

It was also argued that it was anomalous that a pension should be paid on death when during the lifetime of the member of the Forces the disease was not pensionable. That argument overlooks the fact that if there had been a period of actual incapacity due to that disease prior to death it would have been pensionable. In both cases the assumption is that it arose out of or was attributable to war service.

The Solicitor-General for the Commonwealth contended that sub-s.(1A) should be read as requiring a temporal connexion between contracting the disease and war service. On this view the relevant part of the sub-section should be read as if it took the following form, i.e., "a disease or an infection that was contracted *on war service*, and would not have occurred or been contracted but for his being on war service". However the natural meaning of the words used points to a causal connexion rather than a temporal one. Moreover the suggested meaning does not extend the operation of sub-s.(1)(b) at all, notwithstanding that the opening words of sub-s.(1A) display a clear intention to do so. The argument on behalf of the Commission on this point should be rejected.

Before considering the argument as to s.107VII it is desirable to describe briefly the nature of the material placed before the Review Tribunal which was more extensive than that available at the earlier stages of this long series of proceedings. It comprised the deceased's Service medical records from pre-enlistment medical examination to discharge and subsequent treatment for various diseases accepted as attributable to war service. It included the report dated 16 January 1978 from Sir Edward Dunlop referred to above. He said that the Repatriation Board's conclusions reflected "quite outmoded attitudes as to cancer development which overlook the fact that the causes of cancer are subtle and long acting and that the cancer itself may be for a long time a focus which is not apparent on clinical examination or X Ray." He also referred to the effect of severe debility on immune reaction and the probability of impaired immunological surveillance, and to the possible relation between the deceased having suffered from sarcoidosis and the cancer of the lung. He concluded by saying: "There are ample grounds to think that his death could well have been either due to or accelerated by War Service." There was a report from "Cancer Forum" of 1976 setting out an extract from a Report on the Third World

Conference on Smoking and Health in 1975 which stated that for many smokers smoking was a "chronic compulsive behaviour". Other medical reports were from Dr Perkins dated 30 March 1978 which disagreed with Sir Edward Dunlop in relation to myocardial infarction, which was given as a contributing cause of death in the death certificate. Dr Perkins considered the deceased's smoking to be a "personal choice" and said "I do not consider that the veteran's smoking was caused by his war service". There was a report by Dr Stockler, an Acting Senior Medical Officer (Appeals), dated 26 January 1979 and a further report by Dr Perkins dated 16 April 1979 in which he disagreed with Sir Edward Dunlop with respect to impaired immunological surveillance and the possible effect of sarcoidosis. Dr Stockler said that the material did not "indicate the conclusion that the development of the smoking habit was the result of service" and that smoking was a habit which could be broken. He expressed a view as to the period of development of the cancer contrary to that of Sir Edward Dunlop. He also said: "The P.O.W.(J) conditions . . . still do not prove that these conditions were responsible for the late Mr Law's smoking" and that the widow's evidence and certain statutory declarations "do not prove that war service conditions, including the P.O.W. experiences are responsible for taking up smoking." He concluded that "The new evidence in no way proved that war service (including the P.O.W.(J) experiences) is responsible for taking up the smoking habit".

It may well be that the expressions used by the Review Tribunal in its reasons were derived from the reports from these Senior Medical Officers without the Tribunal adverting to the conflict between their mode of expression and the statutory requirement of s.107VII(2). The medical officers were of course not concerned with the ultimate question nor the statutory requirements as to the mode of arriving at an answer to it, but with the expression of their own medical opinions.

The conflict between the material provided by the Commission and that provided by the respondent was in the end a conflict of expert medical opinion on the question of whether the cancer was caused by smoking which arose out of or was attributable to war service. The Review Tribunal appears to have preferred the opinion of the Commission's medical officers to that of Sir Edward Dunlop. In a civil court it would be necessary for the judge, or the jury if there were one, to hear oral evidence from the expert witnesses and to resolve any conflict on the balance of probabilities, taking into account the impression given by each expert witness. The Review Tribunal in the present case was in a very different position. In the first place it had only the written reports of the expert witnesses. Moreover it was required to find in favour of the applicant unless it was satisfied beyond reasonable doubt that there were insufficient grounds for doing so. Thus a heavy onus was placed upon the Commission to satisfy the Tribunal beyond reasonable doubt of that negative proposition. Although the medical reports were in conflict, no challenge appears to have been made to the standing or expertise of any of the medical experts. In that situation it is difficult indeed to see how the Tribunal could properly have been satisfied beyond reasonable doubt that the reports favourable to the applicant were wrong.

For the Commission it was argued that neither s.47(2) nor s.107VII(2) had anything to do with the standard of proof and that the reference to "insufficient grounds" must mean something more than that the claim did not meet the requirements of the section. The argument was that neither s.47 nor s.107VII was concerned with evidence, but dealt with the manner in which the Commission or the Review Tribunal directed themselves. It was urged that the expression "insufficient grounds" did not refer to the facts but to liability under s.101.

This argument misconceives the nature of the function of the Commission and the Review Tribunal. The expression "insufficient grounds" must include, though it may not be limited to, the conclusion that the evidence does not establish on the relevant standard of proof the absence of the requisite connexion between the carcinoma and war service. In so far as the claimant had to prove anything, she had to establish two things, first that the carcinoma from which her husband died was caused by smoking, and that was found by the Review Tribunal; and second, that his smoking had arisen out of or was attributable to his war service, including his imprisonment in Japanese prisoner of war camps. Section 101(1)(b) and (1A) require no more than that. For the Commission it was argued that sub-s.(1A) of s.101 was dependent on the opinion of the Commission. However when the matter reaches the Review Tribunal the opinion of the Commission is not material because the only question is whether that Tribunal is satisfied beyond reasonable doubt of the negative proposition that there are not sufficient grounds for granting a pension. In that process the opinion of the Commission is irrelevant. It is a misconstruction of s.101(1A) to regard the opinion of the Commission as essential to its operation, for that is to deny to the Review Tribunal an essential part of its function. It would require words far more explicit than these to deny to the Review Tribunal in a context such as the present the capacity to form its own opinion on such a matter as this. If the Review Tribunal is to "review" the decision of the Commission as required by s.107VC, it must be entitled to review all opinions of the Commission.

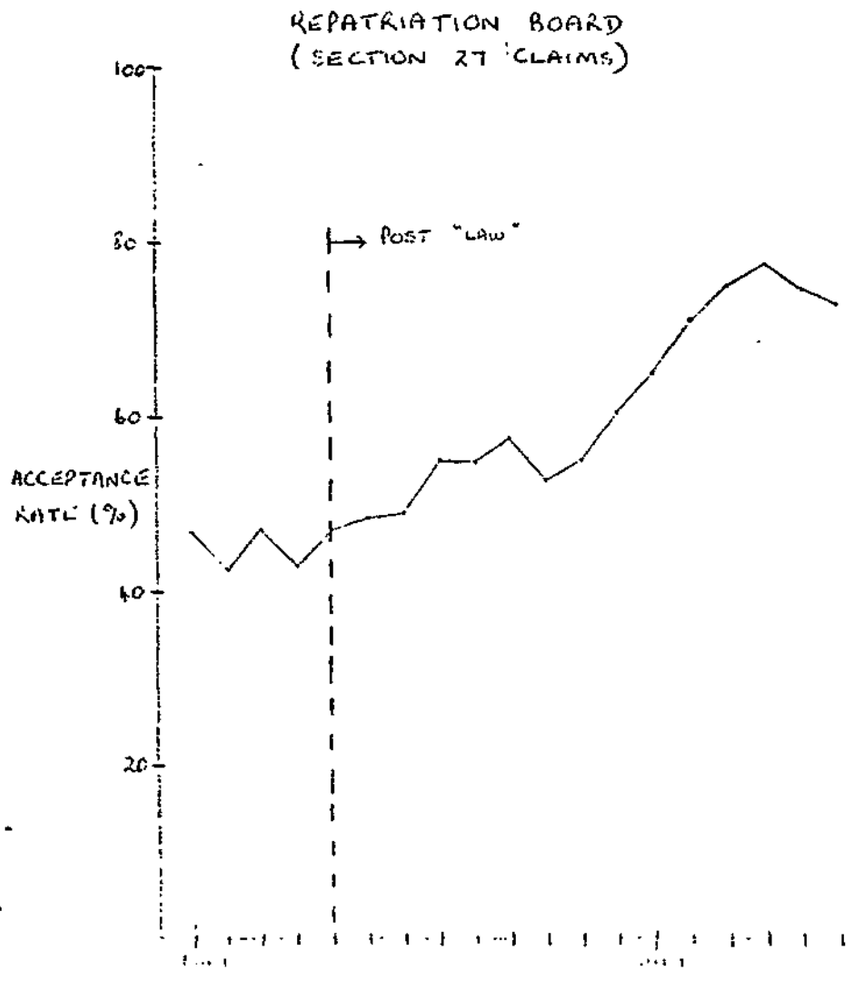
The Commission also relied on the difference between the former s.47 and the present ss.47 and 107VII but the general nature of the 1979 amendments demonstrates that the intention of the Parliament was to expand, rather than to reduce, the extent to which pensions are payable under the Act. In my opinion the present form of ss.47 and 107VII does not demonstrate an intention to make pensions harder to obtain or to deny pensions in cases in which, under the repealed sections, there would have been an entitlement to a pension.

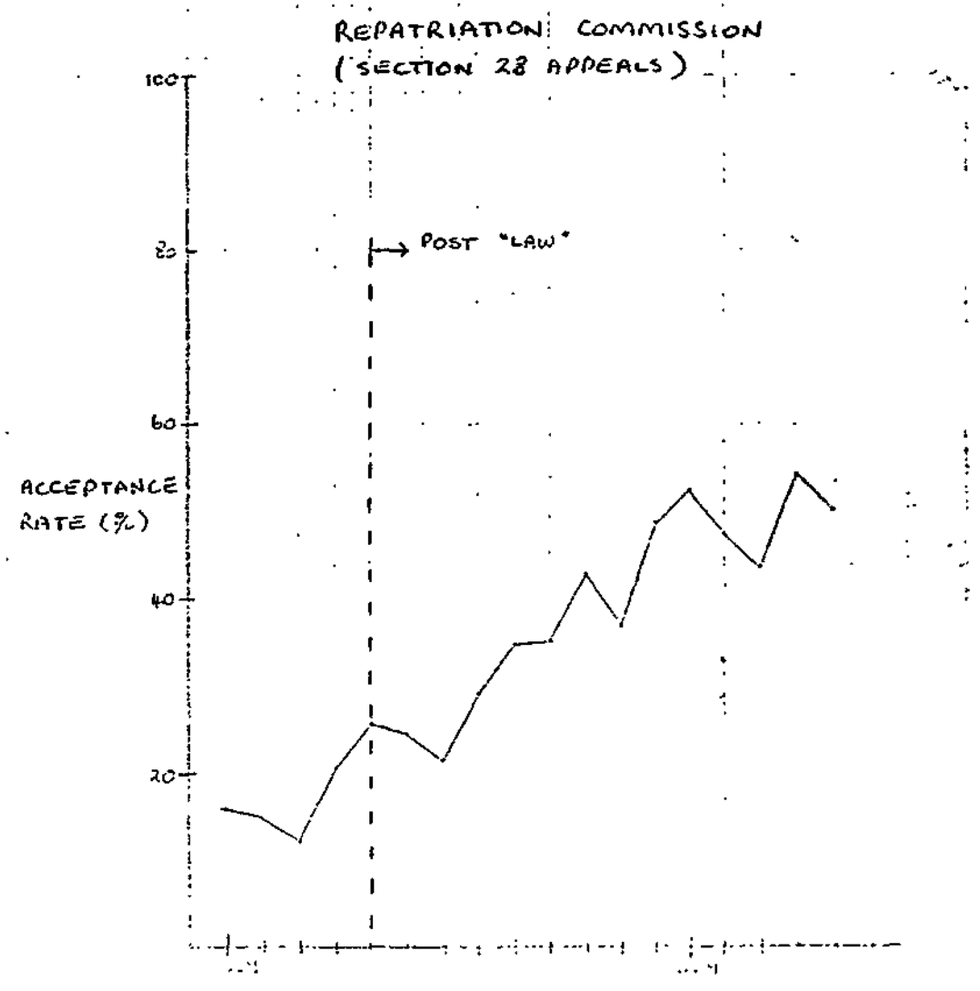
Accordingly the submission that s.107VII is not an "evidentiary provision" should be rejected. I am satisfied that the operation of that section does not involve a two-stage process and that it requires that, in relation to any fact necessary to establish entitlement, the Review Tribunal must be satisfied

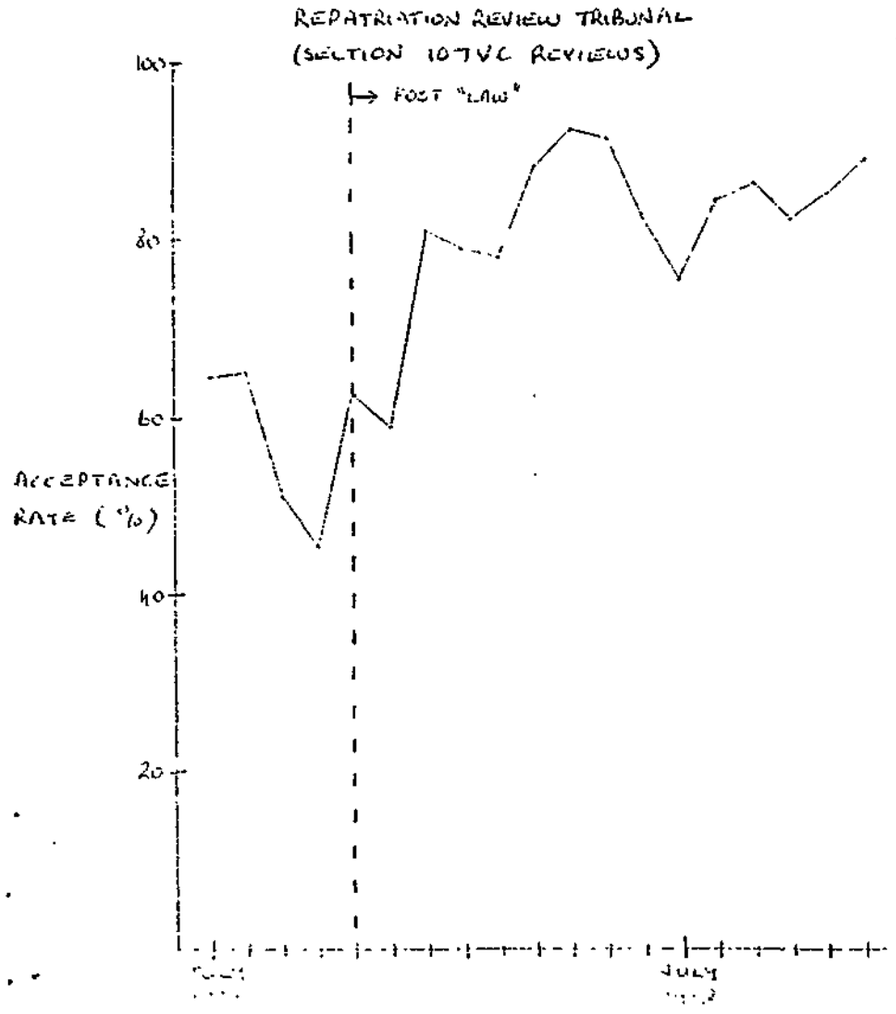
beyond reasonable doubt that the fact does not or did not exist before it can refuse an application or dismiss an appeal by a claimant. The reference in sub-s.(2) to the "completion of its consideration in a proceeding on a review" is to the entire process of examining the evidence and determining whether the Review Tribunal is satisfied beyond reasonable doubt that each of the factual requirements has not been established. Sub-section (2) then directs the Review Tribunal as to what it must do in the light of its determination, i.e. to set aside the decision if it is not so satisfied, and to uphold the decision if it is so satisfied.

I am therefore in agreement with the Full Court of the Federal Court that on the material before it the Review Tribunal could not properly be satisfied beyond reasonable doubt that there were insufficient grounds for granting the claim or application. I would therefore dismiss the Commission's appeal.

ATTACHMENT B






REPATRIATION REVIEW TRIBUNAL
(SECTION 107VC REVIEWS)
POST "LAW"
100
80
60
40
20
ACCEPTANCE RATE (%)
JULY

DEPARTMENT OF VETERANS' AFFAIRS

HOUSE OF REPRESENTATIVES QUESTION

QUESTION NO. 5648

Mr Holding asked the Minister representing the Minister for Veterans' Affairs, upon notice, on 10 November 1982:

(1) Can the Minister state what measures have been taken by (a) repatriation Boards, (b) the Repatriation Commission and (c) Repatriation Review Tribunals to ensure reasonable uniformity of judgements made on claims which are essentially similar either because of circumstances surrounding the claims, or the conditions for which the claims are made, or both.

(2) When were those steps taken and what changes to practice resulted.

Mr Thomson - The Minister for Veterans' Affairs has provided the following answer to the honourable member's question:

(1) and (2) For some time the Repatriation Commission has been taking steps to improve the uniformity of decision-making within the Repatriation determining system, particularly since the handing down of the High Court decision in the case of Mrs Nancy Law.

...2/

Since that time regular meetings of Repatriation Board Chairmen and delegates of the Repatriation Commission have been held to discuss decisions of the Courts and the Administrative Appeals Tribunal and other matters of common interest, with a view to ensuring consistency in decision-making as far as practicable.

The re-organisation of the top structure of the Department is being implemented. As part of the restructuring of the Department it is proposed to locate in Canberra all Commission delegates who handle appeals against decisions of Repatriation Boards. This should enhance the consistency of decision-making at this level. In addition, a Legal Services Division has been established. Among other things, it will advise on the functions, structure and operation of the determining system.

One of the priority tasks of the new Legal Services Division will be the development of a system of reference documentation for distribution to all Repatriation Boards and Commission delegates. This documentation will include copies of identified significant decisions of the Courts and the Repatriation Review Tribunal as they become available. The

...3/

Legal Services Division is responsible for developing a consistent approach to the consideration of claims and appeals and identifying training requirements for those engaged in the determination system. Some training courses have already been run. This Division is also responsible for monitoring the decisions of the various determining bodies to check that they are consistent and correct in law.

These matters are still in the developing stage. While it is hoped that they will result in more effective decision-making, it is too early to assess any effects.

The Repatriation Review Tribunal has commenced collecting copies of its decisions and reasons in a form to make them more readily accessible and in this exercise the Tribunal is seeking to identify more significant decisions.

I also understand that the Tribunal has been convening meetings of Deputy Presidents to discuss the various decisions of the Courts and the Administrative Appeals Tribunal in the Repatriation area.