

Chapter 2

The legal framework

2.1 The relevant legislative provisions are contained in the *Veterans' Entitlements Act 1986* (the VE Act) and the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act). A copy of the relevant legislative provisions is included at appendix 3 (VE Act) and appendix 4 (SRC Act).

The Veterans' Entitlements Act

2.2 Section 13 of the VE Act deals with eligibility for a pension. Subsection 13(1) relevantly provides that where the death of a veteran was war-caused, or the veteran has become incapacitated from a war-caused injury or disease, the Commonwealth is liable, subject to the Act, to pay pensions by way of compensation to the dependants of the veteran in case of death, or a pension to the veteran by way of compensation if the veteran is incapacitated.

2.3 Division 4 of Part II of the VE Act sets out the rates of pensions, other than service pensions, payable to veterans. Section 21 provides that the degree of incapacity of a veteran from war-caused injury or war-caused disease, or both, must be determined in accordance with the provisions of the approved Guide to the Assessment of Rates of Veterans' Pensions (GARP). The GARP is published by DVA in accordance with section 29 of the VE Act.¹

2.4 The disability pension can be paid at either the general rate (section 22), intermediate rate (section 23) or special rate (section 24). There is also provision for an extreme disablement adjustment to be paid in addition to the pension in certain circumstances (section 22). The general rate may be increased to the special rate if there are circumstances which mean that the veteran is regarded as permanently incapacitated for work.

2.5 The provisions of Part II of the VE Act cover veterans deployed in conflicts such as Vietnam and Korea, whereas Part IV of the VE Act covers peacetime service, mostly within Australia but potentially overseas as well.

The Safety, Rehabilitation and Compensation Act

2.6 Part II of the SRC Act deals with compensation, including injuries resulting in death (Division 2), injuries resulting in incapacity for work (Division 3) and injuries resulting in impairment (Division 4).

1 *Guide to Assessment of Rates of Veterans' Pensions*, Fifth edition, Department of Veterans' Affairs, 1998.

2.7 Section 24 deals with compensation for injuries resulting in permanent impairment. Comcare is required to determine the degree of permanent impairment of an employee resulting from an injury under the provisions of the approved *Guide to Assessment of the Degree of Permanent Impairment* (the Guide) prepared in accordance with section 28. The degree of permanent impairment must be assessed by Comcare as 10 per cent or greater before the employee is eligible for a payment under this section. This component covers the economic loss suffered by the employee as a result of the injury.

2.8 Section 27 of the SRC Act deals with compensation for non-economic loss. Where an injury to an employee results in permanent impairment and compensation is payable for that injury under section 24, Comcare is liable to pay additional compensation for any non-economic loss suffered by the employee as a result of that injury or impairment. The amount of compensation is worked out in accordance with the formula set out in subsection 27(2). The final figure factors in the percentage determined under section 24 to be the degree of permanent impairment and the percentage determined under the Guide to be the degree of non-economic loss suffered by the employee.

2.9 Section 30 of the SRC Act makes provision for the conversion of weekly payments, payable by Comcare, into a lump sum. Subsection 30(1) states that where Comcare is liable to make weekly payments under sections 19, 20, 21, or 21A to an employee in respect of an injury resulting in an incapacity, and the amount of those payments is \$50 per week or less, and Comcare is satisfied that the degree of the employee's incapacity is unlikely to change, Comcare *shall* make a determination that its liability to make further payments under that section be redeemed by the payment to the employee of a lump sum.

2.10 The effect of section 30 is to require Comcare to pay an employee a lump sum in the circumstances set out in that section, and calculated in accordance with the formula set out in subsection 30(2). Whether the employee wishes to receive weekly payments or a lump sum is not relevant in this situation.

2.11 Section 137 is similarly worded to section 30, and applies to payments made by a relevant authority.² The difference between the operation of sections 137 and section 30 is that section 137 requires a former employee to make a written request to the authority that the weekly payments be converted to a lump sum. As with section 30, the lump sum is calculated in accordance with the formula set out in the section.

2.12 The effect of these provisions of the SRC Act and the VE Act is that depending on the nature of the illness or injury suffered by a veteran, the veteran, or

2 A 'relevant authority' means either Comcare or a licensee—a Commonwealth authority or corporation that is licensed under Part VIII of the SRC Act (see section 4). This means that, depending on the scope of the licence issued by the Safety, Rehabilitation and Compensation Commission, the Commonwealth authority or corporation may accept liability under the SRC Act for payment of compensation and for management of claims. See Part VIII of the SRC Act.

his or her widow or widower if the veteran has died, may be eligible to claim under both Acts. Sections 30 and 137 are relevant because both sections are referred to in Section 30C of the VE Act.

2.13 If a veteran, widow or widower does make a claim under both Acts, and is awarded both a lump sum and a pension for the same injury or illness, sections 30C (war-like service) and 74 (peace time service) of the VE Act operate to ensure that that individual is not compensated twice for the same injury or illness.

Interaction between the VE Act and the SRC Act

Section 30C of the VE Act

2.14 Subsection 30C(1) of the VE Act states as follows:

(1) If:

- (a) a lump sum payment of compensation is made to a person who is a veteran or a dependant of the veteran; and
- (b) the compensation payment is paid in respect of the incapacity of the veteran from injury or disease or the death of the veteran; and
- (c) the person is receiving, or is subsequently granted, a pension under this Part in respect of the incapacity from that injury or disease or the death;

the following provisions have effect:

- (d) the person is taken to have been, or to be, receiving payments of compensation at a rate per fortnight determined by, or under the instructions of, the Commonwealth Actuary;
- (e) the person is taken to have been, or to be, receiving those payments for the period of the person's life determined by, or under the instructions of, the Commonwealth Actuary;
- (f) the period referred to in paragraph (e) begins:
 - (i) on the day that lump sum payment is made to the person; or
 - (ii) on the day the pension becomes payable to the person;
 whichever is the earlier day.

Note 1: Pensions under this Part are payable in respect of the incapacity of a veteran from a war-caused injury or disease or in respect of the death of the veteran (see section 13).

Note 2: A payment of arrears of periodic compensation is not a lump sum compensation payment (see subsection 30B(2)).

2.15 Subsections 30C(2) and (3) contain similar provisions and apply specifically to lump sum payments made under sections 137 and 30 of the SRC Act respectively. In these cases, the person is deemed to have been receiving the payments from the date the lump sum is paid or the day the pension becomes payable to the person, whichever is the *later* day.

2.16 The effect of these provisions is that if a veteran or their dependent has received a lump sum payment in compensation for incapacity under the SRC Act, and is subsequently awarded a disability pension under the VE Act, for the same incapacity, that lump sum is converted to an actuarial equivalent of fortnightly payments, in accordance with the instructions of the Australian Government Actuary.

2.17 The fortnightly equivalent of the lump sum payment is then ‘offset’ against the pension paid to the veteran or widow under the VE Act, for the period of that person’s life. The period for which the offsetting is applied is the date on which the lump sum was paid to the person or the date on which the pension is payable to the person, whichever is earlier.

2.18 This provision has the potential to operate retrospectively: where a person has received a lump sum, and some time later, perhaps even years later, is awarded a pension, the pension will be offset as if it had been paid to the person at the same time as the lump sum.

2.19 The reverse is also true; if a veteran or a dependant is in receipt of a pension and is later awarded a lump sum payment which falls within the scope of subsection 30C(1), the pension will be offset as if the lump sum had been paid to the person from the date the pension was received. The individual has not received the benefit of the lump sum or pension from the earlier date but is deemed by the legislation to have been in receipt of it. This situation has the potential to cause unnecessary financial hardship for recipients of these payments.

2.20 Part IV of the VE Act deals with pensions for members of a Defence Force or Peacekeeping Force and their dependants.³ Section 73 states that the provisions of Divisions 4 and 5 of Part II of the VE Act apply to pensions payable in accordance with Part IV of the Act, in the same manner as those provisions apply to pensions payable under Part II (Part II of the VE Act deals with pensions, other than service pensions, for veterans deployed in conflicts and their dependents). This means that the off-setting provisions apply to pensions for members of a peacekeeping force, and their dependants, in the same manner as those provisions apply to veterans deployed in conflicts, and their dependants.

Section 74 of the VE Act

2.21 Section 74 is a ‘mirror’ provision to section 30C of the VE Act, and applies to payments by way of compensation or damages, including any payment in the nature of compensation and any damages recoverable at law whether from the Commonwealth or any other person in respect of the injury to or death of a person. The section applies where a person is entitled to receive compensation in respect of the death or incapacity of a member, which is defence-caused, or is the result of a defence-caused injury or a

3 See appendix 5 for a definition of ‘Defence Force’ and ‘Peacekeeping Force’.

defence-caused disease⁴, and where a pension under Part IV of the VE Act is payable to the to a person as a result of the death or incapacity of the member.

2.22 The effect of subsection 74(3) is that where an eligible person is in receipt of a lump sum payment by way of compensation and the person is receiving, or is subsequently granted a pension under Part IV of the VE Act, in respect of the death or incapacity of the veteran, that person is deemed to have been in receipt of fortnightly equivalent payments, at a rate determined by the Commonwealth Actuary, at the date the pension becomes payable, or the date on which the lump sum payment is made, whichever is the *earlier* date.

2.23 Subsections 74(3A) and 74(3B) apply to payments made under sections 137 and 30 of the SRC Act respectively. The effect of these subsections is that if a lump sum payment is made under either of sections 137 or 30 of the SRC Act, and the person is receiving a pension under Part IV of the VE Act, that person is taken to have been receiving fortnightly payments at the rate determined by the Commonwealth Actuary, beginning on the day the lump sum payment is made or the day the pension becomes payable, whichever is the *later* day.

2.24 If the person has received or is eligible for a payment under section 137 of the SRC Act, that person will be deemed to have been in receipt of fortnightly payments for the period of their life. If a payment has been or is made under section 30 of the SRC Act, the veteran or dependant will be deemed to be receiving fortnightly payments until age 65.

Approach to compensation

2.25 As noted in Chapter 1, Mr Bill Maxwell of the Department of Veterans' Affairs, explained the "compensation philosophy" underlying the VE Act as seeking to compensate an individual for incapacity due to their service. A single compensation amount is paid to encompass "both the pain and suffering and the economic loss aspects of that incapacity".⁵ As Mr Maxwell pointed out, this differs from most compensation schemes, where a pain and suffering or non-economic loss component is paid usually as a lump sum, and a component to cover economic loss, or loss of earning capacity is usually paid periodically.

2.26 Mr Maxwell commented on the situations in which the offsetting issue is likely to arise:

In the main, offsetting arises where a person has been injured in one period of service—covered by the VEA—and the injury was aggravated in a subsequent period of service which was covered by both or the other statute. Under the VEA—again, reflecting our 1917 origins—we have a head of

4 See appendix 5 for an explanation of 'defence-caused injury' and 'defence-caused disease'.

5 *Committee Hansard*, 16 June 2003, p. 2 (Mr Bill Maxwell, Head, Compensation and Support Division, Department of Veterans' Affairs)

liability which is aggravation. If someone has a condition aggravated by a period of eligible service, that becomes compensable under the Veterans Entitlements Act. However, it becomes compensable in a curious way: the whole of the incapacity arising from that source is compensable. Under more modern compensation legislation, including the SRCA, an injury in that situation would be compensable if aggravated by a period of eligible service but only to the extent of the aggravation.⁶

Incapacity for work and degree of impairment—are like payments being compared?

2.27 The Armed Forces Federation of Australia’s (ArFFA) submission discusses the issue of compensation for incapacity for work and for permanent impairment, submitting that the two payments are not necessarily compensating for the same injury or illness, and so cannot be compared for the purposes of offsetting.⁷

2.28 The VE Act provides for a disability pension to be paid to a veteran for incapacity as a result of war-caused injury or war-caused disease. The DVA fact sheet *Disability Pension and Allowances—Disability Pension and Compensation Offsetting* states that disability pensions are paid “in respect of incapacity, not for the underlying disease or injury”.⁸ The extent of the incapacity is worked out in accordance with the Guide to the Assessment of Rates of Veterans’ Pensions (GARP).

2.29 Section 14 of the SRC Act provides for compensation to be made to employees where an injury results in death, incapacity for work, or impairment. The provisions dealing with compensation for incapacity for work are set out in Division 3 of Part II, and the provisions dealing with compensation for permanent impairment are set out in Division 4 of Part II. That is, incapacity for work and permanent impairment as a result of an injury are dealt with separately under the SRC Act.

2.30 As explained above, there are two components to a lump sum payment made for permanent impairment—a component for the degree of impairment and a component for resultant non-economic loss or pain and suffering.⁹

2.31 Section 74 of the VE Act provides that offsetting will apply to a person who is receiving or is later granted a pension and has received a lump sum payment by way of “compensation” in respect of the incapacity of that person from injury or disease.

2.32 The argument which flows from this is that offsetting a lump sum paid under the SRC Act for permanent impairment against a disability pension paid for loss of

6 *Committee Hansard*, 16 June 2003, p. 6 (Mr Bill Maxwell, DVA)

7 *Submission 13* (Armed Forces Federation of Australia (ArFFA))

8 DVA Facts, DP 82, *Disability Pension and Allowances—Disability Pension and Compensation Offsetting*, p 1. Department of Veterans’ Affairs, November 2002. Available at: <http://www.dva.gov.au/factsheets/default.htm>

9 See sections 24 and 27—*Safety, Rehabilitation and Compensation Act 1988* (appendix 4).

earning capacity is not comparing “like with like”. ArFFA has argued that only the pain and suffering (non-economic loss) component of the lump sum should be offset against the disability pension, not the whole amount, which includes a component for permanent impairment.¹⁰

2.33 This point was considered in the Federal Court Case of *Hobbs v. Repatriation Commission*.¹¹ At issue was the interpretation of legislative provisions including section 74 of the VE Act and sections 24 and 27 of the SRC Act.

2.34 The Applicant in this case, Mr Hobbs, argued that “incapacity” in section 74 of the VE Act would have a different meaning depending on the rate of pension being paid, and that in the case of a person receiving a special rate pension, “incapacity” refers to loss of earning capacity. It was further argued that as a lump sum received under Division 4 of Part II of the SRC Act is compensation for impairment, not for loss of earning capacity, it is not “compensation” for the purposes of section 74 of the VE Act.

2.35 This argument was rejected by His Honour Justice Gyles who found that “a lump sum payment pursuant to Div 4 of Pt II of the SRC Act plainly answers the description in s 74(3)... [g]iving full weight to the beneficial nature of the statute, I cannot agree that ‘compensation’ in s 74(3) would have a different meaning depending upon the nature of the pension in question”.¹²

2.36 Justice Gyles further stated his view that loss of earning capacity is not entirely irrelevant to the GARP assessment, as had been suggested by the applicant. He referred to the comments of the court in the case of *Apthorpe v. Repatriation Commission* (1987) 77 ALR 42, referring to the difference between the criteria for a special rate and a general rate pension:

In brief, the criteria for the intermediate rate and for the special rate look to incapacity for work, that is to say incapacity to earn, whereas incapacity for the purposes of the general rate is not concerned primarily with incapacity for work but looks to incapacity which takes into account the effect of the relevant disability upon the whole of the veteran’s life, not only his working life, but also his social and family life. Capacity to earn is a relevant factor to be taken into account in an assessment of total or partial incapacity for the purposes of the general rate but it is not a determining factor.¹³

2.37 Bill Maxwell responded to ArFFA’s argument at the hearing on 16 June:

... I do not think they are being fully mindful of the differences that exist between the two compensation regimes. For a start, impairment is not the

10 *Committee Hansard*, 23 June 2003, p. 18 (Mr Greg Isolani, ArFFA)

11 *Hobbs v. Repatriation Commission* (unreported) [2002] FCA 560.

12 *Hobbs v. Repatriation Commission* [2002] FCA 560 at para 13.

13 *Apthorpe v. Repatriation Commission* (1987) 77 ALR 42 at 43.

same as incapacity as defined and as indeed assessed. Under the VEA, we assess and compensate on the basis of incapacity, which is the impairment and a heavy lifestyle function flowing from that impairment, yielding a total incapacity. One of the cases that the author of that submission raises entailed someone with a spinal degenerative effect flowing into sciatica in the left leg. The VEA's assessment approach would enable us to compensate both for the back condition and for the flow-on into the left leg. It is true that it is not the same as the incapacity under the SRCA, but it encompasses the same symptoms. It is that incapacity that we are actually compensating. So it is two claims under the SRCA, but one claim under the Veterans Entitlements Act.¹⁴

2.38 The Committee understands the arguments presented by ArFFA. The approach taken in the Hobbs case indicates, however, that this view is not shared by the Federal Court—at least with regard to the factual circumstances in that case, which focused on offsetting in the context of the special rate pension (which is paid for incapacity to work). If the argument is pursued in the context of the general rate pension, it is acknowledged that there may be a degree of 'like' being compared with 'unlike', largely as a result of the historical development of the general rate pension.

2.39 In the Committee's view, the confusion surrounding the interpretation and applicability of the relevant provisions of the VE Act and the SRC Act can be partly attributed to the complexity of the issues, and to the fact that the compensation regime in the VE Act was initially developed when the approach to compensation for members of the defence forces was quite different to the approach now taken in the SRC Act.

The actuarial model

2.40 It was clear from the submissions received by the Committee and from the evidence provided at the hearings that one of the main causes of confusion amongst members of the veteran community and widows was the operation of the actuarial calculations as set out in the legislation.¹⁵ The effect of the actuarial model used is that the lump sum paid to a recipient is converted to a fortnightly equivalent and is then 'offset' against the recipient's pension.

2.41 Mr Peter Martin, the Australian Government Actuary, explained how the actuarial 'pool' works at the Committee's hearing on 16 June 2003.¹⁶ Mr Martin explained that the disability pension can be seen as a series of cash flows, one per fortnight, payable for the life of the veteran. The value of the cash flows is not certain because the payments will start off at one amount, and then will be indexed in line

14 *Committee Hansard*, 16 June 2003, p. 8 (Mr Bill Maxwell, DVA)

15 See *Submission 2* (Returned and Services League of Australia (RSL)); *Submission 8* (Legacy Coordinating Council); *Submission 12* (Australian Peacekeepers and Peacemakers Association (APPA))

16 *Committee Hansard*, 16 June 2003, p. 3 (Mr Peter Martin, Australian Government Actuary)

with the CPI. The duration of the cash flows is also uncertain because the life span of the veteran is unknown. Each of the fortnightly payments, or cash flows can be given an “actuarial present value”, or actuarial cost to the Commonwealth.

2.42 Determining the actuarial cost of the cash flows requires an estimate of the size of the cash flows, which means forming a view about the CPI over the life of the veteran. This involves estimating the probability that the veteran will be alive over a period of time, and then allowing for the ‘time value’ of money—essentially the cost of borrowing for the Commonwealth.

2.43 For each possible future cash flow (fortnightly payment) to the veteran, a ‘present value’ can be calculated by taking into account the estimated size of the cash flow and the probability that it will be paid (ie that the veteran will still be alive at the time of the payment) and then discounting for the ‘time value’ of money. The present value of a large number of fortnightly payments adds up to the present value in an actuarial sense. Mr Martin explains further:

The approach that is taken to the application of the offsetting provisions is essentially the reverse of what I have just described. For example, the disability pension might have a present value of, for argument’s sake, \$200,000; that is, the sum of the actuarial values of each of the future cash flows might be \$200,000. If the lump sum you are offsetting is \$50,000 then the offset in effect is fifty two–hundredths or a quarter of the disability pension. The tables that are produced in my office and the instructions that go with those tables are designed to give effect to that sort of process.¹⁷

2.44 The actuarial model described above can be seen as resulting in a finite number or ‘pool’ of recipients. The model is designed, in theory, to ensure that each veteran gets the best possible benefit. Not all recipients will live to their predicted ‘actuarial’ age; some may die before their lump sum has been fully offset against their pension, but those who live longer will in effect end up ‘paying’ for those who have died earlier. Overall, there should be no substantial net loss or gain for the Commonwealth as a result of implementation of this model.

2.45 The Committee understands the theory of and the reasons for the use of the actuarial model in the context of the legislation which provides for ‘dual eligibility’ for compensation. However, it is also apparent that a number of veterans and widows do not fully understand the operation of the actuarial model, and have difficulty coming to terms with the fact that the offsetting applied to their pensions is for the whole of their life, regardless of how long they live.

17 *Committee Hansard*, 16 June 2003, pp. 3–4 (Mr Peter Martin)

2.46 This can be partly attributed to poor or incorrect advice being given to veterans and widows at the time compensation is paid. This and other concerns raised by those who made submissions to the inquiry and those who appeared as witnesses at the hearings are considered in greater detail in Chapter 3.