IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-551
[2023] NZHC 1897

UNDER	section 239 of the Veterans' Support Act 2014
BETWEEN	THE GENERAL MANAGER OF VETERANS' AFFAIRS NEW ZEALAND Appellant
AND	THE ESTATE OF LIEUTENANT COLONEL TĀ HARAWIRA GARDINER KNZM Respondent

Hearing:	27 March 2023
Appearances:	A B Goosen and T L Lamb for Appellant R L Roff and S W H Fletcher Counsel Assisting
Judgment:	20 July 2023

JUDGMENT OF McQUEEN J

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[1] This is an appeal on a question of law pursuant to s 239 of the Veterans' Support Act 2014 (the Act), against a decision of the Veterans' Entitlements Appeal Board (the Appeal Board).

[2] The General Manager of Veterans' Affairs New Zealand (the GMVA) appeals on the ground that the majority of the Appeal Board erred in law in concluding that the late Lieutenant Colonel Tā Harawira Gardiner's claim for glioblastoma must be treated as a service-related condition under the Act.

[3] I acknowledge the passing of Tā Harawira, a rangatira who gave a lifetime of service to Aotearoa New Zealand.[1]

[4] This is an appeal that is effectively unopposed. Major Ross Himona, a long-time friend and colleague of Tā Harawira, and the Hon Hekia Parata, Tā Harawira's widow, as representative and executor respectively of Tā Harawira's estate, advised the Court that the estate did not wish to defend a decision made on the basis of an argument the estate did not raise, in a claim that was intended to be representative of all veterans. Accordingly, Ms Roff has been appointed as counsel assisting, to act as contradictor to the arguments of the GMVA.[2] Ms Roff has provided submissions which contradict the GMVA's' position on the law, but only to the extent appropriate to assist the Court. I thank Ms Roff for her assistance in this matter.

[5] For the reasons below, I consider that the appeal should be allowed, although not on the grounds advanced by the GMVA. In light of my findings, I direct the Appeal Board to consider again Tā Harawira's application for a disablement pension.

Background

Factual background

[6] The late Lieutenant Colonel Tā Harawira Gardiner served in the New Zealand Army between 11 January 1963 and 12 July 1983. Tā Harawira had "qualifying routine service" from 11 January 1963 to 3 June 1969 and from 9 May 1970 to 31 March 1974 and "qualifying operational service" in Vietnam from 4 June 1969 to 8 May 1970.[3]

[7] Tā Harawira was diagnosed with glioblastoma on 28 July 2021. That is a condition that has been previously experienced by veterans who served in Vietnam, and were exposed to Agent Orange, a chemical herbicide used during the Vietnam War. On 3 September 2021, Tā Harawira applied for a disablement pension pursuant

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1 See Eulogy for Sir Harawira Tiri Gardiner – Tā Wira – (Te Kawa Mataaho | Public Service Commission dated 16 November 2022) < Eulogy for Sir Harawira Tiri Gardiner – Tā Wira - Te Kawa Mataaho Public Service Commission>.

2 Minute of Palmer J dated 10 October 2022.

3 The terms "qualifying routine service" and "qualifying operational service" are defined in s 8 of the Act.

to s 47(1) of the Act, which provides that a veteran who suffers disablement as a consequence of a service-related injury or illness is entitled to a disablement pension.

[8] On 20 September 2021, Veterans' Affairs New Zealand (VANZ), through its Decision Officer, declined to accept the claim for glioblastoma as a service-related condition. On 5 January 2022, Tā Harawira sought a review of that decision.

[9] On 4 February 2022, the Review Officer upheld the Decision Officer's decision and declined to accept glioblastoma as a service-related condition on the grounds that:

(a) Tā Harawira was not diagnosed during his operational service;

(b) glioblastoma is not a presumptive condition for Vietnam; and

(c) no factor in the relevant Statement of Principles "Malignant Neoplasm of the Brain (Reasonable Hypothesis) No. 85 of 2016" (SOP 85/2016) was met.

[10] The estate of Tā Harawira filed an appeal against that decision dated 23 February 2023.

[11] On 11 April 2022, the Appeal Board conducted a preliminary hearing to determine:

(a) whether or not the review was properly conducted;

(b) whether or not the review was in breach of s 220(2) of the Act; and

(c) whether or not the Review Officer's decision should be revoked.

[12] On 27 April 2022, the Appeal Board:

(a) found that the Review Officer breached s 220(2) of the Act because he had previous involvement with the claim before being appointed Review Officer, and therefore lacked jurisdiction to conduct the review;

(b) found the effect of the breach was the Review Officer's decision was a nullity;

(c) revoked the decision under s 237(1)(c) of the Act; and

(d) directed that the appeal be set down for a substantive hearing before the Appeal Board.

[13] That hearing took place on 17 June 2022, with the Appeal Board's decision issued on 14 July 2022. It is this decision that the GMVA appeals against.

The relevant law

The Act's legislative history

[14] The Act was enacted in 2014. It replaced the War Pensions Act 1954. The Act's purpose is to provide for:[4]

(a) the rehabilitation of and support for veterans who, as a result of being placed in harm's way in the service of New Zealand, have been injured or become ill; and

(b) entitlements for eligible veterans who suffer service-related injuries or illnesses; and

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4 Veterans' Support Act 2014, s 3(1). Section 3(2) goes on to specify that the purpose of pt 2 of the Act is to promote positive veteran and claimant interaction with Veterans' Affairs New Zealand through the development and operation of a Code of Veterans' and Other Claimants' Rights.

(c) entitlements and support for eligible spouses, partners, children, and dependants of veterans with service-related injuries or illnesses and for other persons who provide non-professional support to those veterans.

[15] The main impetus for the Act's passage was the need to replace the War Pensions Act, which was designed for the needs of veterans of the Second World War.[5] The War Pensions Act did not reflect modern understandings of psychological and environmental trauma. Nor had it been amended to reflect the introduction of the accident compensation scheme in 1974. The Act was intended to give effect to the recommendations of Te Aka Matua o te Ture o Aotearoa | Law Commission (the Law Commission) in its report *A New Support Scheme for Veterans: A Report on the Review of the War Pensions Act 1954*.[6]

[16] The principles and decision-making presumptions of the War Pensions Act were not to be different in the Act.[7] This was emphasised by the responsible Minister when the Veterans' Support Bill was introduced.[8] This thread was also present in the Law Commission's report. That report provided that the legislation replacing the War Pensions Act should be guided by the following principles:[9]

> **Community responsibility** – Veterans put themselves in harm's way during service on behalf of the nation. The community therefore has a reciprocal responsibility to look after veterans and their families if they are injured or killed. This is an enduring obligation.
>
> **Fair entitlements** – A fair entitlement scheme should provide for greater entitlements than are available to other New Zealanders, and include:
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> - Compensatory payments for the effects on a veteran's quality of life caused by injury or disease attributable to service;
> - Income support or replacement where a veteran's injury or disease affects his or her ability to earn money by working;
> - Rehabilitation services, including medical support and services and support based on a veteran's needs; and

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5 Veterans' Support Bill 2013 (158–1) (explanatory note) at 1.
6 Te Aka Matua o te Ture o Aotearoa | Law Commission *A New Support Scheme for Veterans: A Report on the Review of the War Pensions Act 1954* (NZLC R115, 2010).
7 Veterans' Support Bill 2013 (158–1) (explanatory note) at 2.
8 (22 October 2013) 694 NZPD 14102.
9 See Law Commission, above n 6, at [1.3].

- Compensation and income support payments to eligible family members upon the death or serious impairment of a veteran.

Equality – There should be equal treatment of equal claims. Decision-making criteria should be clear.

Benevolent approach to claims – In considering veterans' claims for entitlements, beneficial evidential provisions should be applied to veterans.

Administrative efficiency – The scheme should be as simple as possible and should aim to minimise delays. It should not replicate existing structures.

Affordability – The scheme should be affordable in terms of the community's expectations and priorities. This concept should encompass sustainability and resource efficiency.

Claims, reviews and appeals under the Act

[17] Section 47 of the Act provides that a veteran who suffers a disablement as a consequence of a service-related injury or illness is entitled to a disablement pension. This is one of the entitlements available under the Act. Section 7 of the Act provides a definition of "veteran". There is no dispute in this case that Tā Harawira was a veteran as defined. Section 48 of the Act provides for veterans to apply to VANZ for a disablement pension. 'Service-related' is defined in s 7 as "in relation to an injury, an illness, a condition, or a whole-person impairment, means an injury, an illness, or a whole-person impairment caused by, contributed to by, or aggravated by qualifying service".[10]

[18] The entitlements for which a veteran may be eligible depends on their service. "Qualifying operational service" means service on any deployment treated as a war or emergency for the purposes of the War Pensions Act, or service on any deployment declared to be operational service under s 9 of the Act.[11] "Qualifying routine service" means service in the armed forces before 1 April 1974 that is not qualifying operational service.[12] "Qualifying service" means qualifying operational service or qualifying routine service.[13]

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10 See Veterans' Support Act 2014, s 7, which also defines "service-related death".
11 Section 8(2).
12 Section 8(2).
13 Section 8(2).

[19] Operational service relates to a deployment which the Minister is satisfied poses a significant risk of harm to the members deployed, and is declared as such by the Minister.[14] The Chief of Defence Force advises the Minister for the purpose of making such decisions.[15]

[20] Section 215 of the Act permits a veteran or other claimant to apply for a review of a decision by VANZ. A review officer may conduct such a review.[16] A review officer must decide the review on the basis of the substantive merits under the Act.[17] Section 220(2) prohibits a review officer from conducting a review if they have had any previous involvement with the claim. Section 228 permits a review decision to be appealed to the Appeal Board. Such an appeal is "a *de novo* appeal".[18] Section 229(5) requires the Appeal Board to comply with the principles of natural justice, the principles specified in s 10(b), any other relevant provisions of the Act, and any regulations made under s 265 of the Act. A determination of the Appeal Board may be appealed to the High Court only on a question of law, pursuant to s 239.

Approach to deciding claims under the Act

[21] Section 10 of the Act provides principles for how functions are to be performed and how powers are to be exercised under the Act. It is a provision that accords with the principles preferred by the Law Commission, as noted above, by providing:[19]

> Every person who performs any function or exercises any power under this Act must do so—
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> (a) in acknowledgement, on behalf of the community, of the responsibility for the injury, illness, or death of veterans as a result of them being placed in harm's way in the service of New Zealand; and
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> (b) in accordance with the following principles:
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> (i) the principle of providing fair entitlements to veterans and other claimants:
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> (ii) the principle of promoting equal treatment of equal claims:

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14 Section 9(3).
15 Section 9(1).
16 Veterans' Support Act 2014, s 219.
17 Section 220(3)(a).
18 Section 229(1).
19 Section 10.

(iii) the principle of taking a benevolent approach to claims:

(iv) the principle of determining claims—

A. in accordance with substantial justice and the merits of the claim; and

B. not in accordance with any technicalities, legal forms, or legal rules of evidence.

[22] Section 12 provides that VANZ must perform its functions and exercise its powers on reasonable grounds and in a timely manner, having regard to the requirements of the Act, the nature of the function or power and all the circumstances.

[23] Sections 14 and 15 set out a sequential process for how claims to entitlements are to be decided under the Act. This may be summarised as follows:

(a) The first step is to consider all of the relevant available material and decide whether the material is consistent with a hypothesis that the veteran's injury, illness, or death was service-related.[20]

(b) If the relevant available material is consistent with such a hypothesis, the second step is to decide whether there is a 'statement of principles'[21] that applies.[22] If there is no applicable statement of principles, then s 15 applies.[23]

(c) If there is a statement of principles that applies, the third step is to decide whether the hypothesis is consistent with the statement of principles.[24]

(d) If the hypothesis is consistent with the statement of principles, the fourth step is to accept the claim, unless there are reasonable grounds

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20 Veterans' Support Act 2014, s 14(2).

21 Section 14(7). In ss 14 and 15, a 'statement of principles' means a statement of principles that, under ss 22(6) and regulations made under s 265, applies for the purposes of the Act.

22 Section 14(3).

23 Section 14(4).

24 Section 14(5).

for believing that the veteran's injury, illness, or death was not service-related.[25]

(e) In circumstances where there is no applicable statement of principles, the person deciding whether to accept the claim must decide whether the claim is consistent with a hypothesis that is reasonable.[26] A hypothesis is reasonable if it is more than a possibility, consistent with known facts, and not inconsistent with proved or known scientific facts.[27]

(f) If the claim is consistent with a hypothesis that is reasonable, then the claim must be accepted, unless there are reasonable grounds for believing that the veteran's injury, illness, or death was not service-related.[28]

[24] Section 16 provides that the process set out in ss 14 and 15 applies to the extent that it is not modified or overtaken by the presumptions contained in ss 17 to 21, or the provisions of s 28. For present purposes, only s 21 is relevant. Section 21 provides that regulations made on the recommendation of the Minister under s 265 may specify injuries, illnesses, and conditions that must be treated as service-related if a veteran has been exposed to specific events, served in a specific place, or served over a particular time period, during qualifying operational service.

[25] Relevant to the present case, therefore, is reg 13 of the Veterans' Support Regulations 2014 (the Regulations), which applies to a veteran who served in Vietnam:[29]

(a) at any time during the period beginning on 29 May 1964 and ending on the close of 31 December 1972; or

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25 Section 14(6).
26 Section 15(2).
27 Section 15(4).
28 Veterans' Support Act 2014, s 15(3).
29 Veterans' Support Regulations 2014, reg 13(1).

(b) with 41 Squadron RNZAF at any time during the period beginning on 1 January 1973 and ending on the close of 21 April 1975; or

(c) as a member of the civilian surgical team at Qui Nhon Provincial State Hospital, Binh Dinh province at any time during the period beginning on 1 December 1963 and ending on the close of 31 March 1975.

[26] Tā Harawira was a veteran to whom reg 13 applied, as he had qualifying operational service in Vietnam from 4 June 1969 to 8 May 1970. Regulation 13(2) provides that if a veteran to whom reg 13 applies suffers from an illness or condition described in reg 13(3), the illness or condition must be treated as service-related. However, glioblastoma does not appear in the list of illnesses and conditions contained in reg 13(3).

Statements of principles under the Act

[27] Statements of Principle (SOPs) are an important part of decision-making under the Act. SOPs are used in the assessment of whether a claimed condition can be attributed to a person's qualifying service. The Act expressly draws on SOPs already made by the Australian Repatriation Medical Authority, under the Veterans' Entitlements Act 1986 (Cth).

[28] The application of these SOPs in New Zealand is determined by the Minister through the making of regulations pursuant to s 265.[30] The scheme relating to SOPs envisages the Minister adopting the approach taken by the Australian Repatriation Medical Authority in most circumstances, emphasised by the direction that "as soon as practicable", a new or revoked SOP should be reviewed and a report provided to the Minister so they may decide whether to apply or revoke a SOP.[31]

[29] The Regulations also provide for the applicable statement of principles. Regulation 15 states that the SOPs contained in sch 1 of the Regulations apply for the purposes of the Act. Regulation 15(2) requires that the version of the SOP referred to in sch 1 in the column headed "Reasonable hypothesis" is to be applied if a veteran's

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30 Veterans' Support Act 2014, s 22(6).
31 Sections 22 and 23.

service-related injury, illness, condition, whole-person impairment, or death relates to "qualifying operational service".

[30] The relevant SOP in the present case is SOP 85/2016. Clause 9 of SOP 85/2016 states:

> **9 Factors that must exist**
>
> At least one of the following factors must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting malignant neoplasm of the brain or death from malignant neoplasm of the brain with the circumstances of a person's relevant service:
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> (1) having received a cumulative equivalent dose of at least 0.1 sievert of ionising radiation to the brain at least two years before the clinical onset of malignant neoplasm of the brain;
>
> (2) being infected with human immunodeficiency virus before the clinical onset of malignant neoplasm of the brain;
>
> (3) inability to obtain appropriate clinical management for malignant neoplasm of the brain.

[31] It is common ground that Tā Harawira's medical condition, glioblastoma, is a form of malignant neoplasm of the brain, but that none of the factors specified in cl 9 applied to Tā Harawira.

The Kenyon decision

[32] Of some importance in the present case is the effect of a decision of the War Pensions Appeal Board (the WPAB), the Appeal Board's equivalent under the War Pensions Act.[32] It is convenient to discuss it at this point.

[33] This decision concerned William Kenyon, who appealed against a decision of the National Review Officer dated 9 September 2013 on the ground that his disabilities of glioblastoma and pulmonary embolism were attributable to or aggravated by his service. Mr Kenyon was a veteran who, like Tā Harawira, had served in Vietnam and had experienced exposure to Agent Orange. Mr Kenyon's claim was initially denied for want of evidence that his illnesses were attributable to his service.

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32 *Kenyon* War Appeal 7, 19 December 2013.

[34] Section 17(3) of the War Pensions Act entitled an applicant to produce any evidence (whether strictly legal or not) to show that the condition that resulted in their disablement was possibly or probably attributable to or aggravated by their service with the forces in connection with any war or emergency. Section 17(3) further provided that if any reasonable evidence to that effect is produced by that applicant, a presumption that that condition was in fact attributable to or aggravated by their service was established. Thereafter, that presumption could be rebutted only by evidence that satisfied the WPAB that the condition was not so attributable or aggravated but was due entirely to other causes. This is a similar analysis to the procedure established by s 15 of the Act.

[35] The issue before the WPAB was whether there was reasonable evidence to show that Mr Kenyon's conditions were possibly or probably attributable to his service. The WPAB concluded that there was such reasonable evidence, and therefore allowed Mr Kenyon's appeal, notwithstanding that the presumptive lists for service in Vietnam (the equivalent of reg 13) did not include glioblastoma or pulmonary embolism. The evidence relied upon by the WPAB included that:

(a) Mr Kenyon had never smoked, and there was no family history of his condition;

(b) he had been exposed to Agent Orange during his service in Vietnam, and to the best of his knowledge had never been exposed to any other radiation or toxins, other than for his treatment;

(c) his service was in connection with a war or emergency; and

(d) medical evidence provided that Mr Kenyon's condition was the same as that suffered by American veterans who had served in Vietnam, as referred to in two United States cases cited to the WPAB.

The Appeal Board decision under appeal

[36] The Appeal Board for the hearing of Tā Harawira's appeal comprised three members.[33] Ms Anderson was the chairperson, while Mr Griggs and Dr Holdaway were the other two members. The Appeal Board reached its decision by majority, with Ms Anderson dissenting. All three members approached the appeal differently. I summarise their reasoning below.

[37] The submissions presented in support of the appeal raised several arguments. The first was that Tā Harawira's claim was lodged through s 35 of the Legislation Act 2019 rather than under the Act. Reliance was also placed on the *Kenyon* decision, the United States and Australian contexts, the application of the reasonable hypothesis approach, and the principle of benevolence.

[38] VANZ opposed the appeal on all grounds.

Ms Anderson's reasons

[39] Ms Anderson considered that Tā Harawira's claim had been made under the Act and that the claim was to be determined under the Act, stating:

> While section 35 of the Legislation Act provides that powers exercised under repealed or amended legislation have continuing effect, that provision does not allow for new claims to bypass the VSA [the Act] statutory scheme for determining claims. The effect of section 35 of the Legislation Act is to preserve any decision made under the WPA [War Pensions Act] as if that decision had been made under the VSA, provided that it could have been made under the VSA.

[40] Ms Anderson did not accept the argument that Tā Harawira's claim was required to receive equal treatment to claims made under the War Pensions Act in accordance with s 10(b)(ii) of the Act. She accepted that s 10(b)(ii) of the Act provides for equal treatment of equal claims but considered that section must be read in a manner which is consistent with s 14, to mean equal treatment of equal claims made

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[33] The Appeal Board is established pursuant to s 240 of the Act. Section 241 provides for the membership of the Appeal Board. Section 230(1) requires that every appeal must be heard by not fewer than three members, one of whom must be a medical practitioner and one the chairperson. Section 230(2) requires every appeal to be determined by a majority of the votes of the members hearing the appeal, and the chairperson has a casting vote if voting is equal.

under the Act rather than equal treatment with claims made and determined under the War Pensions Act. Ms Anderson went on to say:

> Section 10 of the VSA does not allow the Appeal Board to judicially review the Minister's decision not to include glioblastoma in the list of conclusively presumed conditions for service in Vietnam between 1964 and 1972 as set out in regulation 13(3) of the Veterans' Support Regulations 2014 (VSR). Neither can the Appeal Board rely on section 10 to find that a Minister was bound to adopt and carry forward decisions such as *Keynon* made under the WPA (prior legislation) when they drafted the presumptive list, as that would not be consistent with the prescribed process for deciding claims provided for in the VSA.
>
> …In this appeal there is no doubt about the interpretation of section 14 and the proper application of the law to the facts. While the Appeal Board acknowledges the Appellant's service, it is not open to us to step around s 14 and simply decide the appeal in accordance with a broader assessment of the substantial justice and merits of the claim than is provided for in the Regulations.

[41] Ms Anderson therefore considered that she could not refuse to apply the Act and the regulations made under it. She considered that neither could she determine what ought to have been specified in the regulations prescribing the presumptive list of illnesses and conditions for Vietnam veterans.

[42] Ms Anderson accepted that there is a reasonable hypothesis that Tā Harawira's glioblastoma was service-related, and that SOP 85/2016 applied. Ms Anderson referred to a US National Academies of Sciences, Engineering and Medicine's systemic review of scientific literature concerning glioblastoma in Vietnam, recording that it shows there is an absence of evidence connecting glioblastoma and exposure to herbicides in Vietnam. She went on to say:

> On the other hand, I accept that the condition of glioblastoma is such a rare cancer tumour that no one can say definitively that it is not related to Agent Orange exposure. I also understand there is literature suggesting that there may be an association between exposure to Agent Orange and other agents used in the Vietnam War and the carcinogenic changes this has long term on DNZ and cellular metabolism. I also accept that Courts in the United States have accepted veterans' claims for glioblastoma where the evidence is equivocal.

[43] Ms Anderson then concluded that the hypothesis was not consistent with SOP 85/2016 because there was no evidence that Tā Harawira met any of the three factors

listed in cl 9. She also considered that s 15 of the Act was inapplicable as there is a relevant SOP.

[44] Ms Anderson concluded that it was not open to her to find that Tā Harawira's glioblastoma was service-related.

Mr Griggs' reasons

[45] Mr Griggs agreed with Ms Anderson that the claims should be considered under the Act, and that s 35 of the Legislation Act did not have the effect contended for on behalf of Tā Harawira. However, he saw the core issue in the appeal as "what the Appeal Board should do if there is a conflict between one or more of the principles specified in section 10(b) and a regulation made under s 265".[34]

[46] Mr Griggs observed that s 10 is unique and deserves careful reading. He accepted that the operative provisions of the Act must be interpreted consistently with the principles specified in s 10(b), and said that if a provision of the Act cannot reasonably be given a meaning consistent with those principles, it must be given effect on its terms. However, he considered that the same considerations do not apply where regulations rather than the operative provisions of the Act are concerned. Mr Griggs was of the view that s 10 applies to any person who performs any function or exercises any power under the Act, including the making of Orders-in-Council by the Governor-General on the advice of the Minister, and imposes mandatory duties.

[47] Mr Griggs therefore concluded that:

> When the Governor-General made the VSR [the Regulations] on 1 December 2014, His Excellency had a duty under s 10(b)(ii) of the VSA [the Act] to give effect to the principle of promoting equal treatment of equal claims. Equally, when the Minister provided his recommendation for the purposes of section 21, he had a duty to give effect to that principle.

[48] And:

> …when the Minister provided his recommendation in 2014 as to which conditions ought to be specified in the presumptive list for Vietnam veterans in regulation 13(3) of the VSR [the Regulations], the *Kenyon* case was an

[34] Mr Griggs noted that this was not directly addressed by the parties.

> "equal claim". It established a precedent that glioblastoma in Vietnam veterans might be related to their service, due to their exposure to Agent Orange. In my view it was the Minister's duty to make his recommendation in accordance with the principle of promoting equal treatment of equal claims, namely by including glioblastoma in the presumptive list. When the Governor-General made the Order-in-Council, His Excellency similarly had a duty to ensure that the presumptive list promoted equal treatment of equal claims, by including glioblastoma.

[49] Mr Griggs considered that it could not have been Parliament's intent that equal claims should be confined to claims made under the Act, and if that had been intended, Parliament would have made that clear. He said that:

> As a matter of ordinary usage, it seems to me that a previous claim by a New Zealand veteran of the same operational theatre in respect of the same condition is, absent any other distinguishing characteristics, an "equal claim", whether or not it has been considered under the VSA [Act].

[50] He did not "entirely agree" with Ms Anderson's view that the Appeal Board does not have jurisdiction to review the Regulations and must apply them on their terms. He considered that the Appeal Board may consider collateral challenges to the Regulations if it is alleged they are invalid.[35] Mr Griggs did not however consider it necessary to take this approach in the present case.

[51] Rather, Mr Griggs considered that s 10(b)(iv), read together with s 229(5) of the Act, obliged the Appeal Board to determine the claim in accordance with the substantial justice and merits of the claim, given his view that the Governor-General had a duty to include glioblastoma in the relevant presumptive list. He said that while s 229(5) requires the Appeal Board to comply with the Regulations, it does not require the Appeal Board to give effect to an omission from the Regulations which contravenes s 10(b) or any other provision of the Act. On that basis, Mr Griggs was of the view that Tā Harawira's claim for glioblastoma must be treated as a service-related condition under the Act.

Dr Holdaway's reasons

[52] The remaining member of the Appeal Board, Dr Holdaway agreed that the claim should be determined under the Act. He considered that the Appeal Board does

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[35] Mr Griggs relied on *Attorney-General v P F Sugre Ltd* [2004] 1 NZLR 207 (CA) [48]; and *Conley v Hamilton City Council* [2008] 1 NZLR 789 (CA) at [45].

not have the authority to change or add conditions to the presumptive list. However, he agreed with Mr Griggs that exercising benevolence required that Tā Harawira's claim for glioblastoma should be treated as a service-related condition under the Act. Dr Holdaway did not set out reasons for these conclusions.

The Appeal Board's decision

[53] Therefore, in accordance with the votes of the majority (being Mr Griggs and Dr Holdaway), the Appeal Board decided that Tā Harawira's claim for glioblastoma should be treated as a service-related condition under the Act.

Approach to appeal

[54] An appeal to the High Court against a determination of the Appeal Board may only be on a question of law, and is to be made in accordance with the High Court Rules 2016.[36] Rule 20.18 of the High Court Rules provides that an appeal is by way of rehearing.

[55] On the hearing of an appeal, the court may:[37]

(a) make any decision it thinks should have been made:

(b) direct the decision-maker—

(i) to rehear the proceedings concerned; or

(ii) to consider or determine (whether for the first time or again) any matters the court directs; or

(iii) to enter judgment for any party to the proceedings the court directs:

(c) make any order the court thinks just, including any order as to costs.

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36 Veterans' Support Act 2014, s 239.
37 High Court Rules 2016, r 20.19

[56] I note also that when a general right of appeal is exercised, the persons exercising those rights are:[38]

> …entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.
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> (Footnotes omitted)

Grounds of appeal

[57] The main ground of appeal advanced by the GMVA against the Appeal Board's decision is that the majority erred in law by not deciding the claim under the prescriptive process set out in s 14 of the Act. The GMVA says that the approach of the majority contained the following specific errors of law:

(a) The majority erred in treating s 10(b) of the Act as a substantive overriding provision under which a claim can be considered and ruled on, despite the prescriptive process for deciding claims in s 14 of the Act. Rather, the role of s 10(b) is to provide guiding interpretation principles for persons performing functions or exercising powers under the Act.

(b) Mr Griggs erred in proceeding on the basis that the Board had the jurisdiction to review regulations made under the Act and determining the appeal as if the Regulations had been drafted differently to include glioblastoma in the presumptive list. Rather, he should have applied the Regulations as they are.

(c) Mr Griggs erred in finding the Governor-General (when the Regulations were made on 1 December 2014) and the Minister (when he provided his recommendation for the purposes of s 21) had a duty

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[38] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

under s 10(b)(ii) to give effect to the principle of promoting equal treatment of equal claims. Neither s 10 nor s 21 were in force when the Regulations were made.

(d) Mr Griggs erred in finding that when the Minister provided his recommendation as to which conditions ought to be specified in the presumptive list for Vietnam veterans in reg 13(3) of the Regulations, the *Kenyon* claim was an equal claim giving rise to a duty to include glioblastoma in the presumptive list.

(e) Mr Griggs erred in finding that the principle of promoting equal treatment of equal claims in s 10(b)(ii) does not confine the enquiry to claims made under the Act.

[58] Ms Roff submitted that in light of the GMVA's grounds of appeal and submissions, the following four issues require determination:

(a) Does s 14 of the Act exhaustively state the process that must be followed by the Appeal Board in considering an appeal under s 229 of the Act?

(b) Is the Appeal Board bound by regulations issued under s 265 of the Act, such that, if a regulation is or may be unlawful, the Appeal Board must apply that regulation notwithstanding any issues of illegality?

(c) Will a regulation be intra vires, if at the time it is promulgated, a provision that renders it unlawful has not yet come into effect?

(d) Can a claim be an 'equal claim' for the purposes of the Act if it was decided under the War Pensions Act?

[59] I address the appeal broadly in accordance with those issues.

The effect of s 10(b) on the process envisaged by s 14

Submissions for the GMVA

[60] Counsel for the GMVA, Mr Goosen, submits that Ms Anderson correctly interpreted and applied s 14 to Tā Harawira's claim. He contends that Tā Harawira's claim that his illness was service-related is unable to succeed because there was no evidence of the three factors in SOP 85/2016 applying to him, and therefore the hypothesis that his illness was service-related was not consistent with the SOP. Mr Goosen says that the majority of the Board erred by failing to apply that analysis.

[61] Mr Goosen submits that s 14 provides an exhaustive process unless a presumption under s 16 applies (which it does not, in this case). He argues that the Law Commission report supports his position, emphasising particularly its comments about the need for change because of cumbersome administrative and decision-making processes, which led to its recommendations about the use of SOPs and presumptions.[39] Mr Goosen notes that the Law Commission recommended that SOPs be introduced and said:[40]

> The SOPs should be exhaustive, in that they would provide a complete list of the service-factors that link a condition with service. If not, it would defeat the purpose of these decision-making instruments, which is to overcome the difficulty of making consistent, legally correct decisions using the beneficial evidential provisions.

[62] Mr Goosen says that the SOPs reflect decisions favourable to veterans. He also emphasises that the Act contemplates a process whereby SOPs are adopted and revoked as necessary, and this is the appropriate way in which the grounds for claims are kept up to date.

Submissions from counsel assisting

[63] Ms Roff promotes a broader approach to understanding s 14, which necessarily takes longer to outline here. She submits that s 14 "should not be seen as a procedural straitjacket prohibiting decision makers from adopting procedures in particular cases not provided for". She says that ss 10 to 12 are mandatory provisions, which must be

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39 See Law Commission, above n 6 at [iv], [5.46]–[5.48], [5.78]–[5.79] and [5.85].
40 At [5.98].

complied with when exercising powers or performing functions under the Act. She submits that the principle of benevolence (s 10(b)(iii)) underpins the scheme and purpose of the Act, as seen in the way the usual rules of evidence are 'jettisoned' (s 10(b)(iv)) and the 'presumptions' contained in ss 17 to 21 and 28 are intended to displace the need for a claimant to prove that their condition was caused by their service.[41] Ms Roff submits that when determining what a "reasonable" decision is, the facts must be viewed through this benevolent lens, as too high a standard of reasonableness undermines the necessary focus on the substantial merits of a claim.[42]

[64] Ms Roff highlights that these principles were established under the War Pensions Act and were reintroduced in the Act, as intended by Parliament. She says this was acknowledged in *Edwards v Attorney-General* when Williams J said that "…the spirit of the 1954 presumption remains although the structure and application of that spirit is rendered with the greater clarity characteristic of modern drafting practice".[43]

[65] Ms Roff submits that as the Appeal Board was required to reach a new and fresh decision on the evidence of Tā Harawira's claim, it was operating subject to a mandatory obligation to ensure that its decision was compatible with s 10. She says:

> That the appellant does not agree s 10 required this of the Board on the facts is not a basis for an appeal on a question of law. As with any other decision-maker, it was a matter for the Board what s 10 required in this particular case, and the majority held that it required a different approach to that set out in s 14. The only issue could be, as discussed below, whether the Board had any residual discretion outside s 14 to reach that conclusion.

[66] Ms Roff emphasises that s 12 requires that all decisions made by VANZ must be made on "reasonable grounds" and have regard to "all the circumstances". She suggests that when read consistently with s 12, the s 14 process must result in a decision that is consistent with VANZ reaching a decision on reasonable grounds with the effect that the "reasonable grounds" standard operates as a final check to ensure a claim is not unreasonably rejected.[44] Ms Roff also argues that while s 12 on its face

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41 See *Te Ua v Secretary for War Pensions* [2014] NZHC 1050 at [114]–[116].
42 At [115].
43 *Edwards v Attorney-General* [2017] NZHC 3180 at [68].
44 "Reasonable grounds" requirements are found throughout the Act, see ss 12, 14(6), 15(3), 27(5), 28(1A), 28(2), and 63(3).

applies only to VANZ, it would be absurd if VANZ was required to ensure its decisions were made on reasonable grounds but other decision-makers under the Act were not. Given that reviewers and appeal boards are required to reach decisions afresh on the same claims first considered by VANZ, it would be expected the same standard applies. Ms Roff submits that the entire Act is characterised by a different, lower, standard of causation that exists in ordinary and adversarial civil litigation, which is essentially the principle of benevolence rendered into practice.[45] She also notes that, as a general principle, regulation cannot exhaust decision-making discretion as a matter of public law.[46]

[67] Ms Roff says that the application of s 14 therefore requires the principle of benevolence to be given effect, and that s 14 can be informed by what occurs under s 15 when there is no applicable SOP—being an assessment of whether the hypothesis determined under s 14(2) is a reasonable hypothesis. If a reasonable hypothesis is then established, the claim must be accepted unless there are reasonable grounds for believing that the injury was not service-related. The overarching question under the Act is still whether there is a reasonable hypothesis that the injury is service-related.

Analysis

[68] As is apparent from the summary of submissions, Mr Goosen contends for a straightforward interpretation of the plain words of s 14, while Ms Roff contends that the correct interpretation is reached following a broader consideration of the Act and its legislative history.

[69] Section 10 of the Legislation Act 2019 requires me to ascertain the meaning of legislation from its text and in light of its purpose and its context. I have already set out the legislative background, but it is helpful here to consider specifically how ss 10 and 14 of the Act evolved.

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45 This is apparent in the definitions of "service-related" and "service-related death" in s 7 of the Act which include the notions of "contributed to' and "aggravated by" as opposed to simply "caused by".

46 See *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [47]–[50]; and Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [15.70] and [15.74]–[15.76].

[70] Sections 10 and 14 were introduced at the Select Committee stage because of the substantial amendments proposed by the Select Committee to cl 15 of the Bill, which set out the central decision-making provision of the Bill.[47] In effect, the proposal was to shift the elements of cl 15 that the Select Committee considered relevant to the overarching decision-making principles to be applied in determining veterans' claims, away from the specific procedural steps to be taken by VANZ in reaching decisions.[48] The Select Committee explained that the clause was "necessary to make the claim decision process, and the establishment of entitlements under the proposed legislation, as clear as possible for both VANZ as decision-makers, and veterans."[49]

[71] In the Departmental Report on the Bill, officials also addressed how veterans were to establish their entitlements under the Act. They recommended that cl 15 be amended to clearly reflect how the Bill is intended to operate using commonly understood language.[50] The officials observed that the Bill was intended to "apply conclusive decision-making tools to aid the establishment of entitlements, largely removing the decision-making discretion …".[51] They went on to recommend that the hierarchy of decision-making tools be amended to make the SOPs the primary tool to apply, noting that when a more generous presumptive decision-making condition applied, the benefit of benevolence must be accorded to a veteran despite any SOP that may apply.[52] When the Bill was introduced into Parliament, the then acting responsible Minister, Hon Nathan Guy, noted that the decision-making provisions and the points of reference for deciding claims were an area of change. He said that:[53]

> Underlying the rewrite of the 1954 Act was a desire not only to modernise the legislation but to make it more accessible for both veterans and administrators to understand and use. …There was very broad support for the use of the Australian statements of principle as the main reference point for deciding claims. The statements of principle are comprehensive, soundly based in medical terms, and introduce a much needed element of certainty to the process.

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47 Veterans' Support Bill 2013 (158–2) (select committee report) at 5.

48 At 5. This was recommended by officials in New Zealand Defence Force "Veterans' Support Bill – Departmental Report" (February 2014) at [92]–[96].

49 At 6.

50 New Zealand Defence Force "Veterans' Support Bill – Departmental Report" (February 2014) at [87].

51 At [89].

52 At [91].

53 (10 April 2017) 697 NZPD 17188.

> The bill also needed to modernise the legal and evidential tests for establishing entitlement … [I]t became clear that more work was needed to reduce legal jargon and ensure the provisions are clearer, easier to understand, and fully aligned with the benevolence principle in decision-making.

[72] The explanatory note to the Bill records that it "enables the adoption of decision-making tools to assist the decision maker in determining whether a condition is linked to a veteran's service".[54] The explanatory note goes on to say that presumptive lists will continue to be used and SOPs will be introduced. It describes the introduction and use of the SOPs as greatly benefiting the decision-making process as it will "reduce the amount of discretion applied by the decision-maker".[55] Thus, although the Law Commission may have recommended that SOPs be exhaustive, it does not appear that this was carried through into the Act.[56]

[73] The separation out of the overarching principles from the claim process is significant. Section 10 may, as Mr Griggs commented, be unique in the statute book. In it, Parliament has not indicated matters for decision makers under the Act to have regard to, rather it has imposed duties that are mandatory. When a person is performing a function or exercising a power under the Act, they must do so in accordance with the principles set out in s 10(b). In my view, these principles must be taken into account in ascertaining the proper meaning of s 14.

[74] Having carefully reviewed the Act overall, and its legislative history, I consider that s 14 is properly understood as establishing a default process by which claims would be determined— but not an exhaustive process. In my view, the creation of both presumptive conditions (as, for example, in reg 13) and SOPs were intended to benefit veterans making claims by providing, as far as possible, clear bases on which claims might be made out. I do not consider that Parliament intended the effect of introducing the default process to be to exclude possible claims, to the disadvantage of veterans. Rather, I am satisfied that Parliament intended that claims made for a service-related condition should be considered and determined on substantive grounds. This is clearly contemplated in the Act, as the process in s 15 provides.

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54 Veterans' Support Bill (158-1) (explanatory note) at 5.
55 At 5.
56 See Law Commission, above n 6 at [5.98].

[75] In my view, it would not be taking a benevolent approach, as required by s 10(b), to conclude that where a veteran is not assisted by a relevant SOP, they are not entitled to the benefit of s 15, whereas a veteran in respect of whom there is no relevant SOP, is entitled to the benefit of s 15. This can also be compared with effect of the presumptive conditions in reg 13(2). These assist a potential claimant if their condition appears in the regulation—but does not preclude them from arguing a further reasonable hypothesis, if it does not.

[76] I accept that on its face the Act is silent on what is to occur, as a matter of process, when there is a relevant SOP, but it is not applicable to the claimant's circumstances. The effect of the GMVA's submissions is that this must be understood as Parliament deliberately choosing that such a claim could never succeed. The further effect of this approach is that a veteran would be better off if there was no relevant SOP. I find such a conclusion unattractive, and inconsistent with the purpose and scheme of the Act, its legislative history, and a proper reading of ss 10 to 12, 229(5)(b), and 229(5)(c).

[77] I consider that in such circumstances, a claimant should be treated as if there is no applicable SOP, and the process in s 15 should apply. This approach accords with the requirements in s 10(b) that a benevolent approach is taken, and that claims are not determined in accordance with any technicalities, legal forms, or legal rules of evidence, but rather in accordance with substantial justice and the merits of the claim.

[78] Thus, even when a SOP is apparently applicable, but no factors relate to the claimant, the overarching question should still be whether there is a reasonable hypothesis that the condition or injury is service-related. If it is, the claim should be accepted unless there are reasonable grounds for believing that the veteran's injury, illness or death was not service-related.

[79] This approach is consistent with the requirement in s 12, which mandates that decisions must be made on reasonable grounds and in light of all the circumstances.

[80] This approach also takes into account Ms Roff's concern that the discretion under the Act cannot be exhausted after the fact by the issuing of SOPs. I accept that

the Act's requirements of "consistency" with a SOP or a reasonable hypothesis contemplates a claim that does not fit strictly with that SOP or reasonable hypothesis. This accords with s 12 and its mandate that decisions must be made on reasonable grounds and in light of all the circumstances. It also allows the decision maker to consider the application of the principles in s 10(b). This is important in the present case, as it allows the decision maker to consider whether an "equal claim" exists, as required under s 10(b)(ii).

[81] In my view, then, the majority of the Appeal Board did not err by adopting a broader approach than the process described in s 14 in the determination of Tā Harawira's claim. Nonetheless, I do not entirely agree with the reasoning set out by Mr Griggs, and of course Dr Holdaway did not explain in any detail why he thought exercising benevolence required that Tā Harawira's claim for glioblastoma should be treated as a service-related condition under the Act. I return to this matter when I consider the appropriate relief to be given in this case.

The Board's jurisdiction in relation to the Regulations

Submissions

[82] Mr Goosen submits that the Appeal Board did not have the jurisdiction to address the question of "what the Appeal Board should do if there is a conflict between one or more of the principles specified in s 10(b) and a regulation made under section 265". This was the question posited by Mr Griggs in his reasons as the core issue in the appeal.

[83] Mr Goosen says instead that ss 229(5)(b) and 229(5)(c) require an Appeal Board to apply the general principles in s 10(b) when deciding appeals under any relevant provisions of the Act and any regulations made under s 265. He submits that an Appeal Board is not empowered or authorised to determine appeals on the basis of what it considers should have been included in regulations made under the Act, and that the interpretation principles in s 10(b) cannot override regulations made under the Act. Rather, any regulations must be taken as they are and interpreted and applied in light of the s 10(b) principles.

[84] Ms Roff does not consider that the Appeal Board reached a view as to whether the Regulations were ultra vires and so the error of law raised by the GMVA is academic and not properly subject to appeal. She also submits that in any event, the Appeal Board would have been justified in embarking on a "collateral challenge" analysis.[57] Regulations are only lawful to the extent that they comply with the empowering legislation, which is assessed against the Act's wording, and also the purpose for which regulation-making power is conferred.[58] Ms Roff argues that s 10 would be important in determining that purpose and that a regulation incompatible with s 10 is likely ultra vires as involving an improper purpose. Ms Roff contends that the Appeal Board need not apply regulations it considers to be unlawful when making its decisions.

Analysis

[85] While Mr Griggs did express a view that a "collateral challenge" could be contemplated in principle, he said that it was not necessary for him to consider whether the omission of glioblastoma from reg 13(3) was "in breach of the duty in s 10(b)(ii) [and] could be viewed through the lens of invalidity" because:

> … section 10(b)(iv), read together with section 229(5), obliges the Appeal Board to determine the Appellant's claim in accordance with substantial justice and the merits of the claim. If, as I do, the majority of the Appeal Board considers that the Governor-General had a duty to include glioblastoma in the relevant presumptive list, then in my view it is the duty of the Appeal Board to determine the claim as if that had in fact been done. While section 229(5)(c) of the VSA does require the Appeal Board to comply with the VSR, it does not oblige the Appeal Board to give effect to an omission from the VSR which contravenes section 10(b) or any other provision of the Act. That would contravene the VSA, with which the Appeal Board is also required to comply.

[86] I find Mr Grigg's reasoning problematic. I accept that he made no findings explicitly "through the lens of invalidity", but there seems to be little difference between doing that, and his ultimate conclusion, being that the inconsistency of reg 13(3) with s 10(b) required the reading in of glioblastoma. The preeminent ground under which a regulation might be considered invalid is that it is inconsistent with its empowering provision.

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57 *Brady v Northland Regional Council* [2008] NZAR 505 (HC).
58 *Unison Networks Limited v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

[87] While Dr Holdaway agreed with Mr Griggs that exercising benevolence required that Tā Harawira's claim for glioblastoma be treated as a service-related condition under the Act, he also said that the Appeal Board must apply the Act "as intended" and had no authority to change or add conditions to the presumptive list. In this respect (despite some residual uncertainty as to what Dr Holdaway meant by applying the Act "as intended"), this suggests he and Ms Anderson were in agreement as to the latter point.

[88] For these reasons, I do not consider that a majority of the Appeal Board reached a view that the Regulations were unlawful, or purported to judicially review them. There is simply no basis for such a conclusion, having regard to the reasons of the three members of the Appeal Board. On this basis, I conclude that a majority of the Appeal Board did not take an approach which could establish the grounds for asserting an error in law in its decision, in this respect. Accordingly, I do not need to address the further question of the availability of a "collateral challenge" to the regulations as a matter of law, although I note that such a challenge may indeed be available in principle.[59]

The alleged duty of both the Governor-General and Minister to give effect to s 10(b)

Submissions

[89] Mr Goosen submits that neither the Governor-General nor the Minister could have been subject to the duty pursuant to s 10(b)(ii) to give effect to the principle of promoting equal treatment for equal claims, described by Mr Griggs, at the time the Regulations were made, and could therefore not have breached such a duty. Mr Goosen submits when the Minister recommended the Regulations be made, and when the Governor-General made the Regulations on 1 December 2014, they were not subject to s 10, as the Act was not yet in force. He says:

(a) the Act received royal assent on 7 August 2014;

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[59] See *Attorney-General v P F Sugre Ltd* [2004] 1 NZLR 207 (CA) at [48]. See also *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [6.11].

(b) pursuant to s 2(1), the Act came into force four months after the date of royal assent, being 7 December 2014, except the provisions specified in ss 2(2), and 2(3), which came into force on 8 August 2014;

(c) sections 10 and 21 are not in any of the provisions that came into force on 8 August 2014, and accordingly came into force on 7 December 2014;

(d) section 265, which provides the power for the Governor-General to make regulations, came into force on 8 August 2014;

(e) the Regulations were made on 1 December 2014; and therefore

(f) section 10 was not in force at the time the Regulations were made, and could not have applied to the Minister recommending, or the Governor-General making, those Regulations.

[90] Mr Goosen says that, as a result, it is unnecessary to address Mr Griggs' conclusion that the Governor-General could have a duty of care under s 10 to consider whether proposed regulations are lawful as against the requirements of s 10.

[91] Ms Roff submits that a regulation must always be lawful. She says that if the empowering legislation is changed such that the regulation is no longer lawful, then it is unlawful. She submits that in this case the Regulations cannot be preserved merely by "fortuity of timing".

Analysis

[92] I agree that secondary legislation must always be lawful, and that amendment to empowering legislation that necessarily makes secondary legislation unlawful would have the effect of invalidating that secondary legislation. Secondary legislation must align with its empowering provisions, and the principles which apply to the exercise of discretion to promulgate secondary legislation. Whether regulations comply with the empowering legislation is assessed against an Act's wording, and also the purpose for which regulation-making power is conferred.

[93] However, I consider that this issue is moot, as a majority of the Appeal Board in the present case did not make, nor purport to make, explicit findings as to the validity or legality of the Regulations as made under the Act. While I consider that the Regulations are indeed required to comply with s 10 and all other relevant provisions in the Act, it is therefore not necessary for me to reach a conclusion about this for the determination of the present appeal and I do not do so.

The impact of the *Kenyon* decision and the principle of equal treatment

Submissions for the GMVA

[94] Mr Goosen submits that as s 10(b)(ii) was not in force at the time the Regulations were made, Mr Griggs erred in law in concluding that the *Kenyon* decision was required to be considered an 'equal claim' at the time the Minister provided his recommendation in 2014 as to which conditions ought to be specified in the presumptive list for Vietnam veterans.

[95] Mr Goosen also says that the *Kenyon* case cannot be an equal claim under the Act. He relies both on the fact that it was decided under the War Pensions Act and on comments made by Simon France J in *Keelan v The General Manager of Veterans' Affairs New Zealand*.[60] In that case, Simon France J considered whether principles espoused by Whata J in a decision pursuant to the War Pensions Act could be considered to be applicable in full to decisions made under the Act.[61] His Honour stated:[62]

> Sections 14 and 15 prescribe a process for deciding claims that is both prescriptive and different from that which existed under the War Pensions Act 1954. A central feature of the new scheme is the adoption of what are called statements of principles which govern the consideration of claims for different conditions. These statements of principles are extensive documents that identify a list of criteria applicable to almost every condition. For example, in relation to osteoarthritis (for which there is a standalone Standard) 40 different circumstances are identified, any one of which, if applicable to the veteran, will see the claim presumptively accepted. In adopting this methodology the Act expressly at s 22 draws on the statements of principle already established by the Australian Reparation Medical Authority. The fact that the existence of one such situation will trigger the presumption is an example of the benevolence principle being built in.

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60 *Keelan v The General Manager of Veterans' Affairs New Zealand* [2016] NZHC 1869.
61 See *Te Ua v Secretary for War Pensions*, above n 41.
62 Above n 59, at [33], [35], and [36].

…

> …it would be inappropriate to declare that Whata J's analysis of a very different scheme applies here. I am unaware of any principle of interpretation that would support such an approach. It would be rather unexpected that, Parliament having updated a statutory scheme that is itself the product of significant Law Commission work, the Court would then immediately read back various provisions from the old Act that have not been carried over.
>
> There is no good policy reason to make a declaration like the one sought. The new Act can stand for itself, and be interpreted as required. It would also be a declaration that is far too vague to be of benefit - in order to be effective, one would have to identify in the declaration what the Te Ua principles are (the plaintiffs provide a list of them) and then give some sort of detailed explanation as to how they apply to ss 14 and 15 of the new Act.

[96] His Honour considered that it would be an incorrect approach to interpretation to seek to in effect transfer repealed provisions from a repealed Act into a new statute with its own scheme.[63] Having declined to make any of the declarations sought, his Honour concluded:[64]

> The proposition that the language and presumptions contained in the previous Act should be overlaid on the text of the present Act is rejected. It is a new Act with its own purposes and principles. It establishes a different methodology for assessing claims. There is no interpretation approach or principle that would support what the plaintiffs propose.

[97] Mr Goosen says that *Keelan* is authority for the principle that the test for deciding claims under the Act and the War Pensions Act is different. He submits that the claim in *Kenyon* was successful because the veteran concerned was entitled to the benefit of the presumptions contained in the War Pensions Act, and that the principle of equal treatment for equal claims under the Act must mean equal treatment of equal claims under the Act, not the War Pensions Act. Parliament cannot have intended that the Act require claims to be decided by reference to claims decided under a different (and now repealed) Act. Mr Goosen submits that this accords with the requirement in s 199 of the Act that it is a function of VANZ to provide entitlements to veterans and other claimants "in accordance with the Act".

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63 Above n 58, at [42].
64 At [72].

Submissions from counsel assisting

[98] Ms Roff says instead that *Keelan* is not authority for the proposition that an 'equal claim' in terms of s 10 cannot be found by relying on a successful claim under the War Pensions Act. She submits the correct approach is that a claim under the War Pensions Act *may* amount to an equal claim in terms of s 10 and whether it does will depend on the circumstances. She relies on the intention of Parliament noted above that the foundational provisions and principles of the War Pensions Act were to be carried through into the new legislation. She submits that it therefore cannot be that Parliament intended for successful claims under the War Pensions Act to be entirely irrelevant to the scheme established by the Act.

[99] Ms Roff submits that whether any two claims are 'equal' depends on those claims themselves factually, and where they arise under different legislation, the particular legal implications. A case-by-case analysis is required, with decisions under the Act to be made on the basis of substantial justice, rather than technicalities or legal forms.[65] Ms Roff submits that merely stating that the War Pensions Act is different to the Act is to invite reasoning based on form, rather than substance.

[100] Ms Roff also says that in *Keelan*, Simon France J properly notes that s 14 is procedurally more prescriptive, but submits that his Honour did not discuss ss 10 to 12 or the history of the Act in any detail, and notes that the issue of 'equal claims' does not appear to have been directly in issue in that case. Rather, Simon France J observed that decisions were required to be 'context-specific', necessarily turning on the particular facts before the decision-maker, and that is not consistent with the suggestion that his Honour was deciding that claims under the War Pensions Act could never be equal claims under the Act.

[101] Ms Roff also observes that the Appeal Board did not deal with the argument before it about the relevance of case law from the United States, where claims relating to glioblastoma have been accepted.

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65 Veterans' Support Act 2014, s 10(b)(iv).

Analysis

[102] I do not consider that *Keelan* is authority for the position that no successful claim made under the War Pensions Act can be relevant to the assessment of a claim under the Act. *Keelan* involved a group of veterans alleging that what they described as the "Te Ua principles" had always to be applied by VANZ under the Act. The "Te Ua principles" were matters discussed by Whata J in an earlier judgment under the War Pensions Act.[66] The applicants in *Keelan* sought declarations that these principles apply to decisions to be made under the Act when no such decisions had yet been made. The central issue in the case was whether an interpretation of the War Pensions Act could be superimposed upon the Act, notwithstanding the differences between the two. No specific claim, or even factual context relating to a specific claim, was before the court, and this was noted by Simon France J, who went to great lengths to describe why it would be inappropriate to make the declarations sought by the applicants.[67] His Honour's conclusion was instead to reject the argument that any principle or claim under the War Pensions Act must automatically apply in the same way under the Act.

[103] Further, as a matter of interpretation of the Act, particularly s 10, I consider that Mr Goosen's interpretation of the effect of *Keelan* also prioritises form over substance, or legal technicalities over substantial justice. In my view, it is entirely clear that, despite the differences between the previous and current legislation, the broader principles that apply to the determination of claims are the same.

[104] I consider that it would be inappropriate for the legal position to be that the *Kenyon* claim is unable to be regarded as equal to Tā Harawira's claim simply because the claims arose under different legislation, given the clear Parliamentary intention that the Act was, in important purposive senses, a continuation of the earlier legislation. Mr Kenyon's claim appears to be similar to Tā Harawira's claim and as stated by Mr Griggs, "a previous claim by a New Zealand veteran of the same operational theatre in respect of the same condition is, absent any other distinguishing characteristics, an equal claim". However, I make no finding about this as I consider that is a matter that is for the Appeal Board to further address.

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66 *Te Ua v Secretary for War Pensions*, above n 41.
67 *Keelan*, above n 60, at [18]–[27].

[105] Any other view is one that favours legal technicalities over substantial justice. When broadly the same principles apply to the determination of a claim under each statute, and the claim is sufficiently similar, that must be relevant to the determination of whether there is a reasonable hypothesis that an illness, injury, or death was service-related, both as a matter of fact and a matter of law. There can be no hard and fast exclusion of successful claims under the War Pensions Act; it must instead be a consideration of all of the circumstances as they present themselves before the decision-maker. I consider the principles in s 10(b) prohibit an analysis that regards successful claims made under the War Pensions Act as automatically irrelevant, merely on the basis that there is now a different statute.

[106] The argument advanced by Tā Harawira before the Appeal Board relied not only on *Kenyon* but also successful claims made for glioblastoma in the United States. As noted earlier, Ms Anderson accepted that there was a reasonable hypothesis that Tā Harawira's glioblastoma was service-related, based on scientific literature from the United States. Given the references in ss 14 and 15 to reasonable hypotheses in relation to a finding that an injury is service-related, I consider that it remains open to a decision maker to find such information, and overseas case law, of assistance. It is clear from the use of SOPs made in reliance on the work of the Australian Repatriation Medical Authority, that overseas approaches have been considered relevant to the New Zealand approach.

[107] For the avoidance of doubt, I confirm that it must also be correct that where a claim was accepted under the War Pensions Act, it must not necessarily be accepted under the Act as an equal claim. Again, a full consideration of the two claims must be undertaken by the decision maker.

[108] Given these views, it will be apparent that I do not see any merit in the argument that as s 10(b) was not enacted at the time the Regulations were made, the *Kenyon* case could not be an equal claim at the time the Minister provided his recommendation about reg 13 in 2014.

Conclusion

[109] My conclusions as to the questions of law raised in this appeal are that:

(a) section 14 is not an exhaustive code for considering a claim under the Act;

(b) in circumstances where a SOP appears to be applicable to a claim but the claimant cannot establish any of the factors contemplated by the SOP, the correct interpretation of the Act requires VANZ to treat the claim in accordance with the process in s 15, addressing whether the claim is consistent with a reasonable hypothesis, and accepting that claim unless there are reasonable grounds for believing that the veteran's injury, illness or death is not service-related;

(c) in applying the principle of equal treatment for equal claims found in s 10(b)(ii), a claim determined under the War Pensions Act may be considered an equal claim to a claim under the Act; and

(d) in determining a claim under the Act, VANZ may take into account scientific literature and overseas caselaw if VANZ considers it will assist, consistent with s 10(b).

[110] It will therefore be apparent that there are aspects of the reasoning of both Ms Anderson and Mr Griggs with which I do not agree. I am also concerned about the absence of reasons from Dr Holdaway.

[111] Nonetheless, I conclude that as a matter of law, it was open in principle to the majority of the Appeal Board to reach the outcome that Tā Harawira's claim for glioblastoma must be treated as a service-related condition under the Act. In my view, the appropriate approach to Tā Harawira's claim, in circumstances where there was a relevant SOP but none of the factors in the SOP applied to Tā Harawira, was for the Appeal Board to adopt the process set out in s 15 of the Act. In undertaking that process, the Appeal Board should have also considered the principles in s 10(b), especially that of equal treatment of equal claims. The Appeal Board may not refuse to take account of the decision in *Kenyon* solely because it was a decision under the War Pensions Act.

[112] I have concluded that it would not be appropriate for me to use the power available to me make my own decision in relation to Tā Harawira's claim. Rather I find that, in the circumstances, the Appeal Board should consider the claim again, given my conclusions as to the questions of law. This is for two reasons. First, the nature of the Appeal Board decision is such that while there is a majority decision that Tā Harawira's claim for glioblastoma must be treated as a service-related condition under the Act, there is no clear shared reasoning for that outcome. In my view, the Appeal Board should have a further opportunity to consider the claim and provide reasoning that supports the outcome reached (or another outcome, once the claim is considered in light of my conclusions as to matters of law, above). Second, in undertaking this task, the Appeal Board will be required to assess Tā Harawira's medical information and other relevant information, such as *Kenyon*, and possibly other decisions or material. I am not confident that all such information is before me, and nor have I heard argument in relation to it. These reasons are enhanced by the fact the Appeal Board is a specialist body of which one member must be a medical practitioner.

Relief

[113] I direct the Appeal Board to consider again Tā Harawira's application for a disablement pension. I direct the Appeal Board to take account of my conclusions as to the questions of law, in so doing. I also direct each member of the Appeal Board to provide reasons for their conclusions, which, as a matter of principle, they must do.[68]

Result

[114] The appeal is allowed.

Costs

[115] Costs were not addressed by counsel at the hearing. My preliminary view is that in the circumstances, costs should lie where they fall, particularly as Ms Roff's

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[68] A failure to give reasons or an inadequate statement of reasons is a reviewable error. See for example *Bell v Victoria University of Wellington* HC Wellington CIV-2009-485-2634, 8 December 2010 at [76]; and Graham Taylor Judicial Review: A New Zealand Perspective (4th ed, LexisNexis, Wellington, 2018) at [9.05]–[9.06].

costs will be paid by the Court and the estate took no part in the appeal. If the GMVA or Ms Roff have a different view, they are to file a memorandum of no longer than five pages within 15 working days of the date of this judgment. Any memorandum in reply is to be filed within a further five working days. Costs will then be decided on the papers.

McQueen J

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