HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

JURE JACK RONCEVICH APPELLANT

AND

REPATRIATION COMMISSION RESPONDENT

Roncevich v Repatriation Commission
[2005] HCA 40
10 August 2005
D7/2004

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Full Court of the Federal Court of Australia dated 30 June 2003 and, in place thereof, order that:*

   (a) the appeal be allowed;

   (b) the order of Mansfield J in the Federal Court of Australia dated 2 December 2002 be set aside and, in place thereof, order that:

      (i) the appeal be allowed;

      (ii) the decision of the Tribunal be set aside; and

      (iii) the matter be remitted to the Tribunal to be determined according to law.

3. *The respondent is to pay the appellant's costs in the Federal Court, both at first instance and in the Full Court, and the appellant's costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation:

D De Marchi for the appellant (instructed by Pipers)

P J Hanks QC with E Ford for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Roncevich v Repatriation Commission

Repatriation pension – Whether injury arose out of or was attributable to defence service – Whether attendance at Mess function compulsory – Whether attendance at Mess function constituted defence service – Applicant injured as a result of falling from window due to intoxication.

Administrative law – Tribunal of the Commonwealth – Whether Administrative Appeals Tribunal gave reasons which conformed to law – Sufficiency of reasons – Whether perverse findings of fact constitute an error of law – Jurisdiction of Federal Court to disturb perverse findings of fact – Whether returning matter to the Administrative Appeals Tribunal would be futile – Whether High Court should substitute a finding on the facts.

Statutes – Construction – Interpretation of beneficial provisions.

Words and phrases – "defence-caused", "defence service", "attributable to", "arose out of".

Administrative Appeals Tribunal Act 1975 (Cth) ss 29, 43, 44, 57A.
Federal Court Act 1976 (Cth) ss 19, 20.
Veterans' Entitlement Act 1986 (Cth) ss 44(1), 70(1), 70(5), 70(7), 70(9), 120(4), 120B(3), 180A(3).

1 McHUGH, GUMMOW, CALLINAN AND HEYDON JJ. The matters for determination in this appeal are the meaning of the terms "defence-caused", "defence service" and "arose out of, or was attributable to, any defence service" as used in sub-ss (1) and (5) of s 70 of the *Veterans' Entitlement Act* 1986 (Cth) ("the Act").

Facts

2 Between 11 February 1974 and 13 February 1998 the appellant was an enlisted non-commissioned officer ("NCO") in the Australian Army. On his discharge, which was voluntary, he held the highest non-commissioned rank in the Army, Warrant Officer (Class 1).

3 On 27 February 1986 the appellant, who was then a Sergeant, attended a dinner at the Sergeants' Mess at Holsworthy Military Barracks (the "Base") where he was stationed and resided. The reason for his attendance at the Mess was that the Regimental Sergeant Major of the Army ("RSM Army"), the most senior soldier in the whole Army and a person of considerable military importance, was visiting the Base. Short notice only had been given of this officer's visit.

4 The evidence was that at the time of the relevant events it was the expectation and custom of the Army for NCOs on Base to attend at the Mess when a distinguished visitor was a guest. The circumstances and implications of the appellant's attendance at the Mess were well summarised by Heerey J in the Full Court of the Federal Court[1]:

> "The evidence of the present appellant and RSM Lee, the truthfulness of which was not disputed and which was implicitly accepted by the tribunal, show that attendances by a SNCO at the sergeants' mess, and especially at a function to welcome visiting dignitaries, were an integral, and valuable, part of army life. Sergeants and other SNCOs need to be in regular informal contact about the operation of the unit and the well-being of those serving in it. The longstanding tradition is that a mess, whether sergeants' or officers', is perhaps the best place where this can be done effectively. Moreover the camaraderie of the mess

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1 *Roncevich v Repatriation Commission* (2003) 75 ALD 345 at 350-351 [26]-[27]; 37 AAR 397 at 402.

> encourages the maintenance and development of trust, loyalty and regimental pride which are essential for an effective military organisation.
>
> When the mess entertains a distinguished visitor the unit is, so to speak, on show. If 3 Battalion RAR were to provide an embarrassingly small turnout of Warrant Officers and Sergeants for the Senior RSM in the Australian Army because the appellant preferred to read a book in his own quarters, it may be doubted whether his conduct would have been accepted by his colleagues and RSM Lee as purely a matter of free choice for him."

5 The appellant was present at the Mess from about 4:30pm until 9:00pm. In this period he drank a considerable quantity of beer, indeed to the extent that he became inebriated. The evidence was that alcoholic drinks were from time to time and in various ways subsidised, and that it was "frowned upon" to consume drinks of low alcoholic content.

6 Later in the evening the appellant left the Mess with the permission of RSM Colin Lee, his immediate superior. He intended to change from his military fatigues into civilian clothes, iron his uniform for the next day, and then return to the Mess. Others present there were already in civilian clothes. The appellant's military commitments had prevented him from changing earlier.

7 The appellant returned to his room on the second floor of the barracks at the Base, opened his windows to air the room, and began to iron his uniform. The appellant was a smoker. He felt the need to clear his throat. He walked to a window, stood on a trunk beneath it and lent forward with the intention of expectorating. He overbalanced and fell to the ground below. The fall caused an "internal derangement" of his left knee.

The proceedings below

8 On his retirement the appellant made a claim under the Act seeking recognition, for the purpose of claiming compensation, of various injuries he had suffered during his service, including the derangement of his knee. The respondent rejected the claim. The appellant made an application for review of the decision in the Administrative Appeals Tribunal ("the Tribunal").

9 It is convenient to set out the applicable statutory provisions at this point. Relevantly, s 70(1) of the Act provides:

"**70 Eligibility for pension under this Part**

(1) Where:

...

(b) a member of the Forces or member of a Peacekeeping Force has become incapacitated from a defence-caused injury or a defence-caused disease;

the Commonwealth is, subject to this Act, liable to pay:

...

(d) in the case of the incapacity of the member – pension by way of compensation to the member;

in accordance with this Act."

Section 70(5) is as follows:

"(5) For the purposes of this Act, the death of a member of the Forces (other than a member to whom this Part applies solely because of section 69A) or member of a Peacekeeping Force shall be taken to have been defence-caused, an injury suffered by such a member shall be taken to be a defence-caused injury or a disease contracted by such a member shall be taken to be a defence-caused disease if:

(a) the death, injury or disease, as the case may be, arose out of, or was attributable to, any defence service, or peacekeeping service, as the case may be, of the member;

...

(c) the death is to be deemed by subsection (6) to be defence-caused, the injury is to be deemed by subsection (7) to be a defence-caused injury or the disease is to be deemed by subsection (7) to be a defence-caused disease, as the case may be; or

(d) the injury or disease from which the member died, or has become incapacitated:

(i) was suffered or contracted during any defence service or peacekeeping service of the member, but did not arise out of that service; or

(ii) was suffered or contracted before the commencement of the period, or the last period, of defence service or peacekeeping service of the member, but not during such a period of service;

and, in the opinion of the Commission, the injury or disease was contributed to in a material degree by, or was aggravated by, any defence service or peacekeeping service rendered by the member, being service rendered after the member suffered that injury or contracted that disease; ..."

10 The appellant sought to rely in this Court and in the Full Court of the Federal Court on s 70(7) which is as follows:

"(7) Where, in the opinion of the Commission, the incapacity of a member of the Forces or member of a Peacekeeping Force was due to an accident that would not have occurred, or to a disease that would not have been contracted, but for his or her having rendered defence service or peacekeeping service, as the case may be, or but for changes in the member's environment consequent upon his or her having rendered any such service:

(a) if the incapacity of the member was due to an accident – that incapacity shall be deemed to have arisen out of the injury suffered by the member as a result of the accident and the injury so suffered shall be deemed to be a defence-caused injury suffered by the member; or

(b) if the incapacity was due to a disease – the incapacity shall be deemed to have arisen out of that disease and that disease shall be deemed to be a defence-caused disease contracted by the member, for the purposes of this Act."

11 There are other relevant provisions. Section 120(4), requires, in respect of an injury caused during general service[2] that the standard of proof be to the

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2 As opposed to "operational service", "peacekeeping service" or "hazardous service", all of which receive separate attention in the Act.

"reasonable satisfaction" of the respondent. Sub-section (3) of s 120B should also be noted:

> "(3) In applying subsection 120(4) to determine a claim, the Commission is to be reasonably satisfied that an injury suffered by a person, a disease contracted by a person or the death of a person was war-caused or defence-caused only if:
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> (a) the material before the Commission raises a connection between the injury, disease or death of the person and some particular service rendered by the person; and
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> (b) there is in force:
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> (i) a Statement of Principles determined under subsection 196B(3) or (12); or
>
> (ii) a determination of the Commission under subsection 180A(3);[3]

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3 Section 180A(3) provides:

> "**180A Determination by Commission**
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> ...
>
> (3) A determination under this subsection in respect of a particular kind of injury, disease or death must be in writing and must:
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> (a) state that it has effect only in relation to the class of veterans or members of the Forces referred to in subparagraph (1)(b)(i); and
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> (b) state that it applies only in respect of claims relating to:
>
> (i) eligible war service (other than operational service) rendered by a veteran; or
>
> (ii) defence service (other than hazardous service) rendered by a member of the Forces; and
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> (c) set out:
>
> (i) the factors that must exist; and

(Footnote continues on next page)

that upholds the contention that the injury, disease or death of the person is, on the balance of probabilities, connected with that service."

12 There is a relevant Statement of Principles with respect to Internal Derangement of the Knee[4]. It acknowledges that internal knee derangement is capable of being caused by defence service.

13 The Tribunal[5] affirmed the decision under review. The *Administrative Appeals Tribunal Act* 1975 (Cth) provided for an "appeal to the Federal Court of Australia, on a question of law" (s 44(1)). The Federal Court (von Doussa J) held that the Tribunal's decision was affected by error of law, the respondent having made a concession to that effect. The matter was remitted to the Tribunal for a fresh hearing[6]. The Tribunal on this occasion reached the same conclusion as the first one.

14 After summarising some of the evidence and the competing contentions, the Tribunal said this[7]:

> "The Tribunal finds that on the evening of 27 February 1986, between 4.30pm and 9.00pm, the applicant attended the sergeants mess at the Holdsworthy Army Base to socialise with fellow NCOs. They drank alcoholic beverages, ate a meal and had a friendly conversation. The situation was in fact no different to what they might have done, had they decided to go to a hotel away from the Base.

(ii) which of those factors must be related to service rendered by a person;

before it can be said, on the balance of probabilities, that an injury, disease or death of that kind is connected with the circumstances of that service."

4 Repatriation Medical Authority Instrument No 60 of 1997.

5 *Roncevich v Repatriation Commission* [2001] AATA 199 (16 March 2001).

6 *Roncevich v Repatriation Commission* (2001) 66 ALD 105.

7 *Roncevich v Repatriation Commission* [2002] AATA 343 (14 May 2002) at [9]-[11].

> The only links between the Army and the intoxication of [the appellant] were that the intoxication occurred on an Army Base and that [the appellant] and his fellow drinkers were soldiers. The intoxication was not caused by, nor did it arise out of any task that [the appellant] had to do as a soldier, nor did it arise out of his defence service, nor did it occur in the course of his defence service.
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> Consequently, the subsequent injury to [the appellant's] knee was not caused by his defence service, nor did it arise out of or in the course of his defence-service. It was not service-related nor was it defence-caused, within the meaning of those terms in the *Veterans' Entitlement Act 1986*."

15 The appellant again appealed to the Federal Court. The appeal came on for hearing before Mansfield J. His Honour concluded that the Tribunal did not err in law in deciding that the injury to the appellant's knee was not attributable to defence service. His Honour's understanding of the relevant principles appears from this paragraph in his reasons[8]:

> "Whether the left knee injury arose out of the applicant's defence service depends upon whether there is a causal connection between the defence service and the incapacity from the left knee injury[9]. The connection need not be the sole or dominant or prominent cause of the injury; it is sufficient if it is a contributory cause or connection. In *Repatriation Commission v Law*[10] Aickin J (with whom Gibbs CJ, Stephen and Mason JJ agreed) said the natural meaning of the words then under consideration (in ss 101(1)(b) and 101(1A) of the *Repatriation Act* 1920 (Cth)) was to point to a causal connection rather than a temporal connection between the defence service and the injury or disease. The words there under consideration were relevantly to the same effect as those in s 70(5)(a) of the Act. If the cause of the injury is the personal or domestic activities of the claimant, and the defence service provides no

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8 *Roncevich v Repatriation Commission* [2002] FCA 1458 (2 December 2002) at [18].

9 See eg *Holthouse v Repatriation Commission* (1982) 1 RPD 287 at 288 per Davies J.

10 (1980) 147 CLR 635 at 649.

more than the circumstances in which the cause operated, then the injury does not arise out of, and is not attributable to, defence service[11]."

16 The appellant unsuccessfully appealed to the Full Court of the Federal Court (Whitlam and Marshall JJ, Heerey J dissenting). The majority set out in their reasons several passages from the reasons of the primary judge, Mansfield J, before stating that in substance they agreed with them, including the rejection of arguments by the appellant that the Tribunal's reasons were so slight as to fall short of the properly reasoned judgment which it was bound to give, and that the appellant had made out a case which the Tribunal had failed to address, that subsequent defence service had aggravated the injury to the knee caused by the appellant's falling from a window to the ground below his room. Whitlam and Marshall JJ added this[12]:

> "The reasons of the AAT were brief ... It is true, as Heerey J observes, that neither in that passage[13] nor in the next paragraph of its reasons did the AAT refer to the expression 'attributable to' used in s 70(5)(a) of the Act. Such an omission was not relied on as a ground of appeal below or before us. That is hardly surprising. The intoxication and the fall took place during [the appellant's] defence service. In that context, any notion of attribution would not suggest a less proximate causal relationship, between defence service and the injury, than would be conveyed by the expression 'arise out of', which expression was fastened upon by the AAT.
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> The critical finding of the AAT was that [the appellant] was not required to attend the relevant function on the day in question. Its view about whether the injury was defence caused was based on that finding.

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11 See eg *Wedderspoon v Minister of Pensions* [1947] 1 KB 562 at 563-564 per Denning J.

12 *Roncevich v Repatriation Commission* (2003) 75 ALD 345 at 359 [57]-[58]; 37 AAR 397 at 411.

13 Their Honours were referring to the following passage: "The only links between the Army and the intoxication of [the appellant] were that the intoxication occurred on an Army Base and that [the appellant] and his fellow drinkers were soldiers. The intoxication was not caused by, nor did it arise out of any task that [the appellant] had to do as a soldier, nor did it arise out of his defence service, nor did it occur in the course of his defence service." *Roncevich v Repatriation Commission* [2002] AATA 343 (14 May 2002) at [10].

We agree with the primary judge that that finding was open to the AAT. Moreover, the statement by the AAT that the intoxication did not 'arise out of any task that [the appellant] had to do as a soldier' does not, in our view, suggest that the AAT took the view that the only relevant service was that performed by a member at risk of disciplinary action for insubordination."

17 In his dissenting judgment, Heerey J cited a passage from *Henderson v Commissioner of Railways (WA)*[14] and made these observations with which we are in agreement[15]:

> "The tribunal said that the appellant's intoxication did not 'arise out of any task that (he) had to do as a soldier'. However, things a person does in the course of serving as a soldier are not limited to the obeying of lawful commands, directions and orders under disciplinary sanction pursuant to ss 27, 28 or 29 of the Defence Force Discipline Act 1982 (Cth). In *Henderson v Cmr of Railways (WA)* (1937) ... where the High Court was concerned with a workers' compensation statute which spoke of injury 'arising out of or in the course of employment', Dixon J said[16]:
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> > 'To be in the course of employment, the acts of the workman must be part of his service to the employer. But the difficulty lies in the application of this conception. *For the service consists in more than the actual performance of the work which the workman is employed to do*. It includes the doing of whatever is incidental to the performance of the work. General expressions of this kind have not proved very helpful. ... Where the accident arises shortly before the beginning of actual work or shortly after its cessation, or in an interval when labour is suspended, and it occurs at or near the scene of operations, the question whether it arises in the course of the employment will depend on the nature and terms of the employment, on the circumstances in which work is done and on what, as a result, the workman is reasonably *required, expected or authorized* to do in order to carry out his actual duties." (Emphasis added by Heerey J)

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14 (1937) 58 CLR 281.

15 *Roncevich v Repatriation Commission* (2003) 75 ALD 345 at 350 [24]; 37 AAR 397 at 401-402.

16 (1937) 58 CLR 281 at 294.

18 Heerey J stated his conclusion in these paragraphs[17]:

> "In the present case, the expression 'arose out of, or was attributable to, any defence service', although made up of ordinary words, is one that conveys a compound legal concept. It is not like the ordinary word 'business' which was at issue in *Hope*[18] or the word 'insulting'[19]. For upwards of a century in common law jurisdictions, courts have construed the meaning of such expressions in workers' compensation legislation. Accordingly the correct application of the expression to the facts found in the present case raised a question of law for the purposes of s 44 of the Administrative Appeals Tribunal Act 1975 (Cth), subject to the need to make a further finding on the causation issue, as explained above[20].
>
> The Tribunal erred in law in the application of this statutory criterion. It effectively ignored what the appellant was, as a matter of practicality, required or expected to do as part of his service in the army. The primary judge did not correct that error. It might also be said that if injury can only arise out of or be attributable to defence service if it occurs when the claimant is doing something which he or she is ordered to do, it is strange that the Act contemplates injury being compensable even when it arises out of disobedience of an order, as long as there has not been a serious default or wilful act or a serious breach of discipline."

The appeal to this Court

19 One of the appellant's arguments advanced in the Federal Court was repeated in this Court, that the paucity of reasoning on the part of the Tribunal was so deficient as to constitute error of law. It should be rejected. Sufficient appears from the judgment of the Tribunal to enable the courts below, and this

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17 *Roncevich v Repatriation Commission* (2003) 75 ALD 345 at 354-355 [36]-[37]; 37 AAR 397 at 406-407.

18 *Hope v Bathurst City Council* (1980) 144 CLR 1.

19 *Brutus v Cozens* [1973] AC 854.

20 *Roncevich v Repatriation Commission* (2004) 75 ALD 345 at 354 [34]; 37 AAR 397 at 406.

Court to understand, and to deal with the reasoning and decision of the Tribunal[21].

The appellant's argument based on s 70(7) of the Act

20 The appellant contended that he was entitled to the benefit of s 70(7) of the Act which we have set out above. The argument was that the provision deems an injury to be defence-caused where it is due to an accident that would not have occurred but for the defence service rendered by the appellant: indeed, that it extends the application of s 70(5) even in circumstances in which the injury may not have arisen due to defence service, but is sufficiently proximate to that service to be deemed to be service related. The second and quite distinct limb of s 70(7), unique to the Act, brings into play as a separate consideration, environmental changes that may have occurred in consequence of a member having rendered defence service. The inebriation of the appellant, having regard to the circumstances of his attendance in the Sergeants' Mess, the appellant submitted, falls within s 70(7), even if the injury were to be held to have been suffered other than in the course of the appellant's defence service.

21 It is correct, as the respondent submits, that this argument was not advanced in, or founded upon any ground of appeal to the Federal Court. The appellant should not therefore be permitted to raise it in this Court, although, subject to s 57A of the Act[22], the width of the grounds stated in the appellant's

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21 cf *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 381-382, 385, 388; *Fox v Percy* (2003) 214 CLR 118 at 165-166 [148] per Callinan J.

22 At the date of the claim made by the appellant under the Act, s 57A provided:

"**57A Application for review**

(1) A request for review of a decision under section 57 must:

(a) be made within 3 months after the person seeking review was notified of the decision; and

(b) set out the grounds on which the request is made; and

(c) be in writing.

(2) If a request for review of a decision is made in accordance with subsection (1) the Commission must review the decision.

(Footnote continues on next page)

application for review, and the Tribunal's powers under s 29 of the *Administrative Appeals Tribunal Act*, the appellant may be able to advance it on the rehearing of his application.

22 Another argument of the appellant should however be accepted. It was, that in asking itself whether the appellant's intoxication was caused by, or arose out of a task that the appellant had to do as a soldier, it asked itself the wrong question, and not the question that the Act requires it to answer. The question that it should have asked is the one posed by s 70(5), whether the injury arose out of, or was attributable to, any defence service of the appellant?

23 The evidence in this case is capable of providing an affirmative answer to the correct question. As Dixon J said in the passage from *Henderson* cited by Heerey J in the Full Court, whether an event arises in the course of an activity, or as here, out of "an activity", depends upon such matters as the nature of the person's employment, the circumstances in which it is undertaken, and what, in consequence, the person is required or *expected* to do to carry out the actual duties. The connexion must however be a causal and not merely temporal one[23].

24 There is little doubt in this case that there was a requirement, albeit not one to be found in formal military orders, and an expectation, of attendance at the Sergeants' Mess and the consumption in some quantity, even perhaps to the point of intoxication short of physical incapacity, of alcoholic drinks. So too, the need for the appellant's return to his quarters and the preparation of his uniform for the next day, are capable of being seen to have arisen out of, or of having been attributable to, his defence service. The remaining question is whether, climbing on to the box to expectorate through the open window, and then falling because he was inebriated, similarly either arose out of, or was attributable to his defence service.

25 The point made by Heerey J argues in favour of a broad construction of s 70(5). Section 70(9) states that the Commonwealth is not liable under that section to a member in respect of death, injury or disease if any of these resulted from or arose out of a member's serious default, wilful act, or a serious breach of

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(3) If the Commission has delegated its powers under this section to the person who made the decision under review, that person must not review the decision."

23 *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 558 per Fullagar J; *Repatriation Commission v Law* (1981) 147 CLR 635 at 647, 649 per Aickin J.

discipline. It is not suggested that the appellant's conduct even remotely approached the magnitude of a serious default, wilful act or serious breach of discipline, yet the respondent has concluded that the appellant's drinking and his subsequent fall constituted such a departure from defence service as to disqualify him from obtaining compensation. The presence and language of s 70(9) argues strongly in favour of a construction of s 70(5) capable of embracing within its terms the appellant's conduct on the evening of his fall.

26 These further observations may be made about the Tribunal's reasons which included a statement that "[t]he situation was in fact no different to what they might have done, had they decided to go to a hotel away from the Base."[24] That what in fact happened occurred on the Base and interrupted the performance of a military duty, the preparation of the appellant's uniform, were relevant matters. It was also of relevance that the inebriation of the appellant occurred on the Base. That is not to say however that a defence-caused injury inevitably could not have resulted if the events had occurred at an hotel rather than at the Base. Nor is it irrelevant that at the time when the appellant hurt his knee it is almost certain that he would have been subject to military discipline[25].

27 The use disjunctively in s 70(5) of the expressions "arose out of" and "attributable" manifest a legislative intention to give "defence-caused" a broad meaning, and certainly one not necessarily to be circumscribed by considerations such as whether the relevant act of the appellant was one that he was obliged to do as a soldier. A causal link alone or a causal connexion is capable of satisfying a test of attributability without any qualifications conveyed by such terms as sole, dominant, direct or proximate[26].

28 In failing to pose and answer the correct question the Tribunal erred in law. That error constituted an appealable error of law within the meaning of s 44 of the *Administrative Appeals Tribunal Act*. The Federal Court in determining an appeal pursuant to that section may make such order as it thinks appropriate (s 44(4)), as may of course this Court on appeal from the Full Court. It is not appropriate however that this Court, or indeed the Federal Court decide the

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24 *Roncevich v Repatriation Commission* [2002] AATA 343 (14 May 2002) at [9].

25 *Re Colonel Aird; Ex parte Alpert* (2004) 78 ALJR 1451; 209 ALR 311.

26 *R v Monopolies and Mergers Commission; Ex parte National House Building Council*, [1994] TLR 38; *Walsh v Rother District Council* [1978] 1 All ER 510 at 514 per Donaldson J.

ultimate question of the appellant's entitlement, that is, whether the injury to his knee was defence-caused, a conclusion which is available on the whole of the evidence.

29 The order we would make is that the appeal be allowed, the order of the Full Court be set aside and in place thereof the appeal to that Court be allowed, the order of Mansfield J be set aside and in place of that order the appeal to the Federal Court be allowed, the decision of the Tribunal be set aside and the case be remitted to the Tribunal to be determined according to law; the respondent should pay the appellant's costs in the Federal Court, both at first instance and in the Full Court, and the appellant's costs of the appeal to this Court.

30 KIRBY J. This appeal comes from a divided decision of the Full Court of the Federal Court of Australia[27]. It concerns a complaint that the Administrative Appeals Tribunal ("the Tribunal") erred "on a question of law"[28] in rejecting a claim to pension benefits under the *Veterans' Entitlement Act* 1986 (Cth) ("the Act") brought by a former member of the Australian Army[29].

31 I agree in the conclusion reached by McHugh, Gummow, Callinan and Heydon JJ in their reasons ("the joint reasons"). The appeal must be allowed. However, several points raised in argument merit consideration because we are correcting the majority in the Federal Court and, effectively, the Tribunal. As the issues raised may recur, I will address them. They do not alter the outcome. But they explain how I arrive at my conclusion.

The facts

32 *A soldier falls from a window*: Most of the evidence relevant to the disposition of the appeal is referred to in the joint reasons[30]. There was no material dispute about it. The contest in the case concerns the legal classification of the facts and whether they give rise to an entitlement under the provisions of the Act upon which Mr Jure Roncevich ("the appellant") relied.

33 Amongst amendments to the appellant's notice of appeal, agreed to by the Repatriation Commission ("the respondent"), was one allowing the appellant to base his contention of error on the part of the Federal Court by reference to the evidence given before the Tribunal, as well as to the facts found by it. In order to understand the Tribunal's conclusion, and that of the majority in the Federal Court, it is therefore helpful to notice some evidence additional to that recorded in the joint reasons.

34 The appellant received injury to his left knee at about 9 pm on 27 February 1986 when he fell from a window in his room on the second floor of the Army barracks at Holsworthy, near Sydney. The incident occurred when he stood on a trunk near the window to expectorate but over-balanced, falling to the ground below. Earlier, he had consumed six to eight cans of full strength beer and was intoxicated as a consequence. He had returned to his room in order to change clothes and iron his uniform for use on the following day. It was accepted that his fall and consequent injury were causally related to his

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27 *Roncevich v Repatriation Commission* (2003) 75 ALD 345.

28 *Administrative Appeals Tribunal Act* 1975 (Cth) ("AAT Act"), s 44(1).

29 Constituted pursuant to the *Defence Act* 1903 (Cth), s 30.

30 Joint reasons at [2]-[8].

intoxication, both in occasioning his loss of balance and in causing him to attempt the manoeuvre in the first place.

35 *Army mess intoxication*: The appellant's consumption of beer occurred at an Army Mess function which the appellant had attended, with other non-commissioned officers, to welcome a visit to the regiment by the Regimental Sergeant Major of the Army ("RSM Army"). According to the appellant, attending the Mess function was treated as "compulsory", even if it was not legally obligatory. He explained:

> "… we were all military and you understand most of the people same as I had joined the military at 17, had seen no outside life, had no other life, there was no life but the military. That's all we knew, that's all we talked about."

36 Beer was sold cheaply in the Mess and drinking "that light stuff" was frowned on by colleagues. Talk at such functions was substantially about Army concerns and life.

37 The appellant attributed his desire to expectorate from the window to his then heavy smoking habit. But he was forthright in inculpating the preceding consumption of beer as a cause of his fall:

> "I … went to spit out, and out I went of my window and over-balanced drunk, that's – I went out my window".

38 Later, he confirmed in cross-examination:

> "And you were a bit the worse for ware [sic] because of alcohol, were you? … Yes, I had drunk, yes.
>
> Is that what you are claiming, that because you were the worse for ware [sic] from alcohol you fell out the window, or was it just an accidental over-balance? … Well, I think it is a matter – I don't think I would have over-balanced and gone out if I hadn't drunk."

39 The Regimental Sergeant Major on the evening of the appellant's fall was Sergeant Colin Lee. He gave evidence describing the informal gathering arranged at short notice in the Mess for the visit of RSM Army. He agreed that available Mess members, such as the appellant, were invited to attend the informal gathering. He stated that "a certain level of decorum" was necessary because of the presence of the visitor. Members of the Mess could excuse themselves earlier than 9 pm. Alcohol was served but non-drinkers would not be forced to partake. He agreed that the amount of alcohol consumed by members "was a matter for them". He also agreed that no members of the Army "are ever required to drink alcohol to the point of intoxication at any of these functions".

40 *The resulting forensic contest*: The foregoing evidence explains the forensic contest before the Tribunal. The appellant sought to bring himself within the entitlements of the Act by linking the causative element of his intoxication to the circumstances in which that had occurred in a Mess activity which he was expected to attend because of the visit of an Army dignitary. In his written statement, Sergeant Lee described attendance at the Mess as "required" of all living-in members of the Regiment in order "to make up the numbers". On the other hand, the respondent sought to demonstrate that attendance and drinking beer and other alcoholic beverages at the Mess was a personal choice, not compulsory and, when the consumption passed over to intoxication it became a private and voluntary act of the soldier, the consequences of which he must wear for himself and not seek to attribute to his defence service.

The legislation and decisional history

41 *The legislation*: The provisions of the Act under which the appellant made his claim for a pension are set out in the joint reasons[31]. I will not repeat this material. Before this Court, the appellant sought to bring himself within the general provisions of the Act entitling him to a "pension by way of compensation"[32] for a "defence-caused injury"[33].

42 The appellant submitted, as he had done before the Tribunal and in the Federal Court, that his injury arose out of, or was attributable to, his defence service and was thus a "defence-caused injury" within the principal definition in s 70(5) of the Act. As a fall-back position, the appellant sought to bring himself within the extended definitions covering post-injury material aggravation by defence service[34] and a notional defence service injury attributable to changes in the member's environment consequent on his service[35].

43 *Decision of the primary judge*: The "appeal" to the Federal Court from the relevant decision of the Tribunal[36] failed. Essentially, this was because the

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31 Joint reasons at [9]-[11].

32 Under the Act, s 70(1)(c).

33 Under the Act, s 70(1)(b).

34 Under the Act, s 70(5)(d)(ii).

35 The Act, s 70(7)(a).

36 As explained in the joint reasons at [13], there were two Tribunal decisions. The first decision was set aside by order of von Doussa J in the Federal Court for error of law. A fresh hearing was then undertaken by the Tribunal but with the same consequence adverse to the appellant affirming the decision of the respondent.

primary judge in the Federal Court (Mansfield J) and the majority in the Full Court,[37] were of the opinion that the issue for decision, as concluded by the Tribunal, was one of fact, not law and involved a conclusion open to the Tribunal upon the evidence before it.

44 Addressing himself to the principal way in which the appellant had sought to bring himself within the Act, under s 70(5)(a), Mansfield J was unimpressed. In effect, he accepted that it was open to the Tribunal to conclude that the cause of the appellant's injury was personal and not service related[38]. The judge recorded the appellant's complaint that the Tribunal had erred in law in failing to find that his attendance at the Mess function, with consequent consumption of alcohol, was obligatory, thereby rendering the consequent fall and knee injury causally related to his defence service at the function[39]. But his Honour said[40]:

> "The Tribunal made a different finding, namely that the [appellant's] attendance at the function and his excessive consumption of alcohol at the function was not related in any relevant way to his defence service. It found his attendance at the function was a matter for the [appellant], as was the extent of his alcohol consumption.
>
> In my view these findings were clearly open to the Tribunal."

45 The primary judge reminded himself of the need, under s 70(5)(a) of the Act, to establish a causal connection between the defence service and the knee injury[41]. He then concluded[42]:

> "If the cause of the injury is the personal or domestic activities of the claimant, and the defence service provides no more than the circumstances in which the cause operated, then the injury does not arise out of, and is

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37 Whitlam and Marshall JJ; Heerey J dissenting.

38 *Roncevich v Repatriation Commission* [2002] FCA 1458 (2 December 2002) at [17]-[18].

39 [2002] FCA 1458 at [15].

40 [2002] FCA 1458 at [16]-[17].

41 [2002] FCA 1458 at [18] citing *Repatriation Commission v Law* (1981) 147 CLR 635 at 649 per Aitkin J (with whom Gibbs CJ, Stephen and Mason JJ concurred).

42 [2002] FCA 1458 at [18].

> not attributable to, defence service: see eg per Denning J in *Wedderspoon v Minister of Pensions*[43]."

46 *Decision of the Full Court*: The same approach to the appellant's primary claim was adopted by the majority in the Full Court. For their Honours, the problem presented for the appellant was the limited jurisdiction afforded to the Federal Court. It was confined to correcting an error on a question of law. This did not extend to substituting a preferred finding of fact for the decision on the facts reached by the Tribunal on the basis of evidence. Their Honours said[44]:

> "[t]he critical finding of the AAT was that Mr Roncevich was not required to attend the relevant function on the day in question. Its view about whether the injury was defence caused was based on that finding. We agree with the primary judge that that finding was open to the AAT. Moreover, the statement by the AAT that the intoxication did not 'arise out of any task that Mr Roncevich had to do as a soldier' does not, in our view, suggest that the AAT took the view that the only relevant service was that performed by a member at risk of disciplinary action for insubordination."

47 In effect, the Full Court majority held that, whilst others engaged in fact-finding might have reached a different conclusion concerning the "requirements" of the appellant to attend the Mess function on the day of his fall, there had been differences in the evidence over the circumstances of attendance at the function and it had therefore been open to the Tribunal (and the primary judge) to conclude that "the [appellant's] claims that he was obliged to attend the function, and to consume alcohol, as part of his defence service" should be rejected[45].

48 It is unnecessary for the present purposes to examine the ways in which the alternative claims under the Act, now pressed by the appellant, were dealt with by the primary judge and by the Full Court, within the grounds of appeal severally pressed upon them. It is enough to observe that the majority view in the Full Court, on the principal case pressed by the appellant, was that the attempt to link causally the appellant's intoxication, and hence his fall, to defence service had been rejected on the facts within a jurisdiction given to the Tribunal by law to decide the facts. On that footing, the Federal Court, within its own limited jurisdiction, had no power to substitute different conclusions of fact

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43 [1947] 1 KB 562 at 563-564.

44 (2003) 75 ALD 345 at 359 [58].

45 (2003) 75 ALD 345 at 357 [51] quoting Mansfield J at first instance.

involving different characterisations of the appellant's conduct. This, then, was the response which the majority in the Full Court gave[46].

49 I have explained what I take to have been the reasoning of the majority judges in the Federal Court, so that their Honours' approach will be understood and the issue for decision by this Court refined. The question is whether the approach of the majority itself evidenced an error on a question of law or was undermined by reasons that indicate an erroneous approach to the Federal Court's statutory functions.

Common ground

50 A number of points of common ground can be mentioned at this stage. They provide further background to the resolution of the appeal.

51 *Interpreting beneficial provisions*: The provisions of the Act are obviously beneficial, designed to afford important pension rights for members of the Australian Defence Forces. The provision of pensions to injured service members, and in the case of their death to their dependants, was first provided by the *War Pensions Act* 1914 (Cth) ("*War Pensions Act*"), enacted at the outbreak of the First World War. Section 3 of that Act provided that a pension was payable upon the death or incapacity of certain members of the forces which "... resulted from ... employment in connexion with warlike operations". The *War Pensions Act* was replaced at the conclusion of the War by the *Repatriation Act* 1920 (Cth) ("*Repatriation Act*"). That Act, frequently amended, eventually conferred benefits on defined members of the Forces where the member's "incapacity or death has resulted from any occurrence that happened during the period from the date of his enlistment to the date of the termination of his service ... or ... whose incapacity or death has *arisen out of or is attributable to* his war service"[47].

52 For some decades before the enactment of these provisions, workers' compensation and seamen's compensation legislation in Australia had adopted different criteria of connection to activities of service, being the conjunctive requirement that the applicant demonstrate the happening of an injury "arising out of and in the course of the employment"[48]. It would have been possible for

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46 Set out in the joint reasons at [16].

47 *Repatriation Act*, s 101(1) (emphasis added). See *Repatriation Commission v Law* (1981) 147 CLR 635 at 642. This test did not appear in the Act until it was amended by the *Australian Soldiers' Repatriation Act* 1943 (Cth) s 37.

48 See eg *Seamen's Compensation Act* 1911 (Cth), s 5. See *Joyce v Australasian United Steam Navigation Co Ltd* (1939) 62 CLR 160 at 164. See also *Union*

(Footnote continues on next page)

the Federal Parliament to have adopted the same formula for repatriation entitlements. However, it did not.

53 Moreover, the beneficial operation of the *Repatriation Act* was assured by two statutory provisions, one relatively common and the other quite unusual. The common provision was an instruction to the decision-maker, determining claims to repatriation benefits, to do so "according to substantial justice and the merits of the case"[49] without being bound by technicalities or legal forms or rules of evidence[50]. The unusual provision was one introducing a burden of proof of disentitlement beyond reasonable doubt, in certain cases, in favour of the applicant. This provision for an exceptional standard and burden of proof remains in the present Act[51], although it is now applicable to more limited circumstances. Normally, the respondent, in making any determination or decision in respect of a matter arising under the Act, is required (as it was in the present case) to "decide the matter to its reasonable satisfaction"[52].

54 The point of this legislative history is that, in every case, care has to be taken to observe the precise language of the Act. It contains its own peculiarities and special features. Problems in the application of the Act cannot be avoided by the invocation of generalities about beneficial construction[53].

55 *Causal not merely temporal connection*: Whatever the provisions for entitlements in workers' compensation or like statutes, or other laws providing repatriation benefits, it follows from the first point that it is essential, certainly so far as the principal claim based on ss 70(1)(b) and 70(5)(a) of the Act is concerned, to focus on the causative relationship postulated between the posited "defence-caused injury" and "any defence service". The need for such a causative relationship is indicated by the phrase "arose out of, or was attributable

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Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1 at 15 considering s 10A of that Act, later enacted, adopting a disjunctive criterion.

49 See *Repatriation Act*, s 39B. The Act was later amended in 1979 by the insertion of s 107VG(b): see *Repatriation Commission v Law* (1981) 147 CLR 635 at 644-645.

50 See *Repatriation Act*, s 107VG(a). Similar provisions were very common in workers' compensation statutes: see, eg, *Workers' Compensation Act* 1926 (NSW) s 36(3).

51 The Act, s 120(1), (2).

52 The Act, s 120(4).

53 (2003) 75 ALD 345 at 357 [53].

to". As the primary judge correctly noted, that expression was explained by this Court in *Repatriation Commission v Law*[54]. This Court accepted that the natural meaning of the words pointed to a "causal connexion rather than a temporal one". To this extent, the words were, by 1981 when they were considered in *Law*, viewed as significantly narrower than the formulae then common in workers' compensation legislation affording an alternative basis for entitlement, namely causal *or* temporal connection to the posited service[55].

56 The difference so established is clearly a deliberate one. The apparent disadvantages involved in the applicable phrase are offset by special provisions enlarging entitlement in certain cases[56] and the unique provisions governing the burden and onus of proof just mentioned. The duty of the decision-maker is to attend to the precise language of the Act. In respect of the principal claim of the appellant, this is the language of causal connection. That said, the causal connection postulated (as the primary judge noted) is not confined to "the sole or dominant or prominent cause of the injury; it is sufficient if it is a contributory cause or connection"[57].

57 *Other statutory entitlements*: It emerged during argument of this appeal that the appellant enjoyed, and had pursued, concurrent entitlements, in respect of his service injuries under the *Safety, Rehabilitation and Compensation Act* 1988 (Cth). By that Act, in respect of the notional employment of service members, such as the appellant, an alternative basis of claim exists in respect of injuries arising "in the course of" such service. This Court has not examined the entitlements, if any, of the appellant under the latter Act with its wider formulation or how they relate to the present claim made under the Act. The only entitlements in issue in this appeal are those to a veteran's pension under the Act in respect of the appellant's knee injury. Any other entitlements must be disregarded[58].

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54 (1981) 147 CLR 635 at 649 per Aitkin J (with whom Gibbs CJ, Stephen and Mason JJ concurred).

55 See eg *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 555-557 considering the *Commonwealth Employees' Compensation Act* 1930 (Cth), s 9(1); cf *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 335, 351-352.

56 Under the Act, s 70(5)(c) and (d) and s 70(7).

57 [2002] FCA 1458 at [18] citing *Holthouse v Repatriation Commission* (1982) 1 RPD 287 at 288.

58 Defence personnel were earlier entitled to benefits under the *Commonwealth Employees' Compensation Act* 1930 (Cth). That Act was repealed by the *Compensation (Commonwealth Employees) Act* 1971 (Cth).

The issues

58 Against this background, the following issues arise for decision:

(1) *The sufficiency of reasons issue*: Whether the Tribunal gave sufficient reasons for its conclusion adverse to the appellant and, if it did not, whether the Federal Court erred on a question of law in failing to detect and remedy that insufficiency?

(2) *The error on a question of law issue*: Whether the decision of the Tribunal adverse to the appellant was correctly found by the Federal Court to have been open to it on the evidence, rendering it impermissible for that Court, as the majority concluded, to disturb the Tribunal's fact finding, even if that finding might appear factually erroneous or even perverse?

(3) *The causation issue*: Whether it was open to the Tribunal on the evidence before it to conclude that the intoxication of the appellant, that caused him to fall suffering injury to his knee, was a personal, voluntary or domestic act sustaining the Tribunal's conclusion that the appellant's injury was not "defence-caused" excluding correction by the Federal Court?

(4) *The misdirection issue*: Whether the Tribunal erred in law in the way in which it defined the attributes of defence service, and if so, whether this required correction by the Federal Court?

(5) *The futility issue*: Whether it would be futile for this Court to remit this case to the Tribunal bearing in mind the probability of the Tribunal concluding, on a correct application of the law, that the appellant's injury was, or was not, "defence-caused"?

(6) *The consequential orders issue*: Having regard to the conclusions on the foregoing issues, and the resolution of other grounds of appeal, what relief should be granted in the case, if any?

Sufficiency of reasons

59 *The appellant's complaint*: The appellant complained that, in rejecting his claim under the Act, the Tribunal had given inadequate reasons for doing so. In particular, the appellant complained of errors of commission and omission on the part of the Tribunal in giving its reasons. As to commission, the appellant argued that the Tribunal had expressed his case too narrowly in describing the "links"

between the Army and the appellant's intoxication[59]. According to the appellant, the Tribunal's statement neglected to refer, or to give apparent weight, to the matters of military culture, courtesies to a visiting senior officer, habits of expected conduct and Sergeant Lee's statement that "[a]ll living in members were required to make up the numbers" when the RSM Army arrived for a visit.

60 So far as omissions were concerned, these were said to include the failure of the Tribunal to refer, and respond, to the evidence of both the appellant and Sergeant Lee concerning the expectations imposed on members such as the appellant to attend, as he did, the function in the Mess. The fact that the occasion was not a "top dinner night" and that it was not "compulsory" to attend (in the sense of inviting disciplinary proceedings for a failure to do so) was less relevant, so the appellant argued, than the practical and service pressures imposed which were ignored by the Tribunal and uncorrected by the Federal Court.

61 *The statutory obligations*: This is not a case where the scope of the duty of the administrative body to state reasons for its decision has been left to the common law. Here, Parliament has provided for a system of "appeals" from the Tribunal to the Federal Court.

62 Self-evidently, sufficient reasons on the part of the Tribunal would be required to make the system of appeals effective and to fulfil its assumptions. Moreover, the Parliament has spelt out a general obligation for the Tribunal to give reasons "either orally or in writing for its decision"[60]. Where, as in the present case, the Tribunal gave its reasons in writing "those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based"[61]. The Tribunal is obliged to cause a copy of its decision to be served on each party to the proceedings[62]. It is such a "decision" that enlivens the right in a party to a proceeding before the Tribunal to appeal to the Federal Court on a question of law[63]. Although such an "appeal" engages the jurisdiction of the Federal Court, as a matter of law that Court is

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59 *Roncevich v Repatriation Commission* [2002] AATA 343 (14 May 2002) at [10] ("Reasons of the Tribunal").

60 AAT Act, s 43(2).

61 AAT Act, s 43(2B).

62 AAT Act, s 43(3).

63 AAT Act, s 44(1).

exercising its original and not its appellate jurisdiction under the *Federal Court of Australia Act* 1976 (Cth), ss 19 and 20[64].

63 The scope of the obligation on the part of an administrative decision-maker, acting in accordance with provisions such as those governing the Tribunal in this case, to set out "findings on material questions of fact", was considered by this Court in *Minister for Immigration and Multicultural Affairs v Yusuf*[65]. In that case, a majority concluded that provisions, not materially different from those governing the Tribunal in the present case, required the decision-maker only to set out findings on those questions of fact which the decision-maker considered material to the decision[66]. Although I took a broader view concerning the ambit of the statutory obligation in that case[67], in the present appeal it is appropriate for me to proceed upon the basis of the correctness of the approach adopted by the majority.

64 *Conclusion: reasons adequate*: Upon this basis, it may be accepted (as the primary judge concluded in the Federal Court[68]) that the reasons of the Tribunal were brief. However, that is not necessarily a flaw in the context of such a busy administrative tribunal. Courts conducting this form of review have been repeatedly enjoined by this Court to avoid overly pernickety examination of the reasons[69]. The focus of attention is on the substance of the decision and whether it has addressed the "real issue" presented by the contest between the parties. The primary judge defined this as[70]:

> "The real issue was whether the relevant factor, namely the fall, was in fact related to the [appellant's] defence service. That issue was identified and addressed by the Tribunal."

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64 *Director-General of Social Services v Chaney* (1980) 3 ALD 161 at 171; 31 ALR 571 at 582-583.

65 (2001) 206 CLR 323.

66 *Yusuf* (2001) 206 CLR 323 at 331 [9] per Gleeson CJ, 338 [34] per Gaudron J, 346 [68]-[69] per McHugh, Gummow and Hayne JJ, 389 [212] per Callinan J.

67 *Yusuf* (2001) 206 CLR 323 at 367 [136]-[138].

68 [2002] FCA 1458 at [12].

69 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575 at 597; cf *Yusuf* (2001) 206 CLR 323 at 348 [74].

70 [2002] FCA 1458 at [33].

65 Within the ambit of what it has been held the statutory provisions governing the Tribunal required of it, no error has been shown in the conclusion that followed. The Tribunal's reasons adequately set out the reasons for its decision, "includ[ing] its findings on material questions of fact and a reference to the evidence ... on which those findings were based"[71]. The Tribunal might be right or wrong about the features that it identified in the evidence that afforded links between the appellant's defence service and the intoxication that caused his fall and consequent injury. However, it made its reasons plain enough. The attack on the decision, based on a failure by the Tribunal to conform to the statutory obligations of reasoning, must be rejected.

Limits to a "question of law"

66 *The respondent's argument*: The Federal Court's jurisdiction in the present case derived from s 44 of the *Administrative Appeals Tribunal Act* 1976 (Cth). It was limited to an "appeal", being one "on a question of law". This is a technical phrase. The respondent asserted that it brought with it restrictions on the ability of the Federal Court to disturb a conclusion "on a question of fact", even if such a conclusion were one which the Federal Court would not itself have reached, so long as the conclusion was sustained by evidence. This limitation is an important one because the respondent argued that it went to the heart of the reasoning of the majority judges in the Federal Court. As fact-finders, they might, or might not, have reached the same conclusion. But because there was evidence to sustain the conclusion, notably the evidence of Sergeant Lee, it was one which the Federal Court had no jurisdiction to disturb within its limited powers in an "appeal".

67 *Perverse fact finding?*: Statutory provisions limiting appeals to those involving an error or question of law are relatively common. Accordingly, the scope of these expressions has attracted much judicial attention. In the New South Wales Court of Appeal, at least after *Poricanin v Australian Consolidated Industries Limited*[72], it was repeatedly held that even perverse or unreasonable findings of fact do not constitute errors of law. Consequently, such findings could not raise a question of law. So much was held by majority in that Court in *Azzopardi v Tasman UEB Industries Limited*[73]. I dissented there from the view so expressed. I did so by reference to considerations of legal authority and principle. In particular, to combat the notion that errors of fact-finding could never rise to an error of law, I drew attention to the opinion of the Court,

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71 AAT Act, s 43(2B).

72 [1979] 2 NSWLR 419 at 426.

73 (1985) 4 NSWLR 139 at 155-156 per Glass JA (Samuels JA concurring).

delivered by Jordan CJ, in *Brakell v Metropolitan Ice & Cold Storage Works (W Angliss & Co Aust Pty Ltd)*[74] to the effect that "in extreme cases only one [factual] inference may be possible as a matter of law"[75]. The notion that a decision-maker, including a judge, could reach *perverse* conclusions on the facts and the evidence, and yet be immune from judicial correction, is one that I have never accepted[76].

68 Nonetheless, *Poricanin*, affirmed in *Azzopardi*, has continued to enjoy judicial support[77]. Applying that authority, if all that was involved in the present case was a question whether the Tribunal had reached a "perverse" finding of fact, on the basis of the evidence submitted to it concerning the relationship of the appellant's fall and injury to his defence service, the appeal would be doomed to fail. If "perverse" findings of fact are protected from disturbance by courts limited to a jurisdiction confined to correcting errors on questions of law, a conclusion which is far from "perverse" is even more obviously protected from disturbance.

69 After all, Sergeant Lee's evidence would sustain a conclusion of fact that alcohol consumption at Mess functions, although permitted, was not obligatory. Still less was it part of defence service, as such, "to drink alcohol to the point of intoxication". Ordinary commonsense would affirm that alcohol intoxication reduces the capacity of a member of the Forces, or anyone else, to perform duties if called upon at short notice to do so. Alcohol-aided conviviality might contribute to social harmony at Mess functions. But it is more than arguable, and far from perverse, to conclude that intoxication passes beyond any implied function related directly or indirectly to a member's defence service as such.

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74 (1946) 63 WN (NSW) 203 at 203.

75 *Azzopardi v Tasman UEB Industries Limited* (1985) 4 NSWLR 139 at 149.

76 *Azzopardi v Tasman UEB Industries Limited* (1985) 4 NSWLR 139 at 146-151. See also *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 253-254; *Warley Pty Ltd v Adco Constructions Pty Ltd* (1988) 8 BCL 300 at 305-308; *X v The Commonwealth* (1999) 200 CLR 177 at 218-219 [136].

77 See eg *Mahony v Industrial Registrar of New South Wales* (1986) 8 NSWLR 1 at 5; *Haines v Leves* (1987) 8 NSWLR 442 at 476; cf at 469-470; *Warley Pty Ltd v Adco Construction Pty Ltd* (1988) 8 BCL 300 at 310-311; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 at 37; *Bowen-James v Delegate of the Director-General of the Department of Health* (1992) 27 NSWLR 457 at 474-475; *Wilson v Lowery* (1993) 110 FLR 142 at 146-147; *Bruce v Cole* (1998) 45 NSWLR 163 at 188.

70 Should the "perverse findings" test be applied to the conclusions reached by the Tribunal? If it should, it would certainly strengthen the immunity of such conclusions from correction in the Federal Court in a proceeding such as the present. It would strengthen the respondent's case. On the other hand, the *Azzopardi* approach does not appear to have been uniformly applied by the Federal Court in deciding cases such as the present.[78] It has been doubted in some state[79] and territory decisions[80]. It is hard to reconcile with developments of administrative law involving decision-makers of lesser skill than judicial officers. In a suitable case, this Court should overrule the majority holding in *Azzopardi*. Perverse fact-finding, like perverse decision-making generally, is not immune from judicial correction in an appeal limited to correction of an error on a question of law. But the present is not a case in which it is necessary to establish that point.

71 In its argument, the respondent did not seek to support the approach expressed in *Azzopardi*. Instead, by reference to the reasons of the Full Court of the Federal Court in *Maunder v The Commonwealth*[81], in turn applying the reasons of Jordan CJ in *Davidson v Mould*[82], the respondent emphasised the need for an approach to such questions that would comply with the language and purpose of the Act affording "appeals" on a question of law. In *Davidson*, Jordan CJ had said[83]:

> "… [a] question of law arises when it is contended on the one hand that there was no material before the Commission on which it could find that it did, or on the other that on the material which the Commission accepted and its findings on that material it necessarily followed that it did … Between these two extremes, the question is one of degree, depending on the view taken of the relative importance and significance of the facts

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78 See, for example, *Dibeek Holdings Pty Ltd v Notaras* [2000] FCA 1212 at [52]; contra *C A Ford Pty Ltd t/as Caford Castors v Comptroller-General of Customs* (1993) 46 FCR 443 at 446.

79 See, for example, *Hill v Green* (1999) 48 NSWLR 161 at 212-213; contra at 177.

80 See, for example, *Young v Northern Territory* (2004) 183 FLR 121 at 129.

81 (1983) 76 FLR 341.

82 (1943) 44 SR (NSW) 113.

83 (1943) 44 SR (NSW) 113 at 115 (citations omitted). See also *Davidson v Mould* (1944) 69 CLR 96 where the decision of the New South Wales Supreme Court was affirmed.

proved in the evidence; and a decision either way by the Commission is one of fact and cannot be disturbed by this Court."

72 *Maunder* was itself a case bearing some factual similarities to the present. A member of the Australian Army had attended a party in the Sergeants' Mess where he was Adjutant Quartermaster. The party began at 5.30 pm and continued until 3 am the following morning. An accident occurred on the member's journey home at 4.54 am. In the result, the member sustained injuries resulting in his death. A claim was made by his widow under the *Compensation (Commonwealth Government Employees) Act* 1971 (Cth). It raised legal issues different from the present case. However, as here, the claim was determined by the Tribunal adversely to the claimant and made subject to an "appeal" to the Federal Court.

73 The Tribunal in *Maunder* had determined that it was an incident of the member's duty to be present at the Mess party until 10.30 pm but not thereafter. Rejecting the appeal to it, the Federal Court unanimously concluded that it was open to the Tribunal, on the evidence, to reject the claim on the assessment of the reasonableness of the member's attempt, after the prolonged Mess party, to drive himself home. This, it was concluded, was a question of fact immune from correction in an appeal limited to one on a "question of law". Thus, it was "open to the Tribunal on the evidence before it". The decision was therefore affirmed. There was no error of law.

74 The respondent urged a similar approach on the part of this Court to the question whether the present appellant's injury was "defence-caused" within the meaning of the Act. It argued that it was open to the Tribunal to conclude, as a matter of fact, that the injury did not arise out of, nor was it attributable to, any defence service. As with Captain Maunder's case, the Tribunal was competent to conclude that a point was reached where convivial participation in a Mess party, even if initially connected to defence service and causes, turned into a purely personal pursuit of activities having no causal relationship with defence service.

75 *Conclusion: a strong argument*: Subject to what follows, it will be obvious that I consider the respondent's submission to be a powerful one, consistent with legal authority and principle. Save for the legal misdescription to which reference will shortly be made, it would, in my view, have been fatal to an appeal limited to a "question of law".

Causation and voluntary intoxication

76 *Causation and antecedent conditions*: An argument related to the subject just considered arises from the respondent's contention that it was open to the Tribunal to draw the distinction of fact, sustained by the Federal Court, between

conduct that could be classified as "defence-caused"[84] and conduct that could be classified as "personal", "domestic" or "voluntary". In this sense, whatever view might have been taken of attendance at the Mess function for a time, for the purpose of welcoming a distinguished Army guest, it was open to the Tribunal to conclude that proceeding to become intoxicated was not "defence-caused" and thus not within the causative character of the phrase relied upon by the appellant ("arose out of or was attributable to, any defence service").

77 In support of its argument in this respect, the respondent called in aid the analysis by Professors Hart and Honoré in their text *Causation in the Law*[85]. In discussing voluntary action, as it relates to the concept of causation, the authors wrote:

> "[A] deliberate human act is therefore most often a barrier … in tracing back causes … [I]t is often something *through* which we do not trace the cause of a later event and something *to* which we do trace the cause through intervening causes of other kinds". (original emphasis)

78 Later in the same text the authors observed, as a general principle of causation, that "the free, deliberate and informed act or omission of a human being, intended to exploit the situation created by defendant [sic], negatives causal connection"[86]. In such a case, the voluntary act of the subject might be "an antecedent condition not amounting to a cause"[87]. It might not, at least for legal purposes, be viewed as a cause in itself.

79 Like so many other "general principles" in the matter of causation, this one admits of exceptions. One is that voluntary action will not be regarded as an intervening cause when it was the defendant's conduct that gave rise to the risk that injury would ensue from such voluntary conduct.[88] Thus, in *Reeves v Commissioner of Police of the Metropolis*[89] the House of Lords held that the fact

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84 The Act, s 70(1)(b).

85 2nd ed (1985) at 44.

86 *Causation in the Law*, 2nd ed (1985) at 136. A good example is *Beard v Richmond* [1987] Aust Torts Reports ¶80-129 at 69,000.

87 *March v Stramare* (*E & M H) Pty Ltd* (1991) 171 CLR 506 at 517.

88 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 518-519; *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1999] 2 AC 22 at 30-32; Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 193-204.

89 [2000] 1 AC 360.

that a prisoner committed suicide while in police custody did not preclude an action brought against the police on behalf of the prisoner's estate on the basis that the prisoner was only capable of committing suicide because the police had failed in their duty to exercise reasonable care to prevent prisoners like him from performing acts of self-harm.[90]

80 Nevertheless, judicial authority, cited by the respondent, gives a measure of support for this kind of analysis. Like the present case, such authority concerned a claim to the grant of a pension for a serviceman. In *Wedderspoon v Minister of Pensions*[91], cited by the primary judge, the facts involved a Surgeon Lieutenant in the Voluntary Reserve of the Royal Navy. During war service he suffered from sleeplessness and took a drug to overcome this difficulty. However, the drug had fatal consequences and he died on board his ship. His widow brought a claim for a service pension. It was disallowed on the basis that the death was due to misadventure unconnected with war service. The relevant tribunal stated a case for the opinion of the English High Court. Denning J affirmed the disallowance of the pension. His Lordship said[92]:

> "His weak heart and his sleeplessness were not causes of his death, but only the circumstances in which the cause operated. They were factors in the situation, but factors which fell short of being causes. … The dose was taken by [him] in his personal capacity. … The consequences of such an action are no more attributable to war service than the consequences of drinking too much or smoking too much or playing a game of squash. The cases show that when the cause of the death or disablement lies in the man's own personal or domestic sphere, and the war service does no more than provide the circumstances in which the cause operated, it is not attributable to war service."

81 Given the attention of the Act presently applicable to similar questions of causation and its use, in the primary definition, of the same phase of connection ("attributable to"), the respondent urged that a like approach was open to the Tribunal and the Federal Court and should be affirmed by this Court. The circumstances in which the appellant had become intoxicated were part of the factual substratum of the case. But they did not provide a "defence-cause". Nor could the fall, consequent upon intoxication, be "attributable to" any defence activities or service as such.

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90 See also *Goodsell v Murphy* (2002) 36 MVR 408 at 411-412 [22]-[29]; [2002] Aust Torts Reports ¶81-671 at 69,083-69,094.

91 [1947] KB 562.

92 [1947] KB 562 at 563.

82 Whilst there are points of distinction between *Wedderspoon* and the present case, most notably the statutory foundation for the pension claim in Australia, and whilst Denning J's rejection of entitlements for such conduct as "smoking too much" hardly accords with later Australian repatriation cases[93], a point of importance remains. As with all issues of causation in law, it is necessary to identify the limits of the propounded obligations. Such limits are usually drawn in a commonsense way by reference to any considerations of policy reflected in the language and purposes of the governing law.[94] The prior existence of facts and circumstances does not, as such, make those facts and circumstances causally relevant, in a legal sense, for an event that follows in time. In every case, it is necessary to postulate an outer boundary of liability. According to the respondent, this is what the Tribunal did in finding that the appellant's intoxication in the Mess was not "defence-caused" and did not arise out of, nor was it attributable to, any defence service.

83 *Intoxication: recent authority*: Some possible support for this line of reasoning may also be found in the approach of the majority of this Court in *Cole v South Tweed Heads Rugby League Football Club Limited*[95]. That was a case in which a club patron, supplied by or in the club over many hours with free alcohol, was seriously injured on her way home in an intoxicated state. Although in that case, with McHugh J, I dissented, and although the legal issue (being concerned with negligence law) was different, some of the reasoning of the majority in *Cole* contains expressions about the voluntary choice made by people who become intoxicated. It is thus reflective of the arguments of causation pressed on this Court by the present respondent.

84 Self-evidently, no different principle of general application could apply to the resolution of issues arising out of intervening intoxication because the appellant was a woman with a problem of alcohol tolerance and the appellant was an intoxicated soldier, otherwise commendable in his service as such. In *Cole*, Gleeson CJ described the appellant's extended drinking as "voluntary

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93 See, eg, *Repatriation Commission v Law* (1981) 147 CLR 635. See also *Repatriation Commission v O'Brien* (1985) 155 CLR 422.

94 *Fitzgerald v Penn* (1954) 91 CLR 268 at 277-278; *Alphacell Ltd v Woodward* [1972] AC 824 at 847; *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 515, 522-523; *Royall v The Queen* (1991) 172 CLR 378 at 441; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 412-413; *Chappel v Hart* (1998) 195 CLR 232 at 238 [6], 243 [24], 268-269 [93], 281-282 [111], 285 [125], 290 [148].

95 (2004) 217 CLR 469.

behaviour"[96]. There are similar references to voluntariness of alcohol consumption in the reasons of Callinan J[97]. His Honour remarked, in words seemingly applicable to the present appellant[98]:

> "Everyone knows as the outset that if the consumption continues, a stage will be reached at which judgment and capacity to care for oneself will be impaired, and even ultimately destroyed entirely for at least a period."

85 In their joint reasons, Gummow and Hayne JJ rejected the argument of liability in negligence by reference to the concept of causation[99]:

> "Even assuming the various difficulties identified about the formulation of a duty of care to monitor and moderate the amount of liquor the appellant drank could be overcome, the breach of such a duty, however it is expressed, was not a cause of the injuries the appellant sustained. … [T]he Club could do nothing more to require her to take care. In particular, it could not lawfully detain her. If, as happened here, she left the Club and was injured, any carelessness of the Club in selling her liquor was not a cause of what happened."

86 Can it be said that, by analogous reasoning, it was open to the Tribunal in the appellant's case to conclude, on the facts, that his consumption of alcohol to the point of intoxication was "voluntary behaviour" and that his later fall and injury were not causative of any service liability, simply the outcome of his own personal conduct, even if such conduct was itself affected by the antecedent consumption of alcohol in a defence facility on a service occasion?

87 *Conclusion: distinguishable issues*: I will assume for present purposes that the issues raised about voluntariness and causation in *Cole* are special to the facts of that case or limited to the law of negligence. Certainly, because of my own views in *Cole*[100], I would not want to extend any principle of exemption from legal liability of the suppliers of alcohol products for which that case stands[101]. The considerations emphasised for the respondent in this appeal as to

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96 (2004) 217 CLR 469 at 473 [3].

97 (2004) 217 CLR 469 at 502 [115].

98 (2004) 217 CLR 469 at 507 [131].

99 (2004) 217 CLR 469 at 491 [76].

100 (2004) 217 CLR 469; see especially at 494-495 [90]-[92].

101 cf Chamberlain, "Duty-Free Alcohol Service", (2004) 12 *Tort Law Review* 121; Hamad, "The intoxicated pedestrian: Tortious reflections", (2005) 13 *Tort Law*

(Footnote continues on next page)

the voluntariness of the appellant's consumption of alcohol may yet prove important for the resolution of the facts of this case. This analysis brings me to the point under the Act that ultimately carries the day for the appellant.

The Tribunal misdirected itself

88 *The content of "defence service"*: The Tribunal rejected the appellant's claim by reference to a view of the operation of the Act that was unduly narrow. Despite the extensive evidence of the circumstances of the appellant's defence service and the events that had effectively required him to make up the numbers in the Mess function, the Tribunal allowed itself to be diverted into issues concerning the appellant's *obligation* to attend that function. Thus, the Tribunal referred to the evidence of Sergeant Lee that the occasion was "not a 'top dinner night'. It was not *compulsory* to attend". It recorded that it was "not *compulsory* to drink alcohol" and "not *compulsory* to stay until any specified time". It was in this context that the Tribunal concluded[102]:

> "The only links between the Army and the intoxication of Mr Roncevich were that the intoxication occurred on an Army Base and that Mr Roncevich and his fellow drinkers were soldiers. The intoxication was not caused by, nor did it arise out of any task that Mr Roncevich *had* to do as a soldier, nor did it arise out of his defence service, nor did it occur in the course of his defence service."

89 It was common ground that the reference in this passage to the "course of his defence service" was immaterial, no temporal expression in these terms appearing in the Act[103]. For the present, I will assume, as the respondent argued, that this error was immaterial. That still left the criterion, applied by the Tribunal of what the appellant "*had* to do as a soldier".

90 The respondent submitted that this reading of the Tribunal's reasons involved fine tooth-combing the language of the reasons. It suggested that the expression was no more than a reference to any task of the appellant "as a soldier", in effect omitting the words "*had* to do". I would gladly embrace that reading of the Tribunal's reasons but for the Tribunal's repeated emphasis, in

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Review 14; Dixon and Spinak, "Common Law Liability of Clubs for Injury to Intoxicated Patrons: *Cole v South Tweed Heads Rugby League Football Club Ltd*", (2004) 27 *University of New South Wales Law Journal* 816.

102 Reasons of the Tribunal at [10] (emphasis added).

103 A similar reference to "in the course of his defence service" appears in the Reasons of the Tribunal at [11].

describing the evidence of Sergeant Lee, as to what it was *compulsory* for the appellant to do at the Mess function.

91 Clearly enough, the Tribunal was considering the scope of defence service by reference to notions of compulsion, requirement and obligation. It was after reference to such notions that the Tribunal rejected the claim as not defence-caused nor arising out of the appellant's defence service nor service related within the meaning of the Act. The question is whether this approach involved a material legal error that contaminated the fact-finding otherwise immune from correction in the Federal Court in an appeal limited to one on a "question of law". Did it show that the Tribunal misdirected itself in law, calling for correction on this account by the Federal Court?

92 *The authority of Henderson*: In the joint reasons, approval is given to the reasoning in the Full Court of Heerey J, in dissent, citing in turn a passage from the reasons of Dixon J in *Henderson v Commissioner of Railways (WA)*[104].

93 With respect, that passage appears in an explanation by Dixon J of the content of the phrase "in the course of the employment" which phrase is contained in many workers' compensation statutes. As has been pointed out, when the *War Pensions Act* and the *Repatriation Act* were enacted, that phrase was omitted. Instead of expressing the foundation of entitlement in such temporal terms, causal criteria were adopted in both instances. A causal criterion has persisted in the Act to the present time in respect of the primary entitlement to pension benefits upon which the appellant relied. The "injury" must be "defence-*caused*". It must be one that "arose out of, or was attributable to" defence service. Therefore, as such, *Henderson* does not provide authority that applies to the applicable statutory language. And, as has been pointed out, that language is deliberate, different and must be given effect according to its terms.

94 Yet does the approach in *Henderson* nonetheless apply, beyond the category which Dixon J elaborated in that case, so as to define the ambit of "defence service"? True it is, Dixon J was specifically concerned with accidents arising "shortly before the beginning of actual work or shortly after its cessation", and thus addressing himself to issues of temporal connection. But in defining the scope of defence service, considerations arise similar to those presented in defining the scope of "the course of employment". Just as the latter includes not only work that is "required" to be done but also that is "expected or authorised" to be done, notions of "defence service" and "defence-caused" should be similarly extended. To adopt a narrow reading of "defence service" in the

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104 See joint reasons at [17], citing *Henderson v The Commissioner of Railways (WA)* (1937) 58 CLR 281. See also *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473.

modern age would be unduly constricting. True, defence service is disciplined. It is subject to many laws and regulations. But there is also scope, and need, for individual initiatives that go beyond the performance of what is "compulsory", "obligatory" or "required".

95 By confining attention to considerations of what it was "compulsory" for the appellant to do as part of his "defence service" and limiting notions of "defence service" and "defence-caused", the Tribunal unduly narrowed the appellant's activities as a member of the Forces out of which entitlements under the Act might arise.

96 This was not an immaterial restriction. Indeed, it went to the heart of the issues to which the evidence before the Tribunal was addressed. Those issues concerned whether, whatever the legal or disciplinary obligations, attendance by the appellant in the Mess function was expected of him, with the consequence that he would become involved in drinking with colleagues and might become intoxicated because of the social, cultural and environmental norms to which he was subjected at such an event.

97 *Conclusion: error of law*: It follows that the Tribunal misdirected itself on a question of law material to its decision. This error ought to have been detected and corrected by the Federal Court. In the Full Court, far from correcting the error, the majority repeated as the "critical finding" of the Tribunal that the appellant "was not *required* to attend the relevant function on the day in question"[105]. It acknowledged that the Tribunal's view about whether the injury was "defence caused was based on that finding"[106]. In stating that such a finding was open to the Tribunal, the majority in the Full Court failed to perceive that narrowing the ambit of the appellant's "defence service" and what was thus "defence-caused" potentially prejudiced the appellant in the factual establishment of his claim.

98 Instead of considering, as a question of fact, what was reasonably expected or authorised to be done by the appellant to carry out his duties of defence service, the Tribunal diverted its attention to notions of requirement, obligation and compulsion. Because, arguably, this deprived the appellant of the chance to secure a favourable determination on the facts concerning the cause of his fall and injury, it deprived him of the application of the Act to his case according to its terms. On the face of things, this requires a factual redetermination by the Tribunal free of this legal misdirection and free of the

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105 (2003) 75 ALD 345 at 359 [58] (emphasis added).

106 (2003) 75 ALD 345 at 359 [58].

consequential confinement of the "only links" between the Army and the intoxication which the Tribunal nominated.

Redetermination is not futile

99 *The appellant's suggested futility*: Having reached this point, a question arises whether this Court should terminate this over-long saga of litigation stretching back nearly 20 years. The appellant suggested that this was one of the "rare cases" where it would be appropriate for this Court to substitute a finding on the facts in favour of the appellant so as to bring the litigation to a close. The Full Court of the Federal Court has held that, in limited circumstances, it has the power in an "appeal" on a question of law to enter upon a substantive determination of the matter[107]. Any powers that the Federal Court enjoys in this respect would belong to this Court in the exercise of its own appellate jurisdiction[108].

100 For a number of reasons, assuming (without deciding) that such a power exists, this would not be a case for exercising it. First, since these proceedings commenced, express power has been afforded to the Federal Court, in appeals of this character, to make findings of fact in specified circumstances[109]. Where the Parliament has provided such a power, but with restrictions that are material, that affords a substantial reason why a like power should not be assumed in other circumstances by this Court.

101 Secondly, the appellant's proposition invited this Court to make a finding of fact which, due to an error on a question of law, has never been decided by the body entrusted by the Parliament with fact-finding, namely the Tribunal. The proper and limited function of "appeals" from the Tribunal should be observed. The advantages of the Tribunal in fact-finding should be respected. Behind observance of the statutory provisions in this respect lies an important constitutional principle, limiting the disturbance of administrative decisions by courts created under Ch III of the Constitution, such as this Court[110].

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107 *Lowerson v Repatriation Commission* (1994) 50 FCR 252 at 269-271; *Repatriation Commission v Nation* (1995) 57 FCR 25 at 35.

108 *Judiciary Act* 1903 (Cth), s 37.

109 See AAT Act, s 44(7). The transitional provisions applicable to the amendment provide that the sub-section applies only to an appeal instituted after the commencement of the item, thus making it inapplicable to the present appeal: *Administrative Appeals Tribunal Amendment Act* 2005 (Cth), Sched 1 (175).

110 cf *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 598-600.

102 Thirdly, as the discussion of the issues of fact-finding and causation demonstrate, it is far from certain, even within a larger concept of "defence-caused" and "defence service" that the appellant would succeed on the facts. He still has to confront the respondent's arguments designed to limit the ambit of what is "defence-caused" and what arises out of, or is attributable to, any "defence service" by reference to excluding conduct that can be classified as "personal", "domestic" or "voluntary" in the circumstances. Obviously, the appellant's case does not fall within the somewhat extreme evidentiary circumstances described in *Maunder*[111]. Nevertheless, in the current judicial environment of expressed faith in the voluntarism of alcoholic intoxication, the respondent undoubtedly has a strong factual argument to exclude liability, at least under s 70(5)(a) of the Act.

103 *The respondent's suggested futility*: But can it be said that returning this case to the Tribunal for a third time would be futile because the Tribunal would inevitably reach a result adverse to the appellant even without any misdirection of law? I think not. It is not impossible that, absent restrictions derived from notions of obligation, requirement and compulsion, a factual conclusion could be reached that the appellant's consumption of alcohol on this occasion was defence related or defence-caused and thus that his consequent fall "arose out of or was attributable to" defence service in its more ample factual understanding.

104 *Conclusion: not futile*: I do not therefore regard it as futile to return this matter to the Tribunal. This was the course that was favoured by the dissenting judge in the Full Court[112]. It is the course that the proper application of the law requires.

Consequential orders

105 The appellant succeeds in this Court on a ground not, as such, argued in the Federal Court and not finally expressed in this Court until the very day of the hearing. A consideration arises as to whether this fact, and the meandering course of the grounds of appeal as the matter progressed through the Federal Court, should be reflected in this Court's order for costs. However, as the respondent, somewhat benignly, did not so submit, I am content to agree with the order proposed by my colleagues, that the respondent should pay the costs of the appellant.

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111 (1983) 76 FLR 341.

112 *Roncevich v Repatriation Commission* (2003) 75 ALD 345 at 355 [38].

106 In his submissions to this Court, principally those in writing, the appellant propounded his claim beyond the one chiefly relied on under s 70(5)(a) of the Act. Because the matter must now be returned to the Tribunal, where the ultimate claims may be reformulated yet again and the evidence propounded accordingly, it would be superfluous to add remarks concerning the other provisions of the Act. They were not specifically addressed in the Tribunal's decision. Remitter to the Tribunal will afford the opportunity to do so, should further reflection convince those appearing for the appellant that they deserve separate consideration and decision and should the Tribunal permit that course.

107 I agree in the orders proposed in the joint reasons.