

AUSTRALIA / JUDGMENT

Shafran v Repatriation Commission [2019] FCA 1833

COURT

FEDERAL COURT OF AUSTRALIA

Source: judgments.fedcourt.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Source record

FEDERAL COURT OF AUSTRALIA

Shafran v Repatriation Commission [2019] FCA 1833

File number: QUD 424 of 2019

Judge: LOGAN J

Date of judgment: 8 November 2019

Catchwords: DEFENCE AND WAR – veterans' entitlements – application for judicial review of conduct of the Veterans' Review Board – where the veteran applied to the Repatriation Commission for an increase in his rate of pension on the basis of a number of medical conditions – where the veteran applied to the Board for review of the Commission's decision – where the Secretary to the Department of Veterans' Affairs must prepare a report under s 137 of the Veterans' Entitlements Act 1986 (Cth) and provide it to the veteran for comment – where the Secretary provided the report to the Principal Member of the Board before providing it to the veteran for comment – where the veteran sought a ten-year extension of time in which to comment – where the Board held two directions hearings and made certain case management directions – where the Secretary eventually granted the applicant's request for an extension of time – whether the Secretary committed a jurisdictional error in providing the report to the Principal Member before giving it to the veteran for comment – whether the Board committed jurisdictional error by holding either of the two directions hearings – whether the Board had jurisdiction to make the directions that it made – whether the Secretary's decision to extend time was legally unreasonable

STATUTORY INTERPRETATION – where s 137(1) of the Veterans' Entitlements Act 1986 (Cth) requires the Secretary to prepare a report – where s 137(4) requires the Secretary to provide the report, any comments on it made by the veteran and any supplementary report arising from any consequential investigation to the Principal Member of the Board as soon as practicable – whether the Secretary can only send the relevant documents to the Board once the time for comment and any consequential investigation has ended – whether it is a jurisdictional error for the Secretary to send the documents to the Principal Member before providing it to the veteran

STATUTORY INTERPRETATION – where s 137(3) requires the Secretary to give the veteran 28 days on which to comment on the report or such longer time as is requested – where s 137(3) does not expressly provide for approval of the extension or how long it may be for – whether there is an implied reasonableness restriction on the veteran's rights to request an extension under s 137(3) – whether the Secretary has the power to grant or refuse an extension request under s 137(3) –

whether the request must be made to the Secretary – whether the Board has jurisdiction to make directions regarding a request for an extension of time to comment under s 137(3)

Legislation: Administrative Decisions (Judicial Review) Act 1977 (Cth)

Australian Soldiers' Repatriation Act 1917 (Cth)

Australian Soldiers' Repatriation Act 1929 (Cth)

Invalid and Old-age Pensions Act 1908 (Cth)

Judiciary Act 1903 (Cth) s 39B

Repatriation Act 1920 (Cth) ss 7, 8, 45A, 45L, Pt IIIA

Repatriation Legislation Amendment Act 1984 (Cth)

Veterans' Entitlements Act 1986 (Cth) ss 120A, 133A, 134, 135, 136, 137, 141, 141A, 142, 145A, 147, 148, 149, 155, 158, 175, 179, 180, 182, 184, 196, 213, Pt IX, Pt XIA, Pt XIB

War Pensions Act 1914 (Cth)

Cases cited: Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297

Curtney v Peters (1990) 27 FCR 404

Eso Australia Pty Ltd v Australian Workers' Union (2014) 263 CLR 551

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597

Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476

Project Blue Sky v Australian Broadcasting Authority (1997) 194 CLR 355

R v A2 (2019) 93 ALJR 1106

R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13

R v Ross-Jones; Ex parte Green (1984) 156 CLR 185

R v Young (1999) 46 NSWLR 681

Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82

Repatriation Commission v Kirkland (1923) 32 CLR 1

Repatriation Commission v Thompson (2001) 107 FCR 235

Wei v Minister for Immigration and Border Protection (2015) 257 CLR 22

Date of hearing: 1 November 2019

Registry: Queensland

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 82

Solicitor for the Applicant: IAMCU Legal Pty Ltd

Counsel for the First Respondent: Ms E Longbottom

Solicitor for the First Respondent: Australian Government Solicitor

Solicitor for the Second Respondent: The Second Respondent filed a Submitting Notice

Table of Corrections

11 November 2019 In paragraph 49, the word "test" is replaced with "text".

ORDERS

QUD 424 of 2019

BETWEEN: GEOFFREY SHAFRAN

Applicant

AND: REPATRIATION COMMISSION**First Respondent****VETERANS REVIEW BOARD****Second Respondent****JUDGE: LOGAN J****DATE OF ORDER: 8 NOVEMBER 2019****THE COURT ORDERS
THAT:**

1. It be declared that:

(a) The Second Respondent had no lawful authority to list the Applicant's review application on 5 December 2018 for a directions hearing and the directions made that day were invalid.

(b) The following directions made by the Second Respondent on 2 July 2019 in respect of the review application to which the Applicant and the First Respondent [the Respondent named in the direction] were parties were invalid:

- That if the Applicant seeks to make any comments concerning the section 137 report provided by Respondent, the applicant should provide any comments in writing to the Respondent, pursuant to section 137(3) of the Act. This must be done within 28 days of today's date, being by close of business of 30 July 2019.
- That should the Applicant make any comments by the above date, the Respondent shall, pursuant to section 137(4) of the Act, provide those comments and any further investigations conducted and any supplementary reports referring to any evidence obtained in that further investigation, to the Applicant and the Board, within 14 days, being the close of business of 14 August 2019.

[sic]

2. Save as aforesaid, the application be dismissed.

3. Any consequential submission by the applicant of not more than three pages in relation to costs be filed and served by the close of business on 11 November 2019.

4. Any consequential submission by the first respondent of not more than three pages in relation to costs be filed and served by the close of business on 13 November 2019.

5. Costs reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

REASONS FOR JUDGMENT**LOGAN J:**

1 One hundred years ago this month, a year after the Armistice, the great task of repatriating the First Australian Imperial Force (AIF) from France and Flanders, the United Kingdom and the Middle East was all but completed. Then, as now, the term "repatriation" was apt as a matter of ordinary English to describe this task – "The return or restoration of a person to his or her native country": Oxford English Dictionary, Online Edition. But the word "repatriation" had by then also been employed in Australia in the name of a statutory corporation, the Repatriation Commission (original Commission), established by the Australian Soldiers' Repatriation Act 1917 (Cth) (repealed) (commenced 8 April 1918) (Australian Soldiers' Repatriation Act), to a department of State, the Department of Repatriation (Repatriation Department) (established, 28 September 1917, Commonwealth Gazette No 168, 4 October 1917, p 2587) and to a branch of the

Headquarters of the AIF (HQ, AIF), its Demobilisation and Repatriation Section. The functions of these bodies either, in the case of original Commission, did not entail any responsibility at all for repatriation in the ordinary sense of that word or, in the case of the Repatriation Department and the HQ AIF, and because of government inertia, lacked any clarity of responsibility for that task, and its immediate sequel, demobilisation, until shortly after the Armistice: see C E W Bean, *First World War Official History, - Volume VI – The Australian Imperial Force in France during the Allied Offensive, 1918* (1st ed, 1942), Chapter XXI – The War Ends, pp 1054 - 1057) (Bean).

2 The function of the original Repatriation Commission had been the provision of advice to the Governor-General in relation to the making of regulations for the granting of assistance and benefits to Australian soldiers (as defined, which included members of the Australian Army Nursing Service) and their wives, widows, children and other dependants, as well as for the administration of various patriotic funds established for the re-establishment into civilian life of returned soldiers.

3 The Repatriation Department did have responsibility for repatriation in the ordinary sense of that word, as well as for the Australian Soldiers' Repatriation Act (Administrative Arrangements Order of 17 July 1918, Commonwealth Gazette No 105, 18 July 1918, p 1520; Bean, at pp 1056 - 1057) but, so too did the Department of Defence. The potential for resultant confusion and deadlock in that immediate "repatriation" task was solved on 21 November 1918 in an inspired way by additionally appointing General Sir John Monash GCMG, KCB, VD as Director-General of Repatriation and Demobilisation: Bean, at p 1057.

4 Neither the original Repatriation Commission nor the Department had any responsibility for the determination and payment of war pensions. Under the War Pensions Act 1914 (Cth) (repealed) (War Pensions Act), that responsibility was originally consigned to a War Pensions Board and then, by amendment in 1915, inferentially because of the sheer number of claims as a result of casualties, to a Commissioner of Pensions and Deputy Commissioners. That legislation provided for an appeal from Deputy Commissioners to the Commissioner. By the amendment, Parliament also took the doubtless expedient course of providing that persons for the time being holding the offices of Commissioner of Pensions, Assistant Commissioner of Pensions, Deputy Commissioner of Pensions, Registrar of Pensions, each within the Department of the Treasury, or Special Magistrate, under the Invalid and Old-age Pensions Act 1908 (Cth) (repealed) were deemed to have been appointed to the offices under the War Pensions Act corresponding respectively to the offices held by them under that Act. Thus, for most of the First World War, war pension decisions were, for practical purposes, made by Commonwealth public servants.

5 Australia's broad use of the word, "repatriation" was idiosyncratic and in contrast to its more accurate use in public administration by the United Kingdom and Canada (Bean, at p 1054).

6 When the Australian Soldiers' Repatriation Act 1917 was repealed by the Australian Soldiers' Repatriation Act 1920 (Cth) (renamed Repatriation Act 1920 on 31 December 1950) (Repatriation Act) and the original Repatriation Commission thereby abolished, the word "repatriation" was again employed in the name of a statutory corporation, the Repatriation Commission (Commission) established by that Act. As described by Knox CJ and Starke J in *Repatriation Commission v Kirkland* (1923) 32 CLR 1 (Kirkland), at 8, the Commission was:

... a statutory corporation charged with the administration of an Act designed to carry out two objects which are peculiarly within the province of the Government, namely the re-establishment in civil life of persons who have served in the defence forces, and the provision of pensions and benefits for persons incapacitated and the dependants of persons killed or incapacitated as a result of active service in those forces.

7 Kirkland established that the Commission represents the Crown in right of the Commonwealth.

8 In relation to pensions and related entitlements flowing from war service, the Repatriation Act repealed and replaced the War Pensions Act.

9 The Commission has always since 1920 co-existed with a department of State which has, over time, assumed complementary responsibilities for health care, education, vocational training, employment assistance, help with housing, soldier settlement on the land, remembrance and commemoration in relation to veterans and their dependants.

10 When the Repatriation Act was repealed by the Veterans' Entitlements Act 1986 (Cth) (VEA), the Commission, and thus the idiosyncratic, Australian sense and use of the word "repatriation", was preserved and continued as a statutory corporation: s 179, VEA. Long before 1986, that idiosyncratic sense and use, and its foreshortening, "Repat", had become entrenched in Australian idiom. The Commission is the only active party respondent in the present proceeding.

11 From its establishment in 1920 and to this day, both under the Repatriation Act and under the VEA, it is the Commission which, subject to the Minister, has had the general administration of the legislation: originally, s 7(1), Repatriation Act; now, s 180(2), VEA. That was so even though, in 1920, the Repatriation Department remained as a department of State and even though, now, there is a successor to that department, the Department of Veterans' Affairs (DVA). Thus, apart from an idiosyncratic sense and use of the word "repatriation", a feature of Australian legislative provision for veterans' pensions and other entitlements ever since 1920 has been that Parliament has always intended that, subject to Ministerial responsibility, the general administration of the relevant legislation be by a statutory corporation, not directly by a department of State.

12 Another feature of the Commission is that, from its inception, its governing legislation has always provided that at least one of the commissioners who constitute it shall be drawn from a nominee of the veterans' community: see s 8(2), Repatriation Act and ss 182(3) and 182(4), VEA. But it has never been the case that its membership (originally three commissioners, now at least three and no more than five) had to be drawn exclusively from nominees of the veterans' community. The reason for this was given by the original Minister for Repatriation, Senator the

Honourable Edward Millen, when introducing the Bill which became the Repatriation Act:

... I would point out how extremely unwise it would be to compel the Government to select returned soldiers for the other two positions. If these Commissioners were merely to perform the legislative functions now discharged by the present Commission, and to decide what benefits were to be given, and to hear appeals from the men, something might be said in favour of giving the returned soldiers the right to nominate the whole three. But when we have to select men with some business knowledge to control a big department, the Government is bound to look for men with special qualifications for the positions.

[Report of the Independent Enquiry Into the Repatriation System by the Honourable Mr Justice Toose CBE, Australian Government Publishing Service, June 1975 (Toose Report), at p 72, citing Hansard]

13 Until 1947, the separation of the Commission from the general Commonwealth public service was even starker than now. That is because, as enacted and until then, the Repatriation Act provided for the employment of staff by the Commission, rather than under prevailing public service legislation, although public servants could be appointed to the Commission's staff without loss of benefits. The professed reason for this change was to ensure that modern methods of public administration and efficiencies were taken up in the administration of the Repatriation Act: Clem Lloyd and Jacqui Rees, *The Last Shilling – A History of Repatriation in Australia* (Lloyd and Rees), pp 312-314. On and from then, the Commission has been served, in the administration of the Repatriation Act and now the VEA by public servants within the Department, of whom the most senior is the Secretary to the Department. Presently, that position is formalised by s 196 of the VEA. Further, the VEA contemplates that the Secretary to the Department may, ex officio, be a commissioner and the President of the Commission: s 184, VEA. In practice, ever since 1947, the Secretary to the Department has, ex officio, been President of the Commission: Toose Report, at pp 74-75.

14 Understanding this heritage and its evolution, the deliberate provision for general administration by a statutory commission on which the veterans' community is represented and the synergistic relationship between the Commission and the Department is important in resolution of the present case.

15 The evolution of the Australian system of "repatriation" in the broad, idiosyncratic sense of that word from the time of the First World War into the Second World War and beyond is more particularly described in the Toose Report and in the Report of the Advisory Committee on Repatriation Legislation Review, Australian Government Publishing Service, November 1983 (Keys Report) but, subject to one feature added to the Australian system of "repatriation" in 1929, detailed below, the account thus far given suffices.

16 In point of law, it is the Commission which has the function of granting "pensions, allowances and other benefits to veterans, dependants of veterans and certain other persons under and in accordance with the provisions" of the VEA: s 180(1)(a), VEA. In practice, most decisions of the Commission in relation to claims under the VEA are made by delegates of the Commission who

are public servants within the DVA: see, as to the power of delegation by the Commission, s 213, VEA. This scheme conforms with the historic position, in terms of the general administration, subject to the Minister, of the prevailing legislation by the Commission and continues as well the 1947 reform of support being provided to the Commission in that administration by public servants especially dedicated to that task in a related department of State for which the Minister was also responsible to Parliament.

17 In his Foreword to Philip Payton, *REPAT - A Concise History of Repatriation in Australia* (Payton), the Honourable Darren Chester MP, Minister for Veterans' Affairs, stated, "At first, it was imagined that once all the veterans of the First World War had been successfully 'repatriated', in the fullest sense of the word, the Commission and Department would quietly wither away, their job done." The course of subsequent history attests that this expectation as to the fate of the Commission and the Department proved not to be fulfilled. Initially, that was because of the Second World War, but later wars in Korea and Vietnam, and other, more recent operational and peace keeping deployments of the Australian Defence Force (ADF), notably in East Timor, Iraq and Afghanistan, as well as the application of the VEA to certain non-operational service, have ensured that there has been no such withering. If this subsequent history is any guide, perhaps it will be ever thus.

18 The applicant, Mr Geoffrey Shafran, is one of the modern community of ADF veterans eligible to claim pensions and entitlements under the VEA. Mr Shafran enlisted in the ADF in 1976. He served thereafter for over 20 years in the Regular Army, initially in the Royal Australian Armoured Corps and, latterly, in the Australian Army Catering Corps. He attained senior non-commissioned rank.

19 On 3 April 2018, Mr Shafran applied to the Commission under s 15 of the VEA for an increase in his then pension on the basis of a number of nominated medical conditions. On 13 September 2018, the Commission accepted all but two of these nominated conditions. It is not necessary, for the purposes of this proceeding, to detail any of the nominated conditions, whether accepted by the Commission or otherwise.

20 On 8 October 2018, Mr Shafran applied to the Veterans' Review Board (Board) under s 135 and in accordance with the procedural requirements specified in s 136 of the VEA for a review of the Commission's decision. That review application is presently pending before the Board. Mr Shafran claims that the Board is unlawfully progressing his application towards a hearing, or perhaps dismissal for non-compliance with the Board's directions. Accordingly, he has instituted proceedings in this Court in which, by his amended originating application and under s 39B of the Judiciary Act 1903 (Cth) (Judiciary Act), he claims, together with related relief, a writ of prohibition, prohibiting the Board from further proceeding unless and until what he claims is a condition precedent to its exercise of jurisdiction has been fulfilled.

21 Until the hearing of his judicial review application, Mr Shafran also separately claimed under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) or, alternatively, the Judiciary Act in respect of certain conduct of the Secretary, detailed below, related to the review

application. The Commission raised an objection to the competency of the originating application as original pleaded and at a time when it was not apparent on the face of the application that Mr Shafran also sought to invoke this Court's jurisdiction under the Judiciary Act. Even after the originating application was amended and the Judiciary Act identified as a further or alternative source of jurisdiction, the Commission pressed a contention as to the absence of jurisdiction under the ADJR Act to review the particular conduct of the Secretary. As the hearing progressed, it became apparent that it would be necessary in any event to consider the particular conduct of the Secretary in the course of determining whether Mr Shafran was entitled to any relief under the Judiciary Act against the Board. Accordingly, he abandoned his separate claim under the ADJR Act in respect of the conduct of the Secretary.

22 The Board is the only other respondent party in the proceeding. Having regard to *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, the Board, quite properly, has filed a submitting appearance.

23 By virtue of s 147(1) of the VEA, the parties to a review proceeding before the Board are the applicant for review, here Mr Shafran, and the Commission. Accordingly, whatever might have been the position prior to the abandonment of his ADJR Act claim, the appropriate respondent parties to Mr Shafran's claim for prohibition are the Board and the Commission, with the Commission aptly assuming the role of contradictor.

24 Put generally, and that is insufficient to resolve this case, s 137 of the VEA envisages that, within six weeks of the receipt by the Department of an application for review, the Secretary to the DVA will prepare a report, serve that report on the applicant and then forward to the Board's Principal Member that report, together with such comments, if any, on that report as the applicant may care to make and any consequential supplementary report of any further investigation conducted by the Secretary as a result of those comments. It is the conduct of the Secretary in relation to the forwarding of documents which Mr Shafran sought to review under the ADJR Act. It remains necessary to consider whether the Secretary has lawfully discharged her statutory function under s 137 to determine the legality of the Board's actions to date and proposed actions. Section 137 provides:

Secretary to prepare report

- (1) Within 6 weeks after an application for review made under subsection 135(1), (2) or (3) is received at an office of the Department in Australia, the Secretary shall:
 - (a) cause to be prepared a report referring to the evidence under the control of the Department that is relevant to the review; and
 - (b) subject to subsection (2), cause a copy of that report to be served on the applicant.
- (2) Where the report prepared by the Secretary in pursuance of subsection (1) contains or refers to any information, opinion or other matter:

- (a) that, in the opinion of the Secretary, is of a confidential nature; or
- (b) that, in the opinion of the Secretary, it might be prejudicial to the physical or mental health or well-being of the applicant to communicate to the applicant;

the document served on the applicant in pursuance of paragraph (1)(b) shall not contain or refer to that information, opinion or other matter.

- (3) Where a copy of a report is served on an applicant in accordance with subsection (1), the applicant may, within 28 days after service of the report or within such further period as the applicant may request in writing before the expiration of that period, furnish to the Secretary in writing any comments the applicant wishes to make concerning the report.
- (4) The Secretary shall forward to the Principal Member of the Board all the relevant documents, including any comments furnished to the Secretary by the applicant concerning the report served on the applicant and, if a further investigation has been made in consequence of those comments of the applicant, a supplementary report referring to any evidence obtained in that further investigation:
 - (a) if the applicant duly furnishes comments in accordance with subsection (3) and no further investigation is made in consequence of those comments--as soon as practicable after receipt of those comments;
 - (b) if a further investigation is made in consequence of comments furnished by the applicant--as soon as practicable after the completion of that further investigation; or
 - (c) in any other case--as soon as practicable after the expiration of the period or extended period referred to in subsection (3).

25 On 8 November 2018, the Secretary both prepared a copy of her report under s 137 of the VEA and caused a copy of that report to be forwarded to the Board's Principal Member. The Secretary did not, at that time, append any comments from Mr Shafran in relation to that report, because she had not, at that stage, sought any. It was not until 14 November 2018 that Mr Shafran received a copy of the report.

26 On 19 November 2018, within the 28 day period for which s 137(3) of the VEA provided, Mr Shafran sent the following email to a "client liaison officer" within the Department:

In accordance with S137(3) I request a 10 year extension to the 28 days in order to furnish comments I have concerning the 137 report date 8 Nov 2018.

[sic]

27 Much correspondence followed between officers of the Department and Mr Shafran after the receipt of this request. A good deal of related correspondence was also subsequently exchanged internally within the Department. It is all to be found in the Court Book but it is not necessary to detail any of it. Suffice it to say, on 1 July 2019, along with tendering an apology for delay, an officer of the Department informed Mr Shafran, "The Department of Veterans' Affairs (DVA)

accepts your request for an extension of time and confirms that any comments you provide will be added to the report."

28 In the interval between Mr Shafran's request for an extension and this reply by the Department, the Board had not been idle.

29 On 26 November 2018, the Board listed Mr Shafran's review application for directions on 5 December 2018 "on the basis that the [Applicant] has requested a 10 year period to make comments on the [report]". On 5 December 2018, after hearing submissions that same day from Mr Shafran and from an officer of the Department on behalf of the Commission, the Board made the following directions:

- The Directions hearing is adjourned for 6 months.
- In the interim the [Applicant] is to use his best endeavours to seek to resolve any issues he has with the Commission relating to the [report]; and
- [The Applicant] Is DIRECTED at the end of this period to advise the Board in writing of how he wishes to best progress the matter before the Board.

It is apparent from the evidence in the Court Book that, by the time it made listed the case for directions and certainly when the Board made this direction, it was well aware that Mr Shafran wished to have an extension of time within which to make comments in respect of the Secretary's report, had requested the Secretary allow him 10 years for this purpose and was awaiting a response to that request from the Secretary.

30 On 16 December 2018, Mr Shafran wrote to the Board's Principal Member, Ms Jane Anderson, querying the jurisdiction of the Board to make the direction of 5 December 2018, given that he had not provided comments in respect of the Secretary's report. On 20 December 2018, the Principal Member furnished Mr Shafran with a reply in which, materially, she stated:

As a result of submissions you have made about the provisions contained within section 137 of the Veterans' Entitlements Act 1986 (VEA), including in relation to your ability to make comments to the Secretary (of DVA) concerning the section 137 report, the matter was listed for a Directions Hearing, pursuant to sections 148 (4A) of the VEA. The Directions hearing was held on 5 December 2018. On that occasion, certain directions were made pursuant to section 148(4B), including for you to use your best endeavours to seek to resolve any issues you have with the Commission in relation to the section 137 report, and the Directions Hearing was adjourned for a period of six months.

I note that in your letter dated 16 December 2018, you advise that you have not yet provided the Secretary with any comments concerning the section 137 report.

You are at liberty to seek legal advice as to any appeal rights you have in relation to the exercise of the Board's powers under sections 148(4A) and 148(4B) of the VEA.

[sic]

31 On 2 July 2019, the Board held a further directions hearing with respect to Mr Shafran's review application. On that occasion, materially, the Board directed:

NOTING that the matter last came before a Board Directions Hearing on 5 December 2018 and since that time no communication was made by Applicant to the Respondent relating to the content of the section 137 report, other than a request for a 10 year extension of time in which to do so, AND further that the Applicant has not advised the Board in writing as to how he wishes to best progress his matter;

AND FURTHER NOTING that the Applicant now submits that the Board does not have jurisdiction to hear the application at the present time and is currently seeking Judicial Review of the Board's jurisdiction;

The Directions Hearing proceeded on the basis that the Board has jurisdiction to hear the application pursuant to section 136 of the Veterans' Entitlements Act 1986 (the Act) AND pursuant to section 148(4B) of the Act, the Board DIRECTS that:

- The application is to proceed to a Board hearing.
- That if the Applicant seeks to make any comments concerning the section 137 report provided by Respondent, the applicant should provide any comments in writing to the Respondent, pursuant to section 137(3) of the Act. This must be done within 28 days of today's date, being by close of business of 30 July 2019.
- That should the Applicant make any comments by the above date, the Respondent shall, pursuant to section 137(4) of the Act, provide those comments and any further investigations conducted and any supplementary reports referring to any evidence obtained in that further investigation, to the Applicant and the Board, within 14 days, being the close of business of 14 August 2019.
- Thereafter Registry will lit the matter for a Board hearing, unless the matter is withdrawn by the Applicant beforehand.

32 The preceding day, Mr Shafran had filed his originating application in this Court.

33 It is now desirable to set out s 148 of the VEA:

Procedure of Board

- (1) The Principal Member shall, upon receipt of the relevant documents relating to a review of a decision of the Commission, cause to be served on each party to the review a notice informing the party that the Board is to review the decision of the Commission and requesting the party to inform the Principal Member, in writing, within a reasonable time specified in the notice, whether the party wishes to appear on the hearing of the review and, if the party wishes so to appear, whether the party intends to appear on the hearing personally or by another person under section 147.

- (2) Where either party to a review of a decision of the Commission informs the Principal Member that the party wishes to appear on the hearing of the review of the decision by the Board, the Principal Member shall:
 - (a) cause a date, time and place to be fixed for the hearing of the review; and
 - (b) cause notice of the date, time and place so fixed to be served on each party to the review.
- (3) The Principal Member may defer fixing a date, time and place for the hearing of a review under subsection (2) until the parties to the review have informed the Principal Member that they are ready to proceed at a hearing.
- (4) Where a party to a review of a decision of the Commission does not inform the Principal Member, within the time specified in the notice served on the party under subsection (1), that the party wishes to appear on the hearing of the review, the review may be heard and determined in the absence of that party.
- (4A) A member may hold a directions hearing in relation to a review.
- (4B) Before the hearing of a review has commenced, a member, the National Registrar, a Registrar, a Deputy Registrar or a Conference Registrar may give directions, not inconsistent with subsections (1), (2), (3) and (4) or directions under subsection 142(2), in relation to the procedure to be followed in connection with the review. Without limiting this subsection, a direction may:
 - (a) require any person who is a party to the review to provide further information in relation to the review; or
 - (b) require the Commission to provide a statement of the grounds on which the application will be resisted at the hearing of the review; or
 - (c) require any person who is a party to the review to provide a statement of matters or contentions upon which reliance is intended to be placed at the hearing of the review.
- (5) The Principal Member:
 - (a) may give general directions, not inconsistent with subsections (1), (2), (3) and (4) or directions under subsection 142(2), as to the procedure of the Board with respect to reviews before it, including reviews the hearings of which have not been commenced; and
 - (b) may give directions, not inconsistent with subsections (1), (2), (3) and (4) or directions under subsection 142(2), as to the procedure of the Board with respect to a particular review before the Board, either before or after the hearing of the review has commenced.
- (5A) The power of the Principal Member under subsection (5) includes the power to give directions:
 - (a) as to the manner of communication of documents, including electronic documents, that are required or permitted to be communicated to the Board; and

(b) as to the time at which such documents are to be taken to have been so communicated.

(5B) Without limiting the documents to which subsection (5A) applies, those documents include:

(a) documents, comments and supplementary reports forwarded to the Principal Member under subsection 137(4); and

(b) notices given to the Principal Member by a party to a review of a decision for the purposes of section 148; and

(c) documents produced to the Board under section 151 for the purposes of the hearing of a review Board; and

(d) further documents and reports of investigations or examinations forwarded to the Board as a consequence of a request made under subsection 152(1); and

(e) documents withdrawing or discontinuing applications for review communicated to the Board under subsection 155(2).

(6) The presiding member in respect of a particular review may, in respect of a matter not dealt with by directions under subsection (5), give directions, not inconsistent with subsections (1), (2), (3) and (4) or directions under subsection 142(2), as to the procedure to be followed on a hearing of the review, either before or after the hearing of the review has commenced.

(6A) The Principal Member may, in relation to a review, request the Secretary:

(a) to give to the Principal Member further documents in the Secretary's custody; or

(b) to obtain, and give to the Principal Member, further documents; or

(c) to arrange for the making of any investigation or medical examination and to give to the Principal Member a report of the investigation or examination.

(7) In giving a direction or making a request under this section, the Principal Member or a presiding member must have regard to the objective in section 133A.

(8) A member holding a directions hearing or the Board in the hearing of a review may allow a person to participate by:

(a) telephone; or

(b) closed-circuit television; or

(c) any other means of communication.

(9) A party to a review of a decision of the Commission, and any person representing such a party, must use their best endeavours to assist the Board to fulfil the objective in section 133A.

34 Mr Shafran's point, made to the Board as early as the 5 December 2018 at the directions hearing and repeated in his letter to the Principal Member later that month, is that the Board had no power to make directions under s 148(4B) of the VEA which were inconsistent with s 148(1), (2) or (3) of that Act. More particularly, his point as the succinct oral submissions of his solicitor, Mr Boulot confirmed, is and always has been that the "relevant documents" to which reference is made in s 148(1) of the VEA comprise not just the Secretary's report but also such comments as the applicant may have made in respect of that report within 28 days or permitted extension after its receipt. Thus, so he contends, it was premature for the Secretary to have sent her report to the Board without his comments and, in any event, not having received all of the "relevant documents", the Board lacked jurisdiction to issue either the direction of 5 December 2018 or those of 2 July 2019, because that would be inconsistent with s 148(1).

35 The purpose of the provision in s 137(4) of the VEA for the making of comments by an applicant in respect of the Secretary's report was, Mr Boulot submitted, procedural fairness. The question of what further time beyond the stipulated 28 days for the making of those comments was, he submitted, a matter between him and the Secretary, not, as the Board's direction of 2 July 2019 assumed, a matter for the Board. In light of the Board's direction of 2 July 2019, signifying a disposition to progress his case to hearing before the expiry of the ten-year extension of time to comment, he submitted that prohibition should issue. He also drew attention in his submissions to the provision in s 155(8) of the VEA for dismissal of an application by the Board on the basis of a failure to comply with a direction made by it.

36 For its part, the Commission conceded that "there exists a tension between s 137(3) and the issuing of directions that require comments on the Report be provided within a shorter period than the Applicant has requested". However, the Commission submitted:

... when viewed in the context of the evident purpose and policy of the provisions of the Act with respect to proceedings before the Board – relevantly, to provide a mechanism of review that is accessible, fair, just, economical, informal and quick [s 133A, VEA] and that is proportionate to the importance and complexity of the matter – it would appropriate to treat s 137(3) as containing the additional word "reasonable" such that it is construed to mean "...such further reasonable period as the applicant may request...".

[emphasis in original]

The Commission submitted that the Secretary was entitled under s 137 of the VEA progressively to send her report and then any comments of an applicant to the Board's Principal Member and that neither direction made by the Board was, as Mr Shafran had contended, premature by virtue of an absence of receipt by the Board's Principal Member of the "relevant documents". In oral submissions, the Commission went so far as to submit that the Secretary's granting of a 10 year period within which Mr Shafran might make comments on the report was unlawful, because the granting of an extension was a matter for the Board. The Commission submitted that all that was necessary to engage the Board's power to make each of the directions was the making under s 135 of Mr Shafran's review application.

37 Though each had looked, neither Mr Shafran nor the Commission was able in submissions to point to any judicial authority directly on point in relation to s 137 of the VEA or to the power of the Board, in the circumstances prevailing, to make each of the directions; nor have my own researches disclosed any. It was the joint position of the parties that the present was a test case which raised novel issues of general importance concerning the powers and procedures of the Secretary and of the Board. Recognising that and in response to a query by me, counsel for the Commission informed the Court that there would be no application for costs in the event that the application were dismissed.

38 Regard to s 137 of the VEA is reason enough for the opening exploration of the history of the administration of repatriation legislation, its unique provision in relation to the general administration of that legislation and to the inter-relationship between the Commission and the Secretary. It is also desirable to expand that historic survey so as to make some brief reference to the provision for the review on the merits of decisions of the Commission in relation to pensions and other entitlements of veterans and their dependants.

39 Provision for such review has existed ever since 1929 when, by an amendment to the Repatriation Act, made by the Australian Soldiers' Repatriation Act 1929 (Cth) (1929 Amendment Act), war pensions entitlement and assessment appeal tribunals were established. Before then, the Minister administering the Repatriation Act, The Honourable Sir Neville Howse VC, KCB, KCMG, FRCS, who was uniquely well qualified by training, experience and disposition for the task, had assumed the considerable burden of personally reviewing on request decisions of the Commission. However, by 1929, it had become obvious to the government that reliance on Ministerial conscientiousness could not continue and that its statutory foundation was moot: Lloyd and Rees, pp 235 - 236. The tribunals so established were replaced in 1979 by the Repatriation Review Tribunal: Keys Report, p 15 [4.2]. That tribunal was short-lived. The Repatriation Legislation Amendment Act 1984 (Cth), which repealed the previous Pt IIIA of the Repatriation Act, established the Board in place of the Repatriation Review Tribunal. The Board as so established was continued in existence by s 134 of the VEA. Since 1985, the Board has provided the first level of independent review of decisions of delegates of the Commission in individual cases. There is a further right of review by the Administrative Appeals Tribunal of decisions of the Commission which have been affirmed, varied or set aside by the Board: s 175, VEA.

40 The Board is comprised of members appointed by the Governor-General: s 158(1), VEA. It must at all times include in its membership "Services Members" drawn from lists submitted to the Minister by organisations representing veterans throughout Australia: s 158(3), VEA. Members enjoy, during their term of office and the continuance of the VEA in its current form or at all, tenure during good behaviour and mental capacity, being removable only by the Governor-General: s 164, VEA. The management of the business of the Board (s 142, VEA) and, assisted by the National Registrar, its administration (s 141A) is consigned by the VEA to the Principal Member. In the ordinary course of exercising its jurisdiction the Board must be constituted by three members, one of whom is a Services Member (ss 141(1), 141(1A), VEA) but there is scope for

the Board differently to be constituted for, for example, pre- review hearing directions hearings: ss 141(2), 148(4B), VEA. Where the Board is constituted by three Members, questions may be decided by majority: s 149, VEA.

41 The composition of the Board's membership is not coincidental. Rather, it reflects the heritage of the original composition of the War Pensions Entitlement Appeal Tribunals established by the amendment of the Repatriation Act by the 1929 Amendment Act. The requirement for a Services Member replicates Parliament's provision for such an entitlement appeal tribunal to have such members: see s 45A(4) of the Repatriation Act, inserted by the 1929 Amendment Act.

42 The Board also undertakes assessment review functions once the province of the separately constituted War Pension Assessment Appeal Tribunals, the membership of which, apart from a legally qualified Chairman, had to be drawn from the medical profession: s 45L, Repatriation Act. This notwithstanding, there is no express prescription in the VEA that the Board's membership include medical practitioners, although it can and in practice does. Further, the need for the Board to include persons with medical qualifications has been diminished by the highly prescriptive statement of principles regime (s 120A, VEA), which intrudes on whether a hypothesis connecting an injury suffered by a person, a disease contracted by a person or the death of a person with the circumstances of any particular service rendered by the person can be accepted as reasonable and, related to that regime, by the establishment of a Repatriation Medical Authority (Pt XIA, VEA) and a Specialist Medical Review Council (Pt XIB, VEA), the membership of which is drawn from the medical profession.

43 In *Curtney v Peters* (1990) 27 FCR 404, at 411 – 412, Lee J made this observation of the provisions of the VEA governing the review by the Board of decisions of the Commission, with which I respectfully agree:

[The] provisions of the Act display the intention of the legislature that reviews be conducted by the Board efficiently and with minimum cost to applicants. Formal requirements and technicalities are few, parties are represented by lay people with a view to speedy and cheap resolution of reviews.

I have no doubt on the evidence that the Board's Principal Member in listing the review for directions and in later corresponding with Mr Shafran, as well as those who constituted the Board for the purposes of the directions hearings, approached their duties not just in good faith (and no active party suggested otherwise) but with these same sentiments in mind. However, good intentions are no substitute for jurisdiction.

44 In *Repatriation Commission v Thompson* (2001) 107 FCR 235, at 245 [39], Emmett J paraphrased s 137 in this way in the course of summarising the provisions for the review of Commissions by the Board found in Pt IX of the VEA:

Under s 137(1) the Secretary must cause a report to be prepared referring to the evidence under the control of the Department that is relevant to the review. A copy of the report is to be served on the applicant. Under s 137(4) the Secretary must forward to the Board all the relevant documents, including any comments furnished to the Secretary by the applicant concerning the report.

His Honour's paraphrasing might be thought at odds with the submission made by the Commission as to s 137 conferring an ability to send "tranches" of documents to the Board's Principal Member. However, the meaning and effect of s 137 of the VEA was not at issue in that case. Truly, that subject has indeed hitherto been free from judicial authority.

45 As a matter of principle, the interpretation of s 137 of the VEA must commence with the text of the section, read in context and then having regard to subject matter, scope and purpose not just of the Act but of the section itself: *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*), at [69]; *R v A2* (2019) 93 ALJR 1106, at [32] – [37], per Kiefel CJ and Keane J, with whom Nettle and Gordon JJ generally agreed. The language of the presently material parts of ss 137(1), 137(3) and 137(4), is terse. A literal reading of s 137(3) would suggest that, providing an applicant makes a request within 28 days after the receipt of the Secretary's report, that applicant has whatever period he or she specifies in his or her extension request within which to make comments on that report. Even that literal reading would leave unanswered to whom that request had to be directed.

46 To construe s 137(3) of the VEA such that an applicant might have whatever period he or she requested would not only be at odds with the objective found in s 133A of the VEA, that a review by the Board be "quick" but also "fair" and the specification in s 148(9) that "A party to a review of a decision of the Commission, and any person representing such a party, must use their best endeavours to assist the Board to fulfil the objective in section 133A" but also with the relatively short period within which the Secretary must prepare a report (six weeks – s 137(1)), with the even shorter period (28 days after receipt – s 137(3)) within which an applicant is *prima facie* allowed to make comments in respect of that report and with the "as soon as practicable" specifications in s 137(4). It would also be at odds with the stipulation that any request for a longer period must be made within that 28 day period, there being no provision for the extension of the request period. Overall, there is a discernible purpose that reasonable expedition will attend the provision for the independent review function consigned to the Board and the related, anterior report preparation, comment and relevant document forwarding steps.

47 It might be said that an applicant would know best how much longer he or she needed within which to make comments but, even so, an unrestricted ability, on a literal reading of s 137(3), just to nominate any period in a request would admit of absurd results, of which the present might well be one. In fairness to Mr Shafran, having regard to the correspondence in the Court Book and his submissions, there is reason to think that he has an abiding and genuine concern about the legality of a Practice Direction which the Board has issued in relation to s 137 of the VEA. The actions of both the Secretary and the Board do seem to have been informed by this Practice Direction. So his specification of ten years may well have been to generate circumstances for a

test case.

48 There is an alternative construction of s 137(3) open, which requires the provision to be read as if it contained words which are not there. This can be a permissible consequence of a reading of the words Parliament has chosen, as Spigelman CJ explained in *R v Young* (1999) 46 NSWLR 681, at [6]:

In order to construe the words actually used by parliament, it is sometimes necessary to give them an effect as if they contained additional words. This is not, however, to introduce words into the Act. This involves the construction of the words actually used. Judicial statements which appear to have been prepared to countenance something more than this, should be so understood.

49 Adopting this approach to construction of the text of s 137(3) does not just lead to a conclusion that the period requested by the applicant must be a reasonable one but also, by necessary implication, that the request must be directed to the Secretary. That is because, by s 137(4), it is the Secretary, not the Commission, who is charged with forwarding the "relevant documents", which at least comprise her report and may additionally include an applicant's comments (if made within time) and any supplementary report, to the Principal Member. For like reasons, another necessary implication from the language of s 137(3) and s 137(4) is that the Secretary has power to grant or to refuse such a request. To adopt such a construction, as opposed to the literal, avoids absurdity and advances the discernible purpose. It is therefore to be preferred to a literal construction: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, at 305, per Gibbs CJ, at 310-311, per Stephen J and, at 319-320, per Mason and Wilson JJ; *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551, at [52].

50 For these reasons, I construe s 137(3) of the VEA such that an applicant may, within 28 days of the receipt of the Secretary's report, request a reasonable extension of the period for comment and the Secretary is empowered to grant any such request.

51 What is a reasonable extension period would not just inherently be dependent upon the circumstances of a given case. Its duration would also have to be informed by the fact that a review application has been lodged, by all of the objects (s 133A, VEA) which attend provision for review by the Board, of which quickness is but one, that the receipt by the Board's Principal Member of the relevant documents is, as further discussed below, a condition precedent to the exercise by the Board of certain procedural powers specified in s 148, and that, in the exercise of those procedural powers, once engaged, the Board is empowered, for cause, to defer the fixing of a hearing date until the parties are ready to proceed (s 148(3), VEA). Further, the statutory provision for the Secretary to forward the relevant documents, including the applicant's comments, to the Board's Principal Member is not, when the Principal Member's managerial responsibilities are recalled, happenstance. Parliament evidently intended that the Principal Member have the benefit, in her management of the Board's business, of some understanding, at the earliest possible stage, arising from the "relevant documents", of the issues likely to arise in a particular case and, insofar as it might also be revealed by an applicant's comments, when part of

the "relevant documents", something of the animus and personality of the applicant. Such information can be of great value in determining, having regard to Member availability and background, who ought to be assigned to directions hearing duties and how the Board might need to be constituted for the purposes of a hearing. So, within the limits of reasonableness, there is benefit not just to an applicant but to the Commission as the other party to the review and to the Board in an extension of time for the making of comments by an applicant, if requested.

52 It follows from this construction of s 137(3) of the VEA that the Board has no role whatsoever to play in relation to the granting of an extension of time within which to make comments on the Secretary's report.

53 Another reason why that is so flows from reading s 137(4) in conjunction with s 148(1) of the VEA. Read together, it is tolerably clear that Parliament intended that the condition precedent to the exercise of the various procedural powers conferred by s 148 is not the making of a review application per se but rather the consequential receipt by the Board's Principal Member from the Secretary of the "relevant documents". The provision by the Secretary of the "relevant documents" to the Principal Member is a self-contained, anterior stage.

54 It is necessary to read the reference to "relevant documents" in s 148(1) in conjunction with the Secretary's obligation, found in s 137(4), to forward relevant documents to the Principal Member. What comprises the "relevant documents" will, as ss 137(4)(a), 137(4)(b) and 137(4)(c) envisage, depend on whether, apart from the Secretary's report, an applicant has made comments and the Secretary has made a further investigation yielding a supplementary report.

55 This does not mean that the Board is completely without powers prior to the receipt by the Principal Member of the "relevant documents". The exercise of the Board's alternative dispute resolution powers, found in Div 4A of Pt IX of the VEA, especially the powers of the Principal Member found in s 145A, are not conditioned upon the receipt by the Principal Member of the "relevant documents", although the Principal Member might, in a given case, choose not to exercise those powers until those documents were received.

56 Contrary to the Commission's submission, the text of s 137(4) does not admit of a staged dispatch to the Principal Member by the Secretary of the "relevant documents". In my view, Parliament has deliberately made an inclusive reference in the chapeau to s 137(4) of the VEA to any comments by an applicant on the Secretary's report for the avoidance of any premature dispatch to the Principal Member by the Secretary of her report. Mr Shafran's point as to a procedural fairness purpose underpinning the provision for an applicant's comments in s 137(3) is sound, although, as I have already indicated, it is possible to discern a separate but not unrelated purpose of assistance in the Principal Member's Board business managerial function, too. Certainly, the provision for the making of such comments is no mere formality.

57 This construction is also supported by the reference to the forwarding to the Principal Member by the Secretary, as part of the "relevant documents", of a supplementary report containing evidence gathered in any further investigation conducted by the Secretary as a result

of an applicant's comments. The text of s 137(4) indicates that Parliament's intention was that there would be but one forwarding to the Principal Member of the "relevant documents". More particularly, this construction flows from the language of ss 137(4)(a), 137(4)(b) and 137(4)(c) in specifying, exhaustively, as to from when the Secretary's obligation to forward "as soon as practicable" arises. These obligations must be read in a distributive way, but not one of them contemplates that the Secretary will forward anything to the Principal Member prior to the expiration of the period (or extended period) for an applicant's comments or, if comments are made, the receipt of those comments or, if a further investigation is conducted, the completion of that investigation and the consequential preparation of a supplementary report by the Secretary.

58 What occurred in this case was in conformity with the Board's Practice Direction but that Practice Direction is not, for the reasons given, in conformity with the VEA. Further and with respect, it is the Commission, in accordance with its function of the general administration of the VEA, which has the responsibility of giving policy guidance and direction to the Secretary as to how she and her officers within the DVA must go about discharging the Secretary's responsibilities under s 137.

59 There is express provision, found in s 137A of the VEA, for the later forwarding of documents to the Board. However, as s 137A(b)(i) indicates, this is the responsibility of a party to the review, of which the Secretary is not one. Rather, as part of her express and historic responsibility of administratively supporting the Commission in the discharge of its functions, one might expect, as and when other documents of relevance came into her possession, that the Secretary, on behalf of the Commission, would forward these to the Board.

60 It follows that the forwarding by the Secretary to the Principal Member of her report on 8 November 2018 was premature. On any view, the Secretary at least had to wait until the expiration of the time limited for the making of comments before forwarding her report to the Principal Member. Even that period had yet to expire at the time when the Board made its directions on 5 December 2018.

61 In turn, it follows from this that, on any view, the Board's listing of the case was premature and its various directions of 5 December 2018 were, in terms of the qualification in s 148(4B) of the VEA of the Board's power to give directions, inconsistent with s 148(1), because the case was listed and those directions were made prior to the expiration of the period for the forwarding of the "relevant documents" to the Principal Member.

62 In *Project Blue Sky*, at 389-391 [92] - [93], a cautionary note was sounded as to the classification of statutory requirements as mandatory or directory. Yet, as Gageler and Keane JJ stated in *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, at 33 [25], with particular reference to reasons given by Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 (S157), at 489 [21]:

there remains utility in maintaining the traditional terminological distinction between an "imperative" (or "mandatory") duty on the one hand, and a "directory" duty on the other hand, for the purpose of describing whether or not a material breach of an antecedent statutory duty results in an invalid exercise of a decision-making power.

What Gleeson CJ had stated in S157 was:

To describe a duty as imperative, or a restraint as inviolable, is to express the result of a process of construction, rather than a reason for adopting a particular construction; but it explains the nature of the judgment to be made.

63 The caveat, s 148(1) caveat, "upon receipt of the relevant documents relating to a review" and the qualification, "not inconsistent with subsections (1), (2), (3) and (4)" found not just in s 148(4B) but twice in s 148(5) and again in s 148(6) are indicative of a Parliamentary intent as to when and then which procedural powers of the Board are enlivened after a review application is made. The receipt by the Principal Member of the relevant documents, not the lodgement of the application, is the initiator for the giving of notice under s 148(1) by the Principal Member "requesting the party to inform the Principal Member, in writing, within a reasonable time specified in the notice, whether the party wishes to appear on the hearing of the review and, if the party wishes so to appear, whether the party intends to appear on the hearing personally or by another person under section 147". In context, the repetition of "not inconsistent with subsections (1), (2), (3) and (4)" strongly suggests that Parliament regarded the prescriptions in subs (1), (2), (3) and (4) as of fundamental importance in relation to the progress of an application for review by the Board after the lodgement of an application in accordance with s 136. In its provision for an applicant to make comments on the Secretary's report and for these, if given, to form part of the relevant documents, Parliament's self-evident intention is that an applicant have the opportunity before any progression of a case towards hearing to add his or her perspective. The importance of this is not to be minimised.

64 The whole history of the Australian system of "repatriation", once the immediate demands and ad hoc, reactive responses of the period of the First World War had passed, has been that a veteran and his (or her) dependants can have confidence that there would be opportunity for the offering of a veteran's perspective throughout the administration of the relevant legislation. That explains why, from the moment of its establishment (s 8(2), Repatriation Act) and to this day (s 182(4), VEA) the Commission's membership has had to include at least one member drawn from persons nominated by the veterans' community. It explains why, subject always to a responsible Minister, the general administration of the relevant legislation has always been consigned not to a Secretary but to that Commission. It explains why, from the inception of external merits review of the Commission's decisions in 1929 to the era of the Board, the review body has had to include a person drawn from nominees of that same community. It also explains why there is provision for an applicant to make comments on the Secretary's report. Parliament's intention is that the perspective of a veteran will be brought to bear at the highest level of administration, in external merits review of an individual case by the Board and in the individual veteran's or his or her dependants' case before that review progresses. Viewed in this context, the qualification found in

s 148(4B) is truly an inviolate one.

65 The Australian understanding of "repatriation" from its earliest days has been that of a societal bargain for military service, encapsulated during the First World War by the then Prime Minister, the Right Honourable William Morris (Billy) Hughes KC, MP in this way (Lloyd and Rees, p 69):

We say that the care of the returned soldier is one of the functions of the Commonwealth Government. Our soldiers fight not for Queensland, New South Wales, or Tasmania, but for Australia. They are enlisted under the Commonwealth banner. They go out to fight our battles. We say to them: 'When you come back we will look after you' ... The soldiers will say to the Commonwealth Government: 'You made us a promise. We look to you to carry it out.'

The notion of legislative provision for "repatriation" being part of a societal bargain for military service was repeated by the then Minister, the Honourable Clyde Holding MP in his Second Reading speech with respect to the Bill which became the VEA: "Let me say at the outset that this Government fully acknowledges its continuing responsibility to the veteran community." (Commonwealth Parliamentary Debates, HoR, 16 October 1985, p 2178). The express provision at various levels for veteran input either at the general administrative level, the review level or the individual case level are essential features of the societal bargain presently represented, on the Commonwealth government side, by the VEA. The very name of the VEA underscores that. It is beneficial legislation but it is not just welfare legislation. The VEA provides entitlements for the service of veterans.

66 What follows from the foregoing is that, on any view, the Board's hearing on 5 December 2018 was an unlawful act. Further, s 137(3) of the VEA did not authorise the Board to direct Mr Shafran on 2 July 2019 to make in writing any comments he wished concerning the s 137 report by close of business of 30 July 2019. Neither did the VEA authorise the making of the Board's consequential "s 137(4)" direction. Indeed, it was a misconception for the Board to describe that report as one provided by the respondent Commission. It was provided by the Secretary, albeit prematurely.

67 It does not necessary follow from this that the Board's other directions of 2 July 2019, that the application is to proceed to a Board hearing, were unlawful.

68 There is merit in the Commission's submission that the Secretary's approval of the ten year extension period requested by Mr Shafran was invalid. There is no incongruity in the Commission's calling into question the legality of an act taken by the Secretary. Indeed, given that, subject to the Minister, it is the Commission, not the Secretary, which has the general administration of the VEA, it is not just within the remit of the Commission but its duty to question the acts of the Secretary if so advised. In its role as contradictor, it was perfectly appropriate for the Commission to submit that a reason why prohibition should not issue was that the approval was invalid. As it happens, the reason for the invalidity assigned by the Commission namely, that it was for the Board to grant an extension, was misconceived. For reasons given above, the Secretary was empowered to grant Mr Shafran an extension, but only for a reasonable period.

69 Properly construed, the VEA did not oblige the Secretary to grant Mr Shafran an extension of whatever length he sought in order to make his comments on the Secretary's report. It is difficult to see how a ten year extension could ever be regarded as reasonable given that one evident object of review by the Board is expedition. Mr Shafran certainly offered nothing to the Secretary either in his initial request or in any subsequent correspondence relating thereto which provided material upon the basis of which the Secretary might reasonably conclude that there were circumstances of such singularity as warranted the granting of an extension period of this length. At the hearing, he pointed to no such circumstances in his submissions.

70 In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, at 364 [68], Hayne, Kiefel and Bell JJ, referring to Lord Greene MR's formulation of unreasonableness in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, at 230, observed:

Wednesbury is not the starting point for the standard of reasonableness, nor should it be considered the end point. The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*.

The Secretary gave no reasons in the letter sent by the DVA to Mr Shafran approving his request for a ten year extension. But the approval was, with respect, bizarre. Even on the most stringent conception of unreasonableness, the Secretary exercised her power to grant an extension in a way which was unreasonable.

71 The position which prevailed as at the time when the Board conducted the directions hearing on 2 July 2019 was therefore that, by then:

- (a) The Secretary had forwarded to the Principal Member her report.
- (b) Mr Shafran had made no comments in respect of that report within the 28 day period following his receipt of it.
- (c) Mr Shafran had requested, within the 28 day period, the Secretary's approval of a ten year extension of the comment period.
- (d) The Secretary had purported to approve that request.
- (e) The approval was an unreasonable exercise of the approval power and thus an invalid administrative act.

72 In my view, the conclusion to be drawn from this is that, by 2 July 2019, the Secretary had forwarded to the Principal Member the "relevant documents". In the events that had by then transpired, the meaning and application of the VEA was that the "relevant documents" comprised only the Secretary's report. Mr Shafran had made no comments in respect of that report within the 28 day period and the approval of his request for an extension of that period was an invalid act.

73 In *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 (Bhardwaj), Gaudron and Gummow JJ, with whom McHugh J concurred, stated:

- at p 613, [46]:

In our view, it is neither necessary nor helpful to describe erroneous administrative decisions as "void", "voidable", "invalid", "vitiating" or, even, as "nullities". To categorise decisions in that way tends to ignore the fact that the real issue is whether the rights and liabilities of the individual to whom the decision relates are as specified in that decision. And, perhaps more importantly, it overlooks the fact that an administrative decision has only such force and effect as is given to it by the law pursuant to which it was made.

- and at pp 614-615, [51]:

There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded in law as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged.

[Footnote reference omitted]

74 The Secretary's approval decision of 1 July 2019 entailed a jurisdictional error. It was, in law, "no decision at all": Bhardwaj, at 616 [53].

75 What follows from this is that, the Board was on 2 July 2019 empowered to make a direction under s 148(4B) of the VEA that the application proceed to hearing, because the Principal Member by then being in possession of what, in the circumstances, constituted the "relevant documents" no inconsistency with s 148(1) existed.

76 Is then Mr Shafran entitled to any relief by way of prohibition?

77 For the reasons given, the Board's direction of 2 July 2019 that the application proceed to hearing was lawful. The Board cannot be prohibited from taking a lawful course of action.

78 But what of the unlawful direction, also made on 2 July 2019, which purported, under s 137(3) of the VEA, to require Mr Shafran to make any comments on the Secretary's report by 30 July 2019 and its consequential, further, purported direction under s 137(4)? There is no evidence that the Board has warned him that, if he makes no comments by then his review application will be dismissed for non-compliance with that direction. Nor, even were the directions themselves lawful, could there be any lawful dismissal for non-compliance, because he was not obliged to make any comments, only given until then to make such comments as he wished.

79 As to the remedy of prohibition, Aronson, Groves and Weeks correctly state in *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017), at p 848:

Prohibition can issue to prevent further action being taken to the extent that it would be based on a nullity. It can also be used to prevent the decision-maker committing that nullity.

80 In *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185, at 194, Gibbs CJ stated:

If ... a clear case of want or excess of jurisdiction has been made out, and the prosecutor is a party aggrieved, the writ [of prohibition] will issue almost as of right, although the court retains its discretion to refuse relief if in all the circumstances that seems the proper course.

That statement was expressly approved and adopted by Gaudron and Gummow JJ (with whom Gleeson CJ agreed), and Kirby J in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, at 106 [51], and 137 [149], respectively.

81 There is no evidence of any further action which is proposed to be taken either by the Board or the Commission on the strength of the Board's invalid direction in relation to the making of comments by 30 July 2019. There is therefore no reason to grant prohibition. However, the Board obviously saw it of importance, as a matter of fairness, that Mr Shafran be afforded an opportunity to make comments about the report if he wished before any hearing. While the time for his making comments under s 137(3) had passed, the Board did, by 2 July 2019, have power under s 148(4B) of the VEA to give a procedural direction, to be followed in connection with the review, which would allow him to make such comments as he wished within a time fixed by the Board. The course of judicial proceedings has intruded both on the time which the Board had in mind and the progress of the review application towards hearing. While Mr Shafran is not entitled to prohibition against the Board, there would, in my view, be utility in the making of a declaration as to the invalidity of the directions hearing of 5 December 2018 and the particular directions on 2 July 2019 about the making of comments. It necessarily follows that the Board is not prevented by the invalidity of these particular 2 July 2019, "s 137" directions from making a direction under s 148(4B) of the VEA that Mr Shafran make such comments as he may be advised in relation to the Secretary's report within a time limited by the Board and prior to the hearing.

82 There will be orders accordingly.

I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 8 November 2019

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2019/2019fca1833>

CASE PAGE <https://chat.esheria.ai/case-law/australia/shafran-v-repatriation-commission-2019-fca-1833-2019>

Prepared on 26 October 2026 · Esheria