REPATRIATION DISABILITY PENSIONS: REVERSE ONUS OF PROOF PROBLEMS IN THE DETERMINATION AND REVIEW SYSTEM

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INTRODUCTION

The appeal to the High Court in *Repatriation Commission* v. *Law*[1] raised the issue of the appropriate procedures for determining entitlement to a Repatriation disability pension. The system for determining entitlement and for appeals from or reviews of determinations has been a matter recurrently considered during the past ten years.[2] In part this can be attributed to the general review of Administrative arrangements and procedures within determining authorities and government departments which the new package of administrative law legislation has initiated. However certain features of the Repatriation Pension determination system itself seem, in part, responsible for the recurrence of design issues and the necessity for recourse to the High Court for its judgment on the legality of certain evidentiary procedures followed by the Repatriation Boards, the Repatriation Commission and the Repatriation Review Tribunal.

During the 12 month period preceding the outcome of the appeal by the Repatriation Commission to the High Court in *Law's* case the internal review system within the Commission was suspended.[3] The Repatriation Commission was waiting for the High Court to clarify the appropriate evidentiary procedure on the burden of proof during a determination on entitlement to a pension. The burden of proof and the related issue of the use of presumptions in determinations are not traditionally viewed as issues playing such a pivotal role in an administrative determination system. Most lawyers have considered the burden of proof issue only in the context of judicial proceedings. However, as more becomes known about administrative determination systems, it becomes clearer that adherence

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[1] (1981) 36 A.L.R. 411.

[2] *Report of the Independent Inquiry into the Repatriation System*, Hon. Mr. Justice P.B. Toose, (A.G.P.S., Canberra, June 1975). Administrative Review Council, *Sixth Annual Report*, 1981–82 (A.G.P.S., Canberra, 1982), p. 3.

[3] In *Thornton* v. *Repatriation Commission* (1981) 35 A.L.R. 485 Fisher J. decided this delay by the Commission was not unreasonable.

to judicial concepts of the burden of proof requires careful planning in an administrative system. The essence of the judicial notion of a burden of proof, or burden of persuasion, is that the issues required to be proven will remain unproven unless the decision maker considers there is sufficient evidence to meet the standard of proof required.

In an administrative determination system[4] the adjudicator typically relies upon findings made by other persons. In a discretionary determination the adjudicator applies internal rules or policies which accord to those findings a weight which may not be the same weight the adjudicator would accord the findings if he were to review the evidence and make the finding himself. The merits of this administrative method of adjudication are its efficiency in allocating tasks of similar function to one fact finder and the consistency it achieves when internal rules are applied. However, the typical administrative determination system, which separates fact finders from adjudicators, has to take great care if it is to maintain the judicial notion of proof during the determination. If the adjudicator adopts as fact findings found elsewhere, or applies internal rules or presumptions to meet the standard of proof in the determination, there may be a departure from judicial notions of proof. The evidence before the adjudicator may not in fact be sufficient to satisfy the standard of proof required. In an administrative system the standard of proof is often met by a presumption or rule which accords to a fact found elsewhere a weight which may not be supported by the evidence. The rule or presumption accords the finding more, or less, weight. The arbitrary allocation of additional or diminished weight to findings by use of rules or presumptions is a method of controlling the discretionary decisions of more junior decision makers, whether they be adjudicators or fact finders. It *is* the system of structuring the discretion of administrators by internal rules.[5] However, where a judicial style adjudication is chosen for the administrative system, careful planning is required to permit the adjudicator to apply the judicial notion of proof.

[4] While written in the U.S. context, Davis, K.C., *Administrative Law Text*, 3rd ed., West Publishing Co., 1972, is a good introduction to the procedural issues in an institutional decision, see Ch. 11, pp. 226–244.

[5] The benefits of structuring the discretion of administrators by rule making, findings and reasons procedures have been well argued by Davis, K.C., *Discretionary Justice* (Louisiana State University Press, Baton Rouge, 1969), 97–141. However, there is little written on the evidentiary effects of legal rules in administrative adjudications because until recently there have been few evidentiary requirements for administrative proceedings. However the jury trial is like some administrative adjudications in that findings of fact are the function of the jury and it must apply the rules as directed by the judge in reaching the findings. Work has been done in this area of criminal law on the evidentiary effects of the judge's directions to the jury and whether these directions undermine the ability of the jury to apply the reasonable doubt standard. R.J. Allen, 'Structuring Jury Decision making in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices' (1980) 94 *Harv. L.R.* 321.

He must be permitted to find an issue unproven unless he considers there is sufficient evidence to meet the requisite standard of proof.[6]

The system for determining entitlement to a Repatriation disability pension does not have a discretionary determination. Once the grounds set out in the Act for entitlement are established, the adjudicator has no discretion but to decide that the claimant is entitled. The entitlement system does, however, involve discretionary findings and the application of internal rules or guidelines in the determination of those findings. This presents the first problem for the Repatriation system. Where fact finders are separated from adjudicators careful planning is required to permit the adjudicator to accord whatever weight he considers appropriate to the evidence upon which findings have been based. If the adjudicator adopts findings made elsewhere in the system because he considers the internal rules have been correctly applied he will be according a weight to the evidence which has been dictated by the rules. Planning is required to preserve the discretion of the adjudicator to accord whatever weight to the evidence he considers it merits. He must be permitted to accord to the opinion evidence of experts outside the government department whatever weight he considers their evidence warrants. The appropriate role of the expert in administrative proceedings is a newly emerging legal issue.[7] It is an evidentiary issue of the same kind as that posed in judicial proceedings; but it is overlaid with the very new issues arising from the facts of employment of the expert by the same institution whose function it is to adjudicate, and by the institutional requirement that the body of experts apply a set of internal guidelines in the interests of consistency.

The second, and related problem, arises from the section 47 (2) reverse onus provisions in the Act. Section 47 (2) of the *Repatriation Act* 1920 (as amended) (Cth) provides as follows:

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

How do you preserve the adjudicator's power to follow the legal requirements in section 47 (2) that he must grant a claim for a pension unless he finds there is sufficient evidence that there are no grounds for entitlement?

[6] The evidentiary practices of administrators who make judicial-like decisions is a new area of legal inquiry. In Australia the area is developing through the implication of natural justice requirements and by the example set by administrative tribunals who are not required to comply with the rules of evidence but who nevertheless regard themselves as bound to apply minimum evidentiary standards. *Re Pochi and the Minister for Immigration* (1979) 2 A.L.D. 33, 57. *Minister for Immigration* v. *Pochi* (1980) 31 A.L.R. 666, 689. See E. Campbell, 'Principles of Evidence and Administrative Tribunals' in Campbell, E. and L. Waller (eds.), *Well and Truly Tried*, (Law Book Co., Sydney, 1982), 36.

[7] Cleary, E.W. (ed.), *McCormick's Handbook of the Law of Evidence*, (2nd ed., West Publishing, St. Paul, Minnesota, 1972). Ch. 37 Administrative Evidence, 848 on opinion evidence and expert testimony in administrative hearings. Gellhorn, E., *Administrative Law and Process*, (West Publishing, St Paul, Minnesota, 1972), 193.

The adjudicator must be permitted to grant a claim unless he is *personally* satisfied that the evidence proves beyond a reasonable doubt that a claimant has *no grounds* for entitlement to a pension. This means the Repatriation system must permit the adjudicator to review independently findings made elsewhere.

This article is concerned with the design problems created by the reverse onus of proof provisions in the *Repatriation Act*. However, evidentiary procedures are only one component of a determination system, design requires a balancing of several competing and conflicting factors and these factors have to be managed alongside reverse onus requirements. The monetary costs to the institution's budget of the provision of fair hearing procedures have to be balanced against the competing priority of judicial concepts of the degree of fairness to be accorded a claimant or participant in the determination system.[8] Where judicial concepts of the degree of fair procedures required are strong, the institution with a fixed budget has to cost the judicial procedural requirements, such as an oral hearing before the adjudicator, or a claimant's right to cross-examine opposing witnesses, and plan a strategy for administering the new requirements. Ultimately, if the costs, in terms of time and personnel, cannot be borne by the institution, it may decide to draft legislation removing the judicially imposed procedures. The subject matter of any determination raises questions of the degree of expertise required of adjudicators and the necessity of seeking expert witnesses to assist the adjudicator in resolving expert issues. Where a participant in a determination is dependent upon resolution of a decision for income support, time will be of the essence. The claimant's own interests in fair hearing procedures will conflict with his or her interests in a quick resolution of the claim.

A discretionary determination and those in which the rules for determining facts are discretionary introduces problems of designing for accountability. The merits of discretions are their potential for achieving a just decision because the individual facts of a case can be accorded a significance which warrants departure from previous patterns of decisions. However, the flexibility of permitting departures from previous rules has to be managed by procedures requiring the adjudicator to give a written record of the facts upon which he based his decision, the evidence considered in the factual determination, and a statement of reasons which

[8] In Australia the judiciary have not been particularly active in imposing "fair hearing" or natural justice requirements upon government departments. The balancing of costs and fair procedures now appears to be carried out by the Administrative Review Council by negotiation with the Department whose determination system is being scrutinized. See Administrative Review Council, Report No. 20, *Review of Pension Decisions under Repatriation Legislation*, 1983.

logically links the ultimate decision with the factual determinations.[9] Reason writing takes time and considerable expertise where the substance of the decision involves application of legal principles. Adjudicators with legal expertise are costly and more of them are required if detailed reason writing is chosen as a method of resolving the accountability requirements in discretionary decisions.

All of these factors are present in the Repatriation entitlement system. The claimant is entitled to a fair hearing, the subject matter requires an adjudicator with both medical and legal expertise, the claimant needs a minimum of delay in resolution of the claim and the determination of entitlement involve factual determinations in which discretionary rules are applied. In addition to these factors, Parliament has decided that a claimant's contribution to the public welfare in the form of war service, or the war service of a spouse or parent, is of such significance that the risks of error in a determination borne by a claimant should be small. The probability of an erroneous determination can be managed by varying the hearing procedures. In the Repatriation entitlement system the risk of error borne by a claimant is minimized by the direction in the legislation that a claim shall be granted unless the adjudicator is satisfied, beyond reasonable doubt, that there are insufficient grounds for granting the claim. Where there is some evidence supporting grounds for granting the claim for a pension the adjudicator will rarely be satisfied beyond reasonable doubt that there are insufficient grounds.

LEGAL ISSUES IN DETERMINING ENTITLEMENT

Preservation of the power of an adjudicator independently to consider the findings or opinions of experts placed in evidence before him, and to apply a different onus of proof to the evidence of that expert depends upon the provision of expertise. Expertise can be provided to the adjudicator by way of his own qualifications for the position, the kind and scope of investigative powers he is given, and by the appointment of research or investigative personnel to assist him. Decisions on these issues are dependent on the kind of matters required to be determined; for this reason, an outline of the legal issues in determining entitlement to a disability pension is given in the following pages.

There are two kinds of Repatriation pensions: disability pensions and service pensions. Disability pensions were originally war pensions and the grounds for entitlement were, generally, service as a forces member during a qualifying period and incapacity attributable to war service. The war pension description was dropped when the qualifing period of service

[9] G.D.S. Taylor, 'Decision making and reasons for decisions — pitfalls and standards', Repatriation Review Tribunal, *First Annual Conference, 1980*, 49. (A.G.P.S., Canberra, 1982). G.A. Flick, 'Administrative tribunals: the threat of over-judicialisation,' Repatriation Review Tribunal, *Second Annual Conference, 1981*, 71, at 87. (A.G.P.S., Canberra, 1982).

was extended to include periods when the forces, whether army, naval or air force, were not at war. Where a member satisfies the qualifying period by non-war service, entitlement depends upon incapacity being attributable simply to defence service. Entitlement to a service pension is based upon a qualifying period of war service and either the unrelated fact that the member is permanently unemployable or the member attaining the age of 55 years.[10] Pensions are payable to dependants of any forces member where the member's incapacity or death was attributable to war service or defence service, and also where a forces member has war service and is permanently unemployable, or would but for his death have been granted a service pension because he was permanently unemployable.[11]

The determination of entitlement to a disability pension involves medical issues of physical incapacity, socio-economic issues of the effects of this physical incapacity upon the member's ability to earn a living, the medical assessment of the aetiology of the disease which has caused the illness or death of the member, and application of the legal principles in the Act. The findings on aetiology or causes of the disease assist in deciding whether the incapacity is attributable to war or defence service or to an occurrence during the period of war or defence service. The system for determining entitlement to a disability pension has to provide a level and kind of expertise appropriate to these issues.

A major problem with the *Repatriation Act* is that it contains two sets of provisions for determining entitlement to a disability pension. Both are concerned with the causal link between physical incapacity and war service but the grounds or statutory factors required to be proven differ in each. In some entitlement cases, the grounds in both sets of provisions will be proven by the same evidence, problems have arisen where the grounds in one set of provisions have not been proven but have been satisfied in the other.[12] The Act urgently requires amendment to these entitlement provisions.

Entitlement to a disability pension arises under sections 24 and 101 of the *Repatriation Act* because the Commonwealth is liable to pay a pension under the section 24 (1) or section 101 (1) grounds and also arises under section 47 (2) because the Commission or Board shall grant a claim under the section 47 (2) grounds. The grounds in each set of provisions are different. Liability to pay in section 101 (1) depends upon proving a positive causal link between incapacity and war service. The requirement to grant a claim depends upon failing to prove the negative proposition that incapacity was not caused by war service. Section 47 (2) was not intended to operate as a substantive entitlement provision when introduced by amendment in 1979, but nevertheless it does operate in this way.

[10] ss. 84, 85 *Repatriation Act* 1920-1981.
[11] s. 85 (3).
[12] See footnote 17.

Liability of the Commonwealth to pay a disability pension is based upon sections 24 and 101 of the *Repatriation Act* (as amended). Broadly, section 24 applies to members who saw war service during World War I and section 101 to those in World War II; the grounds in both sections are similar. Provided the qualifying period of service is satisfied and the section applies, liability to pay depends upon a causal link between war service and incapacity or death. There are two formulae to be applied, alternatively, for establishing the causal link. Each legal formula seeks to link some feature of the member's war service with his subsequent incapacity or death. The forumlae differ in the requirement to identify temporally this feature within the period of service. Section 101 (1) sets out the two formulae as follows:

"101. (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 entlistment 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."

Under section 101 (1) (a) the formula for establishing the causal link requires that "incapacity or death has resulted from any occurrence" that happened during the period of service, while under secion 101 (1) (b) it is not necessary to identify any feature which temporally arises during the period of war service. The phrases in s. 101 (1) (b) used to denote the requisite causal link, "has arisen out of" and "is attributable to", do not differ in the degree of causal relationship required. Toohey J. in *Law* v. *Repatriation Commission* considered that "para (b) of s. 101 (1) requires no more than that the death of a member of the forces have some causal connection with his war service."[13] The Full Federal Court in *Repatriation Commission* v. *Law*[14] considered it was not particularly useful to put a gloss upon the words "has arisen out of" by saying that the causal relationship must be "immediate", "direct" or "proximate" or by saying it connotes a "real", "sole" or "dominant" cause. The Court considered that where the expression "is attributable to" is used, it is sufficient to show "attributability", or the requisite causal link, "if the cause is one of a number of causes providing it is a contributing cause".[15]

Each of the three causal phrases appear capable of covering quite weak causal links, but section 101 (1A) makes it clear weak causal chains are intended to satisfy the formulae in section 101 (1) (b) "has arisen out of"

[13] (1980) 29 A.L.R. 64, 72.
[14] *Repatriation Commission* v. *Law* (1980) 31 A.L.R. 140, 150.
[15] *Id.* 151.

or "is attributable to". Where the Commission forms the opinion that an accident, disease or infection would not have occurred or been contracted but for the member being on war service or, but for changes in his environment consequent upon his being on war service, then section 101 (1A) has the effect of deeming the incapacity or death of the member from the accident or disease "to have arisen out of his war service". Proviso (a) following section 101 (1) makes it clear that the same "but for" test of causal connection cannot be applied to the section 101 formulae where the incapacity or death was due to the serious default or wilful act of the member, involved self-inflicted injury or arose from an occurrence which happened during a serious breach of discipline.

Entitlement to a disability pension also arises under section 47 (2)[16] which must be read in conjunction with section 24 or section 101. Section 47 (2) indirectly requires the Commission or a Board to grant a claim unless it is proven beyond a reasonable doubt that incapacity was not caused by war service. Entitlement thus depends upon one of the parties or the decision maker failing to adduce sufficient evidence that incapacity was not caused by war service. It appears that section 47 (2) was intended only to relieve the applicant of the onus of proving the causal link ground in section 101 (1) but its effect was to introduce a new ground, proof of which admittedly did not lie with the applicant.

The legal problem of two partially inconsistent entitlement provisions[17] could be solved by amending section 47 (2) and re-drafting sections 24 and 101 in the form of a presumption of entitlement, as follows:

> "101 (1) Upon the incapacity or death of any member 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 unless—
>
> (a) the incapacity or death of any member of the Forces who was employed on active service did not result 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) the incapacity or death of any member of the Forces did not arise out of or is not attributable to his war service."

Section 47 (2) would require an amendment to the effect that a claim will be granted unless the Commission is satisfied beyond reasonable doubt that there are "sufficient grounds for denying the claim or application or allowing the appeal, as the case may be".

Entitlement to a disability pension under section 101 requires a causal link between incapacity and war service. The legal meaning of "inca-

[16] See the preceding pages for the full text of s. 47 (2) *Repatriation Act*.

[17] Where there is sufficient evidence that incapacity was caused by war service there will always be insufficient evidence that incapacity was not caused by war service. There may be insufficient evidence that incapacity was not caused by war service but the same evidence would not necessarily prove that incapacity was caused by war service. This has occurred in the "unknown aetiology" cases.

pacity" and the method of its assessment were clarified in *Repatriation Commission* v. *Bowman*[18]. The Full Federal Court considered that the term "incapacity" in section 101, and elsewhere in the Act, meant a physical or mental disability rather than an inability to work or earn wages. Section 23 adds to this meaning of "incapacity" and is consistent with the *Bowman* interpretation of incapacity in section 101. It provides:

> " '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."

Schedules 1 to 5 of the Act contain the rates of pension appropriate for the relevant degree of incapacity suffered by a member. For determining the higher rates of pension the Schedules adopt loss of earning capacity. Confusion has arisen as to whether the term "incapacity" in section 101 in fact meant loss of earning capacity.[19] This confusion as to the correct legal meaning of "incapacity" appears to be due to the medical profession's understanding of incapacity or disability as involving both a functional limitation and a restriction of activities. Economic self-sufficiency, or earning capacity, is only one activity which may be restricted by a physical limitation but in the context of entitlement to a pension it could come to be regarded as the only activity.[20]

Assessment of the rate of pension to which a claimant was entitled has recently required judicial clarification.[21] The legal rules for determining the rate of pension are set out, in a very outdated form, in the Schedules to the Act. The Schedules provide three rates, the base or general rate, an intermediate rate and a special rate. A claimant is entitled to a percentage of the general rate depending only on the degree of physical disability suffered. Where a claimant's physical disability has resulted in him being employable only part time or intermittently he is entitled to the higher or intermediate rate, where he is virtually unemployable by reason of the physical disability he is entitled to the highest or special rate.[22]

Confusion in rate assessment has arisen due to several factors: (a) the failure to define "incapacity" in the Act, and (b) adoption of the nomenclature of "total incapacity" as a description of the full general rate entitlement.

"Total incapacity" does not mean a claimant is totally disabled, it is an arbitrary benchmark used to set the base or general rate. The term

[18] (1981) 38 A.L.R. 650. See also *Repatriation Commission* v. *Moss* (1982) 40 A.L.R. 553, *Repatriation Commission* v. *Hayes* (1982) 43 A.L.R. 216.

[19] Dr. K. Fleming, "Assessment in Repatriation — Background Paper". Repatriation Review Tribunal. *First Annual Conference 1980*, 30.

[20] Professor I.W. Webster, "Defining handicap — background paper". Repatriation Review Tribunal. *First Annual Conference 1980*, 19.

[21] *Bowman* v. *Repatriation Commission* (1981) 34 A.L.R. 556; the appeal from the decision of Ellicott J. was dismissed by the Full Federal court in *Repatriation Commission* v. *Bowman* (1981) 38 A.L.R. 650. See also *Collins* v. *Repatriation Commission* (1980) 32 A.L.R. 581.

[22] In November 1983 the general rate (100%) was $62.05 per week, the intermediate rate $113.30 per week, and the special rate $164.55 per week.

"total incapacity" is accorded to that disability which qualifies a claimant to 100 per cent of the general rate pension, in November 1983 this was $124.10 per fortnight. The 100 per cent rate has been fixed by internal Departmental rules as applicable to that disability which restricts a claimant to "sedentary work only". However as the legal meaning of "incapacity" is simply physical disability there need, in law, be no restriction of earning ability for a claimant to be entitled to 100 per cent of the general rate.

In *Bowman* v. *Repatriation Commission*, Ellicott J. viewed the general rate pension as compensation for having suffered war-related disabilities.[23] A disability is a physical impairment or functional loss which restricts activities but need not necessarily restrict economic self-sufficiency. Recreational or social activities might be severely restricted by a member suffering disfigurement but his economic self-sufficiency remain unaffected. Depending upon the degree to which the physical impairment restricts any activities, the member will be entitled to from 0 to 100 per cent of the general rate. Assessment of the degree of restriction has been simplified by Schedule 4, which sets down the appropriate percentages for particular functional losses or impairments. For example, a member suffering "very severe facial disfigurement" is entitled to 100 per cent of general rate, while "severe facial disfigurement" is accorded 80 per cent. Ellicott J. considered that the 100 per cent of general rate which was payable on "total incapacity" was an amount to which the claimant was entitled "even if he is able to obtain full-time employment in a highly remunerative position".[24]

Apart from the percentages attached to particular disabilities in Schedule 4, how is the degree of "total incapacity" measured? What is the correct method for determining the percentage of general rate appropriate for a disability which is less than "total incapacity"? The Department's internal rules for assessing the percentage of general rate under Schedule 1 directed that matters to be taken into account included "impairment, the restriction of ability to engage in employment, discomfort, pain, disfigurement, loss of enjoyment of life and restricted normal recreations".[25]

It appears that these matters listed in paragraphs 26–8 of the *Guide to the Assessment of Incapacity*[26] are discretionary in the sense that failure, for example, to find any effect of the physical condition upon the member's ability to engage in employment would not disentitle a member to a general rate pension as the criterion for the general rate is simply "incapacity". The member's physical condition may severely restrict his social activities and this kind of restriction may satisfy the legal meaning of "incapacity".

[23] *Bowman* v. *Repatriation Commission* (1981) 34 A.L.R. 556, 563.
[24] Ibid.
[25] *Guides to the Assessment of Incapacity*, Repatriation Department, Canberra, 1973; referred to Repatriation Review Tribunal, *First Annual Conference 1980*, 33–4.
[26] Ibid.

Ability to engage in employment is one criterion for measuring disability, but there are others, and the failure to satisfy any one criterion has no bearing upon any other criterion providing a full measure of incapacity.

However, the question whether the member is entitled to an amount above the 100 per cent rate of $124.10 per fortnight depends upon whether the incapacity has that effect on ability to earn as described in the relevant provisions in the Schedules. Clause 6 of Schedule 1 sets out the grounds for what is known as the intermediate rate pension. Clause 6 provides that:

> "Where the incapacity of a member of the Forces is such that he is unable to earn a living wage by reason that he is unable to engage in a remunerative occupation except on a part-time basis or intermittently, the amount . . . shall . . . be deemed to be $226.60 [per fortnight]."

Schedule 2 provides for the special rate of pension (known as the T.P.I. pension) of $329.10 per fortnight for totally and permanently incapacitated members, that is, "incapacitated for life to such an extent as to be precluded from earning other than a negligible percentage of a living wage".[27]

There is little agreement upon the correct interpretation of the legal principles for assessment of the rate of disability pension.[28] The legal ground in Schedule 2 for entitlement to a specal rate pension may be satisfied in cases where a member's physical disability was not sufficiently severe to be accorded a 100 per cent rating in the determination of the degree of "total incapacity", a determination required in the assessment of the general rate pension.

Confusion has arisen because the arbitrary benchmark "total incapacity" has, not unreasonably, been accorded its logical or substantive meaning and decisionmakers have hesitated to find that a claimant found to have a 50 per cent rating on "total incapacity" and therefore entitled to only 50 per cent of $124.10 per fortnight (the general rate) is nevertheless entitled to a special rate pension of $329.10 per fortnight because he fulfils the legal ground in Schedule 2 of being "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)". A claimant who is not "totally incapacitated" can be found to be "totally and permanently incapacitated". It appears, however, that the legal ground in clause 6 of Schedule 1 for entitlement to an intermediate rate pension cannot be satisfied where the member's physical disability was not assessed at the 100 per cent rate on "total incapacity".[29]

The purpose of the preceding discussion of grounds for entitlement to a disability pension was to indicate that determinations of entitlement and

[27] *Repatriation Act.*

[28] See the following paper and the discussion following Dr Stillwell's address. G.G. Stillwell, 'The role of the Medical Members of the Tribunal: touching on the implications of "assessment" case law and the use of the Guides to Assessment of Incapacity and Impairment'. Repatriation Review Tribunal, *Third Annual Conference 1982*, 91–117.

[29] See the argument of Mr Flett, Deputy President, *Third Annual Conference 1982*, 97–117.

assessments of the appropriate rate of pension involve both medical and legal expertise. Should adjudicators be medically qualified with additional legal training, legally qualified with medical training, or a multi-member adjudicatory body with each member contributing a single area of expertise? The alternatives are numerous. A non-medically qualifed person might be adequate if he were given easy access to expert witnesses who could provide the medical expertise. Or, to some extent, having legally qualified counsel representing either one or both parties before the adjudicator could be a substitute for an expert on legal issues; the opinion of a legal representative on legal issues could not of course be received by the adjudicator as fact in the same way as the opinion of an expert witness. It could, however, assist a non-legally qualified adjudicator in forming his own opinion on the proper legal issues which the legislation and the evidence raised for determination.[30]

THE PRESENT DETERMINATION AND REVIEW SYSTEM

The present system for determining and reviewing entitlement to a Repatriation disability pension has a four-tier structure, with a fifth level of appeal to the courts. The second, third and fourth level of the structure can be short-circuited and an application for review made to the Federal court under the *Administrative Decisions (Judicial Review) Act* 1977. The first two tiers of decision making are internal and the second two are external.

1. Repatriation Boards

Initial determination of entitlement to a disability pension is made by one of the many Repatriation Boards. The Act suggests[31] that the Boards have a legal status separate from the Department of Veterans' Affairs and the Repatriation Commission, but it appears that, in practice, the Boards are separate in legal status only.[32]

The Boards are constituted by a Chairman, a Services member and a Commission member[33] and all are appointed by the Governor-General on the recommendation of the Repatriation Commission. Chairmen of Boards have usually been senior officers of the Department.[34] Boards do not have their own supporting staff and rely upon the Department for administrative services. The Boards are required to consult and co-operate with the

[30] For this reason the Administrative Review Council has recommended that the present restriction upon claimants being represented at Repatriation Review Tribunal hearings by legal practitioners should be removed. Administrative Review Council, *Report: Review of Pension Decisions under Repatriation Legislation*, 1983, 43. For the problems encountered by a medically qualified Tribunal member on receiving different opinions on the legal issues from his legally trained brethren members see Dr G.G. Stillwell 'The role of the Medical Members of the Tribunal . . .' Repatriation Review Tribunal. *Third Annual Conference 1982*, 91–96.

[31] s. 14 (1), *Repatriation Act*.

[32] *Toose Report*, 199.

[33] s. 14.

[34] *Toose Report*, 191.

Commission[35] and may be directed by the Minister for the purpose of ensuring co-operation.[36] It is intended that the Boards apply the Commission's versions or legal interpretations of the legislation under which entitlement is determined and also the Commission's discretionary rules or policies.[37] It is also intended that the Boards should apply the principles on entitlement coming out of the two external review bodies, the Repatriation Review Tribunal and the Administrative Appeals Tribunal, as they are "deduced by the Commission".[38] While the Boards cannot legally be directed by another, whether Minister or Commission, to apply any rule other than the legislation, the absence of supporting staff available to the Boards would severely inhibit their capacity to exercise their legal discretion to apply such principles from the Repatriation Review Tribunal or the Administrative Appeals Tribunal as they thought fit. Board members would have little time independently to compile the principles as they emerged.[39] If the Boards were abolished and replaced by a delegate of the Commission, as recommended in 1975 in the Toose Report and more recently by the Administrative Review Council,[40] the delegate could, of course, be legally directed to apply any interpretative rules or discretionary principles fomulated by the Commission. The present arrangement of the three member Board and the legal requirement to consult and co-operate is a compromise which takes into account the service associations' desire to retain a member on an initial determining body[41] and the need to introduce consistency and a higher standard of legal reasoning to Board decisions.

In an entitlement determination a Board has to decide, generally, whether the incapacity from which a member is suffering or from which he has died resulted from an occurrence that happened during war service

[35] s. 15 (1).
[36] s. 15 (3).
[37] E.g. *Guide to the Assessment of Incapacity*, Repatriation Department, (1973 [sic] Canberra); *Guide to the Assessment of Medical Impairment*, Department of Veterans' Affairs, Canberra, 1979. See reference in Repatriation Review Tribunal, *First Annual Conference 1980*, 37.
[38] s. 15 (2) (b) *Repatriation Act*.
[39] An interesting time-saving practice was reported to the Senate Standing Committee on Health and Welfare in 1972 by an ex-chairman of the then War Pensions Entitlement Appeal Tribunal. ". . . according to my information, the Boards do not sit as Boards, but operate as individuals — each member considering a parcel of claims on his own . . . In this respect the Department has tried to obtain the best of both worlds, i.e., the economy of administrative decisions made by individual decision-makers, and the representational aspect which can only be organised by the creation of Boards . . ." "Observations on the Operation of the Australian Repatriation System's Decision making functions". Commonwealth, *Official Hansard Report* (Canberra) 29 August 1972, 931, 935, Senate Standing Committee on Health and Welfare: Repatriation Reference.
[40] *Toose Report*, 207. Administrative Review Council, Report No. 20, *Review of Pension Decisions under Repatriation Legislation*, 1983, 32.
[41] The service associations desire to retain a "representative" at all levels of the determination and review system has been well argued on the ground that the service member is often the only available source of information at a hearing on conditions of service suffered by a claimant. If the A.R.C. recommendation to abolish the Boards is accepted, the delegate of the Commission could of course ask the claitant to give evidence on conditions suffered, preferably at an oral hearing.

or arose out of or was attributable to war service.[42] The Board also has to consider the physical impairment or disability of the member to determine whether it comes within the legal meaning of "incapacity", one of the legal requirements for entitlement.[43] An entitlement application involves an assessment of the nature and extent of physical disability. However when a member who has been held entitled applies for a higher rate of pension this separate assessment determination is not made by the Board. Under section 27 (2) the Commission may direct that any particular case or cases of a particular class within the jurisdiction of the Board be referred to it for determination, and it has so directed in the case of assessment of the rate of disability pensions.

2. Repatriation Commission

The second tier in the entitlement system is the Repatriation Commission, a statutory body, subject to the control of the Minister and responsible for administration of the *Repatriation Act*.[44] Commissioners are appointed by the Governor-General and, in 1983, the Chairman of the Commission is also the Secretary, or administrative head, of the Department of Veterans' Affairs. The Commission has a general power of delegation, as approved by the Minister, of its powers and functions to officers of the Commission.[45]

An appeal may be made by an applicant dissatisfied with a Board decision to the Repatriation Commission.[46] Reviews of Board decisions may also be made by the Commission when it appears to the Commission that sufficient reason exists for a review.[47] The Commission can also conduct a review or reconsideration of its own decisions on entitlement or assessment, which would usually be made in the light of its own revision of guidelines on assessment of incapacity or the aetiology of a disease. If current medical opinion on the causes of a disease or illness changed the Commission might reconsider its previous denials of entitlement to a disability pension.

There are some review procedures in the Act designed to ensure the Repatriation Review Tribunal is required to review only those Commission decisions denying entitlement which the Commission currently considers to be correct. Section 107VL[48] permits the Commission to retain for reconsideration at Commission level the review of a case in which the applicant, denied a pension or an increased rate, has applied to the Repatriation Review Tribunal for review. Until 1981 there were two circumstances under which the Commission could retain a case once the claimant

[42] s. 27 (1). By virtue of s. 47 (2) the Board must also grant a claim unless it is satisfied that incapacity did not arise out of war service.
[43] ss. 24, 101.
[44] s. 7.
[45] s. 12 (1).
[46] s. 28.
[47] s. 31 (1).
[48] *Repatriation Act* 1920–1981.

had appled to the Tribunal for review. Firstly, where there had been a lapse of time since the decision of the Commission denying the pension and the Commission considered it should review its decisions.[49] Secondly, where there was "further evidence" before the Tribunal that had not been before the Commission and the Tribunal was satisfied that it would have been relevant to the decision which the Commission had made denying entitlement or denying a different rate. In this kind of case the Tribunal was required to adjourn its hearing and give the entitlement decision back to the Commission for review. This procedure on further evidence led to considerable delays and in 1981 the Tribunal was given a discretion on referring cases to the Commission.[50] It was far quicker in many cases to make the entitlement decision at the Tribunal at the time when the further evidence arose.

A second tier decision is also made when an applicant, who has been unsuccessful at the Repatriation Tribunal, presents "further evidence" to the Commission and the Commission is satisfied that the evidence would have been relevant to that Commission decision which was affirmed by the Tribunal.[51]

3. Repatriation Review Tribunal

Application for review of Commission decisions lies to an "independent" external tribunal, the Repatriation Review Tribunal. The Tribunal was established in 1979 to replace the War Pensions Entitlement Tribunal and the Assessment Tribunal. It has jurisdiction to review Commission decisions refusing entitlement to a disability pension,[52] Commission or Board decisions assessing the rate of pension of a member[53] and Commission decisions refusing entitlement to a service pension on the ground the member is not permanently unemployable.[54] On entitlement reviews, the Tribunal is constituted by a Presidential member, a Services member and another member, generally known as the Commission member.[55] While in theory an independent Tribunal, the members are appointed by the Governor-General on the recommendations of the Repatriation Commission to the Minister. Members appointed to fill short term vacancies are appointed by the Minister on the recommendations of the Commission. Under the administrative arrangements of the Commonwealth the Minister for Veterans' Affairs is responsible for the Tribunal. The same Minister is responsible for the Repatriation Commission, a party to all Tribunal proceedings. These arrangements have led both the Tribunal members

[49] s. 107VL (1).
[50] s. 107VL (3), inserted in *Repatriation Act* 1920–1981 by s. 3 (a) *Repatriation (Pharmaceutical Benefits) Amendment Act* 1981.
[51] s. 107VM (1).
[52] s. 107VC.
[53] s. 107VD.
[54] s. 107VE, substituted by s. 44 *Repatriation Acts (Amendment Act)* 1981.
[55] s. 107VN (1).

and the Administrative Review Council to question the degree of independence which the Tribunal has.[56]

On entitlement reviews the Tribunal has jurisdiction to review a decision of the Commission refusing a claim for a disability pension, generally, on the grounds that the member does not suffer from any incapacity, or that the incapacity or death has not resulted from an occurrence that happened during war service or is not attributable to war service.

4. Administrative Appeals Tribunal

A limited right of review of Commission decisions lies to the Administrative Appeal Tribunal as an alternative to review by the Repatriation Review Tribunal.[57] The President of the Repatriation Review Tribunal may refer a case to the A.A.T. and request a review if he considers the decision of the Commission involves "an important principle of general application" with respect to entitlement to, or assessment of pensions.[58] Also, during the hearing of a proceeding before the Repatriation Tribunal, the applicant or the Commission may request that the Tribunal refer the decision to the A.A.T. for review.[59]

5. Judicial review and appeals

Further appeal lies to the Federal Court from a decision of the Repatriation Review Tribunal on a question of law and may be instituted either by the claimant or the Commission.[60] The Tribunal may, with the agreement of its President, refer a question of law which has arisen during a hearing to the Federal Court.[61] Similar avenues of appeal and reference lie from the Administrative Appeals Tribunal. An order of review in respect of any Board, Commission or Tribunal decision of a final nature may be obtained under the *Administrative Decisions (Judicial Review) Act* and there remains the jurisdiction of the courts under the prerogative writs.

THE LAW CASE

During the period preceding the outcome of the appeal by the Repatriation Commission from the Full Federal Court to the High Court in the *Law* case[62] entitlement decisions on disability pensions were suspended within the Repatriation Commission. If the Commission's appeal was unsuccessful and the High Court considered the decision of the Full Federal

[56] Repatriation Review Tribunal, *Annual Report 1981–82*, (A.G.P.S., Canberra, 1982) 8. A.R.C., Report No. 20, *Review of Pension Decisions under Repatriation Legislation*, 1983, pp 46–48. The A.R.C. has recommended that the R.R.T. be abolished and a Veterans Appeals Board be established as an intermediate review body, primarily to emphasise that procedures under the new system of review (if the A.R.C.'s recommendations are accepted by the Attorney-General) are fundamentally different.

[57] Administrative Review Council, *Third Annual Report 1979*, (A.G.P.S., Canberra, 1979), 14–16.

[58] s. 107VZZB (1).

[59] s. 107VZZB (3).

[60] s. 107VZZH.

[61] s. 107VZZG.

[62] (1981) 36 A.L.R. 411.

Court involved no error of law many entitlement decisions where a claimant had been denied a disability pension would require review and current determination procedures would require change. The outcome of the High Court decision was crucial to retention of current determination procedures at all levels of Commission and Tribunal decision making.

Section 47 (2) of the *Repatriation Act* reversed the usual onus of proof in civil proceedings, and required in all proceedings on entitlement or assessment that a claim be granted unless the decision maker, whether the Board or Commission, was satisfied beyond reasonable doubt, that there were insufficient grounds for granting the claim. The High Court was asked to resolve, in effect, whether the requirements of section 47 (2) were satisfied by the procedure, at a Board or Commission determination, of finding facts unproven unless there was sufficient evidence on the balance of probabilities for their existence but, nevertheless, adopting a reverse onus on entitlement after the facts had been settled. If the Federal Court was correct, and this two-stage determination procedure did not satisfy the section 47 (2) requirements there would need to be a new design for the determination of entitlements to disability or service pensions.

In 1976 Law died, aged 67, of carcinoma of the lung. As the dependant of a person who had been a member of the Australian Military Forces and who had undertaken war service, his widow applied under section 101 (1) *Repatriation Act* for a pension. The applicant'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. Her claim was rejected by a Repatriation Board in January 1977 on the ground that her husband's death was not related to his war service. She appealed to the Repatriation Commission[63] but her appeal was disallowed in April 1977. In February 1978 she lodged an appeal with the War Pensions Entitlement Appeal Tribunal, the predecessor to the present Repatriation Review Tribunal, and provided additional material which had not been before the Board or the Commision. The Entitlement Tribunal considered the new evidence and referred it to the Commission for reconsideration pursuant to the now repealed section 64 (4). Between the date on which the Commission disallowed her first appeal and the institution of the appeal to the Entitlement Tribunal the *Repatriation Act* had been amended so as to raise the standard of proof from one similar to the civil standard of the balance of probabilities to that of "beyond a reasonable doubt"[64]. The new provision, section 47 (2), provided that the Commission or Board must grant a claim unless it was satisfied beyond reasonable doubt of the negative proposition that there were insufficient grounds for allowing the claim or appeal. The applicant recommenced the same appeal process as

[63] s. 28.
[64] s. 47 (2).

before, from the Commission to the Tribunal and again was returned to the Commission for reconsideration. The Commission decided to adhere to its previous decision that Mr. Law's death was not attributable to his war service.

In 1979 the Act was amended, the Repatriation Review Tribunal was established and the Entitlement Tribunal abolished. At the new Tribunal the Commission was given, by virtue of section 107 VH (2), the onus of proving, beyond reasonable doubt, the negative proposition that there were not sufficient grounds for allowing the claim for a pension. Mrs. Law applied to the Repatriation Review Tribunal[65], which gave her an unfavourable decision. She subsequently appealed to the Federal Court[66] on a question of law and her appeal was allowed by Toohey J.[67] The Commission appealed to the Full Court of the Federal Court which dismissed the appeal[68] and then to the High Court which also dismissed the appeal[69].

At the Federal Court, Toohey J. was asked to decide whether the Tribunal had misdirected itself in basing its decision in part on the finding that there was no evidence to indicate Mr Law started to smoke because of the conditions of his war service. Entitlement to a pension under section 101 could be established either by the temporal connection between war service and an occurrence which led to incapacity or death,[70] or a causal connection between war service and death.[71] Toohey J. decided the Tribunal had not misdirected itself by basing its decision on the above finding because the formation of a smoking habit did not, in his opinion, come within the notion of an "occurrence" in section 101 (1) (a). He considered the formation of a smoking habit "lacks the sense of an event or incident . . . Rather it connotes a settled tendency or practice, the result of occurrences, reflecting the state of mind or way of acting of the person concerned"[72]. Toohey J. decided that Mr Law's death resulted from the smoking itself not from the habit.

A second question of law which Toohey J. was asked to consider was whether, on the facts properly found and on the evidence before it, the Tribunal could have been satisfied beyond reasonable doubt that there were insufficient grounds for granting the claim by Mrs Law. The Tribunal had found that Mr Law died from a carcinoma of the lung caused by his smoking habits and that he took up smoking during his war service. Entitlement to a pension under section 101 (1) (b) depends upon the causal connection between war service and death. However the Tribunal had also found that there was no evidence to indicate that Mr Law started to

[65] s. 107VC (1).
[66] s. 107VZZH.
[67] (1980) 29 A.L.R. 64.
[68] (1980) 31 A.L.R. 140.
[69] (1981) 36 A.L.R. 411.
[70] s. 101 (1) (a).
[71] s. 101 (1) (b).
[72] (1980) 29 A.L.R. 64, 71.

smoke because of the conditions and demands of his particular war service or because of the conditions in general pertaining to prisoners of war. The Tribunal had required evidence of the causal connection before it would find the grounds to entitlement in section 101 (1) (b) satisfied. By virtue of the reverse onus of proof provision,[73] it was required to set aside the Commission denial of entitlement unless it was established beyond reasonable doubt that war service did not cause death. Reliable medical evidence had been presented to the Tribunal of a causal link between war service and death, albeit contradictory to other reliable medical evidence.

Toohey J. decided that the Tribunal had erred in law because it had not followed the reverse onus of proof requirements in section 107 VH (2). Given the existence of some medical evidence connecting war service and death, it could in law only have been satisfied beyond a reasonable doubt that war service did not cause death if there was either evidence going to the credibility of the medical witness who had presented the evidence of a positive connection or other expert medical evidence available which the Tribunal used to reject the evidence of positive connection or otherwise deprive it of any significant weight. As there was no credibility evidence available and the Tribunal's reasons did not disclose the rejection of the medical evidence connecting war service and death by the use of other expert evidence the Tribunal could not have been satisfied, beyond a reasonable doubt, that war service did not cause death. Toohey J. allowed the appeal of Mrs Law and the decision of the Tribunal was set aside.

At the appeal to the Full Federal court by the Repatriation Commission Bowen C.J., Brennan and Lockhart JJ., agreed with Toohey J. that the Tribunal could not properly have been satisfied beyond a reasonable doubt that there were insufficient grounds for granting the claim and they dismissed the appeal[74]. At the subsequent appeal to the Full High Court the Court was similarly in agreement and the appeal was dismissed[75].

The confusion created by the onus of proof sections which reverse the usual onus on an applicant in a civil proceeding is centered upon whether they are applicable to all factual determinations carried out in determining an entitlement to a pension, to some but not other factual determinations, or only the ultimate determination of entitlement. It appears that it was the practice at the Board and the Commission during a determination to find the facts of incapacity, or the causal connection between a war-related occurrence and death, as unproven unless there was sufficient evidence, on the balance of probabilities to support their existence. As the determination was inquisitorial rather than adversial it is not strictly correct to say this placed the balance of proof upon the claimant, but the effect was the same as if the claimant had failed to adduce sufficient evidence to meet the appropriate standard of proof. The section 47 (2) reverse onus

[73] See the following pages for the full text of s. 107VH (2) (a).
[74] (1980) 31 A.L.R. 140.
[75] (1981) 36 A.L.R. 411.

of proof provision was not regarded as operating until the Commission or a Board had passed the fact finding stage in a determination. It appears that this practice was taken as the correct approach by the Repatriation Review Tribunal. This meant that at each stage at which a determination was made Mrs Law had been required to prove that her husband had died from the carcinoma, that the carcinoma had been caused by her husband's smoking, and that his smoking had commenced during his period of war service or that his smoking had been caused by his war service and its conditions.

The Commission practice appears to have been adopted, by analogy, from the conduct of a criminal proceeding in which the accused may, by legislation or the course of the trial, be obliged to disprove certain material facts on the balance of probabilities while the prosecution retains the overall burden of establishing the ultimate fact of the guilt of the accused beyond a reasonable doubt. The criminal proceeding model varies but the Commission appears to have adopted the features of a two-stage determination, two different standards of proof for each stage (the lower or civil standard for the fact finding stage and the higher for the ultimate determination), and an alternating onus of proof. The onus was on the claimant at the fact finding stage and this alternated to the Commission on the ultimate determination of entitlement.

At the full Federal Court Bowen C.J., Brennan and Lockhart JJ. decided that the approach of the Tribunal, the same as that which had been adopted by the Commission, was wrong. The Court specifically rejected the use of two standards of proof. They said "the Tribunal seems to have considered its function to be the making of findings on the evidence applying the civil standard of proof and then, having come to a conclusion, to consider whether its conclusion established beyond reasonable doubt that there were insufficient grounds for granting the claim". The Court conceded that the introductory words of section 107 VH (2) did lend some support to this approach. Section 107 VH (2) (a) provided:

> "(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; . . ."

The Commission had argued that the standard of proof, beyond reasonable doubt was not intended to apply during consideration of the facts but only after that consideration had been completed. However, the Court rejected this interpretation of section 107 VH (2). They considered it was

> ". . . obviously intended to operate in favour of claimants and it cannot operate sensibly unless the standard of proof beyond reasonable doubt is applied at each stage of the inquiry into the facts. Otherwise, one

cannot attain satisfaction beyond reasonable doubt that there are insufficient grounds for granting the claim."[76]

The Court only addressed itself, specifically, to the Commission's submission that a lower standard of proof applied to fact finding as opposed to the ultimate conclusion or determination and did not directly deal with the Commission and Tribunal practice of alternating the onus of proof by placing the onus, albeit at a civil standard, on the applicant during the fact finding stage of a determination. However, the Federal Court did observe that:

"In making its findings, the Tribunal clearly preferred the medical evidence of Dr Stockler and Dr Perkins to the evidence of Sir Edwards Dunlop. The Commission thus appears to have proceeded in the same way as a court or tribunal which has to decide a case on the balance of probabilities where the onus of proving the claim rests upon the claimant. The Repatriation Review Tribunal appears to have accepted this way of proceeding."[77]

In its written decision the Review Tribunal had used phrases which indicated it had placed the onus of proof on the claimant when determining facts in issue.

At the High Court the Commission continued with its claim that section 107 VH (2) supported the use of a two stage process and the use of two standards of proof, it was argued that section 107 VH implied the reasonable doubt standard only after the facts had been decided in the determination, and that the civil standard was appropriate for the initial fact finding stage of the determination. The judgment of Aiken J., with whom Gibbs C.J., Stephen and Mason JJ. concurred, makes it clear that section 107 VH

"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.[78]"

The High Court has specifically rejected a two-stage process, the use of two standards of proof and the practice of requiring the claimant to prove the primary facts of entitlement before placing the onus on the Commission in a Tribunal proceeding. The policy behind the statutory allocation of the burden of proof in the *Repatriation Act* was that the community should bear the financial burden of any error in a determination of pension entitlement in preference to a deserving claimant. The successful implementation of this policy of reducing the risks of error a claimant has to bear was considered to depend on a claimant being relieved of the burden of proof, that is, a burden of persuasion, on both the determination of

[76] (1980) 31 A.L.R. 140, 153.
[77] (1980) 31 A.L.R. 140, 146.
[78] (1981) 36 A.L.R. 411, 424.

entitlement and each decision of fact upon which the entitlement depends. This policy was stated by Murphy J. as follows:

> "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."[79]

The decision of the Full Federal Court in *Repatriation Commission* v. *Byrne and others*[80] contains a clear account of the position of the Repatriation Commission on fact finding procedures at a Board or Commission adjudication. At the time the Commission's position was put to the Administrative Appeals Tribunal, the High Court decision in *Law's* case rejecting the two-stage alternating onus procedure had not been handed down. It was however available to the Federal Court and they referred to it in their decision.[81] The Commission argued that the Tribunal had erred in law as the only conclusion open to it, on the evidence, was that it was satisfied beyond reasonable doubt that there were insufficient grounds for granting Mrs Byrne's claim for a pension. The basis of her claim was that her husband's death from cancer had arisen out of, or was attributable to war service, because his death was due to a disease which had been contracted, or which would not have been contracted but for his being, on war service[82]. Her husband had contracted malaria during war service and there was some evidence before the Tribunal linking malarial disease with cancer of the lymphatic system.

The Commission argued that the application of section 47 involved a two-stage process. The Federal Court gives an account of this submission of the Commission, as follows:

> "a submission that the Act requires two steps in the process of reaching a decision. The first step, as we understood the argument, places an onus upon an applicant to establish causal connection between the relevant disease and death upon a balance of probabilities. The second involves looking at the whole of the evidence and the determination of the claim in the applicant's favour unless the Tribunal is satisfied beyond

[79] (1981) 36 A.L.R. 411, 412.
[80] (1981) 40 A.L.R. 296, 303.
[81] In *Repatriation Commission* v. *Byrne* the Federal Court was hearing an appeal on a question of law from a decision of the Administrative Appeals Tribunal, s. 44 (3), *Administrative Appeals Tribunal Act* 1975. The applicant for a pension had applied to the Repatriation Review Tribunal for a review of the Commission's decision to reject the claim and the matter in *Byrne's* case, together with three other similar matters, had been referred by the Administrative Appeals Tribunal pursuant to s. 107VZZB (3), *Repatriation Act*.
[82] s. 101 (1A), *Repatriation Act*.

reasonable doubt that there are insufficient grounds for granting the claim."[83]

The Federal Court decided that "that approach is not a permissible one. There is no first step nor is any onus placed on the claimant to establish causal connection between a disease and death"[84]. The Commission's submission on the procedures appropriate for section 47 were rejected.[85] The Federal Court decided the Administrative Appeals Tribunal had not erred in law. There was evidence before the Tribunal linking malaria and cancer and therefore it was open to the Tribunal to find they were not satisfied beyond reasonable doubt that the requisite causal relationship did not exist.

THE DESIGN OF A REVERSE ONUS DETERMINATION SYSTEM FOR PENSION ENTITLEMENT

The design of any determination system involves decisions on the provision of expertise, the efficiency needs of the organization and the claimant's needs for fairness and absence of delay. However the Repatriation determination system has the additional factor of reverse onus planning requirements.[86] As a result of the High Court decision in *Law's* case a new design was clearly needed for the determination of entitlement to a disability pension and one in which the section 47 (2) reverse onus provisions were complied with. The managers of the determination and review structure had to provide each adjudicator with sufficient expertise, or access to expertise, to enable him or her to consider the evidence of the Departmental Medical Officers (D.M.O.) on incapacity or causal links and to reverse the onus of proof adopted by the D.M.O. in reaching his findings. The findings of the D.M.O. were the same findings which were required to be made by the adjudicator. If the Boards and the Commission had been permitted by the High Court to retain their two-stage determination procedure, they could continue to use the same onus of proof as the D.M.O. during the first or fact-finding stage of the determination. If the expert had decided there was not sufficient evidence that malaria led to cancer, it was easier for the adjudicator to reach the same finding. The

[83] (1981) 40 A.L.R. 296, 303.
[84] Ibid.
[85] At an A.A.T. review s. 47 (2) was determinative of the onus of proof, rather than s. 107VH (2), as the A.A.T. steps into the shoes of the decision maker whose decision is subject to review, s. 43 (1) *Administrative Appeals Tribunal Act* 1975.
[86] The problems encountered in using a reverse onus in criminal proceedings have little in common with the reverse onus difficulties in a civil determination forming part of a large bureaucracy. The term 'reverse onus' in criminal proceedings refers to that statutory practice of requiring the accused to disprove certain facts as part of his defence while retaining the traditional onus of proof of overall guilt on the prosecution. In this context 'reverse onus' is an affront to common law notions of civil liberties, that is, that one is presumed innocent until proven guilty. In a civil proceeding the onus is traditionally upon an applicant to prove his case, in Repatriation pension decisions this has been reversed and the bureaucracy must grant a pension unless there is sufficient evidence that the claimant is not entitled. 'Reverse onus' in this context raises difficulties of public administration, some of which may relate to devising procedures to protect the public purse from claims by applicants whom the bureacracy cannot prove are not entitled.

High Court decision on section 47 (2) meant each adjudicator was now required to disregard the findings of the D.M.O. because he had addressed himself to a different issue, and to decide whether the medical evidence was sufficient to prove that malaria did *not* lead to cancer. Findings of the D.M.O. on incapacity and causal links were also made at other times in the determination system and the propriety of acting upon these findings was also called into question by the High Court decision.

There are two design problems peculiar to the Repatriation Pension reverse onus system. The first problem is what to do about preliminary findings of fact made within the administrative system to screen out claims based upon irrelevant evidence. Every determination system needs to preserve its resources for those occasions when there is sufficient evidence to warrant a determination; at times it may be appropriate to err on the side of "unnecessary" expense in order to give the appearance of a fair hearing, or in case the resources decision was wrongly judged. In the Repatriation entitlement system the preliminary findings of fact can take on an importance equal to the decision on entitlement simply because the material fact of a causal link between a war-related occurrence and death or incapacity becomes the ultimate fact for determining entitlement under section 101 once the qualifying period of service and the facts of incapacity or death are established. If the only ground remaining to be established is the causal link the screening decision on the relevancy of any evidence presented by the claimant on the causal link is, in effect, a determination on entitlement. Do the section 47 (2) reverse onus requirements apply to findings made outside a determination?

The second problem was detected by the *Law* case. How do you preserve the ability of the adjudicator to comply with the reverse onus where the material facts arising for determination are highly technical, and the adjudicator's expertise is less than that of the witness providing evidence and findings relevant to those material facts. If the witness is the expert and he has adopted a scientific onus of proof, how can the adjudicator reverse the onus?

The statutory allocation of a reverse onus of proof leaves problems of interpretation for a government Department required to administer the determination of entitlements at which the reverse onus is to apply. Must any person who approaches the government Department seeking a pension be held entitled unless a trier of fact is satisfied beyond a reasonable doubt that there are insufficient grounds for granting the claim? Must the case of every enquirer be submitted for determination? Where does the onus of proof lie in preliminary questions of fact? A preliminary finding of fact is that finding made prior to a determination that there exist facts or evidence relevant to the determination of entitlement. It may be the same finding of fact which is again made during a determination of entitlement.

In the administration of some entitlements there is a burden upon a claimant to adduce sufficient evidence to initiate the entitlement process.

The outcome of the preliminary fact finding process may determine the progress of a case within a Department. In the entitlement process in the Department of Veterans Affairs and the Repatriation Commission this is not the case. It appears, from the *Repatriation Act*, an entitlement determination is not initiated by the outcome of preliminary findings but by the claimant lodging a claim for a pension[87]. This means that the burden of adducing evidence which is cast upon a claimant by the preliminary fact finding process is not also a burden of "proof" or persuasion, as the statutory scheme provides that nothing turns on the outcome of preliminary fact finding. If the claimant does not adduce evidence sufficiently probative to be regarded as relevant to an entitlement determination, a determination will nevertheless be required to proceed. Where a claimant carries a burden of adducing evidence which is also a burden of persuasion problems arise concerning the appropriateness of a claimant carrying such a burden of proof. Is this burden upon the claimant in preliminary fact finding consistent with the requirements of section 47 (2)?

The same issues of interpretation of section 47 (2) arise where findings of fact are made at some time after a determination. These findings can also be regarded as preliminary, in the sense that they are preliminary to a review of the original determination. Often they are referred to as "fresh evidence" or "further evidence". It appear that in the administration of the disability pension a burden of adducing evidence rests upon any claimant who wishes to proceed in a review on the basis of further evidence. This simply means that the entitlement process is not administered in such a way as to relieve the unsuccessful claimant of the task of seeking further evidence to present on a claim. Until the inquisitorial entitlement system in fact adopts practices of seeking out further evidence in the case of an unsuccessful claimant that claimant remains with a burden of adducing evidence.[88] However, this burden cast upon a claimant prior to a review does not create problems for the administration of reverse onus determinations provided the claimant is not also allocated a burden of persuasion or proof, in that fact finding process. Where a claimant's right to a review, whether internally by the Commission or externally by the Repatriation Review Tribunal, depends upon the outcome of preliminary fact finding a burden of persuasion has been allocated to that claimant.[89]

In the case of entitlement decisions the *Repatriation Act* indicates that a claimant's right to a review may, at three stages of the review hierarchy, be conditional upon the outcome of preliminary fact finding. A claimant's right to a review of a Board decision is conditional upon the Commission

[87] *Repatriation Act* s. 24AB (1), (2).

[88] The A.R.C. has recommended extensive changes in the evidence seeking practices of the initial determining authority, whom they envisage will become a delegate of the Commission instead of the present Boards. A.R.C. *Report: Review of Pension Decisions under Repatriation Legislation*, 34–5.

[89] On this point see the discussion pp. 37f, Repatriation Review Tribunal, *Third Annual Conference, 1982*. (A.G.P.S., Canberra, 1983).

forming the view that "sufficient reason exists" for reviewing any determination[90]. The Commission may form its opinion on grounds of changes in law or policy, lapse of time, representations from interested persons or even Members of Parliament, and also a representation from the claimant containing additional evidence. Whether the claimant's further evidence is considered by the Commission to be sufficient reason depends upon the claimant persuading a trier of fact that the further evidence would have been relevant to the determination which was carried out by the Board. The claimant, therefore, bears an onus of proof, or persuasion, in fact finding preliminary to a review, albeit at a relatively low standard of proof, that, ostensibly, of relevancy.

The second occasion when a claimant's right of review may be conditional upon the outcome of preliminary fact finding occurs when a claimant has applied to the Repatriation Review Tribunal for a review of a Commission decision and the President finds "further evidence" relevant to the Commission's decision denying entitlement. In this case the President has a discretion to postpone the Tribunal hearing and request the Commission to review its decision.[91] It is not known whether the Commission has a policy of complying with such requests or whether it initiates a review only where it considers sufficient reason exists.[92] In the latter case a burden of persuasion would be cast upon the claimant. Once a Tribunal hearing has commenced a similar discretion lies with the Tribunal to adjourn the hearing and request the Commission to review its decision where the Tribunal finds further evidence relevant to the original decision of the Commission.[93] However in both cases if the Tribunal decides that the claimant's further evidence is not relevant to the original determination there is no discretion in the Tribunal to adjourn the case and the review must proceed. At that review the claimant's further evidence would be admissible.[94] The claimant has a burden of adducing evidence which has not become a burden of persuasion because once a proceeding has begun the reverse onus provisions apply to fact finding by the Tribunal.

The third occasion when an applicant's right of review is conditional upon preliminary fact finding occurs after a claimant has exercised a right of review by the Repatriation Review Tribunal and that Tribunal has affirmed the decision of the Commission denying entitlement. The claimant is not regarded as having exhausted his or her review rights because the

[90] s. 31 (1). The A.R.C. has recently recommended that where an entitlement claim is wholly rejected the claim should be automatically referred to a new Veterans Appeal Board, which is envisaged as taking over the role of the Commission as the first stage in a new review structure. A.R.C. *Report: Review of Pension Decisions under Repatriation Legislation*, 33. (A.G.P.S., Canberra, 1983).

[91] s. 107VL (2), inserted in *Repatriation Act* by s. 3 (a) *Repatriation (Pharmaceutical Benefits) Amendment Act* 1981.

[92] s. 31 (1).

[93] s. 107VL (3), inserted by s. 3 (a) *Repatriation (Pharmaceutical Benefits) Amendment Act* 1981.

[94] s. 107VG.

entitlement issues are of a such a character that facts relevant to entitlement will be changing after any period of review. The claimant can obtain a review by the Commission if the Commission is satisfed that the "further evidence" adduced by the claimant would have been relevant to the Commission's decision denying entitlement. The claimant's right to a review at this stage is conditional upon the outcome of preliminary fact finding and therefore the claimant carries an onus of proof in regard to those facts determined outside the determination process.[95]

However, in the last case, the claimant is given an external "appeal" to the President of the Repatriation Tribunal from the Commission's "extra-adjudicatory" fact finding decision. The claimant bears a burden of persuasion, or proof, on this decision of the President. The initial wording of section 107 VH (2), the reverse onus of proof section applicable to the Tribunal, suggests the section does not apply to Tribunal opinions on the relevancy of further evidence. Section 107 VH (2) (a) provides:

"(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;"

The President's opinion on the further evidence is not "a proceeding on a review". It would of course be open to the Tribunal in a section 107 VM (2) decision to adopt the section 107 VH (2) reverse onus of proof procedure when making its fact finding decision.[96]

Therefore, at both the second tier of the review structure and the third tier the claimant bears a burden of persuasion on fact finding decisions. Is it acceptable to cast this onus of proof in fact finding on a claimant where there is a statutory reverse onus of proof and we have the highest judicial opinions that a reverse onus cannot operate sensibly unless the reverse onus applies to fact finding as well as the ultimate decision of entitlement and the standard of beyond a reasonable doubt is applied in both kinds of decisions?

The answer is yes and it is reached by balancing the claimant's interests against those of the institution. The allocation of a burden of persuasion upon the claimant at varying stages during an appellate or review process is the procedure by which the efficiency demands of the institution are balanced against the claimant's interest in a "fair" hearing. In a section 101 (1) determination on entitlement to a pension, medical evidence offered in support of the causal connection between an illness or event occurring during war service and the incapacity or death of a service member may increase in relevancy or probative force as a claim progresses through the appellate structure. The probative force of the same evidence does not,

[95] s. 107VM (1).
[96] s. 107VH (1).

of course, change but where different evidence is introduced this additional evidence may have greater probative force and it may also increase the relevancy or probative force of previously submitted evidence.

Additional or further evidence may be submitted during the review process for several reasons. The initial preparation of the claimant's case may have been lax, either on the part of the claimant's representative or the determining authority; an accurate, or otherwise, decision may have been made by a claimant's representative that non-submission of relevant evidence at the initial decisionmaking stages carried litigation advantages; or perhaps because the state of medical knowledge in regard to causal links between the illness or event and death has itself developed.

A procedure of confining a reviewing body to consideration of the evidence presented to the initial adjudicator, the Board, would produce an efficient system of determining the correctness of the initial decision. However, where additional medical evidence becomes available after the initial determination and it is relevant to establishing the causal links, a procedure of excluding this evidence would appear to be unfair to the claimant, depending perhaps upon whether the additional evidence could have been presented at the initial determination.[97] However, to allow a claimant a review whenever the claimant produced additional medical evidence would place undue administrative costs upon the appellate structure. By allocating burdens of persuasion upon the claimant at varying stages of the appellate structure the managers of the structure can weigh the interests of the claimant in a fair hearing with the institution's efficiency interests. The presentation of medical evidence of a kind which has not been considered and which is probative of the causal links between an illness or occurrence arising during war service and incapacity or death would indicate the claimant's interests in a fair hearing should predominate over the institution's efficiency interests, particularly if the claimant has not yet exercised any review rights.

While the existence of a screening decision is compatible with fair hearing procedures it poses management problems of ensuring the onus on the claimant in the screening decision is not carried into the determination on entitlement. Where there are a large number of potential entitlement decisions and judicialised procedure requirements for determinations on entitlement, efficiency has usually dictated that the organization of the decision making processes be established on the basis of a filtering system or a screening system. Investigation of potential entitlement is carried out by personnel who make preliminary findings of fact and in some cases, tentative decisions on entitlement. In some government departments an applicant or claimant may at this stage be advised

[97] s. 107VZD (1), *Repatriation Act* provides for a rehearing at the Repatriation Tribunal, after a Tribunal hearing, where the applicant satisfies the Tribunal that a person was unable to present evidence due to circumstances outside his control and which circumstances prevented him from attending the hearing.

that a claim is not likely to be successful and a potential claimant accepting this advice may decide not to submit a claim. Self-screening by a claimant can in this way occur prior to the commencement of a determination process. The costs involved in administering the process have been lessened but at some increase in the risk of error to the potential claimant.

The necessity for an investigative, preliminary fact-finding process prior to determination is a feature of most government departments with heavy case loads. However, where a statute allocates a reverse onus procedure for determinations special care has to be taken to ensure that a burden of persuasion which a claimant may bear in the preliminary fact finding stage is not introduced into the determination process. If this occurs the claimant carries a higher risk of an erroneous decision on entitlement. There are two possible ways of lessening the risks of error borne by a claimant at those stages in the determination and review system when the claimant bears an onus of proof. Firstly, to permit external supervision of investigative or preliminary fact finding decisions and, secondly, to adhere to determination procedures which ensure those extra-adjudicatory facts are not adopted in a determination.

Under the *Repatriation Act* 1920 (as amended) there are no review rights afforded a claimant against the section 31 (1) decision of the Commission that further evidence or other circumstances do not constitute "sufficient reason" to initiate a review of the entitlement decision of the Board, but the claimant does have other adequate opportunities for review and supervision of procedures by the courts. In *Bannister* v. *See*[98] Woodward J., sitting on a Full Federal Court appeal from a decision of Toohey J.[99] stated as follows:

> "If the Commission declines to embark on any review, because it is obvious on the face of the request or on simple inquiry that there are no adequte changed circumstances to constitute 'sufficient reason' for a review, then I believe no appeal would lie to the Tribunal. The legality and good faith of any such decision could, of course, be tested under the *Administrative Decisions (Judicial Review) Act* 1977. There will sometimes be a fine line between consideration whether or not to review and an actual review. The Commission should take pains to distinguish the two processes."[100]

The fine line between a consideration whether or not to review and an actual review appears, from Woodward J.'s decision, to be very fine indeed. Whenever preliminary fact finding involves a determination of fact on a ground for entitlement, it will be regarded as a review of a previous entitlement decision. In the *Bannister* case all grounds under section 101 for entitlement to a pension had been established except the causal link between the neurological disease which caused the death of the claimant's husband and war service. The finding of the Commission

[98] (1982) 45 A.L.R. 146.
[99] *Bannister* v. *See* (1982) 42 A.L.R. 78.
[100] (1982) 45 A.L.R. 146, 152.

on the causal link, therefore, took on an importance equal to the ultimate decision on entitlement. Mrs Bannister had asked the Commission to review its previous decision that her husband's death was not related to war service and that she was not, therefore, entitled to a pension — in view of the interpretation of the provisions of the *Repatriation Act* which had recently been given by the Full Federal Court in *Repatriation Commission* v. *Law*. Woodward J., with whom Fox and Franki JJ. agreed, decided that the Commission's re-stated refusal to recognize Mr Bannister's death as service-related was, in his view, a decision refusing a claim by a person for a pension within the meaning of section 107 VC[101]. This meant that on the claimant lodging an application for review by the Repatriation Review Tribunal, the Secretary of the Department of Veterans' Affairs was required to notify the Tribunal, within 21 days, of the lodgment and to forward the application and relevant material to the Tribunal[102]. The Secretary had refused to forward the application and records and the claimant applied under section 7 (2) *Administrative Decisions (Judicial Review) Act* to the Federal Court for an order of review of the Secretary's failure to make the decision to refer the documents. Toohey J. decided that as there had not been a review by the Commission the claimant had no right to apply to the Repatriation Tribunal and therefore there was no duty on the Secretary to forward the application and records to the Tribunal[103]. The Full Federal Court's decision that there had been a review by the Commission meant Mrs Bannister was entitled to her section 7 (2) order and this was made by the Court. While there are no external review rights under the *Repatriation Act* to a section 31 (1) preliminary fact finding decision *Bannister* v. *See* illustrates the availability of external supervision of procedures under the *Administrative Decisions (Judicial Review) Act*.

While it is still early days for the *Administrative Decisions (Judicial Review) Act*, *Bannister* v. *See* suggests that, whenever an investigation allocates a significant burden of persuasion to a claimant on a fact material to, or substantially significant to, any entitlement, section 7 (2) may be used to require that full procedural protections be afforded that claimant. If a court considers that the investigation has, in fact, functioned as a determination or an internal review, section 7 (2) permits the court to order that the statutory procedures required for a determination or a review be complied with. In the *Bannister* case, the Act provided external scrutiny of the functions in fact performod by the Repatriation Commission. In the full Federal Court decision, Fox J. appears to have recognised that the court was now in effect performing a management review task. He said:

[101] (1982) 45 A.L.R. 146, 151.
[102] s. 107VF (2) *Repatriation Act*.
[103] (1982) 42 A.L.R. 78.

> "When it goes beyond its screening function, the Commission is embarking upon the review. . . . The appeal really turns on this aspect, namely that of assessing and characterizing what the Commission did."[104]

The other stage of the Repatriation Pension Determination system at which a claimant bears an onus of proof is the section 107 VM (1) (b) decision of the Commission whether it is satisfied further evidence submitted by a claimant, after a Repatriation Tribunal decision adverse to a claimant, "would have been relevant to the making of the decision in the proceeding before the Commission". If the Commission is satisfied of the relevancy, retrospectively as it were, of the evidence it must reconsider that claim.[105] Onus problems only arise where the Commission is not satisfied of the retrospective relevancy of the further evidence, that is, where there is a negative decision on relevancy. The Commission's decision on relevancy could function as a review in the same way as its section 31 decision functioned in the *Bannister* case. The claimant's burden of adducing evidence could become a burden of persuasion because the right to a review, or reconsideration by the Commission, is dependent upon the claimant satisfying the burden of proving relevancy.

The *Repatriation Act* provides for some external supervision by the Tribunal President of the Commission's negative decision on the further evidence. The *Repatriation Act* indicates the claimant has a right to submit such further evidence to the President of the Repatriation Tribunal for his opinion on the retrospective relevancy of the evidence but, section 107 VM (2) gives no clear right to a claimant to the opinion of the President. The granting of the opinion has no statutory basis and is clearly at the discretion of the Tribunal. Given the late stage of the review system this is an acceptable compromise between efficency interests of the Tribunal and the claimant's interests. The claimant would however have the same opportunities under the *Administrative Decisions (Judicial Review) Act* in regard to the Commission's negative decision on relevancy as were available in regard to the section 31 (1) fact finding decision. The *Judicial Review Act* provides an adequate, though not particularly cheap or timely, check on an error borne by the claimant in Commission screening decisions.

The policy behind the statutory allocation of a reverse onus of proof is the lessening of risks of an incorrect decision borne by a claimant. The High Court[106] and Federal Court in *Repatriation Commission* v. *Law* both considered the policy could not operate sensibly unless the reverse onus applied during consideration of the facts in a determination and after the fact finding stage when a conclusion is made. Implicit in the High Court's decision is the requirement that preliminary fact finding in the Department of Veterans' Affairs or the Repatriation Commission should be separate from fact finding during a determination. Separation of investigative fact

[104] (1982) 45 A.L.R. 146, 147–8.
[105] s. 107VM (1) (b) *Repatriation Act*.
[106] (1981) 36 A.L.R. 411.

finding from adjudicative fact finding might be made for several reasons, but where adjudicators are required to adopt reverse onus procedures it is one method of ensuring the onus of proof upon a claimant at the investigative stage is not carried over to the determination.

There are several ways of separating the preliminary fact finding process from the adjudicative. Firstly, the preliminary fact finder may be given the authority to reach an initial determination, effectively eliminating the preliminary fact finding process. Where the initial decision is a determination the section 47 (2) reverse onus would apply. An alternative is by requiring the transmission to the adjudicator of the full transcript of the evidence upon which the preliminary facts were based and by requiring that the adjudicator read the full transcript.[107] This second procedure is designed to ensure that facts found by investigative personnel are not adopted, as fact, by the adjudicator. The adjudicator is given the evidence upon which the facts were based and is required to re-find the facts utilizing the section 47 (2) reverse onus procedure.

Both of these procedures can be found in the United States *Administrative Procedure Act* 1946,[108] an Act which has no equivalent in Australia. It appears an equivalent Bill was prepared as part of the new administrative law package of legislation in Australia but progress on the *Administrative Tribunals and Decisions Bill* was delayed until more research was carried out on which administrative decisions it should be applied to. The Administrative Review Council reported, in 1977, that it recommended the draft administrative procedure code not be enacted until necessary research established that it was appropriate.[109] It appears that the Attorney-General accepted this recommendation and the draft Bill did not proceed.

The United States *Administrative Procedure Act* 1946, as amended, contains several rules designed to separate investigative decisions from the adjudicative. One of these rules, section 8, provides in part, as follows:

> "When the agency did not preside at the reception of the evidence, the presiding employee . . . shall initially decide the case unless the agency requires . . . the entire record to be certified to it for initial decision."[110]

[107] In the context of entitlement decisions preliminary facts include those decisions by Departmental Medical officers concerning the causal links between a claimant's incapacity and war service. Many commentators have complained of the practices of DMO's simply stating, as required by s. 48, that the incapacity was not caused by war service without including the reasons for this finding. An ideal statement of reasons would canvas the medical evidence both in favour of and against there being a causal connection and attach the DMO's opinions on the probabilities of the correctness of this evidence. See Dr Hirschfeld 'Scientific Method, Medical evidence and s. 48 requirements' Repatriation Review Tribunal, *Fourth Annual Conference, 1983*. (A.G.P.S., Canberra, 1984), (forthcoming). See also discussion at pp. 62–63, Repatriation Review Tribunal, *Third Annual Conference, 1982*. (A.G.P.S., Canberra, 1983).

[108] 60 Stat. 237 (1946), as amended by 80 Stat. 378 (1966), as amended by 81 Stat. 54 (1967); 5 U.S.C. §§551–9, 701–6, 1305, 3105, 3344, 6362, 7562.

[109] Commonwealth, Administrative Review Council, *First Annual Report 1977*, (The Commonwealth Government Printer, Canberra, 1978), 11.

[110] 5 U.S.C. §557 (b).

The rule applies to those administrative decisions which have been "judicialized", either by statute or by the imposition of hearing requirements under the "due process" provisions of the United States Constitution. Section 5[111] of the *Administrative Procedure Act* 1946 provides, in part, that the section 8 rule applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing". The determinations of entitlement by the Repatriation Boards and the Commission would come within this standard. The current problems of reverse onus requirements in the Repatriation entitlement system suggest that it is time to initiate research on the appropriateness of an administrative procedure code for Australia.

The second major design problem in the Repatriation Pension entitlement system concerns the provision of expertise to the adjudicator, whether the Board, Commission or Tribunal. Expertise in some form is necessary to facilitate the separation of investigative from adjudicative fact finding, the purpose of the separation being to ensure that burdens of persuasion carried by a claimant at the investigative stages are not carried over to the determination. The provision of expertise is one way of ensuring that the adjudicator is free to give whatever weight to the opinion evidence before him that he considers appropriate.

In determining under section 47 (2) whether an occurrance arising during war service did not cause the member's death the Board or Commission may have a medical opinion, for example, that the malaria which was contracted during war service did not cause or contribute to the cancer of the lymphatic system which eventually led to the member's death. However, if it has another reliable medical opinion that malaria could possibly contribute to the development of cancer of the lymphatic system, the Board will usually grant the claim unless it is proven beyond a reasonable doubt that malaria was not a causal factor in the subsequent death.

The Board cannot simply adopt the findings of the first medical officer in preference to the second. It must consider the evidence for the first opinion and the second opinion and decide, on the evidence, whether it is sufficient to prove beyond a reasonable doubt, that there is no causal link. In order to consider the medical evidence the adjudicator needs some medical expertise himself.[112] In order to preserve his ability to satisfy the

[111] 5 U.S.C. §554 (a).

[112] In the 1981–82 *Annual Report* of the Repatriation Review Tribunal, at p. 6, the Acting President of the Tribunal noted the decision of the Tribunal in *Stott's* case. He said '*Stott*'s case involved consideration of the evidence for and against a relationship between war service factors and an ultimately fatal heart condition. The Tribunal discussed the difficulties of weighing opinion evidence, formed by experts on the balance of probabilities, with the requirement to be satisfied beyond reasonable doubt of any facts not favouring the applicant's claim.' See the discussion on the need for a medically trained member in entitlement decisions of the Repatriation Review Tribunal, and particularly the final comment by a Tribunal member as follows 'I think the overwhelming advantage of having a Medical Member on the Tribunal is that, for a change, we might know what we are doing.' Repatriation Review Tribunal, *Third Annual Conference 1982*, (A.G.P.S., Canberra, 1982), 108–11.

legal requirements of section 47 (2) the adjudicator needs sufficient medical expertise, or access to expertise to evaluate the medical evidence in support of the findings on causal links presented to him. If he does not have the expertise he may be tempted to adopt the expert findings before him, and in this case, facts found at the investigative stage will have found their way into the determination.

It appears that at several stages of the Repatriation Pension Determination System, and at the Repatriation Review Tribunal, preliminary fact finding has become integrated with the determination of entitlement. This occurs presumably because there are two entitlement provisions in the Act and entitlement under section 101 (1) to a pension is established by medical evidence relating to the causal links between a war-related illness or occurrence and incapacity and each determining body finds difficulty in refraining from giving weight to the medical findings made by the medically qualified officers of the Department of Veterans' Affairs who are authorised to conduct the preliminary fact finding investigations. It has not been resolved within the Determination System, nor, it appears, at certain Tribunal proceedings, what is the proper weight to give to medical findings submitted in support of medically related factual issues. This has occurred where the adjudicating Board, Commission or Tribunal has not been constituted by the inclusion of a medically qualified member upon the decision body. Where non-medical adjudicators are presented with evidence and findings by expert witnesses on medically related issues it appears those findings are accorded the weight appropriate to the expertise of their proponents whereas the reverse onus provisions, section 47 (2) and section 107 VH (2), in effect require that no weight be accorded the findings of these experts in the ultimate determination, simply because the ultimate determination involves proof of different facts; the adjudicator must consider the evidence and make his own findings.[113]

Confirmation of the adoption of preliminary facts by adjudicators can only be obtained by a study of decision making procedures within the Repatriation Commission and the Boards and this article has not involved empirical investigation of internal procedures. The statistics available from the Repatriation Review Tribunal do however indicate a 87 per cent failure rate[114] for the Commission where a claimant has applied to the Tribunal for a review and a Tribunal decision has been given on entitlement. Reasons for reversal of the Commission's decision would include Tribunal

[113] The problem of expert evidence on issues required to be determined by a court is resolved by judicial decisions which discourage the questioning of experts on questions the court is required to decide for itself (*Minnesota Mining and Manufacturing Co.* v. *Beiersdorf (Australia) Ltd.* (1980) 144 C.L.R. 253, 270) or restrict the evidence to proof of facts adduced to prove or disprove ultimate facts (*Re* v. *Sender* (No. 1) (1982) 44 A.L.R. 139, 143). However where administrative proceedings are non-adversary the appropriateness of experts giving evidence on an issue required to be determined by the adjudicator cannot be questioned; the claimant's protection lies in the opportunities given to him to cross-examine the witness or otherwise contravert the evidence.

[114] Repatriation Review Tribunal, *Annual Report, 1982-83*, (A.G.P.S., Canberra, 1983), 5.

considerations of additional medical evidence and for many of these cases a Tribunal reversal is not an indication of an error in the Commission decision under review, except in the sense it may indicate additional medical evidence should have been sought by the Commission. However, the unusually high proportion of reversals at the Tribunal stage of review suggests the Tribunal is detecting errors at the Commission level in reverse onus procedures.

At the initial Board stage, in both entitlement and assessment determinations, the adjudicators are not medically qualified, despite the centrality of medically related fact finding to both the grounds for entitlement and the assessment of the nature of incapacity upon which a rate of pension is determined[115]. The Boards are constituted by a Chairman, who may be legally qualified, a Services Member and a Commission member[116]. Board decisions are made on the basis of the evidence in the file, evidence prepared during the preliminary fact finding stage by the medically qualified investigators in the Department of Veterans' Affairs. It appears that if the Board has difficulties with the medical evidence the claimant's file is returned to the medical officer in Veterans' Affairs for clarification of the findings. The medical officer makes his findings by adopting the standards and burdens of proof appropriate to scientific inquiry; for example, a causal link between malarial illness and the onset of cancer of the lymphatic system would not be regarded as proven until there was substantial evidence in support of the hypothesis. Where the evidence upon which an entitlement claim was based included the officer's findings on this causal link, the medical officer's adoption of scientific procedures clearly places a burden of proof upon a claimant and does so at the standard of substantial evidence, or perhaps the balance of probabilities. A Board practice of attributing substantial weight to the expert findings of the medical officer would result in an onus of proof, at the Board's fact finding, being placed upon a claimant during the determination, contrary to the legal requirements of section 47 (2).

Adherence to the reverse onus requirements in section 47 (2) could be improved by one or both of two possible changes in design. Firstly, by moving the locus of the medical decision to the Departmental medical officer with the expertise, or, secondly, by moving the expertise to the determining body. The first design change would require medical officers to abandon scientific proof methods when reaching findings on causal links requested by the Board. The second could require the Board to be constituted by a medically qualifed member alert to the issue of reversing the onus when considering the medical evidence before the Board and qualified to form a decision of fact on the medical issues independently of the findings placed before him. Alternatively, medical expertise or

[115] *Repatriation Act* s. 27.
[116] Ibid., s. 14.

judgment could be obtained by greater use of investigative powers by the Board or determining authority. The first approach, in effect a delegation to the D.M.O., would require a legislative amendment to the present section 48, an amendment which imposed a reverse onus similar to that in section 47 (2).[117] In any case this amendment would be essential if the two entitlement provisions, section 47 (2) and section 101, are redrafted to produce a presumption of entitlement as suggested in the earlier parts of this article.

At present section 48 (1) requires, *inter alia*, that a medical practitioner shall, in a claim in relation to a member of the Forces, set out in his report his opinion whether the incapacity from which a member is suffering or from which he has died arose out of or is attributable to his war service. Section 48 (2) provides that where a medical practitioner entertains any doubt concerning a section 48 (1) matter he is required to report upon, "he shall state in his report that he entertains such a doubt and shall indicate, as far as practicable, the nature and extent of his doubt". A reverse onus on the causal link finding in a medical practitioner's section 48 report could be imposed by the following provision:

> "A medical practitioner shall include with his opinion on any matter upon which by s. 48 (1) (i), (ii), (iv) or (v) he is required to report, a finding that a s. 48 (i), (ii), (iv) or (v) matter which has been alleged by a claimant has been proven unless the medical practioner is satisfied, beyond reasonable doubt, that the incapacity from which the member is suffering or from which he died did not result from the matter alleged by the claimant."

The first method, the delegation option, identifies the level at which medically related factual determinations are made and it permits consideration of the provision of legal expertise. The entitlement decisions involve the application of law as well as medical issues and Board composition as a method of providing expertise may be the better approach for legal expertise.

A new design has recently been introduced to the Repatriation Review Tribunal which provides for more careful monitoring of the adequacy of medical evidence available to the Tribunal before the hearing commences. It is intended that the Tribunal will exercise its inquisitorial powers and draw initially upon the medical expertise of the Department of Veterans' Affairs. However, where scrutiny of the evidence, by an Examiner assisting the Tribunal, suggests the medical issues are contentious, the Tribunal may call for a section 48 medical opinion from a medically qualified person outside the Department. In entitlement reviews at the Tribunal

[117] This approach would not be popular with present D.M.O.'s. See Dr. M. Kehoe, 'The role, functions and difficulties of a Departmental Medical Officer', Repatriation Review Tribunal, *Second Annual Conference 1981*, (A.G.P.S., Canberra, 1982). Dr Kehoe questioned the purpose of s. 48, at p. 57 he asked 'Are we in fact seeking to shelter behind medical officers, attempting to base decisions and justify them on pseudo-medical grounds when they are in fact social, political or moral decisions contingent upon the intent and philosophy of interpretation of section 47 and of the Act as a whole?'.

level expertise is provided by way of witnesses rather than composition, in assessment and service pension reviews both methods are used. This is not to say that a medically qualified Tribunal member could act as a witness,[118] but that his training gives him the capacity to evaluate the medical evidence presented with the findings of the D.M.O. A Tribunal practice of calling for expert witnesses "outside" the Department increases the ability of the Tribunal member to evaluate and weigh the evidence he has received from the Department.

CONCLUSION

The decision of the High Court in *Repatriation Commission* v. *Law* and the history of administrative attempts to comply with it illustrates the obvious point that judicial pronouncements on the evidentiary practices of bureaucracies and judgments on the correct method of complying with evidentiary requirements in legislation have real consequences in the administration of determinations affected by those pronouncements. In the past where the consequences were difficult, or coud not be solved, administration often ignored the pronouncements. There was of course no judicial follow-up on whether evidentiary practices had been changed nor were other practical methods of scrutiny available to monitor the implementation of new procedures of administration. Appeal to the courts was expensive and predictably it took some time before another disgruntled claimant undertook the risky course of applying to the courts for a remedy. In the light of this obvious fact of life administrative attempts to implement judicial statements could afford to be slow, or even non-existent.

The Repatriation determination and review system is currently seen to be experiencing difficulties in complying with onus of proof requirements and judicial notions of proof primarily because scrutiny of public administraion now exists in Australia and because public administrators are less reluctant to discuss the difficulties caused to them by judicial decisions. The new package of administrative law reforms in Australia has introduced exposure and publicity to public administration problems. It is becoming clearer that review bodies, whether a tribunal or a court, provide more than individualized justice for a single claimant. The pattern of their decisions exposes problems in administraive procedures; administrative bodies whose decisions are subject to review can greatly increase their success rate in external review proceedings by improving their procedures of primary decision making.[119]

[118] See G.A. Flick, 'Delays in administrative decision making: handcuffing the experts', Repatriation Review Tribunal, *Third Annual Conference 1982*, (A.G.P.S., Canberra, 1983), 29–36.

[119] Where hearing procedures of tribunals permit a respondent to "settle" or concede a claim after a review application has been lodged success rates in Tribunal decisions can also, of course, be greatly improved by practices of proceeding on only those cases which appear to have the highest chances of success.

The main problem embedded in the *Law* case is how to administer a largescale welfare system while giving the applicant the benefit of any doubt in each case. An unlimited budget for welfare payments would be needed unless some screening decisions on applicants were permitted and an unlimited budget for administrative costs woud be necessary if administrators were required to prove that every fact relevant to entitlement did not exist. This paper cannot resolve which screening decisions are compatible with the *Law* judgment, this depends on how close the many facts of a case are to the ultimate determination of entitlement, but it does make the obvious point that screening decisions are necessary for administration of largescale benefit programs and that some administrative procedures are better able to preserve the *Law* requirements than others. Which administrative procedures are better cannot be resolved by recourse to the judgement or the dissection of judicial phrases such as "real as opposed to fanciful" possibilities.[120] Which procedures are better depends upon an understanding of the spirit of the *Law* case: the judicial policy that administration should ensure that the risks of proof in pension entitlement are lower for ex-servicemen, that the community should bear the financial burden of errors in proof rather than have an ex-serviceman bear the personal financial burden of an incorrect entitlement decision.

Disability pensions are primarily concerned with proof of aetiology of a disease, illness or the cause of death. The introduction of findings and reasons requirements for medical experts called upon to report to a determining authority is one method of assisting the authority in satisfying adequate standards of proof. It is hard to be satisfied beyond reasonable doubt if medical opinions are submitted on a "face value" basis. Courts and tribunals can no longer expect to command legitimacy for their decisions solely on "face value", their findings or decisions are only as good as the supporting reasons, and if the reasons offered in fact are unrelated to the decision they are increasingly given no "value" at all. It is not unreasonable to expect the same rigour for medical judgments.

Questions of law involve cost/benefit decisions. When a court is asked to resolve a question of law relating to the administrative and evidentiary procedures of a government organization it is required to undertake a management task similar to that undertaken within the organization itself. Each interpretation of the legal question will involve a different balance of costs associated with implementing the administrative or evidentiary procedure and different benefits to be derived. Judges will differ in the extent to which they recognize the cost/benefit decision involved in the resolution of the question of law and will also differ in the extent to which they are willing to articulate which costs and which benefits they have taken into account in reaching their decision on the law. Judges will differ

[120] *Repatriation Commission* v. *Bishop*, as yet unreported decision of the Federal Court, August 1983.

in the methods they employ to legitimize the visibility of their cost-benefit reasoning.

The reason the question of law has arisen and courts are asked to resolve the dispute is because the organization has reached a considered cost/benefit decision which it is unable to change. Those parts of the organization concerned with budget setting may be evenly balanced with those parts required to determine benefits — in the widest sense of the general advantages the program offers. If these wide ranging benefits cannot be increased, because there is a fixed budget and the benefit setting parts of the organization are not sufficiently powerful to bring about budget changes, questions of law will be cut to fit the available cloth.

The role of the court is to bring about change. It does this by making the same cost/benefit decision, but without the restrictions of responsibility for budget considerations. The weight it accords to the benefits involved with particular administrative procedures is not tempered by the political responsibilities of the concurrent changes in the monetary costs associated with a diminution or an expansion of benefits. Those budgetary effects are thrown back to the organization and to the political arena. In the case of an increase in monetary costs the organization must either enter the budget-time fray armed with the legal statement on the necessity for different procedures or, if unwilling to do this, it might decide to change the law by amendment to the statute. A third alternative is to wear the costs by cutting back benefits in other areas. Whichever path the organization takes there are political repercussions which either legitimize the step taken or redirect the organization to a more popular path. Either way change has taken place within a political framework with the court acting as a catalyst.

The history of the administration of the reverse onus procedures for repatriation pension entitlements indicates a determined resistance on the part of the Boards, the Commission and the Tribunal to implement procedures which relieved a claimant of the requirement to prove the facts material to entitlement. It was obvious to each of these bodies that implementation would involve a large increase in outlay for funding pensions. The budget for pensions was administered by the Department of Veterans' Affairs and ultimately the responsibility of the Minister for Veterans' Affairs. The same Minister appointed the Board members, Repatriation Commissioners and Tribunal members. It appears that each of these determining or review authorities was not sufficiently insulated from budget constraints to bring about change in the direction the organization had decided benefits should be directed, that is, towards lowering the risk of decision making error borne by an ex-serviceman who was incapacitated due to war service. While a court can assist in bringing about change in the administrative procedures of an organization the cost/benefit balance selected by the court will not be implemented unless it gains political acceptability. It is a continuing story of whether the current outlay on

repatriation pensions, in some cases to persons employed and at rates higher than other pensions, will be borne by the electorate.