



The Dominion Building
533 Little Lonsdale Street
MELBOURNE VIC 3000

Ph: (03) 9602 6888
Fax: (03) 9600 0290

www.slatergordon.com.au

Correspondence to:

Ben Mason
National Practice Group Leader
Military Compensation Department

GPO Box 4864
MELBOURNE VIC 3001

DX 229 MELBOURNE

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Military Compensation Review
PO Box 895
WODEN ACT 2606

By E-mail: milcomp.review@dva.gov.au

Dear Sir or Madam

Review of Military Compensation Arrangements

1 Executive summary

- 1.1 Slater & Gordon, incorporating the practice of D'Arcys Solicitors, is recognised as Australia's leading military compensation law firm.
- 1.2 Our dedicated military compensation team has advised and assisted thousands of claimants under the following repatriation and military compensation schemes:
 - (a) the Military Rehabilitation and Compensation Scheme (**MRCS**) comprising principally of the *Military Rehabilitation and Compensation Act 2004 (MRCA)* and the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004 (CTPA)*;
 - (b) the Military Compensation Scheme (**MCS**) comprising principally of the *Safety, Rehabilitation and Compensation Act 1988 (SRCA)*, the *Military Compensation Act 1994 (MCA)* and *Defence Determination 2000/1* made under the *Defence Act 1903*; and
 - (c) the repatriation scheme consolidated by the *Veterans' Entitlements Act 1986 (VEA)*.
- 1.3 The Minister for Veterans' Affairs, The Hon Alan Griffin MP, has emphasised the importance of this Review in ensuring the Government is providing appropriate support and compensation to Australia's veterans and ex-service personnel.¹

¹ The Hon Alan Griffin MP, Minister for Veterans' Affairs, *Media Release VA019*, 8 April 2009: minister.dva.gov.au/media_releases/2009/apr/VA019.pdf (accessed 20 June 2009).

- 1.4 During the launch of the MRCS at Parliament House, the former Government announced:

The scheme that comes into effect on the 1st of July represents the best of both worlds, drawing on the respective strengths of the [SRCA] and [the VEA] to create a scheme able to meet the needs of any ADF member, reservist or cadet who is injured in the course of their service.

In keeping with our Government's commitment, benefits in the new scheme at least match and in many cases enhance those provided under the existing two pieces of legislation.²

- 1.5 Through this submission, we will show that the MRCS is far from being the 'best of both worlds' and in its current form may be inappropriate for Australia's veterans, and service and ex-service personnel.
- 1.6 It has been our experience that benefits under the MRCS do not 'at least match' those provided under the VEA and the SRCA – in many (but not all) cases, benefits and rights have been substantially eroded or abolished.
- 1.7 It would appear that the Military Rehabilitation and Compensation Commission (**MRCC**) and former Minister for Veteran's Affairs have usurped the role of the Governor-General by devising and introducing a guide to determining impairment and compensation (**GARP M**)³ that is not contemplated or authorised by the MRCA, the CTPA or any regulation.
- 1.8 The effect of GARP M is to:
- (a) unlawfully discount compensation payments for new service injuries or diseases under the MRCA by amounts previously received for *unrelated* conditions accepted under the VEA and the SRCA and in some cases creating a notional debt to the Commonwealth;
 - (b) substitute GARP M for Comcare's permanent impairment guide (**PIG**)⁴ under the SRCA in some cases with the effect that members only receive a fraction of the benefit they should be entitled to receive under the SRCA; and
 - (c) remove the right of some members to commence an action for Common Law damages in relation to the negligence of another member or the Commonwealth.
- 1.9 In addition, the MRCS has denied members access to rehabilitation and compensation, including medical treatment and incapacity payments, which would otherwise have been granted under the SRCA: see **Schedule 1** (comparison of MRCS processes and benefits with the VEA and MCS).

² The Hon Danna Vale MP, former Minister for Veterans' Affairs, speech at the launch of the Military Rehabilitation and Compensation Scheme, Parliament House, 21 June 2004: minister.dva.gov.au/speeches/2004/06_jun/MCRS_launch.htm (accessed 20 June 2009).

³ *Guide to Determining Impairment and Compensation*, Instrument No M9 of 2005.

⁴ *Guide to the Assessment of the Degree of Permanent Impairment*, Second Edition, Part 2 – Defence-related Claims for Permanent Impairment.

2 Intentions

2.1 We accept that by their nature the different Acts governing military compensation contain a number of differences.

- (a) The *Terms of Reference* are careful to state that not all differences are unintended.
- (b) The *Terms of Reference* also state that unintended differences will be investigated and intended differences will be explained and noted.
- (c) In order to adequately address the *Terms of Reference*, it is necessary to establish which differences were intended and which were not.

2.2 The current Minister for Veterans' Affairs has stated that the MRCA was 'intended to incorporate the best elements of the two earlier systems'.⁵

2.3 A number of representations made by the former Minister for Veterans' Affairs appear to be consistent with the current Government's view regarding the intentions of the MRCS.

(a) The Hon Mrs Danna Vale MP:

Enhanced benefits

Another fundamental consideration has been our commitment to maintaining a highly regarded and responsible system. I have given the Defence and veteran community an assurance that veterans' entitlements will be enhanced under this legislation. As a package of benefits I am confident that we have achieved this aim.⁶

The best of both Acts

In producing that single piece of legislation, I believe we have drawn on the best parts of the [SRCA] and the [VEA] to create the new scheme.⁷

Compensation payments under the new scheme at least match those provided under existing arrangements. However, for all types of service – warlike, non-warlike and operational - compensation is significantly enhanced for those with the most serious of injuries.⁸

The [MRCB and CTPB] bring together the best elements of the Military Compensation Scheme and the [VEA] to create a single scheme for all Australian Defence Force members who are injured or who lose their lives during future service.⁹

The new Military Rehabilitation and Compensation Scheme is one of our most important achievements in a year which has had many milestones. The scheme will meet the needs of the current and future generations of ADF members and their families and came into [effect] this week on 1 July. The scheme does not affect

⁵ *Media Release VA019, op cit.*

⁶ The Hon Danna Vale MP, former Minister for Veterans' Affairs, speech at release of the exposure draft of the *Military Rehabilitation and Compensation Bill 2003*, Parliament House, 27 June 2003: minister.dva.gov.au/speeches/2003/06_june/mrca_launch_27_june2003.htm (accessed 20 June 2009).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ The Hon Danna Vale MP, former Minister for Veterans' Affairs, response to the Clarke Committee *Report on Veterans' Entitlements*, 2 March 2004: minister.dva.gov.au/speeches/2004/worddocs/ministerial_statement_040302.doc (accessed 20 June 2009).

existing veterans, however, I would like to take this opportunity to extend the Government's gratitude to ex-service organisations and individual veterans who played an important role in developing the scheme.¹⁰

(b) *Explanatory Memorandum to the Military Rehabilitation and Compensation Bill 2003 (MRCB):*

The Bill will apply where injury, disease or death is due to ADF service on or after the commencement date, which is expected to be 1 July 2004. Existing veterans, ADF members and former members will not lose their entitlements or their ability to claim under the two current Acts, the [VEA] and the [SRCA].¹¹

The Bill adopts the SRCA model of providing compensation for service injuries or diseases through economic and non-economic loss payments. Permanent impairment payments are for non-economic loss including functional loss, pain and suffering and the effect of the injury or disease on the person's lifestyle.¹²

A safety net in the Bill allows certain former members to compare the value of the incapacity payments with the Special Rate (the T&PI pension) available under the VEA. Those with permanent impairment assessed at or above 50 points and who are unable to work or be rehabilitated to work more than 10 hours a week, will have a one-time choice between receiving taxable incapacity payments to age 65, or a tax-free Special Rate Disability Pension (SRDP) for life. The SRDP contains economic and non-economic loss components and will therefore be offset by permanent impairment payments payable for non-economic loss.¹³

(c) *Second Reading Speech of the MRCB:*

[The MRCB] has no impact on current veterans or war widows who are receiving benefits under the [VEA]. Current beneficiaries under the [SRCA] will continue to receive their benefits under that act.¹⁴

Permanent impairment payments are non-economic loss compensation. For warlike and non-warlike service, these payments will match the VEA, while members who are severely injured will have their compensation enhanced.¹⁵

In most cases, permanent impairment payments for injuries from peacetime service will be enhanced from those available under the SRCA.¹⁶

The [MRCB] and the associated transitional and consequential provisions bill are proof of this government's commitment to a military-specific rehabilitation and compensation scheme that will meet the needs of all Australian Defence Force members and their families in the event of injury, disease or death in the service of our nation.¹⁷

¹⁰ The Hon Danna Vale MP, former Minister for Veterans' Affairs, speech at the South Australian RSL Congress, 3 July 2004: minister.dva.gov.au/speeches/2004/07_jul/SA_RSL.htm; mirrored at www.ocsportsea.com/political%20pics/Vale%2009%20jul.htm (accessed 15 March 2009).

¹¹ *Explanatory Memorandum to the Military Rehabilitation and Compensation Bill 2003*, House of Representatives, 4 December 2003, circulated by authority of The Hon Mrs Danna Vale MP, former Minister for Veterans' Affairs (p iv).

¹² *Ibid* (p iv).

¹³ *Ibid* (p v).

¹⁴ Senator the Hon Ian Campbell, former Minister for Local Government, Territories and Roads (WA), 'Second reading speech: *Military Rehabilitation and Compensation Bill 2003*', Senate, 1 March 2004: www.aph.gov.au/hansard/senate/dailys/ds010304.pdf (accessed 29 June 2009).

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

(d) *Second Reading Speech of the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003 (CTPB):*

I am pleased to say that [the CTPB] provides for members who have service on both sides of the commencement date to make a deliberate choice to take advantage of the new military rehabilitation and compensation scheme benefits. A member who suffers an injury or illness after that date will be able to combine prior impairments from the SRCA and the VEA with the new arrangements to get the best possible outcome.¹⁸

2.4 In summary, it can be said that Parliament intended, and the Governor-General authorised, the following in relation to the MRCS:

- (a) a military-specific rehabilitation and compensation scheme that meets the needs of all members and their families in the event of injury, disease or death in the service of our nation;
- (b) a new scheme under which current and former members do not lose their entitlements under the VEA or the SRCA;
- (c) a new scheme under which benefits at least match those provided under the VEA and the SRCA;
- (d) a new scheme that adopts the SRCA model of providing compensation for service injuries or diseases through non-economic loss payments;
- (e) for members who suffer an injury or disease related to Warlike and Non-warlike service on or after 1 July 2004, permanent impairment payments should at least match the quantum of compensation paid under the VEA;
- (f) for members who suffer an injury or disease related to Peacetime service on or after 1 July 2004, in most cases permanent impairment payments should be enhanced from those available under the SRCA;
- (g) for members who suffer an injury or disease on or after 1 July 2004, the ability to combine prior impairments from the SRCA and the VEA to obtain the best possible outcome; and
- (h) a safety net Special Rate Disability Pension (**SRDP**) that allows certain former members to compare the value of incapacity payments under the MRCA with the Special Rate available under the VEA.

2.5 The following can be said in relation to Parliament's intention concerning the functions and powers of the MRCC in relation to the MRCA:

- (a) the MRCC must investigate the matters to which a claim relates,¹⁹ then consider all matters that are relevant to the claim and determine the claim in writing in accordance with the MRCA,²⁰

¹⁸ Senator the Hon Ian Campbell, former Minister for Local Government, Territories and Roads (WA), 'Second reading speech: *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003*', Senate, 1 March 2004:

www.aph.gov.au/hansard/senate/dailys/ds010304.pdf (accessed 29 June 2009).

¹⁹ Section 324 of the MRCA.

- (b) the MRCC must, as soon as practicable after receiving a request to reconsider an original determination, reconsider the original determination;²¹
- (c) in considering, hearing or determining a claim or request for reconsideration and in making a decision in relation to such a claim or request for reconsideration, the MRCC:
- is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it thinks just;²²
 - must act according to substantial justice and the substantial merits of the case, without regard to legal form and technicalities;²³
 - must take into account any difficulties that, for any reason, lie in the way of ascertaining the existence of any fact, matter, cause or circumstance, including any reason attributable to the effects of the passage of time, including the effect of the passage of time on the availability of witnesses; or the absence of, or a deficiency in, relevant official records, including an absence or deficiency resulting from the fact that an occurrence that happened during the defence service of a member was not reported to the appropriate authorities.²⁴

2.6 The following can be said in relation to Parliament's intention concerning the functions and powers of the MRCC in relation the SRCA:

- (a) the MRCC must determine defence-related claims under the SRCA accurately and quickly,²⁵ and in performing this function the MRCC is to be guided by equity, good conscience and the substantial merits of the case, without regard to technicalities; is not required to conduct a hearing; and is not bound by the rules of evidence;²⁶
- (b) the MRCC must do anything the doing of which is incidental to the performance of the above function under the SRCA and would be required of Comcare if Comcare had responsibility for the performance of that function;²⁷ and
- (c) the MRCC must maintain contact with the Safety, Rehabilitation and Compensation Commission (**SRCC**) and with Comcare to ensure that, as far as practicable, there is equity of outcomes resulting from administrative practices and procedures used by Comcare and the MRCC in the performance of their respective functions.²⁸

²⁰ Section 333 of the MRCA.

²¹ Subsection 350(1) of the MRCA.

²² Paragraph 334(1)(a) of the MRCA.

²³ Paragraph 334(1)(b) of the MRCA.

²⁴ Paragraph 334(1)(c) of the MRCA.

²⁵ Paragraph 142(1)(a) of the SRCA.

²⁶ Subsection 142(2) of the SRCA.

²⁷ Paragraph 142(1)(d) of the SRCA.

²⁸ Paragraph 142(1)(c) of the SRCA.

3 Operational performance to date

3.1 Under the VEA:

- (a) The number of primary claims received by the Repatriation Commission (RC) in 2007-08 was 24,474;²⁹ and the average time taken to process primary claims was 82 days over the past 2 reported years: see **Schedule 2** (statistical comparison of performance).
- (b) The total number of disability, war widows/widowers and other dependant pensions in 2007-08 was 268,125 with a critical error rate of 1.5%.³⁰

3.2 Under the SRCA:

- (a) The number of new initial liability claims received by the MRCC in 2007-08 was 3,327;³¹ and the average time taken to process initial liability claims was 191 days over the past 3 reported years, reaching a high of 234 days in 2006-07: see **Schedule 2**.
- (b) The total number of incapacity payees, lump sum payments and payments to dependants made in 2007-08 was 4,338 with a critical error rate of 23.8%;³² and the average time taken to process new permanent impairment claims was 108 days over the past 3 reported years: see **Schedule 2**.
- (c) The average percentage of decisions overturned on appeal by the Administrative Appeals Tribunal (AAT) in past 3 reported years was around 45%.³³
- (d) From the data extracted from the Department of Veterans' Affairs (DVA) *Annual Report 2007-08*, it is apparent that the MRCC does not determine defence-related claims under the SRCA accurately (with an error rate of nearly 1 in 4 claims) or quickly.
- (e) It is our direct experience that this is due to an over emphasis on technicalities and processes.
- (f) For example, the MRCC will generally investigate and determine liability separately from any concurrently claimed compensation which in some cases requires reconsideration and appeal in relation to liability and then compensation issues, which can mean a member may wait two or more years before actually receiving the compensation claimed; see:
 - **Schedule 3** (actual comparison of performance – accepted claims); and
 - **Schedule 4** (actual comparison of performance – disputed claims).

²⁹ DVA *Annual Report 2007-08*, (p 65):

www.dva.gov.au/aboutDVA/publications/corporate/annualreport/Pages/2007-2008.aspx (accessed 29 June 2009)

³⁰ *Ibid* (p 65).

³¹ *Ibid* (p 75).

³² *Ibid* (p 76).

³³ *Ibid* (p 78).

3.3 Under the MRCA:

- (a) The number of new initial liability claims received by the MRCC in 2007-08 was 2,450;³⁴ and the average time taken to process initial liability claims was 162 days over the past 3 reported years: see **Schedule 2**.
- (b) The total number of lump sums and incapacity payees in 2007-08 was 1,009 with a critical error rate of 13.1%;³⁵ and the average time taken to process new permanent impairment claims was 121 days over the past 3 reported years: see **Schedule 2**.
- (c) The percentage of decisions overturned on appeal by the Veterans' Review Board (**VRB**) in 2007-08 was around 44%;³⁶ and the percentage of decisions overturned on appeal by the AAT in 2007-08 was around 33%.³⁷
- (d) The *DVA Annual Report 2007-08* data shows a considerable error rate of more than 1 in 10 claims and shows that claims are not determined quickly.
- (e) Again, it is our direct experience that this is due to the MRCC acting in an unnecessarily formal manner by failing to assess and determine liability and compensation issues concurrently.

3.4 The DVA has posted a *Service Charter* on its website in which it specifies a number of standards expected to be achieved by the RC and the MRCC.³⁸

- (a) Comcare has similarly posted a *Revised Claimant Charter* on its website.³⁹
- (b) Recalling that the MRCC is required to maintain contact with Comcare to ensure that there is equity of outcomes resulting from administrative practices and procedures used by Comcare and the MRCC in the performance of their respective functions under the SRCA, it is appropriate to compare the MRCC's performance with the Comcare *Revised Claimant Charter*: see **Schedule 2**.
- (c) The RC's and MRCC's performance can be measured against the DVA *Service Charter* based on data extracted from the *DVA Annual Report 2007-08*.⁴⁰

³⁴ *Ibid* (p 79).

³⁵ *Ibid* (p 81).

³⁶ *Ibid* (p 78), the figures for 2005-06 and 2006-07 were not available.

³⁷ *Ibid* (p 78), the figures for 2005-06 and 2006-07 have been omitted (there were no applications decided in 2005-06 and only 2 applications were decided in 2006-07).

³⁸ *Service Charter*, DVA:

www.dva.gov.au/aboutDVA/publications/corporate/service_charter/Pages/content4.aspx (accessed 29 June 2009).

³⁹ *Revised Claimant Charter*, Comcare:

www.comcare.gov.au/___data/assets/word_doc/0014/51233/Claimant_Charter_V2.doc (accessed 29 June 2009)

⁴⁰ *DVA Annual Report 2007-08*, *op cit*.

- (d) From the data in **Schedule 2**, the following can be stated with some confidence:
- the RC determines most claims under the VEA close to the timeframes set by the DVA; and
 - the MRCC does not come close to determining most claims under the SRCA in the timeframes set by the DVA.
- (e) Given that the MRCA has liability provisions based on the VEA and permanent impairment compensation provisions based on the SRCA, it would be reasonable for those covered by the MRCS to expect performance at least in line with that expected of Comcare and the RC.
- (f) If performance in relation to claims under the MRCA cannot match or better that under the VEA and the SRCA, there is obviously a serious and systemic problem with the MRCS and the process and procedures adopted by the MRCC.

3.5 There are several factors impacting on operational performance of the MRCS that are not evident in the publicly available performance data, including such factors as the number of steps in some decision-making processes (for example, claims for permanent impairment), the time permitted for members to submit elections and/or challenge decisions, and the time taken by the MRCC to determine particular steps and reconsider claims.

- (a) What the publicly available performance data does not show is the considerable number of compensation claims submitted in late 2004 and early 2005 that are still being reconsidered by the MRCC or reviewed by the AAT, in some cases more than 4 years after being submitted.
- (b) The publicly available performance data concerning the MRCS only reveals the number of claims, the time taken to process initial liability claims and the time taken to determine permanent impairment claims.
- (c) In relation to permanent impairment claims, it is not appropriate to directly compare the average time taken to determine a claim under s 24 of the SRCA (108 days) with the average time taken to determine a claim under s 68 of the MRCA (121 days).
- (d) The comparisons in **Schedule 3** and **Schedule 4** illustrate the number of concealed steps and additional time taken to process a claim for liability and permanent impairment compensation under the MRCS.
- (e) The data contained in **Schedule 3** and **Schedule 4** is more reflective of our experience in assisting members in relation to their claims under the MRCS than the data contained in the *DVA Annual Report 2007-08*.

3.6 Slater & Gordon notes that the *Seafarers Rehabilitation and Compensation Act 1992 (Seafarers Act)* is substantially the same as the SRCA and further notes that the Seafarers Act contains 'deeming' provisions that do not appear in the SRCA or the MRCA.

- (a) Slater & Gordon's experience in the seafarers jurisdiction is that claims administration is much fairer and considerably more efficient than claims under the MCS, notwithstanding the substantial similarities in terms of claims, reconsiderations and appeals.
 - (b) Under the Seafarers Act, the employer must determine its liability in relation to a claim within 12 days of receiving a claim relating to incapacity for work, loss of or damage to property or cost of medical treatment, or within 12 days of receiving information or a document requested by the decision-maker (if requested before the expiration of 12 days from receiving such a claim).⁴¹
 - (c) The Seafarers Act then requires a decision-maker to determine a claim for permanent impairment within 30 days,⁴² determine a claim for dependency within 60 days⁴³ and reconsider an original determination within 60 days.⁴⁴
 - (d) If any decision is not made in the specified timeframe, the decision-maker is deemed to have rejected the claim and the claimant is then able to apply for reconsideration or review, as the case may be.
- 3.7 Based on our experience in the military compensation jurisdiction, we believe the inclusion of deeming provisions would significantly improve performance results and outcomes for claimants.
- (a) Most if not all claims under the SRCA and the MRCA require contemporaneous documentary evidence extracted from a member's central health record and/or service record to support a claim.
 - (b) However, it is not possible in all cases for a member to obtain a copy of their central health record quickly, which is particularly important if the claim for medical treatment, rehabilitation or other benefit is urgent (the Department of Defence (**DOD**) advises former members that it can take up to 30 weeks for a request for a central health record to be actioned).
 - (c) The DVA and DOD have 'single access mechanism' through which the MRCC can obtain central health records in a much shorter period (apparently within 2 weeks).
 - (d) Given that it can take 2 weeks or more for the MRCC to obtain a member or former member's central health record, it would not be practical for the timeframes contained in the Seafarers Act to be transposed to the MCS or MRCS.
 - (e) Whilst the timeframes in the Seafarers Act are not entirely appropriate for the MCS or the MRCS, it is appropriate and indeed essential to improve the performance of the MRCC in relation to the determination and administration of claims.

⁴¹ Section 73 of the Seafarers Act.

⁴² Section 73A of the Seafarers Act.

⁴³ Section 72 of the Seafarers Act.

⁴⁴ Section 79 of the Seafarers Act.

3.8 Recommendation 1:

That the Minister for Veterans' Affairs approach the Minister for Employment and Workplace Relations, The Hon Julia Gillard MP, to recommend amendments to ss 60 and 62 of the SRCA to introduce time limits that are modelled on those contained in the Seafarers Act so that Comcare and other determining authorities under the SRCA, including the MRCC, will have:

- 30 days to determine liability in relation to a claim or within 30 days of receiving information or a document requested by the decision-maker (if requested before the expiration of 30 days from receiving a claim);
- 30 days to determine a claim for compensation (including dependency, medical treatment, incapacity for work, permanent impairment or loss of or damage to property); and
- 30 days to reconsider an original determination.

If a decision is not made in the specified timeframe, the decision-maker is deemed to have rejected the claim and the claimant is then able to apply for reconsideration or review, as the case may be.

That amendments be made to ss 333 and 350 of the MRCA to introduce timeframes and deeming provisions that mirror the proposed amendments to ss 60 and 62 of the SRCA.

To enable the MRCC to comply with the proposed timeframes in the SRCA and MRCA, that substantial improvement be made to the DVA's 'single access mechanism' to ensure that requests for central health records are processed by the DOD within 14 days in cases where the member has not provided copies of relevant extracts with the claim form.

4 Quantum of benefits payable for serious injury

- 4.1 The *DVA Annual Report 2007-08* identifies the following as the top 15 most frequently claimed conditions covered by Statements of Principles (**SoPs**) issued by the Repatriation Medical Authority (**RMA**) and determined at the initial liability level under the MRCA in 2007-08:⁴⁵

SoP title	No. of disabilities accepted using RMA SoPs	Acceptance rate (%)	No. of disabilities rejected using RMA SoPs	Disabilities accepted and rejected using RMA SoPs
1. Acute sprain and acute strain	568	89	68	636
2. Fracture	303	89	39	342
3. Internal derangement of the knee	195	78	56	251
4. Osteoarthritis	126	69	57	183
5. Lumbar Spondylosis	140	77	43	183
6. Chondromalacia Patellae	105	59	73	178
7. Intervertebral disc prolapse	150	85	27	177
8. Sensorineural hearing loss	100	61	65	165
9. Tinnitus	112	84	22	134
10. Rotator cuff Syndrome	114	88	15	129
11. Dislocation	104	89	13	117
12. Depressive Disorder	74	64	41	115
13. Shin splints	105	94	7	112
14. Physical Injury due to Munitions Discharge, Cut, Stab, Abrasion and Laceration	74	77	22	96
15. Posttraumatic Stress Disorder	56	77	17	73
Total	2326		565	2891

- 4.2 From the above data, unsurprisingly acute sprains and strains (predominantly of lower limb joints and soft tissues, one can safely presume) and conditions affecting the knees and shins are ubiquitous, accounting for around a third of the most commonly claimed conditions.
- 4.3 Once accepted, permanent and stable, these common lower limb injuries may be the subject of a claim for permanent impairment compensation under Part 2 of Chapter 4 of the MRCA.
- 4.4 Unlike the SRCA, however, each injury is not necessarily compensated under the MRCA because of the way GARP M assesses impairment.
- (a) Part 3.2 of GARP M requires the comparison of:
- the age-adjusted functional impairment rating from loss of range of movement of any joint (Tables 3.2.1 and 3.6.1);

⁴⁵ *DVA Annual Report 2007-08*, op cit, Table 25 (pp 79-80):

- the functional impairment for use of the limbs as whole (Table 3.2.2); and
 - the rating for any other impairment, such as amputations (Table 3.2.3) and joint replacements (Table 3.2.4).
- (b) The highest of the above ratings is the final impairment rating, regardless of the number of service injuries or diseases affecting the lower limbs.
- (c) Whilst there may be an additional rating for frequent pain that continues to affect a joint when the joint is no longer in use (Table 3.4.1), only one rating is permitted for pain in any joint or combination of joints.
- 4.5 Taking, for example, a member who sustains permanent injuries to both ankles, both knees and both hips during one or more parachuting accidents on or after 1 July 2004:
- (a) The member is able to rise to a standing position and walk but has difficulty with grades, steps and distances.
- (b) The injuries have resulted in the loss of less than half normal range of movement of each of the member's ankle joints, knee joints and hip joints.
- (c) Pain is present in one or more affected joints after walking but this improves after several hours rest.
- (d) Had the injuries been sustained prior to 1 July 2004 and accepted under the SRCA, the member would receive an impairment rating of 40%⁴⁶ pursuant to the PIG and a tax-free lump sum payment of between \$71,438.20 and \$99,637.51⁴⁷ regardless of the member's age or gender (based on statutory rates as at 30 June 2009).
- (e) Under the MRCA, the member would receive an impairment rating of 15 points⁴⁸ pursuant to GARP M and the following tax-free payment (based on statutory rates as at 30 June 2009) if the injuries related to Peacetime service:
- Males: \$31,449.36 (age 30) to \$24,391.02 (age 50); or
 - Females: \$31,449.36 (age 30) to \$26,450.20 (age 50).⁴⁹

⁴⁶ 5% Left Ankle (Table 9.2); 5% Right Ankle (Table 9.2); 10% Left Knee (Table 9.2); 10% Right Knee (Table 9.2); 10% Left Hip (Table 9.2); 10% Right Hip (Table 9.2); 20% Left Lower Limb (Table 9.5); and 20% Right Lower Limb (Table 9.5); *Canute v Comcare* (2006) 226 CLR 535; cf *Fellowes v Military Rehabilitation Compensation Commission* [2008] FCAFC 140 (4 August 2008) on appeal to the High Court of Australia.

⁴⁷ \$60,158.48 for s 24 (0.40 x \$150,396.21), \$11,279.72 for s 27 impairment component (0.40 x \$28,199.31) and between \$nil and \$28,199.31 for s 27 non-economic loss component.

⁴⁸ 5 points Left Ankle (Table 3.2.1); 5 points Right Ankle (Table 3.2.1); 10 points Left Knee (Table 3.2.1); 10 points Right Knee (Table 3.2.1); 10 points Left Hip (Table 3.2.1); 10 points Right Hip (Table 3.2.1); 10 points Lower Limbs (Table 3.2.2); and 5 points Resting Joint Pain (Table 3.4.1).

⁴⁹ Using a lifestyle rating of 1, the compensation factor is 0.087; the maximum weekly amount is \$275.86; the weekly amount is \$24.00; using a conversion factor of 1310.4 (31 at next birthday) or 1016.3 (male, 50 at next birthday) or 1102.1 (female, 50 at next birthday).

(f) If the injuries related to Warlike or Non-warlike service, under the MRCA, the member would receive the following tax-free payment (based on statutory rates as at 30 June 2009):

- Males: \$56,030.48 (age 30) to \$43,455.26 (age 50); or
- Females: \$56,030.48 (age 30) to \$47,123.92 (age 50).⁵⁰

4.6 Using a similar example, where a member sustained only one permanent injury to a knee on or after 1 July 2004.

- (a) The member is able to rise to a standing position and walk but has difficulty with grades and steps (but not distances).
- (b) The injuries have resulted in the loss of less than half normal range of movement of the member's knee joint.
- (c) Pain is present in the affected joint after walking but this improves after several hours rest.
- (d) Had the injury been sustained prior to 1 July 2004 and accepted under the SRCA, the member would receive an impairment rating of 10%⁵¹ pursuant to the PIG and a tax-free lump sum payment of between \$17,859.55 and \$46,058.86⁵² regardless of the member's age or gender (based on statutory rates as at 30 June 2009).
- (e) Under the MRCA, the member would receive an impairment rating of 15 points⁵³ pursuant to GARP M and the same tax-free payment as in the first example.

4.7 By way of final example, where a member sustained a serious injury on or after 1 July 2004 resulting in a hemipelvectomy.⁵⁴

- (a) The member is unable to walk or stand but is able to work full-time in alternative employment.
- (b) Had the injury been sustained prior to 1 July 2004 and accepted under the SRCA, the member would receive an impairment rating of 65%⁵⁵ pursuant to the PIG and a tax-free lump sum payment of between \$116,087.09 and

⁵⁰ Using a lifestyle rating of 1, the compensation factor is 0.155; the maximum weekly amount is \$275.86; the weekly amount is \$42.76; using a conversion factor of 1310.4 (31 at next birthday) or 1016.3 (male, 50 at next birthday) or 1102.1 (female, 50 at next birthday).

⁵¹ 10% Knee (Table 9.2); and 10% Lower Limb (Table 9.5).

⁵² \$15,039.62 for s 24 (0.10 x \$150,396.21), \$2,819.93 for s 27 impairment component (0.10 x \$28,199.31) and between \$nil and \$28,199.31 for s 27 non-economic loss component.

⁵³ 10 points Knee (Table 3.2.1); 5 points Lower Limbs (Table 3.2.2); and 5 points Resting Joint Pain (Table 3.4.1).

⁵⁴ Amputation of one leg together with removal of the half of the pelvis on the same side of the body; *Merriam-Webster's Medical Dictionary*: dictionary.reference.com/browse/hemipelvectomy (accessed 28 June 2009).

⁵⁵ 50% Amputation (Table 9.3); and 65% Lower Limb (Table 9.5).

\$144,286.40⁵⁶ regardless of the member's age or gender (based on statutory rates as at 30 June 2009).

(c) Under the MRCA, the member would receive an impairment rating of 75 points⁵⁷ pursuant to GARP M and the following tax-free payment (based on statutory rates as at 30 June 2009) if the injury related to Peacetime service:

- Males: \$320,638.92 (age 30) to \$248,676.23 (age 50); or
- Females: \$320,638.92 (age 30) to \$269,670.45 (age 50).⁵⁸

(d) If the injury related to Warlike or Non-warlike service, under the MRCA, the member would receive the following tax-free payment (based on statutory rates as at 30 June 2009):

- Males: \$335,821.37 (age 30) to \$260,451.21 (age 50); or
- Females: \$335,821.37 (age 30) to \$282,439.51 (age 50).⁵⁹

4.8 The above examples would have shown similar results if compared with other common musculoskeletal conditions.

4.9 When the quantum of compensation payable for the most common musculoskeletal injuries under the MCS is compared with the quantum available under the MRCS, it is clear that the MRCS generally provides less compensation for multiple injuries and greater compensation for some single injuries and in particular serious single injuries.

4.10 Under the SRCA, most injuries resulting in at least 10% impairment assessed under the PIG entitle the member to a payment of lump sum compensation with the result that a member who sustained or subsequently develops more than one serious injury or disease arising out of, or in the course of, service prior to 1 July 2004 may be entitled to an aggregate amount of compensation exceeding the maximum payable under the MRCA.

4.11 Recommendation 2:

That amendments be made to Part 2 of Chapter 4 of the MRCA and GARP M to ensure that compensation payments under the MRCA are no less than payments for the same impairment and non-economic loss under the SRCA.

⁵⁶ \$97,757.54 for s 24 (0.65 x \$150,396.21), \$18,329.55 for s 27 impairment component (0.65 x \$28,199.31) and between \$nil and \$28,199.31 for s 27 non-economic loss component.

⁵⁷ 75 points Lower Limbs (Table 3.2.2); and 60 points Amputations (Table 3.2.3).

⁵⁸ Using a lifestyle rating of 6, the compensation factor is 0.887; the maximum weekly amount is \$275.86; the weekly amount is \$244.69; using a conversion factor of 1310.4 (31 at next birthday) or 1016.3 (male, 50 at next birthday) or 1102.1 (female, 50 at next birthday).

⁵⁹ Using a lifestyle rating of 6, the compensation factor is 0.929; the maximum weekly amount is \$275.86; the weekly amount is \$256.27; using a conversion factor of 1310.4 (31 at next birthday) or 1016.3 (male, 50 at next birthday) or 1102.1 (female, 50 at next birthday).

5 Quantum of benefits payable for death

- 5.1 The quantum of compensation payable under the MRCA for death is now, in some cases, less than that payable under the SRCA to current and former members and civilians, such as employees of the DVA.
- 5.2 The *Employment and Workplace Relations Amendment Act 2009 (EWRAA)* amended the SRCA to increase the lump sum death benefit payment retrospectively for deaths occurring on or after 13 May 2008 made to:
- (a) dependants who were wholly dependant on the employee under subs 17(3) to \$400,000 (\$412,000 as at 30 June 2009);
 - (b) dependants who were partially dependant on the employee under subs 17(4) to a maximum of \$400,000 (\$412,000 as at 30 June 2009); and
 - (c) prescribed children under subs 17(5) to \$110 (\$113.30 as at 30 June 2009).⁶⁰
- 5.3 Recommendation 3:

That legislative amendments be made to the MCS to preserve the relative value of the 'additional death benefit' and other payments under the *Defence Determination 200/1*, including the 'serious injury adjustment'.

That amendments be made to Chapter 5 of the MRCA to increase the value of the death benefit and payments to eligible young persons to at least that payable under the MCS.

6 Unintended limitation on coverage

- 6.1 The MRCA has incorporated the liability provisions contained in the VEA in order that the SoPs issued by the RMA made for the purposes of the VEA could be applied under the MRCA.
- 6.2 In addition, the MRCA has included the following provisions to which the SoPs do not apply:
- (a) a provision concerning the 'consequences' of medical treatment paid for or provided by the Commonwealth in relation to a service injury or disease;⁶¹
 - (b) a provision concerning the 'unintended consequences' of medical treatment paid for or provided by the Commonwealth in relation to an otherwise non-compensable injury or disease;⁶²

⁶⁰ These increases were made retrospective to 13 May 2008 and were increased by indexation on 1 July 2008 and will be further subject to indexation each 1 July thereafter; the subs 17(3) benefit and the maximum subs 17(4) benefit will be indexed by Wage Price Index rather than Consumer Price Indexation from 1 July 2009.

⁶¹ Paragraphs 29(1)(a) and (2)(a), and subs 29(3) of the MRCA.

⁶² Paragraphs 29(1)(b) and (2)(b) of the MRCA.

- (c) a provision concerning the material contribution or aggravation of a sign or symptom of an otherwise non-compensable injury or disease.⁶³

6.3 Notwithstanding the apparently comprehensive liability provisions contained in the MRCA, the definitions of 'injury' and 'disease' contained in subs 4(1) of the SRCA (as they were prior to the amendment in 2007)⁶⁴ permit the acceptance of liability by the MRCC of some conditions in circumstances where the MRCA is not construed by the MRCC to permit acceptance.

- (a) We have seen many claims for compensation in relation to common 'wear and tear' conditions that have been disallowed under the MRCA that would have otherwise (and still do) succeeded under the SRCA⁶⁵ and consequently some members have been denied access to rehabilitation and compensation, including medical treatment and incapacity payments.
- (b) Given that the liability provisions in conjunction with the RMA's SoPs are construed in some cases more narrowly than the liability provisions in the SRCA, we are surprised to find that claims for compensation made by some civilian Government employees (and employees of licensed corporations) are more likely to succeed than claims for compensation under the MRCA for identical conditions.
- (c) Although the amendments to the SRCA in 2007 have strengthened the connection between work and eligibility for workers' compensation, particularly in regard to disease claims, we are still seeing new claims for compensation made post-amendment by some civilian Government employees succeed where their ADF counterpart's claims have failed.

6.4 Recommendation 4:

Where the MRCC is aware that a claim for a particular condition would succeed under the SRCA (based on its own data collected in relation to administration of defence-related claims under the SRCA and data held by Comcare and/or the SRCC), that the MRCC expediently develop and implement policy and procedures requiring delegates to exercise the discretion in s 340 of the MRCA to accept liability notwithstanding that the RMA has determined, or has declared that it does not propose to make or amend, a SoPs in respect of the particular kind of injury, disease or death claimed.

⁶³ Section 30 of the MRCA.

⁶⁴ The *Safety, Rehabilitation, Compensation and Other Legislation Amendment Act 2007* amended the definition of 'injury' and 'disease' on and from 13 April 2007.

⁶⁵ For example, Chondromalacia Patellae (also known as 'joggers knee'), which is one of the most commonly claimed conditions (sixth most common in 2007-08) and has a very high disallowance rate (41% of claims for this condition were disallowed in 2007-08); *DVA Annual Report 2007-08, op cit*, Table 25 (pp 79-80).

7 Unintended discounting of compensation payments

- 7.1 Section 66 of the MRCA states that 'compensation is payable for permanent impairment that occurs as a result of one or more service injuries or diseases if the degree of that impairment is above a certain level'.
- (a) The terms 'service injury' and 'service disease' are defined in s 27, subs 29(1), subs 29(2) and s 30.
 - (b) Section 6 specifies the kinds of service to which the MRCA applies, namely Warlike, Non-warlike, Peacetime and Defence service.
 - (c) Section 2 makes it clear that ss 3 to 359 of the MRCA operate on and from 1 July 2004.
 - (d) Therefore, the phrase 'service injury or disease' in s 66 can only mean an injury or disease attributed to Warlike, Non-warlike, Peacetime and Defence service rendered on and from 1 July 2004.
- 7.2 Sections 68 and 69 of the MRCA define and limit the Commonwealth's liability to pay compensation for permanent impairment under the MRCA – the Commonwealth is *only* liable to pay compensation to a person if:
- (a) a claim in respect of the person has been made under s 319 of the MRCA for 'compensation',⁶⁶ which can only mean 'compensation under [the MRCA]';⁶⁷
 - (b) as a result of 'one or more service injuries or diseases', the person has suffered a permanent impairment,⁶⁸ and
 - for an impairment resulting from a single service injury or disease consisting of hearing loss; the loss, or the loss of the use, of a finger or toe; or the loss of the sense of taste or smell; the impairment suffered by the person constitutes at least 5 impairment points,⁶⁹ or
 - the impairment suffered by the person from 'one or more service injuries or diseases' constitutes at least 10 impairment points.⁷⁰
- 7.3 Neither s 68 nor s 69 of the MRCA creates a liability in the Commonwealth to pay compensation in respect of any injury or disease accepted under the VEA or the SRCA.
- 7.4 However, the MRCS was designed to include a safety net to ensure that those members with an injury or disease accepted under the VEA or the SRCA are not worse off (but not better off) compared to those who suffer the same level of incapacity and/or impairment only as a result of one or more service injuries or diseases accepted under the MRCA.

⁶⁶ Paragraph 68(1)(c) of the MRCA.

⁶⁷ Section 5 of the MRCA.

⁶⁸ Subsections 68(1)(a) and (b) of the MRCA.

⁶⁹ Paragraph 69(1)(a) of the MRCA.

⁷⁰ Paragraph 69(1)(b) of the MRCA.

- (a) In order to create a safety net, it is necessary to take into account the impairment points constituted by an injury or disease accepted under the VEA or the SRCA and assess a member's total impairment resulting from all conditions to see whether the member qualifies for a SRDP and its associated benefits.
- (b) It would be manifestly unfair if all members with service prior to 1 July 2004 had, in effect, their level of impairment reset to nil if, for example, the member was close to being entitled to a Special Rate pension under the VEA but could no longer count new service-related impairment towards his or her total accrued impairment.
- (c) For that reason, the impairment points constituted by each injury and disease accepted under the VEA or the SRCA must be brought across and if, but only if, that total impairment gives rise to a SRDP under the MRCS should the compensation previously or subsequently received under the VEA and the SRCA for conditions that were included as part of the total impairment assessment be offset against SRDP to avoid double-dipping.
- (d) Once a member becomes entitled to a SRDP under the MRCA, being the maximum rate of compensation under the MRCA (which would include an impairment rating under GARP M of at least 50 impairment points and the permanent inability of the member to undertake remunerative work for more than 10 hours per week), the Parliament has intended that the SRDP be offset against any further compensation paid under the VEA, the SRCA or the MRCA for any condition, or benefit paid under a Commonwealth superannuation policy.⁷¹

7.5 Section 13 of the CTPA deals with 'bringing across impairment points from a VEA or SRCA injury or disease'.

- (a) Subsection 13(1) makes it clear that s 13 of the CTPA applies where a claim is made under s 319 of the MRCA in respect of:
 - a person who also has a separate 'injury or disease' within the meaning of the VEA or the SRCA; or
 - an aggravation of, or a material contribution to an 'injury or disease' within the meaning of the VEA or the SRCA, or a sign or symptom of such an injury or disease.
- (b) Put another way, even though a claim for compensation has not been submitted under the VEA or the SRCA, the MRCC must determine the impairment points constituted by the 'old injury or disease' (within the meaning of the VEA or the SRCA) using GARP M.⁷²
- (c) The *Explanatory Memorandum* to the CTPB states that the impairment resulting from the 'old injury or disease' will be 'deemed to have been

⁷¹ Section 204 of the MRCA and s 14 of the CTPA.

⁷² Subsection 13(2) of the CTPA.

impairment under the MRCA' but 'only that portion attributed to service after commencement will attract any further permanent impairment payment'.⁷³

- (d) For the purposes of determining under the MRCA the number of impairment points constituted by an impairment suffered by a person, subs 13(3) of the CTPA requires the MRCC to count the impairment points determined for the 'old injury or disease' towards the person's total impairment points.

7.6 Subsection 67(1) of the MRCA permits the MRCC to determine in writing a guide setting out specific criteria and methods for assessing the degree of impairment resulting from a 'service injury or disease'.

- (a) The MRCC is permitted by subs 13(4) of the CTPA to include in the guide one or more methods of working out the amount of compensation a person is entitled to under Part 2 of Chapter 4 of the MRCA.
- (b) The MRCC is also permitted by subs 13(4) to include a method of offsetting payments made in respect of the 'old injury or disease' and the *Explanatory Memorandum* to CTPB states, for example, this might be for the purpose of determining:
- whether the person meets the criteria to be offered a choice between incapacity payments and the SRDP under s 199 of the MRCA; or
 - whether the person no longer meets the criteria for a SRDP (s 209 of the MRCA).⁷⁴
- (c) The Note at the end of s 13 of the CTPA states that the regulations may also include a method of converting lump sum amounts into weekly amounts for the purposes of offsetting.
- (d) Paragraph 24(3)(b) of the CTPA states, the regulations may provide:
- that persons who are entitled to compensation under the MRCA cease to be entitled to a similar benefit under the VEA or the SRCA; and
 - a method of converting a lump sum amount into weekly amounts for the purpose of working out an amount of compensation payable for a service injury or disease under Parts 2 and 6 of Chapter 4 of the MRCA.

7.7 The Governor-General has made a number of regulations prescribing matters of a transitional nature arising out of the enactment of the MRCA and the CTPA.

- (a) Regulation 4 of the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Regulations 2004 (No 157 of 2004)* prescribes the method of converting lump sum amounts paid under ss 24, 25 and 27 of the SRCA into weekly amounts.

⁷³ *Explanatory Memorandum to the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Bill 2003*, House of Representatives, 4 December 2003, circulated by authority of The Hon Mrs Danna Vale MP, former Minister for Veterans' Affairs (p i).

⁷⁴ *Ibid* (pp 7-8).

(b) The *Explanatory Memorandum* to the above regulations states:

The purpose of the regulations is to deal with the offsetting of Special Rate Disability Pension (SRDP) payments made under the MRCA by lump sum compensation payments made under sections 24, 25 and 27 of the [SRCA]. Regulation 4 describes the method of converting from a lump sum to a weekly payment, which can be offset against the weekly SRDP payment. The SRDP payment is based on the VEA special rate pension that incorporates elements of permanent impairment and economic loss compensation leading to the need to offset these SRCA payments.

7.8 Notwithstanding the beneficial intention of the MRCA and the CTPA when passed by Parliament and approved by the Governor-General, the MRCC included Chapter 25 in GARP M that prescribes the method of working out the amount of compensation payable under the MRCA for a person with an injury or disease accepted under the VEA or the SRCA.

- (a) The effect of Chapter 25 is well known to many members who have submitted claims for permanent impairment compensation under the MRCA in respect of their new service injury or disease to discover that prior compensation payments under the VEA and/or the SRCA for *unrelated* conditions have been deducted from an amount of compensation in spite of the Commonwealth's liability prescribed in ss 68 and 69 of the MRCA.
- (b) In many cases, where a member has suffered a disabling service injury or disease, the amount of compensation has been reduced to virtually nothing or a negative amount.
- (c) Where the application of Chapter 25 has resulted in a negative amount of compensation, this is in effect a notional 'debt' to the Commonwealth – a member would need to suffer a further service injury or injuries in order to gain sufficient 'credit' to be entitled to a compensation payment.
- (d) The unintended consequence, apart from failing to give effect to ss 68 and 69 of the MRCA, is to erode or abolish a member's right under s 389 to commence an action for damages for non-economic loss for the negligence of another member or the Commonwealth – a member may only choose to institute such an action if compensation is payable under ss 68, 71 or 75 in respect of a service injury or disease.
- (e) In light of the above, it would be a reasonable assessment of the MRCS as it stands today to say that any serving member with a previously compensated injury or disease under the VEA or the SRCA may have no future entitlement to permanent impairment compensation for any new service injury or disease and may have no Common Law rights in the event of negligence on the part of the Commonwealth.

7.9 The authority for Chapter 25 is stated in the introduction to GARP M to be s 67 of the MRCA, although it should now be quite clear that neither s 67 nor any other statutory provision or regulation authorises the MRCC to include that chapter in the guide to determining impairment and compensation under the MRCA.

7.10 Recommendation 5:

That the MRCC immediately direct its delegates to refrain from applying Chapter 25 of GARP M to any current or future claim for compensation under the MRCA.

That the MRCC prepare an exposure draft for a new guide that strictly complies with the MRCA, the CTPA and the regulations in consultation with the service and ex-service communities and other interested parties.

8 Unintended erosion of Common Law rights

- 8.1 Under s 45 of the SRCA, where compensation is payable under ss 24, 25 or 27 in respect of an injury and the Commonwealth or another member would, but for subs 44(1), be liable for damages for any non-economic loss suffered as a result of the injury, the member may, at any time before an amount of compensation is paid in respect of that injury, irrevocably elect in writing to institute an action for damages for that non-economic loss.
- 8.2 Under s 389 of the MRCA, a member may irrevocably choose to institute an action against the Commonwealth or a potentially liable member for damages for non-economic loss if compensation is payable under ss 68, 71 or 75 in respect of a service injury or disease but the compensation has not yet been paid, and the Commonwealth or the potentially liable member would, apart from subs 388(1), be liable for damages for that loss.
- 8.3 Whilst the above provisions appear to be consistent, they operate quite differently.
- (a) Under the SRCA, a separate claim is submitted for each injury; each injury is assessed under the PIG; and (subject to ss 24 and 25) each injury receives a discreet compensation payment.
- (b) Under the MRCA, one claim is submitted in respect of the member; all service injuries and diseases are assessed under GARP M; and (subject to ss 68, 69, 71 and 75) the member receives one compensation payment.
- (c) Unlike the SRCA, each injury or disease is not necessarily compensated under the MRCA because of the way GARP M assesses impairment.
- See the example in Section 4 of this submission above (where only the highest rating of all injuries is taken to be the functional impairment under Table 3.2.1).
 - In addition, unlike the SRCA, the impairment resulting from multiple service injuries and diseases are combined in Chapter 18 so that low additional ratings must be combined with a higher aggregate rating with the result that some conditions do not have any effect on the total impairment rating (for example, 76 points plus 2 points = 76 points).

- (d) Consequently, if compensation is not payable under ss 68, 71 or 75 of the MRCA in respect of a particular service injury or disease, the member may not exercise his or her right to commence an action for damages.
- (e) Conversely, a member who has a number of service injuries and diseases accepted under the MRCA may elect to commence an action for damages in respect of a condition that has been assessed at 1 impairment point under GARP M.

8.4 Recommendation 6:

That s 389 of the MRCA be amended to enable a member to commence an action for damages for non-economic loss if the relevant service injury or disease of itself satisfies the thresholds described in s 69 and if compensation is *not* payable under ss 68, 71 or 75 in respect of that service injury or disease.

- 8.5 Slater & Gordon otherwise endorses the submission of the Australian Council of Trade Unions to the Comcare Review in respect of its recommendation to introduce indexed Consumer Price Index (**CPI**) increases in non-economic loss.⁷⁵

8.6 Recommendation 7:

That the Minister for Veterans' Affairs approach the Minister for Employment and Workplace Relations, to recommend amendments to s 45 of the SRCA to increase the cap on Common Law damages (presently \$110,000) in accordance with the CPI to today's value and thereafter index that amount in accordance with the CPI.

That amendments be made to s 389 of the MRCA to increase the cap on Common Law damages (presently \$110,000) in accordance with the CPI to today's value and thereafter index that amount in accordance with the CPI.

- 8.7 A further unintended erosion of Common Law rights has occurred with respect to injuries 'arising out of employment' (as distinct from 'in the course of employment'), in respect of which actions for damages are not barred by s 44 of the SRCA but are effectively barred by s 388 of the MRCA (which provision excludes actions in relation to all service injuries and diseases) and will in future prevent Common Law actions in respect of insidious diseases resulting from, for example, exposure to asbestos, radiation or chemicals.

8.8 Recommendation 8:

That s 388 of the MRCA be amended to reflect the current position in s 44 of the SRCA, which does not prevent members from commencing an action for damages in respect of an injury 'arising out of employment'.

⁷⁵ Submission of the Australian Council of Trade Unions to the Comcare Review: www.workplace.gov.au/NR/rdonlyres/50F420D6-9832-419A-8FD6-663866949693/0/ACTU_ComcareReview.pdf (accessed 29 June 2009).

9 Compassionate payment scheme for family members

- 9.1 Slater & Gordon has represented and continues to represent a large number of family members who were not economically dependent on a deceased member prior to his or her death and who have nonetheless suffered considerably as a consequence of their loss.
- 9.2 We have seen several cases where the member's death was due to events or a state of affairs where the Defence Force and/or Commonwealth agencies have, through the actions or omissions of its members and employees, contributed to the member's untimely death.
- 9.3 Whilst Slater & Gordon supports the creation of a compassionate payment scheme, we do not feel that access to the scheme should be limited to those family members who have lost loved ones in circumstances where the Defence Force or the Commonwealth have contributed to the death.
- 9.4 Recommendation 9:

That the Government carefully considers the creation of a compassionate payment scheme for family members that is designed to ensure that claims administration is fair, transparent and quick.

10 Access to the MRCA for AFP deployed overseas

- 10.1 We can see no compelling reason why members of the Australian Federal Police (AFP) deployed on high-risk overseas operations should not be covered by the MRCA if all of the recommendations contained in this submission are substantially implemented.
- 10.2 If there are compelling reasons why members of the AFP should not be covered by the MRCA, or if the recommendations contained in this submission are not substantially implemented, we believe that inclusion of AFP members in the MCS would be an appropriate alternative.
- 10.3 Recommendation 10:

That members of the AFP deployed on high-risk overseas operations be covered by the MRCA.

11 Conclusions

- 11.1 The above comments and recommendations are not comprehensive – there are several other areas in the MRCS where improvements can and should be made.
- 11.2 However, the comments and recommendations above do represent some of the most pressing issues we have experienced in practice.
- 11.3 Slater & Gordon believes that the MRCS has the potential to realise the Government's commitment to have a scheme that meets the needs of current and

future generations of ADF members and their families in which benefits at least match those provided under the VEA and the SRCA.

- 11.4 We further believe that every attempt should be made to ensure that the MRCS is the 'best of both worlds' and not a scheme based on the lowest common denominator.
- 11.5 We note that the Steering Committee is committed to meeting with interested parties at the appropriate time.
- 11.6 Slater & Gordon is well positioned to comment on the operation of the MRCA and the CTPA to date and share its experiences with the Steering Committee, including several case examples that support the assertions above.

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SCHEDULE 1
(comparison of MRCS processes and benefits with the VEA and MCS)

Process or benefit under the MRCS	Comparison with the VEA	Comparison with the MCS	Recommendations
Injury	Better (inclusion of some MCS provisions)	Worse (more restrictive liability provisions)	4
Disease	Better (inclusion of some MCS provisions)	Worse (more restrictive liability provisions)	4
Aggravation	Better (inclusion of some MCS provisions)	Worse (more restrictive liability provisions)	4
Permanent impairment – multiple conditions	Similar given GARP M is based on GARP V	Worse (quantum is generally less)	2 & 5
Permanent impairment – serious conditions	Similar given the SRDP under the VEA	Better (quantum is generally more, but it is possible to obtain a higher aggregate payment under the MCS)	2 & 5
Permanent impairment – access to Common Law		Substantially worse (much more restricted)	6, 7 & 8
Special Rate Disability Pension	Similar given the SRDP under the VEA	Better	5
Dependents – partners	Better	Better for some, worse for others (pending amendments to match EWRAA increases)	3
Dependents – eligible young persons	Better	Better for some, worse for others (pending amendments to match EWRAA increases)	3
Claims	Substantially worse	Substantially worse	1
Reconsiderations	Substantially worse	Substantially worse	1

SCHEDULE 2
(statistical comparison of performance)

Performance indicator	Legislation	Comcare Revised Claimant Charter	DVA Service Charter	RC Performance results*	MRCC Performance results**
Determine initial liability claim	SRCA (injury)	Within 28 days	Within 120 days		191 days ⁷⁶
	SRCA (disease)	Within 84 days			
	MRCA		Within 120 days		162 days ⁷⁷
Determine permanent impairment claim (SRCA & MRCA) or primary compensation claim (VEA)	SRCA	Unspecified	Unspecified		108 days ⁷⁸
	MRCA		Unspecified		121 days ⁷⁹
	VEA		Within 75 days	82 days ⁸⁰	
Once all evidence is collected, issue a reviewable decision on a reconsideration	SRCA	Within 14 days	Unspecified		> 120 days [^]
	MRCA		Unspecified		> 120 days [^]
	VEA		Unspecified		

Notes: * average over the past 2 reported years (source: *DVA Annual Report 2007-08*)
 ** average over the past 3 reported years (source: *DVA Annual Report 2007-08*)
 ^ average of time taken in claims handled by Slater & Gordon

⁷⁶ *DVA Annual Report 2007-08, op cit* (p 76): 181 days in 2005-06, 234 days in 2006-07 and 158 days 2007-08.

⁷⁷ *Ibid* (p 81): 146 days in 2005-06, 188 days in 2006-07 and 153 days 2007-08.

⁷⁸ *Ibid* (p 77): 92 days in 2005-06, 113 days in 2006-07 and 119 days 2007-08.

⁷⁹ *Ibid* (p 81): 130 days in 2005-06, 103 days in 2006-07 and 130 days 2007-08.

⁸⁰ *Ibid* (p 65): 89 days in 2006-07 and 75 days in 2007-08.

SCHEDULE 3
(actual comparison of performance – accepted claims)

Claim under the SRCA	Average time taken	Claim under the MRCA	Average time taken
A valid claim for liability and permanent impairment compensation is lodged with all necessary forms, evidence and proof of identity			
1. The MRCC issues a determination accepting liability	191 days*	1. The MRCC issues an original determination accepting liability	162 days*
2. The MRCC makes an offer in relation to permanent impairment and non-economic loss	108 days*	2. The MRCC performs a needs assessment as required by s 325	> 30 days**
3. The member submits an election under s 45	0 ≥ 30 days**	3. The MRCC issues a determination in relation to the member's impairment rating	121 days*
4. The MRCC issues a determination awarding compensation	0 ≥ 30 days**	4. The MRCC issues a determination of the member's lifestyle rating and gives the member a notice under s 76	> 30 days**
5. The MRCC pays the compensation to the member as required by s 26	7 ≥ 30 days**	5. The member submits an election under s 78	0 ≥ 180 days**
		6. The MRCC pays the compensation to the member as required by s 79	7 ≥ 30 days**
Average total time taken:	306 to 389 days	Average total time taken:	350 to 553 days

Notes: * average over the past 3 reported years (source: DVA Annual Report 2007-08)

** average of time taken in claims handled by Slater & Gordon

SCHEDULE 4
(actual comparison of performance – disputed claims)

Claim under the SRCA	Average time taken	Claim under the MRCA	Average time taken
A valid claim for liability and permanent impairment compensation is lodged with all necessary forms, evidence and proof of identity			
1. The MRCC issues a determination denying liability and compensation	191 days*	1. The MRCC issues an original determination denying liability and compensation	162 days*
2. The member submits a request for reconsideration	0 ≥ 30 days**	2.1 The member submits a request for reconsideration OR 2.2 The member lodges an application for review with the VRB	0 ≥ 30 days** 0 ≥ 365 days**
3. The MRCC issues a reviewable decision	> 120 days**	3.1 The MRCC issues a reviewable determination 3.2 The VRB issues a decision	> 120 days** 406 days ^{AA}
4. The member lodges with the AAT an application for review of decision against the MRCC's reviewable decision	0 ≥ 60 days**	4.1 The member lodges with the AAT an application for review of decision against the MRCC's reviewable determination OR 4.2 The member lodges with the AAT an application for review of decision against the VRB's decision	0 ≥ 60 days** 0 ≥ 90 days**
5. The application resolves in favour of the member	90 ≥ 365 days ^A	5. The application resolves in favour of the member and is remitted to the MRCC	90 ≥ 365 days ^A
6. The MRCC pays the compensation to the member	7 ≥ 30 days**	6. The MRCC performs a needs assessment as required by s 325	> 30 days**
		7. The MRCC issues a determination in relation to the member's impairment rating	121 days*

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		8. The MRCC issues a determination of the member's lifestyle rating and gives the member a notice under s 76	> 30 days**
		9. The member submits an election under s 78	0 ≥ 180 days**
		10. The MRCC pays the compensation within 30 days as required by s 79	7 ≥ 30 days**
		Average total time taken (reconsideration route):	560 to 1,128 days
	Average total time taken:	408 to 796 days	Average total time taken (VRB route): 846 to 1,779 days

Notes: * average over the past 3 reported years (source: *DVA Annual Report 2007-08*)

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[^] around 60% of applications in the Compensation Division and Veterans Division of the AAT are finalised within 12 months (source: *AAT Annual Report 2007-08*)

^{^^} average time from lodgement of application to finalisation in 2007-08 (source: *VRB Annual Report 2007-08*)