



Veterans' Review Board

Principal Registry

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Mr Terry Fogarty
16 Mann Avenue
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Dear Mr Fogarty

I refer to your letter of 22 May 2007 and the documents that you enclosed, including a copy of a letter to the President of the Administrative Appeals Tribunal and correspondence with the Secretary of the Department of Veterans' Affairs, and certain Parliamentarians.

I understand that your concern in relation to the Veterans' Review Board is that you think it is not applying the law correctly, particularly in relation to the High Court's judgment in *Bushell's* case. Your concern appears to be based on an implication you have drawn from searching reasons for decision made by the Administrative Appeals Tribunal via the AustLII website.

I note your concerns, but do not agree that the methodology you have used is valid for detecting error, or that there is the widespread misapplication of the law that you imply either by the Board or by the Tribunal.

In a system in which the Board was established to decide thousands of cases each year, there will, from time to time, be cases that are incorrectly decided due to mistakes or errors of law. Of course, that is always of concern and we take seriously our endeavours to eliminate such mistakes or errors and to apply the law correctly to the evidence before the Board in every case. That is one of the main reasons the Board publishes its quarterly bulletin, *VeRBosity*, and conducts training for its members. The Board also has an extensive Internet website that provides legal information not only to its members, but to the public at large. We believe in open decision-making, that is, applicants should know the basis on which the Board decides cases. Thus while the Act provides that Board hearings must be held in private (and so, unlike the AAT, we cannot make Board decisions publicly available on AustLII), we are open about our decision-making processes and the legal resource material that is available to members to assist them in making correct decisions. It is publicly available on the Internet.

I note that while you appear to have placed emphasis on one aspect of *Bushell's* case concerning not preferring one opinion over another, immediately after that statement their Honours said:

'This does not mean, however, that in performing its functions under s.120(3) the Commission cannot have regard to the medical or scientific material which is opposed to the material which supports the veteran's claim. Indeed, the Commission is bound to have regard to the opposing material for the purpose of examining the validity of the reasoning which supports the claim that there is a connection between the incapacity or death and the service of a veteran. But it is vital that the Commission keep in mind that that hypothesis may still be reasonable although it is unproved and opposed to the weight of informed opinion.'

While *Bushell's* case concerned the nature of decision-making on whether a reasonable hypothesis is raised by the material before the decision-maker, the Federal Court has since considered the separate question of identification of the proper nature of the claimed injury or disease. An examination of many recent AAT cases on AustLII will reveal that this is often an issue in cases concerning psychiatric disorders.

The Full Federal Court has indicated that the nature of the claimed injury or disease is not part of the hypothesis and so was not the subject of *Bushell's* case. In *Cooke*, *Budworth*, and *Benjamin* the Federal Court decided that this question is a matter to be decided on the balance of probabilities. On this question (but not the question of whether a hypothesis is reasonable) it is open to the decision-maker to prefer the evidence of one specialist over another on the basis of the quality of the opinions, their reasoning, and the evidence and findings that support them. The High Court rejected applications for special leave to appeal in the cases of *Benjamin* and *Budworth* (both of which also concerned the reasonable hypothesis legislation).

The High Court also refused special leave to appeal in the cases of *East* and *Winch*, both of which directly concerned the application of the 'reasonable hypothesis' legislation. Thus your statement that 'the Repatriation Commission has been to the High Court on five occasions and lost on all five occasions' does not tell the whole story.

You may find links to all of the cases to which I have referred at the Board's website at: <http://www.vrb.gov.au/court/court-A.html>. If you are not already on our free mailing list for *VeRBosity*, you may receive it by contacting me by letter or phone or by e-mailing me at contact@vrb.gov.au. Current and past issues of *VeRBosity* may also be downloaded from our Internet site: <http://www.vrb.gov.au/publications.html>.

I trust that you have found this information of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bruce Topperwien', written in a cursive style. The signature is enclosed within a faint, hand-drawn oval.

Bruce Topperwien
Acting Principal Member

25 May 2007