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INTRODUCTION

1. The MRCA Agenda

a. The *Military Rehabilitation and Compensation Act 2004* **(MRCA)** commenced on 1 July 2004 after a period of essentially 8 years of reviews and recommendations following the Black Hawk disaster on the 12th of June 1996. My experience with respect to the MRCA is based on a combination of being a lawyer practicing in the Commonwealth (Military) compensation jurisdiction since 1991 and as an active participant in the Inquires into related matters on behalf of Veterans and Ex Service Organisations ("ESO's").

b. On behalf of the former *Armed Forces Federation of Australia* I was a member of the DVA – Working Group who together with key stake holders in the ESO community convened regularly from 2001 to 2003 to discuss the proposed MRC Bill until the MRCA was passed in 2004. I was fortunate to have insight into the various aspects of the Bill regarding why certain features remained i.e. VRB appeal, Statement of Principles, Safety net – TPI payment and differential compensation for War service as opposed to Peace time service.

c. I appeared before the last Senate hearing into the MRC Bill together with other Senate Inquiry into compensation related issues and raised concerns regarding emerging and actual issues throughout this time.

d. On the basis of my experience as the legal representative of a number of Ex Service Organisations (Vietnam Veterans Peacekeepers and Peacemakers Association, Vietnam Veteran's Federation, DFWA and numerous advocates from various RSL Sub Branches Australia wide I am fortunate to be in a position to utilise my experience and welcome the opportunity to provide a response to the Senate with respect to what has been proposed in the amendments to the MRCA.

e. The initial criticism I raise is the time taken for the response to the *Review into the Military Compensation Arrangements* conducted between 2009 to mid 2010.The recommendations following the review were made to the DVA Minister in a February 2011.A response was required by ESO's and interested parties by June 2011. There was Government reply to the 108 Recommendations announced in May 2012 and now a proposed Bill on the 14th of March with responses to the proposed changes to be addressed by the 18th of April. It would have been preferred for the time allowed to reply to be more than 5 weeks given the proposed changes and implications.

f. I also raise whether, as opposed to seeking a Senate inquiry into the proposed first tranche of changes to the MRCA (taking into account that there is to be further changes to commence with effect from 1 January 2014), it might have been more appropriate for a Senate Inquiry following the recommendations that were made to the government after the Military Compensation Review and their response in May 2012 with respect to the 108 recommendations. Thereafter, it would in my view have been of greater benefit for the stakeholders concerned for a Senate inquiry into all the recommendations including those which were rejected by the government as opposed to those that have been accepted and now proposed in the amendments.

g. The issues that could have been raised before the Senate Committee at that point i.e. post May 2012 would also have included what appears to be a substantial focus on the 'cost' of proposed changes that was the focus of the Review team as opposed to the 'value' of compensating Veterans, their families and their dependents for rendering military service in our name. The "cost imperative" appeared to be at the forefront of the Military Compensation Review as evidence by the composition of the Review team members. Other issues including the impartiality of the review team members have been raised as has the fact that it could have included at least some Ex-Service Organisation representatives to balance out the composition of the Review team.

Schedule 1 Rehabilitation and transition management

1.1 I welcome the proposed change to allow DVA to become a rehabilitation provider for the serving member and the reservist. Furthermore that the Defence as opposed to the Service chief be the rehabilitation provider. The aim to have a serving member who is likely to be medically discharged to receive transitional management and rehabilitation if his or her condition allows is central to the scheme. This transitional management is, in my experience of great assist to the serving member transiting out of the ADF and into a civilian capacity when it is effectively executed. It can assist the discharging member to be positively retrained and assisted to find work subject to their medical conditions and opportunities in the labour market as opposed to being "compensated" which for many can be demoralising.

1.2 However in a case study of Pte X, a former serving defence member and Afghanistan Veteran, it shows that despite impressing upon the chain of command not to discharge him due to the uncertainty as to the status of his compensation claims and no transitional management had been given, Pte X attending his Base and was advised that it was to be his last day as he was being medically discharged despite a raging psychological condition, substance abuse problem and a surgically repaired right shoulder that still caused pain and restriction to do defence or civilian work which in his case as a former bricklayer was out of the question.

1.3 Despite being an inpatient of a psychiatric unit whilst serving, Pte X was deemed suitable to separate from the ADF without any assistance or the 'transitional management' under s64 of the MRCA. Our letters to the chain of command seeking to defer the discharge were ignored as Pte X was medically discharged and had to line up at Centelink to wait his

turn and go on a disability pension for a War caused illness whilst I had to ensure that ComSuper (MSBS) were aware of the discharge and submitted the relevant paper work to them in order that they could assess his pension. After 6 months of investigation his claims were accepted by DVA and incapacity payments commenced. During this time he survived on the good will of his parents, Centrelink pension and the assistance of the RSL (Victorian branch).

1.4 What the proposed change may result in subject to the provision of experienced DVA delegates and their respective good will is that they can now assist and transitionally manage the serving member from the ADF to civilian life far better than it appears defence have been willing or able to do.

- Tertiary Rehabilitation -

1.5 The issue of DVA as opposed to the Defence Chief being the Rehabilitation Authority and whether the proposed changes will trickle down to the quality of rehabilitation and opportunity, in particular for non commissioned officer to be tertiary educated as part of a rehabilitation program in my view remains uncertain. Whilst the Review recommended informing delegates and providing Fact Sheets to explain that **tertiary rehabilitation** is available, it appears to be resisted and in my experience, the rehabilitation providers commissioned by DVA will themselves tell a Veteran that they cannot recommend tertiary retraining due to DVA Guidelines.

1.6 In fact delegates of DVA will threaten that to undertake a university course will result in their compensation payments being terminated or that they will be 'deemed' capable of working part time and have their incapacity payments terminated.

1.7 This is not a fanciful example or exertion as illustrated in the Case study presented to DVA National office in August 2012 by the President of the Vietnam Veteran's Federation, Mr Tim McCombe OAM on this issue. Despite the material being presented in August 2012 nothing happened by way of investigation of the circumstances and the matter has progressed to the Administrative Appeals Tribunal (AAT), when DVA via their legal representatives have only accepted the rehabilitation program to be tertiary education after commissioning one medico-legal report in March 2013. To date the Veteran who dared to undertake such retraining to assist his employment opportunities has done so after his incapacity payments have been terminated.

Schedule – 2 Compensation for Permanent Impairment

1.8 The proposed amendment is to modify the "offsetting" of permanent impairment (lump sum/periodic payments) for injuries payable under the MRCA for different injuries that may have been paid under the SRCA or pensions under the VEA. However, offsetting albeit it to a lesser degree will remain.

1.9 The *Military Rehabilitation (Consequential and Transitional Provision) Act 2004* provides a "method" of calculating permanent impairment i.e. lump sum payments under the MRCA so "Offsetting" or reducing compensation is achieved by taking into account different injuries for which compensation has been paid under different Acts i.e. SRCA and VEA.

An example of how this works is best illustrated using a case study:

Mr C's Case:

1. Mr C is a former ARA member who enlisted in January 1992 and was discharge in May 2007.

2. He served in East Timor in 1999 and sustained a fractured **LEFT wrist.** He received lump sum compensation pursuant to the Military Compensation (SRCA) for a 10% lump sum payment in the amount of approximately $23,000.00.

3. Mr C receives disability pension from DVA (VEA) at 10% of the general rate pension for the LEFT wrist and bilateral pterygia, a condition that was also accepted pursuant to the VEA.

4. He sustained a fracture to the **RIGHT wrist** in late July 2004 whilst serving in New Guinea and aggravated in Afghanistan in 2007.

5. Liability was accepted for the RIGHT wrist pursuant to the MRCA and a lump sum/periodic payment assessment for permanent impairment was undertaken by the MRCG.

6. The MRCA payment for the permanent impairment to the RIGHT wrist condition was determined to equal $29.19 per week.

7. The MRCC also re-assessed the LEFT wrist condition that was the subject of the previous SRCA lump sum payment (See Para. 2) and the lump sum payment was converted by MRCC to equate to $19.92 per week.

8. Before a lump sum/periodic payment were offered to Mr C for the RIGHT wrist the MRCC applied the formula in s13 of the MRC(C and TP) Act as follows:

- $29.97 (MRCA – i.e. Right wrist condition) - SUBTRACT THE
- $48.89 (The $28.97 VEA pension plus $19.92 LEFT wrist SRCA).
- **$0 Compensation for the RIGHT wrist condition.**

9. Therefore Mr C is not entitled to any compensation for a significant break to his RIGHT wrist due to his pre July 2004 injuries. Whilst the AAT found in a neutral evaluation that this appeared to be 'unfair' it nevertheless accepted that the "offsetting' method was one that DVA had created and despite its operating to not provide compensation for the new injury, it was within the parameters of the Guide and therefore permissible.

2.3 Whilst I welcome any attempt to change the "offsetting" formula that is the product of DVA i.e. the Guide used that creates the offset formula is one created by the MRCC

and not the MRC Act that is now the subject of the amended, the fact remains that a DVA public servant will still be entitled to claim and receive lump sum benefits for separate injuries without "offsetting" one injury i.e. the left wrist from a psychological injury that may arise at some later point in time. Why is it that a member of the ADF who due to the hazardous and dangerous nature of their service has to have different injuries sustained "offset" from each other when no other commonwealth public servant is liable to receive nor or reduced compensation? Initially it was due to the MRCC saying so due to 'their method' of creating the Guide and formula to offset. Now it will be the Government who says so by implementing the proposed change rather than directing the MRCC to change the method of "offsetting" or to quire reasonably allow an injured Veteran to receive compensation for each injury sustained without "offsetting" for a different injury.

2.4 The change of the method to offset by the MRC bill as opposed to the MRCC is curious given that the Minister responsible for the inception of the MRCA, the Honourable Dana Vale was quoted in the "*Australian Newspaper*" on the 1st of December 2010 whereby;

> *"That was absolutely not what was intended...John Howard and I were consistent and clear on this: that any conflict between the schemes would always be resolved by erring on the side of generosity to the Veteran".*

2.5 That is, the MRCA was philosophically to be the most beneficial legislation for Veteran and not to disadvantage a Veteran who happens to have served for a period prior to and following 1 July 2004 and been compensated prior to that date for a ***different injury*** to then receive less compensation for the NEW and different injury arising after 1 July 2004 due to offsetting. Essentially, the older and more experienced Veteran is penalised for remaining in the ADF after 1 July 2004.

Schedule – 3

3.1. I support the proposal with the exception that where a wholly dependent partner can show special reasons as to why they seek to make a different choice from either accepting the benefit as a lump sum or 100% of the weekly compensation payment to that DVA should allow some flexibility to consider 'special circumstances' and allow someone to seek a change in their arrangement.

3.2. There would no NET loss to DVA as they would be able to recover any weekly amounts paid from a proposed lump sum payment or reduce a weekly compensation payment taking into the amount received by way of lump sum (assuming the lump sum could be repaid in full or in part back to DVA).

Schedule – 4

4.1. I welcome the change proposed.

Schedule – 5

5.1.There is not NET loss to the Veteran by this amendment and to receive financial and legal advice regarding a significant decision to be made is sensible. Therefore, the proposed change is welcome.

Schedule – 6

6.1. Whilst the proposal to allow Veterans who would otherwise satisfy the SRDP Criteria to elect to receive the benefit notwithstanding they are not receiving weekly payments makes sense, I do not agree that there should "offsetting" of a ComSuper pension which is different in terms of income support funder the MRCA.

6.2. I would propose that any ComSuper pension be **added** to the SRDP rate to allow for a Veteran to receive no more than 100% of their Normal Weekly Earnings as opposed to reducing their SRDP payment by the ComSuper pension.

6.3. With respect to offsetting "lump sum payments", from the SRDP this misconstrues the nature of a lump sum payment which is clearly for pain, suffering, lifestyle effects and the permanent effects of an injury or disease upon a person's body part, organ or psychiatric state. Therefore it has no relevance or comparison to the SRDP payment which is for loss of earnings.

Schedule – 7 Superannuation

7.1. There appears to be confusion by DVA by treating a superannuation payment as the same as an income support payments under the MRCA. There is no anomaly that a person's superannuation payment is a benefit that they have accrued by virtue of their period of service or employment that is made up of their own and their employers' contribution. The right to receive a superannuation pension upon medical retirement from the Defence Force represents the loss of future earnings in a range of alternative suitable employment.

7.2.The incapacity payments paid by DVA pursuant to the MRCA do not have an amount that includes a loss of superannuation benefit in its calculation. I would therefore recommend that Schedule 7 allows a retired Defence Member to receive incapacity payments that can be topped up by the ComSuper benefit to remain at 100% of their Normal Weekly Earnings after the forty-five week (45) period rather than using it to reduce their incapacity payments.

7.3.It is also noted that a person who is discharged, may work in a civilian job and then medically retires under an Industry or State based superannuation scheme and receives a pension or lump sum under that scheme does NOT have that taken into account by DVA to reduce their incapacity payments under the MRCA. Clearly it is recognised that this type of Super i.e. non Commonwealth is not 'double dipping' when receiving both that payment and MRCA incapacity payments. Therefore why is Commonwealth Super treated so differently other than it is the Commonwealth who controls it?

Schedule – 8 Remittal Power of Veterans' Review Board

8.1. I do not have any issue with what is proposed. The only issue is the proposed change of decisions made under the MRCA to be only heard by the VRB. That is, the alternative appeal path being reconsideration is proposed to be abolished (the date of the amendment to be declared).

8.2.

in our view, the reconsideration (internal review) process allows a Veteran the option to pursue a faster, non prejudicial review process with the opportunity to have their disbursements incurred if they appeal to the Administrative Appeals Tribunal (AAT) reimbursement or for legal firms to act on a contingency basis given that legal costs may be paid if they overturn the decision under review.

8.3. By limiting all reviews to the VRB, then the Veteran will not have the right to have his or her legal costs reimbursed as part of the AAT appeal if they overturn the decision.

Schedule – 9 Memberships of the Military Rehabilitation and Compensation Commission

9.1. This does not affect any change.

Schedule – 10 Aggravation of or Material Contribution to War caused or Defence Caused injury or disease

10.1 The delegates for the MRCC should be able to provide a Veteran with an informed decision as to what choice he or she can make for an aggravation of a condition accepted under the VEA following service after 1 July 2004. That is, the nature of the legislation is beneficial and therefore, a veteran should be able to obtain accurate advice and a reasonable projection into the future as to which compensation scheme may be more beneficial taking into account their circumstances.

10.2 Currently, I provide this advice to Veterans and it is extremely beneficial taking into account the individual's particular needs, age, likelihood of incapacity occurring later in their service life i.e. that it may be more beneficial that they remain under the VEA as opposed to a younger Veteran whereby rehabilitation, a higher rate of incapacity payment and a lump sum/periodic payment may be more attractive under the MRCA.

10.3 The reference to the *"section 12 election process is complex and can result in confused and anxious claimants and is administratively burdensome for the Department"* is largely due to the Department's own anxiety about not providing a clear forecast of the potential rights to the individual concerned and not the reality if there was time taken to consider assisting a Veteran to make this informed decision.

10.4 I would therefore recommend that the choice not be taken away but for an analysis to be made taking into account the projected benefits under both schemes to the particular Veteran through a dedicated client liaison officer of the MRCC.

Schedule 11 Treatment for certain SRCA diseases

11.1 The extension of the treatment card to SRCA recipients irrespective of whether they have MRCA or VEA coverage is welcome and will reduce the delays and uncertainty experienced by many SRCA recipients who often complain of delays to be reimbursed for medical treatment.

11.2 DVA need to be aware of the number of medical providers who I understand through some clients that refuse to accept the DVA – White or Gold card and prefer to be paid at the time of the consultation. In order to maintain the integrity of the Card system and ensure medical providers including allied health professionals will undertake to provide treatment and be reimbursed through the White or Gold card DVA must ensure that they are notified if this occurs.

Schedule 12 – Members

12.1 The Ministerial determination system to include potential civilian members to be covered under the MRCA is the same that exists under the VEA. This system provides for essentially the unfettered discretion of the Minster responsible to make the determination which is a disallowable instrument.

12.2 Whilst it may be argued why such an unfettered discretion is reasonable, it should be balanced by the potential prejudice to an individual or organisation who may be denied MRCA coverage due to ill informed or misconstrued advice from the Department(s) upon whom the Minister's determination may rely on.

12.3 This is best demonstrated when considering the Civilian doctors and Surgical Nursing team (known colloquially as the ("SEATO members") who were civilian doctors and nurses and volunteered to assist the Australian and Allied forces in South Vietnam during the Vietnam War. Their service was the training of the local doctors and nurses in local hospitals and clinics together with providing medical care and services to all and sundry including Viet Cong who happened to drop in to the hospitals, generally at night.

12.4 Obviously being in certain areas of Sth Vietnam they were in direct and close proximity to the defoliants used and subsequently implicated in the causation of cancers and birth defects in the children of Veterans.

12.5 The SEATO doctors and nurses however are not eligible under the VEA as they were not under the direct control of the ADF. Nor have they ever been subject to a positive Ministerial determination despite the nature of their involvement (service) in Vietnam.

12.6 Despite at least one Government review (Moor review) recommending that VEA coverage be extended to the SEATO doctors and nurses, they remain under the SRCA and are treated by Comcare as simply, "Commonwealth employees'. Whilst I have assisted many of the SEATO members to obtain SRCA benefits that have been paid,

the majority are ineligible for treatment cards and incapacity payments after age 65 i.e. the TPI or special rate pension.

12.7 Furthermore it is obvious that a worker's compensation insurer like Comcare is not geared to consider the circumstances of the events and nature of war service like in Vietnam nor do they have to use a beneficial standard like the VEA – "Reasonable Hypothesis" when determining a claim.

12.7 It is submitted that the Ministerial determination provision under the MRCA be a decision capable of being reviewed i.e. categorised as an 'original determination" pursuant to s345 of the MRCA to at least allow an external review of the Ministerial determination made to consider the circumstances of the individual or class of individuals such as the equivalent of the future SEATO nursing and surgical team members to be considered for eligibility under the MRCA.

Schedule 13 - Treatment Costs.

13.1 Whilst this appears to be beneficial to the Australian Participants of the British Nuclear Tests (the *"BNT participants"*) through the amendment of the 2006 Act it is in effect a missed opportunity for the Government not to extend the MRCA to include the BNT participates for the range of benefits payable under the MRCA or the SRCA to include for example reasonable funeral expenses for those who die, wholly dependent benefits and lump sums for those with permanent impairments.

13.2 Clearly the average age of the BNT participants are now well in excess of 65 years of age but at least the additional benefits available under the MRCA could have been considered by the Government for inclusion under the MRCA or at least the SRCA to this unique group of former defence personnel who have been ignored for too long. The BNT participants have faced far more obstacles when attempting to receive Commonwealth benefits when compared to other Veterans who served in both Peace time and War like service.

Schedule 14, 15 16

These proposed changes do not appear to have any negative effect on the current arrangements.

Statement of Compatibility with Human Rights

This is a welcome acknowledgement of the proposed amendments complying with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

Perhaps the Government could also review other changes made to legislation, in particular to exclude the operation of the *Disability Discrimination Act (Cwlth)1988* to Defence force members who can be medically discharged and in some cases by using the pretext of a 'medical condition' being a psychological injury to remove those who they consider not to conform to the ADF norm or who may be 'whistle blowers' and the like.

Greg Isolani

KCI LAWYERS
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