

AUSTRALIA / JUDGMENT

Rodda v Repatriation Commission [2006] FCA 1689

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FEDERAL COURT OF AUSTRALIA

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Rodda v Repatriation Commission [2006] FCA 1689

DEFENCE AND WAR – veterans – entitlements – pensions for veterans – requirement of written authorisation for representation before Veterans' Review Board in relation to s 155AA notice – interpretation of s 155AA and s 155AC of the Veterans' Entitlements Act 1986 (Cth)

Held: Appeal dismissed

Veterans' Entitlements Act 1986 (Cth) s 155AA and s 155AC

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355 followed

NOEL RODDA v REPATRIATION COMMISSION and PRINCIPAL MEMBER, VETERANS' REVIEW BOARD

NSD 1328 of 2005

MADGWICK J

5 DECEMBER 2006

CANBERRA (HEARD IN SYDNEY)

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY NSD 1328 OF 2005

ON APPEAL FROM THE VETERANS' APPEALS DIVISION OF THE ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY A SENIOR MEMBER

BETWEEN: NOEL RODDA

APPLICANT

AND: REPATRIATION COMMISSION

FIRST RESPONDENT

PRINCIPAL MEMBER, VETERANS' REVIEW BOARD

SECOND RESPONDENT

JUDGE: MADGWICK J

DATE OF ORDER: 5 DECEMBER 2006

WHERE MADE: CANBERRA (HEARD IN SYDNEY)

**THE COURT ORDERS
THAT:**

1. The appeal be dismissed.
 2. The applicant is to pay the first respondent's costs.
- Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY NSD 1328 OF 2005

ON APPEAL FROM THE VETERANS' APPEALS DIVISION OF THE ADMINISTRATIVE
APPEALS TRIBUNAL CONSTITUTED BY A SENIOR MEMBER

BETWEEN: NOEL RODDA

APPLICANT

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FIRST RESPONDENT

PRINCIPAL MEMBER, VETERANS' REVIEW BOARD

SECOND RESPONDENT

JUDGE: MADGWICK J

DATE: 5 DECEMBER 2006

PLACE: CANBERRA (HEARD IN SYDNEY)

REASONS FOR JUDGMENT**HIS HONOUR:**

1 This is an appeal from the Administrative Appeals Tribunal ('the Tribunal') which had affirmed a decision of the Principal Member of the Veterans' Review Board ('the Principal Member'). The Principal Member had dismissed Mr Rodda's application to the Veterans' Review Board ('the Board') for review of a decision of the Repatriation Commission ('the Commission').

2 At issue is the proper construction of s 155AA and s 155AC of the Veterans' Entitlements Act 1986 ('the Act').

Background and history of proceedings**Background**

3 Mr Rodda is a 68 year old veteran who currently resides in Coffs Harbour. He applied for an increase in a pension accorded him by the Commission under the Act and sought acceptance of a range of new medical claims.

The Commission's decision

4 The Commission accepted that several but not all of Mr Rodda's claimed medical conditions were related to his military service and granted him a pension at 100 percent of the General Rate (as opposed to the higher Intermediate or Special Rates of pension). Mr Rodda's entitlement to an increased pension was calculated accordingly.

Events leading up to the Board's decision

5 On 3 September 2002 the Department of Veterans' Affairs received a letter from Mr Rodda outlining his dissatisfaction with elements of the Commission's decision; in particular, his deemed ineligibility for a pension at the Intermediate or Special rate. This letter was treated by the respondents (and, before me, by all parties) as an application to the Board for review of the Commission's decision.

6 On 19 December 2002 the Board received a signed form from Mr Rodda stating that Mr David Woodcock of the Coffs Harbour Returned Services League ('RSL') Sub-Branch would represent him at his review hearing. The form also stated that Mr Woodcock would advise the Board when both men were ready for a hearing to be arranged.

7 On 8 January 2003 the Board wrote to Mr Rodda informing him that his application would be listed for hearing as soon as his representative sent a 'Certificate of Readiness'. A copy of that letter was also sent to Mr Woodcock, as was a 'Certificate of Readiness for Hearing' form, under cover of a letter requesting that Mr Woodcock return the form once the application was ready for hearing.

8 For two years the Board did not hear from either Mr Rodda or Mr Woodcock. The Board then wrote to Mr Rodda asking him to contact Mr Woodcock and have Mr Woodcock lodge a 'Certificate of Readiness' if the matter was ready to proceed to hearing, or, if it was not ready, to indicate when he expected that the matter would be ready. A copy of that letter was also sent to Mr Woodcock.

9 Eight months later, on 20 October 2004, the Board's Registrar sent Mr Rodda a 'Notice under section 155AA Veterans' Entitlements Act 1986'. The notice required Mr Rodda to inform the Board as to whether his application was ready to proceed to hearing or, alternatively, whether he wished to withdraw it, or finally, if he wished to continue with the application but was not yet ready to proceed, to provide a reasonable explanation for the delay. Two documents, entitled 'Form 1' and 'Form 2' respectively, were enclosed with the notice for the purposes of this information being supplied. The s 155AA notice explained that Mr Rodda could complete and return Form 1 himself, or alternatively, Mr Rodda could authorise someone else to represent him in relation to the notice by using Form 2. The notice stated that:

'If you wish, you may authorise someone to represent you in relation to this notice. The authorisation must be in writing. Form 2 is enclosed for this purpose. You should not send Form 2 back to me. You should give it to the person you have authorised to represent you so that he or she can send it to me together with the statement I have requested within the 28 days allowed. If you choose to be represented in relation to this notice and your representative fails to respond or does not provide a reasonable explanation within the 28 days, your application must be dismissed.' (Original emphasis.)

A copy of this letter was also sent to Mr Woodcock.

10 On receiving the s 155AA notice, Mr Rodda contacted Mr Woodcock immediately. According to Mr Rodda:

'I ... phoned [Mr Woodcock's] RSL office and related to Mr. Woodcock the contents of the notice under s155AA, which he at that stage had not received. I asked him if I should sign the document and bring it down to him. He replied, "No, we don't need to do that, I'll take care of it. Don't you do anything!" I then replied "OK then if that's what you think is the way to go that's OK with me." I concurred with what Mr Woodcock suggested should occur in that he knew better than I.

On Mr Woodcock's advice I did nothing further. I had complete faith in Mr Woodcock's advice and I was happy for him to deal with it.'

11 On 17 November 2004 Mr Woodcock sent an email to the Board's Registrar headed 'Noel Rodda N02/1543 Sect 155 AA Notice'. Mr Woodcock said that he had been 'in and out of hospital', and that a 's 31 review' had already been submitted on behalf of Mr Rodda. (Section 31 of the Act permits the Commission to review its own previous decisions). An extension of time was also requested. The Board's Registrar replied the following day, saying that the Act required Form 2 to be completed, and in particular, 'Mr Rodda's appointment of you to respond to the Notice ... as well as your response'. The Registrar explained that arranging for Mr Rodda to complete Form 1 was an alternative, and outlined the requirements for completing that particular form. In concluding the email, the Registrar reiterated that 'the Act requires that things be done this way'.

12 On 19 November 2004, the Board received back the Form 1 and Form 2 documents, both of which had been completed by Mr Woodcock. The authorisation section of the Form 2 document that was required to be completed by Mr Rodda had been left blank. On that same day the Registrar sent Mr Woodcock another email which spelled out the requirements for completing the forms again.

13 On 13 January 2005, Mr Rodda's application for review of the Commission's decision was dismissed because the delegate had not received a written statement from Mr Rodda, or from a representative authorised for that purpose, as was required by s 155AA(5).

14 Mr Rodda had turned 65 on 18 December 2002. The Act places more onerous eligibility requirements for the (higher) Intermediate or Special rates of pension on applicants aged 65 years and over: see s 23(3A) and (3B), and s 24(2A) and (2B), so that it would now be significantly harder for Mr Rodda to qualify for those higher rates.

Legislative framework

15 The provisions of the Act relevant to the current proceedings are contained in Part IX 'Veterans' Review Board'.

16 Section 135 provides that applications may be made to the Board for review of pension decisions made by the Commission. Section 136 requires that applications be in writing and be submitted to an office of the Department.

17 Section 147 deals with representation before the Board generally. Subsection (1) provides that the parties are the applicant for the review and the Commission. A party to a review may 'appear in person, or be represented at the party's own expense by a person other than a legal practitioner, at any hearing of the review': s 147(2)(a). A party to a review may also make such submissions, in writing, to the Board, as the party, or the party's representative, considers relevant to the review: s 147(2)(b). A 'note' following s 147(2)(b) says:

'if the Principal Member gives an applicant a notice under subsection 155AA(4) or 155AB(4) and the applicant wants to be represented by another person in relation to it, the applicant must so authorise the representative in writing after receiving the notice (see section 155AC).'

Under s 5U of the Act, certain notes form part of the legislation. It appears that the note forms part of the text of s 147. Indeed, the Explanatory Memorandum to the Veterans' Affairs Legislation Amendment Act 1992 (Cth) ('Amendment Act') which inserted the dismissal provisions, addressed the purpose of that note, stating that the amending Act 'will insert a note at the end of section 147 to alert the reader to the separate provisions relating to representation for the purposes of notices given under the new provisions'.

18 The Board is given power by s 155AA to dismiss an application following a 'standard review period'. Such a period is defined as the period of two years after the day on which the application for review was received at an office of the Department. Subsection 155AA(4) requires that if, at the conclusion of the standard review period, the Principal Member considers that the application should be ready for hearing, the Principal Member 'must' issue the applicant a written notice requesting a written statement in response within 28 days indicating readiness for hearing, or an explanation for unreadiness. If a written statement is not provided within 28 days, the Principal Member must dismiss the application: s 155AA(5).

19 Section 155AC deals with an applicant's representation in relation to a notice issued under s 155AA. Subsection 155AC(1) provides that an applicant for review may authorise another person to represent him or her in relation to a s 155AA(4) notice. The authorisation must be in writing: (subs (2)), and can only be conferred once the applicant has received the notice: (subs (3)). If the Principal Member has approved a form for the purpose of authorising a representative under subs (1), then that form must be used: subs (4).

20 As mentioned above, the Amendment Act introduced s 155AC into the Act. The background to the amending provisions, insofar as they relate to the ambit of s 155AC, was referred to in the Explanatory Memorandum (at 17):

'Given that action taken under the dismissal provisions could result in the finalisation of an application without a review of the decision with which the applicant is dissatisfied, it is important that an applicant should be fully aware of action being taken on his or her behalf and that a representative should be specifically authorised to act on the applicant's behalf in such matters. The amendments will provide that it is only after a notice has been given to an applicant under the dismissal provisions that a specific authority can be given for a person to act on the applicant's behalf in such matters.'

21 The mechanics of s 155AC were then explained in the following way (at 19-20):

'Clause 26 will insert new section 155AC which will enable an applicant who has been given a written notice from the Principal Member under subsection 155AA(4) or 155AB(4) to authorise, in writing, a person to act on his or her behalf in relation to the notice. Where an applicant wishes to be represented in relation to a notice, the authorisation can be made only after the notice has been given, and it must be in accordance with a form, if any, approved by the Principal Member.

The requirement that authorisation can only be given after a notice has been received will be inserted to ensure that any person who, purportedly on behalf of an applicant, supplies a written statement in response to a notice has the specific authorisation of the applicant.' (Original emphasis.)

The Tribunal's decision

22 Review of the Board's decision was sought from the Tribunal on the bases that Mr Rodda's 's 31 review' was still to be determined and that the intervention of the 2004/2005 Christmas/New Year break partly explained the delay. Evidence from both Mr Rodda and Mr Woodcock was before the Tribunal.

23 The Tribunal Member accepted that when Mr Rodda received the notice he contacted Mr Woodcock promptly and that Mr Woodcock told Mr Rodda that he would 'take care of it'. The Member also accepted that Mr Woodcock had undertaken training provided by the Department of Veterans' Affairs in the procedures relevant to an application to the Board. She also accepted that Mr Woodcock suffered from ill-health.

24 However, the application for review was dismissed. The Tribunal Member found that the Board's Principal Member had been obliged to dismiss Mr Rodda's application.

25 In reaching this conclusion, several factors were noted. First, the Tribunal Member said that the repeated use of the word 'must' in s 155AA and s 155AC, was indicative of the sections' imperative quality. While the Act's 'beneficial' purpose was recognised, the Tribunal noted that s 155AA and s 155AC were introduced with the specific aim of freeing-up the Board's resources. It was said that the introduction of these provisions in substitution for earlier sections was designed to 'clarify the earlier provisions' and (to quote the Act's Explanatory Memorandum) to 'remove any uncertainty about the scope of the dismissal provisions'. The Tribunal Member also considered that the requirement that the authority to act be in writing underlined the seriousness of that authorisation. The implications for Mr Rodda of the dismissal – insofar as they affected his eligibility for the Special Rate of pension as opposed to his scope for obtaining payment at a higher rate – were not clear, however the Tribunal Member noted that it was possible for individuals to make another claim after an application has been dismissed under s 155AA. (The age 65 barrier to the higher types of pension rate would, however, still apply). Finally, the Tribunal considered that the requirement that a period of two years must elapse before a dismissal notice under s 155AA may be sent was lengthy and generous. The Tribunal Member concluded that:

'On balance, the strength and clarity of the language of the provisions, the purpose of the enactment, in general and as it pertains to the provision of administrative review decisions, and the consequences of an interpretation in accordance with the grammatical effect of the provisions, lead me to the conclusion that the Principal Member had an obligation to dismiss the applications.'

Issues

26 The issue on appeal is whether the Tribunal erred in its understanding of the effect of s 155AA and s 155AC of the Act. Is an authorised person's reply to a dismissal notice under s 155AA of the Act of no effect where the applicant has only orally authorised the person to reply on his or her behalf? In other words: was the oral authorisation given by Mr Rodda to Mr Woodcock sufficient notwithstanding s 155AC(2), such that Mr Woodcock's response to the notice was valid?

Submissions

Applicant's submissions

27 The applicant's case was premised on the submission that Mr Rodda had in fact authorised Mr Woodcock, though not in writing. The Tribunal Member had accepted that when Mr Rodda received the notice he contacted Mr Woodcock promptly and that Mr Woodcock told Mr Rodda that he would 'take care of it'. The applicant submitted that it follows that the Tribunal must have accepted Mr Rodda's evidence that he orally authorised Mr Woodcock to respond to the notice on his behalf. The respondent disputes that there was any authorisation, but it seems to me that, on a fair reading of the Tribunal's decision in its evidentiary context, the Tribunal accepted that there had been such an authorisation and that such a conclusion was open to the Tribunal.

28 A second preliminary point was raised in relation to s 147. The applicant submitted that the Note following s 147 introduced some ambiguity as to whether the reference to 'another person' referred to a person other than the applicant, or, to a person other than a person representing the applicant under s 147. However, the applicant conceded, properly in my view, that it is clear from s 155AC(3) that the Note in s 147 refers to a person other than the applicant. Mr Woodcock, undoubtedly Mr Rodda's representative for the purposes of s 147, gave evidence that he thought the Note meant the latter alternative. He believed, therefore, that because he had been authorised under s 147, there was no need to be authorised again.

29 In relation to the main issue, the applicant pointed out that both the Court and the Tribunal have disavowed a technical and narrow construction of the dismissal provision and have required a beneficial approach in construing it: *Re Linnehan & Veterans' Review Board* and *Repatriation Commission* (1991) 24 ALD 376 at 380; *Repatriation Commission v Allen & Veterans' Review Board* (1995) 38 ALD 557 at 563; *Johnson v Veterans' Review Board* (2002) 71 ALD 16 at 25; and *Johnson v Veterans' Review Board* (2003) 129 FCR 197 at [49].

30 The applicant pointed to the decision of the majority of the High Court in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 wherein their Honours, approving the New South Wales Court of Appeal decision in *Tasker v Fullwood* [1978] 1 NSWLR 20 at 23G, held that (at [91]-[93]):

'An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

...

In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the "elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. ... In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute". (Footnotes omitted.)

31 Specifically, the applicant drew attention to the statement in *Project Blue Sky* to the effect that although an act done in breach of a statutory provision is unlawful and 'Failure to comply with a directory provision "may in particular cases be punishable" ', the act may nevertheless be valid (at [100]). In this regard, reliance was placed on the decision of the Full Court in *Formosa v Secretary, Department of Social Security* (1998) 46 FCR 117, wherein the Court considered (at 122) that there was much force in the view that the distinction between 'mandatory' and 'directory' requirements had its meaning and utility primarily upon consideration of the consequences of a breach. The applicant also relied on *Hall v Minister for Immigration and Multicultural and Indigenous Affairs* (2000) 97 FCR 387 at [11] in which Finkelstein J held that: 'what must be determined is the consequence of a failure to comply with such an instruction. ... It is also important, no doubt, to consider the consequences of a failure to adhere strictly to the requirements of the Act'. The legislature, it was submitted, had not addressed the consequences of non-compliance with the requirement for written authorisation of s 155AC representative. The Act does not expressly provide whether such non-compliance leads to the validity or invalidity of

a response otherwise authorised.

32 The applicant submitted that several factors indicate that actual but informal authorisation ought not invalidate the response given: the scope and object of the whole statute; the language of the relevant provisions; the nature of the preconditions and their place in the legislative scheme; the consequences if the response was invalid; and finally, the consequences if the response was valid.

33 As to the scope and object of the whole statute, the applicant rightly characterised the Act as 'beneficial legislation', to be interpreted liberally, and in a manner that facilitates the provision of benefits to eligible veterans.

34 In relation to the language of the relevant provisions, the applicant argued that while the provisions repeatedly use the imperative 'must', that factor does not, of itself, determine whether the response given by Mr Rodda's representative is invalid. Rather, what has to be considered are the consequences of a failure to comply with such an instruction and the consequences of requiring compliance, regardless of the circumstances.

35 In relation to the preconditions and their place in the legislative scheme, the applicant accepted that, at a general level, the provisions are designed to enable the Board to dispose of cases that are not being pursued actively. However, the applicant submitted that the Explanatory Memorandum makes clear that the requirement for a written authorisation under s 155AC(2) exists to protect applicants, because of the importance of that response to an applicant. Consequently, the essential requirement is authorisation in fact, which was given in Mr Rodda's case. The requirement for it to be in writing was to protect Mr Rodda. It is not a provision cardinal to the objective of the statute. The applicant argued that it is unlikely that Parliament intended that a failure to comply with a provision to protect applicants could lead to their applications being dismissed and a response, actually authorised by an applicant, being rendered invalid and of no effect.

36 The applicant also drew attention to the context in which the Act was created. Parliament would be aware that many veterans are now elderly; s 147(2) – which prohibits representation before the Board by persons with legal qualifications – argued against excessive concern with formalities. It is a well-known feature of Board proceedings that much of the advice available to applicants is provided by volunteers, many of whom lack legal expertise in reading legislation and case law, and in addition, are veterans with their own problems. Such a system has been institutionalised, with the Department sponsoring training for those volunteers who provide assistance. It cannot have been Parliament's intention that the dismissal provisions be implemented in a 'too technical and narrow way' when veterans before the Board are often so represented and advised.

37 The applicant argued that the consequences of treating a response such as Mr Rodda's as invalid were too unfair to have been intended by Parliament. Because the age of the veteran at the time at which the form is lodged can affect the veteran's eligibility for a pension under s 23 or s 24 of the Act, dismissing an informally authorised response as invalid could, as here, have a profound effect on a veteran who had reached 65 but whose claim had been lodged before he or she reached that age.

38 The applicant submitted that the Tribunal failed to consider the loss of benefits that could potentially flow from its interpretation of s 155AC; Mr Rodda's age had been overlooked. At the time of the hearing, 100 percent of the General Rate of pension amounted to \$303.90 a fortnight. By contrast, the Special Rate of pension conferred \$816.20 per fortnight on recipients. In light of these figures, if the dismissal of Mr Rodda's application in fact prevented him from qualifying for the Special Rate of pension, and he lived to age 80, he would lose approximately \$200 000 in tax-free pension. Individuals not already in receipt of a pension could stand potentially to lose even more. The potential for an adverse construction of s 155AC to have profound financial consequences for veterans was said to tell against such an interpretation being made.

39 The applicant submitted that holding responses such as Mr Rodda's to be valid would not overburden the Board. Little loss of administrative efficiency would occur if the Principal Member had to obtain written confirmation from an applicant that an allegedly authorised response received from another person had been specifically authorised after the s 155AA(4) notice had been received by the applicant. Moreover, whether or not there is a need for further information or action by the Principal Member would turn on the particular issues that might arise, but they do not go to the validity of the response.

First respondent's submissions (the Commission)

40 The Commission argued that the legislation demanded full compliance with the requirement of written authorisation to the exclusion of all other possible alternatives. '[I]mperative language' of the kind considered in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 is used in ss 155AA(5), 155AC(2) and 155AC(4). The Explanatory Memorandum showed that the legislature had deliberately chosen the most definitive possible means of ensuring that a veteran's representative is authorised. Because *Project Blue Sky* (at [78]) mandates that the Court has a duty to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have, any attempt to read down the requirement for an authorisation in writing would defeat the intention of s 155AC. Reliance was also placed on the statement by the High Court in *Project Blue Sky* (at [78]) that: 'Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision'.

41 In this respect, the Commission submitted that it would be impossible to think that Parliament intended to create a provision that said merely, 'You must do this', but then abandon that requirement in situations where a person had been misadvised to the contrary. Parliament was not likely to have used mandatory language such as 'must' if it intended to undercut or relax that imperative in certain sets of circumstances.

42 The Commission submitted that the requirement for writing serves both the interests of applicants and the Board. The exercise of providing a written authority was intended to bring home to the applicant the significance of his/her situation, and protect him/her from the activities of unauthorised persons. The corollary of this is that a written authority also enables the Board to be confident that a representative who submits a written statement on behalf of an applicant has been duly authorised. It is clear from the Explanatory Memorandum that it is the Principal Member who must be satisfied that a representative is duly authorised because the Principal Member is placed under a statutory compulsion, rather than given a discretion, to dismiss the matter in certain circumstances. It is no answer to say that at some later stage a person might send a written authority: the statutory scheme is predicated on the basis that, after a delay of at least two years, there are 28 days in which to comply, and at that point the Principal Member comes under a mandatory duty to act.

43 The Commission also argued that 'substantial compliance' with the provisions of s 155AC were not sufficient to validate a response. The requirement in s 155AC(2) that an authorisation be made in writing is, like the requirement that was considered in *Tasker* at 25D-E, a requirement 'of a kind which does not admit of substantial compliance. There will either be strict compliance or non-compliance'. In the present case it was said that there was non-compliance.

44 The Commission conceded that the Act was beneficial legislation. However, this characterisation did not permit an interpretation that would allow the substitution of the words 'an authorisation may be given orally' for the statutory mandate that 'an authorisation ... must be in writing'. The fair meaning of the language must be kept in mind.

45 While the purpose of the Act is to make provision for the payment of pensions to veterans and certain others, eligibility criteria confine the circumstances in which pensions and benefits are payable, and mandatory requirements exist in respect of such matters as the lodgment of various types of claims and applications. The Commission submitted that the lawful exercise of those powers and discretions by the Commission and the Board is subject to those mandatory requirements. It is inappropriate to characterise a provision such as s 155AC(2) as a 'procedural technicality'. Rather, it touches the Board's jurisdiction.

46 Further, the Commission submitted that the clear Parliamentary intention underpinning s 155AA and s 155AC was the facilitation of the dismissal of applications for review that had not been prosecuted for a period of at least two years. Subsection 155AC(5) compels the Principal Member to dismiss the application for review if a response has not been received within 28 days. The Commission contended that there is no support in the Act or the Explanatory Memorandum for the proposition that Parliament intended the Principal Member to make further inquiries

before dismissing an application in accordance with s 155AC(5). While detrimental consequences could, in some cases, follow the dismissal of an application for review under s 155AA, the provisions should not be read down to remove those disadvantages. The Commission conceded that a dismissal does bring a veteran's then existing entitlements to an end, but noted that a fresh claim or application may be lodged in relation to the same medical condition. Consequently, the disadvantage principally takes the form of lost entitlement to back payments of pension that would have been paid if the application for review had remained on foot and if the applicant had succeeded before the Board.

Second respondent's submissions (Principal Member, Veterans' Review Board)

47 The second respondent made submissions directed only to the scope of the powers and procedures of the Principal Member under the Act, and in particular, two issues: the question of representation before the Board; and, the interpretation of Part IX Division 9 of the Act.

48 In relation to the question of representation, the prohibition on legal representation in the veterans' jurisdiction had a long history and continued to operate at the insistence of the major veterans' organisation. While the work performed by lay representatives is often of much assistance to applicants and to the Board, the fact is that some representatives are less experienced and less capable than others.

49 It was submitted that the Explanatory Memorandum makes clear that s 155AC was introduced to avoid the risk of representatives acting without specific authorisation, and to ensure that the Principal Member is able to rely on the statement lodged on behalf of the applicant for the purposes of determining whether the application for review should be dismissed.

50 As such, these requirements afford protection to applicants and enable the Principal Member to be sure that the response, if any, that has been received was properly authorised. This was said to be particularly important when it is remembered that representatives are not legally qualified, need not have had any training, and are not governed by professional standard or rules of ethical conduct.

51 Consequently, it was submitted, the requirement that an approval be in accordance with a form approved by the Principal Member assists to avoid any ambiguity regarding the scope and effect of a purported authorisation.

Conclusions

52 The parties are correct to say that the case must be decided in the manner approved by the High Court in *Project Blue Sky*. As a matter of principle, what both counsel had to say about that case is correct. The relevant matters are summarised at [32] above. The difficulty is their application to the facts of this case.

53 Neither the Tribunal's (and the respondents') interpretation, nor that of the applicant, yields a wholly satisfactory result. The result of the Tribunal's interpretation is that a veteran may lose some valuable substantial rights for merely procedural failures.

54 The result of the applicant's interpretation is that a practical burden would be imposed on the Principal Member either to establish somehow that an applicant for review has not, orally or by conduct, authorised a purported representative, or to require the purported representative to obtain the applicant's written authorisation after the expiry of the 28 day period. (The Registrar in this case required that of the purported representative within the 28 day period).

55 Regrettably for the applicant, it seems to me legally necessary that the respondents' interpretation must be regarded as the less unsatisfactory one and, therefore, is the interpretation that must prevail. Notwithstanding that the Act was intended beneficially for veterans, there are three reasons for this.

56 The first is that, if the applicant's submissions are accepted, the Act's specific and detailed provisions are set at nought. Those provisions allow a two year delay; provide for formal notice from the Principal Member of the Board; require specific written authorisation of a purported representative; and then mandate dismissal of the review application after 28 days. The Principal Member would, on the applicant's approach, be required after such 28 day period at least to go through the whole notification process again and perhaps do more, in an inquisitorial fashion, to establish from the applicant personally whether a purported representative was actually authorised. The express statutory scheme would be rendered pointless.

57 The second reason is that the result which follows for the applicant is not so unexpected that it might have, as it were, passed under the radar of parliamentarians when they enacted the relevant dispositive amendments. It is a well-known incident of the repatriation pension schemes that claimants aged over 65 have much greater difficulty qualifying for a 'TPI pension' at the higher rates. It is obvious enough that a two year plus delay could push a claimant past that age limit. There can be no confident attribution to Parliament of an intention that the disorienting provisions, themselves dependent upon procedural steps, should, on that account, not have what appears to be their plainly intended effect.

58 The third is that, in many fields of legal entitlement to monetary benefits, it is a common consequence of a failure to comply with procedural steps, with which a claimant has a duty to comply, that the entitlements may be lost. A generous balance has here been made by the legislature: over two years to progress a review application and minimal procedural responsibilities placed on a review applicant to avoid summary dismissal of his/her application after that time. The provisions are aimed at both requiring the dismissal by the Principal Member of long outstanding claims not being duly prosecuted and avoiding such dismissal only where there is clearly and reliably presented to the Principal Member a satisfactory response for which an applicant actually takes personal responsibility. The means of assuring such reliability to the Principal Member is that the applicant must specifically authorise such a response, authorise it separately from instructing his/her general representative in relation to the claimed review, and

do so in writing. Nevertheless those responsibilities are actually placed on applicants. There is insufficient reason to ascribe a parliamentary intention to waive those responsibilities when they have not been met, where it later emerges that the applicant was content to stand by what the representative had to say.

59 I do not wish to add any element of criticism of Mr Rodda to his lack of success. However, I should note that this is not a case of a review applicant who has done everything that he could in the circumstances. The case, for example, of a veteran who had authorised the representative in writing but, through infirmity, had been unable to get the written authorisation back to the Board in time might possibly stand in a different position. Such a case may be decided if and when it arises.

Disposition

60 The appeal will be dismissed with costs.

I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Madgwick.

Associate:

Dated: 5 December 2006

Counsel for the Applicant: C Colborne

Solicitor for the Applicant: Legal Aid Commission of New South Wales

Counsel for the First Respondent: R M Henderson

Solicitor for the Respondents: Australian Government Solicitor

Date of Hearing: 5 December 2005

Date of Judgment: 5 December 2006

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