

**Paper presented to Australian Army Legal Corps  
Victoria Barracks, Sydney**

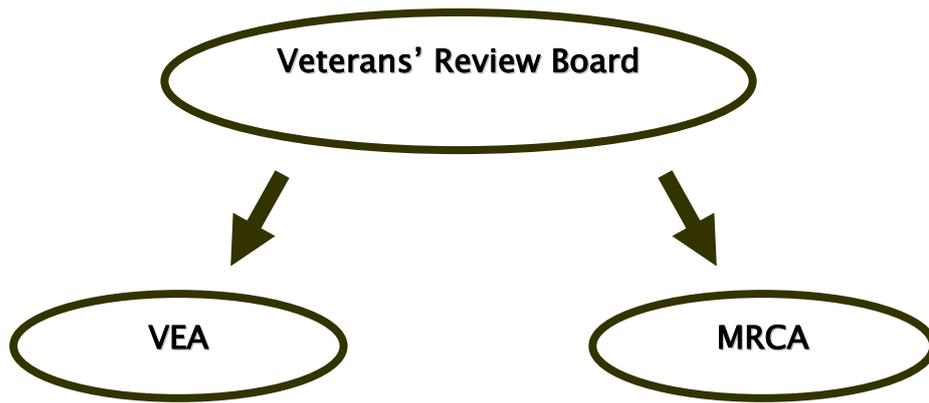
**By Doug Humphreys  
Principal Member, Veterans' Review Board  
3 November 2010**

## **1. Introduction**

It gives me great pleasure to speak to you today about the Board and its work. I will take the opportunity to outline the role of the Board and briefly describe how the Board goes about its core work of conducting reviews. I will identify the areas of the Board's jurisdiction and expertise in relation to military matters.

## **2. An overview of the Board**

- The role of the Board is to provide independent merits review of particular types of decisions and determinations specified in the *Veterans' Entitlements Act 1986* (Cth) and the *Military Rehabilitation and Compensation Act 2004* (Cth).
- The types of decisions that the Board can review under the MRCA is greatly expanded, compared with the VEA (eg. compensation for household services such as gardening and lawn mowing to content of a rehabilitation program.)
- The Board aims to do this in a manner that is fair, just, informal, economical and quick.



- Disability pension
- War widow's pension
- Attendant allowance

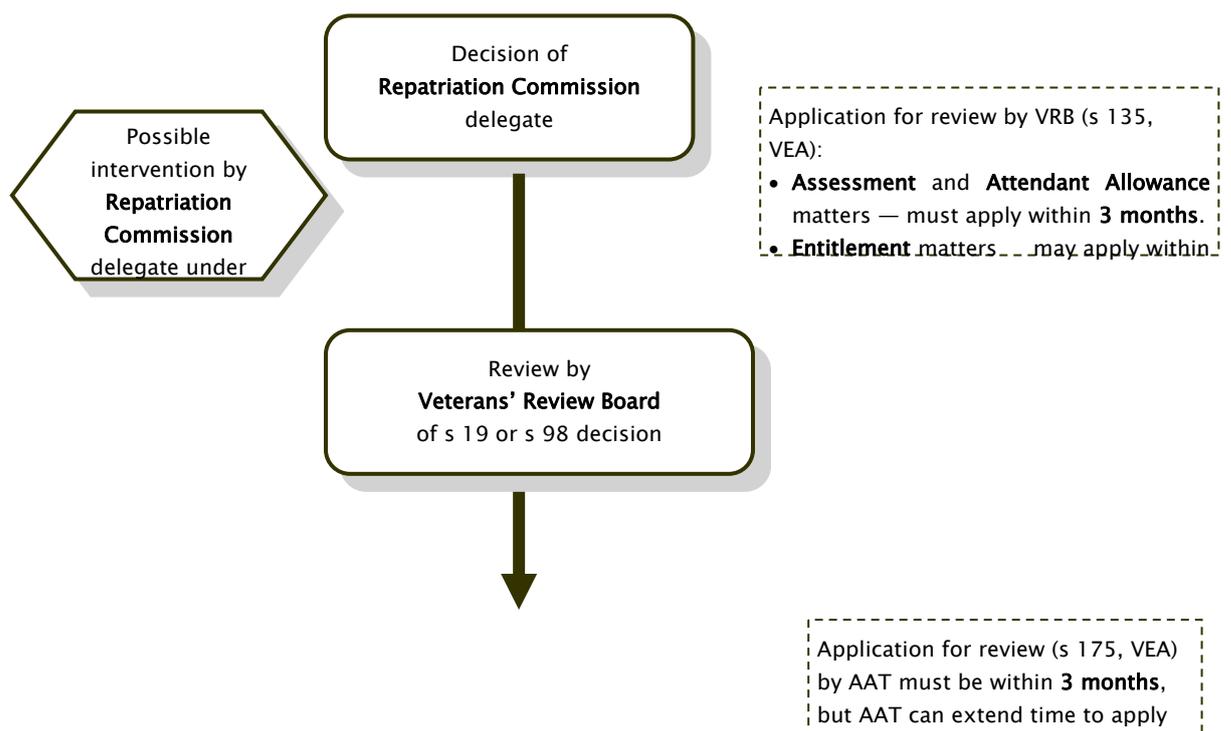
- Almost all matters

### 3. Veterans' Entitlements Act

#### 3.1 VEA benefits

- Disability pension – general rate, EDA, intermediate rate, special rate
- War widow's and orphan's pensions
- Service pension
- Veterans' vocational and rehabilitation scheme
- Treatment
- Attendant allowance
- Recreation transport allowance
- Vehicle assistance scheme
- Veterans' children's education scheme
- Loss of earnings allowance

#### 3.2 Outline of the VEA decision making system



Review by  
**Administrative Appeals  
Tribunal**

## 4. Military Rehabilitation and Compensation Act

### 4.1 Background to the changes in the legislation

Following the Blackhawk Crash in 1996, concerns were raised about the adequacy, equity and relevance of the existing compensation arrangements for members of the ADF, as compensation entitlements varied greatly between those injured and for the dependants of those killed depending on which Act the members eligibility was under.

An inquiry into Military Compensation Arrangements was undertaken and Mr Noel Tanzer AC was appointed to conduct a review of the existing military compensation schemes and develop options for a new self-contained scheme.

In the review report, Mr Tanzer concluded that neither the *Veterans' Entitlements Act 1986* nor the *Safety, Rehabilitation and Compensation Act 1988* provided acceptable solutions to the compensation and rehabilitation needs of a modern defence force.

The review report recommended that:

- a new, single, self contained scheme be established
- for it to apply to all types military service, both in Australia and overseas,
- For it to take a more integrated approach toward the management of safety, rehabilitation, resettlement and compensation.

#### **4.2 MRCA benefits (post 2004 matters)**

- Permanent impairment compensation
- Incapacity payments
- Pension
- Rehabilitation
- Treatment
- Attendant care services
- Household services
- Motor vehicle compensation scheme
- Education and Training Scheme
- Compensation for dependants (lump sums and/or pensions)
- Special Rate Disability

#### **4.3 MRCA: Who is eligible?**

The MRCA provides compensation and rehabilitation coverage for the following members and former members of the ADF for service on and after 1 July 2004:

- all members of the permanent Defence Force
- all members of the Reserve Force

- Cadets and Officers and Instructors of Cadets; *and*
- other people declared in writing by the Minister for Defence to be members of the ADF.

The MRCA also provides benefits to certain dependants of these persons in the event that they are severely injured or lose their life as a result of their service.

#### **4.4 Death Benefits under the MRCA**

All compensation payments under the MRCA are in addition to any superannuation death benefits that are payable by ComSuper under the Defence Force Retirement and Death Benefits (DFRDB) Scheme or the Military Superannuation Benefits Scheme (MSBS). They are also additional to any life insurance payments made in relation to the death.

##### **4.4.1 Death benefits: Service death**

If the death of a member or former members of the ADF is determined to be a service death, that person's dependants may be eligible for compensation and other benefits under the MRCA.

##### **4.4.2 Death benefits: How is a service death determined?**

The MRCA uses the same tests as the VEA to determine whether the Government accepts that it is responsible for the death of a member or former member as a result of service ("accepting liability"). This means that the Statement of Principles (SoPs) made by the Repatriation

Medical Authority are used in relation to most claims. The SoPs are legislative instruments that set up which factors can be said to cause a medical condition that is the subject of the claim. Where a condition is not covered by a SoP, the decision maker can determine a claim by reference to expert medical advice.

#### **4.4.3 Death benefits: What level of proof is used?**

For a death related to warlike or non-warlike service, the decision maker must find liability unless a causal connection to a member's service can be disproved beyond reasonable doubt. This is a more generous standard of proof than applies in other compensation schemes in Australia. It is the same as the standard used under the VEA for veterans who had operational service

For a death related to peacetime service, the decision maker must be reasonably satisfied that the death was, more likely than not, caused by that service. This is sometimes called the civil standard of proof and means that any question is answered on the balance of probabilities.

#### **4.4.4 Death benefits: Wholly dependent partners**

Under the MRCA wholly dependent partners of deceased serving members and former members of the Australian Defence Force (ADF) can be granted compensation.

Essentially, a wholly dependent partner is a person who was the partner of the member; that is who was:

- of the opposite sex to the member (as of 1 July 2009, partners of same sex relationships also qualify as determined under the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*; and
- married to, or in a *de facto* relationship with, the member immediately before the member's death; and
- wholly dependent on the member for economic support at the time of his or her death.

A partner who was living with the member immediately before the member's death is deemed to have been wholly dependent on the member for economic support. It is not necessary for such a partner to provide any evidence to establish the degree of financial dependency.

A partner is also deemed to have been wholly dependent on a deceased member where the couple were temporarily living apart, or were living apart due to illness suffered by either, or both of them immediately before the member's death.

#### **4.4.5 Death benefits: What compensation is available to a wholly dependent partner?**

Wholly dependent partners can receive either tax-free periodic payments equivalent to the rate of the war widow's/widower's pension under the VEA or its age-based lump sum equivalent.

Where the widowed partner was aged 17 or less at the time of the member's death and chooses the lump sum, he or she receives the maximum amount that was applicable at the time of death. Currently this amount is \$610,497.95. The payment reduces for those aged over 17.

Where the member's death has been accepted as having been related to ADF service, an additional tax-free, age-based death benefit may be payable. The maximum amount of additional death benefit is \$125,319.80.

Where the widowed partner was aged 40 or less at the time of the member's death, he or she receives the maximum amount of the additional death benefit that was applicable at that time. The payment reduces for those aged over 40.

#### **4.4.6 Death benefits: What other assistance is available to wholly dependent partners who are eligible for death benefits?**

Other benefits include:

- a Gold Repatriation Health Card. This card entitles the holder to a range of health care for all conditions; and
- A MRCA Supplement Payment of \$6.00 per fortnight in place of the previous telephone/internet allowance.

Wholly dependent partners may also be entitled to the VEA income support supplement and associated allowances, subject to an income and assets test.

#### **4.4.7 Death benefits: Compensation for Dependants Eligible Young Persons**

Compensation can also be awarded to dependants who are “eligible young persons” under the MRCA.

#### **4.4.7 Death benefits: Who is an eligible young person?**

An eligible young person is:

- under 16 years of age; or
- between 16 and 25 years, undertaking full-time education and not in full-time employment or engaged in full-time work on their own account.

#### **4.4.8 Death benefits: When is an eligible young person entitled to compensation?**

An eligible young person may be entitled to compensation for the death of a member or former member if he or she:

- meets the definition of ‘dependant’ in the MRCA; and
- before the death he or she was wholly, mainly or partly dependent on the deceased.

#### **4.4.9 Death benefits: What compensation would such an eligible young person receive?**

All eligible young persons who were wholly or partly dependent on the member or former member immediately before the member's compensable death receive:

- a tax-free lump sum compensation payment which is payable at the rate applicable at the date of the member or former member's death (currently this amount is \$75,191.88); *and*
- education assistance under the Military Rehabilitation and Compensation Act Education and Training Scheme (MRCAETS) while he or she remains an eligible young person.

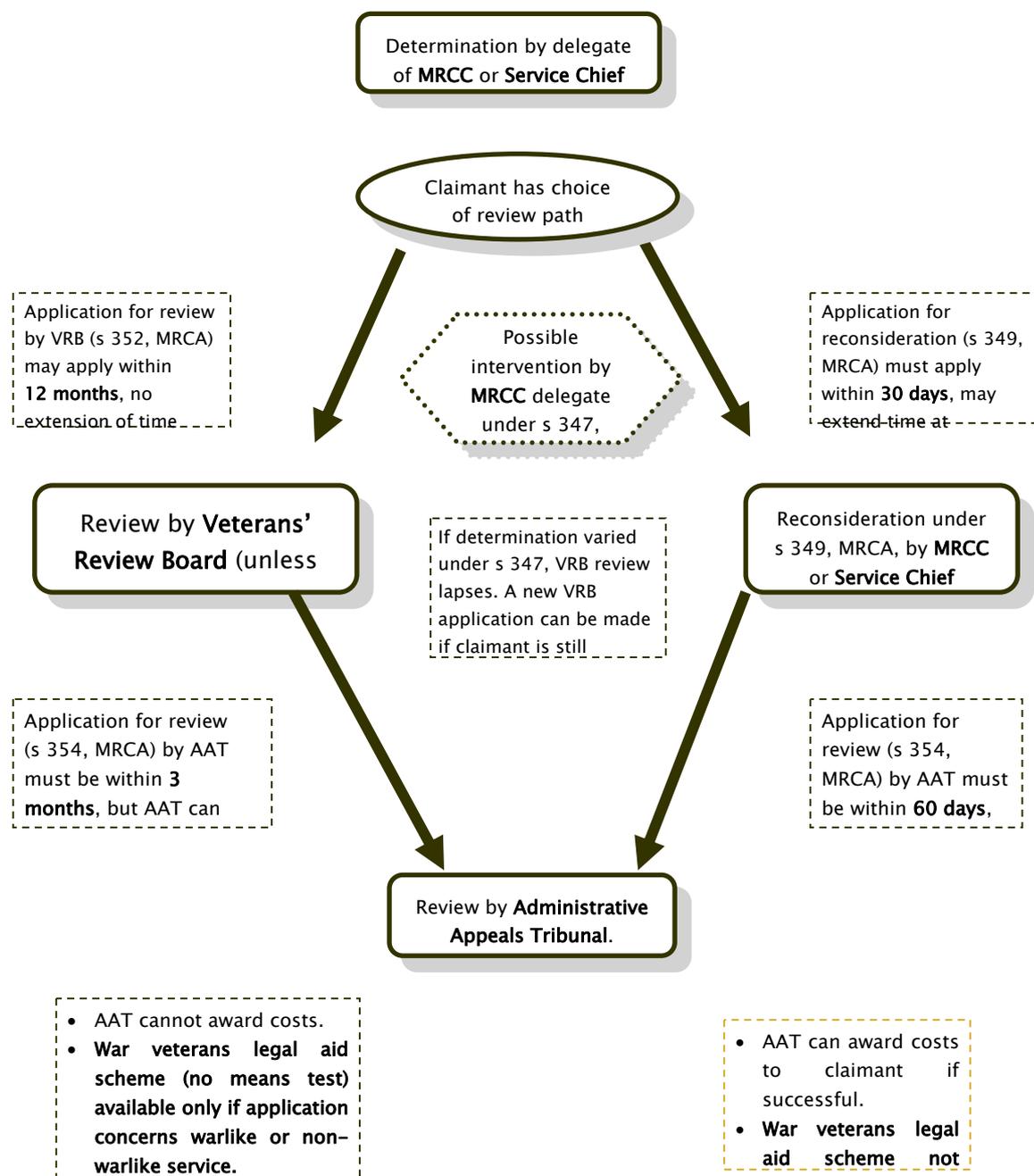
However, for an eligible young person to be entitled to additional benefits, they must be able to show that they were either wholly or mainly dependent on the deceased member. It is not sufficient for this purpose for the eligible young person to only have been partly dependent.

Those eligible young persons who were wholly or mainly dependent can also receive:

- a payment of \$82.71 per week which is payable for his or her benefit from the date of death of the member or former member
- a Gold Repatriation Health Card which provides the eligible young person with free access to treatment for all medical conditions; *and*
- a "MRCA Supplement" payment of \$6.00 per fortnight.

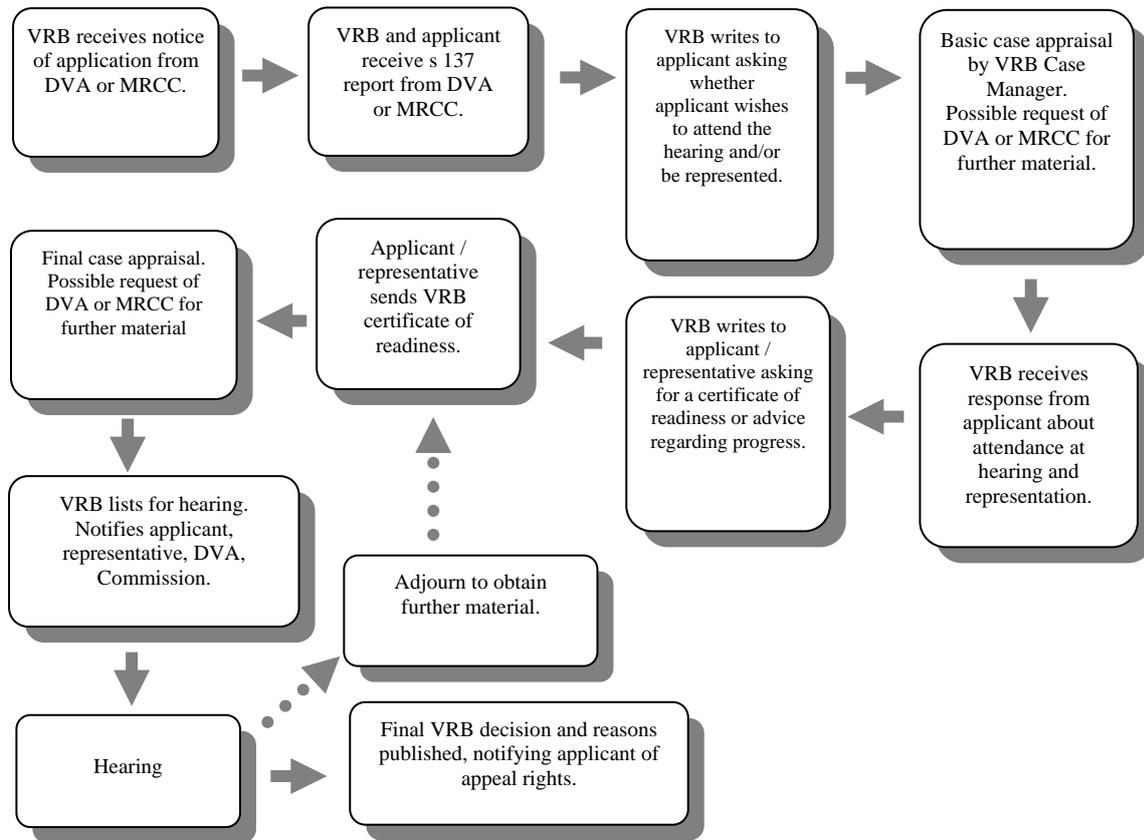
If the child was born after the member's death, the weekly payment commences in the week of the eligible young person's birth. These benefits continue while the dependant remains an eligible young person.

## 4.5 Outline of the MRCA decision making system



**PLEASE NOTE:** There is a current review of Military Compensation Arrangements

## 5. An overview of the VRB: application process



### 5.1 An overview of the VRB: Time limits for review

#### VEA

Matters	Time limit	Extension of time
Assessment of pension	3 months	No
Entitlement matter	12 months, but 3 months for maximum benefits if successful	No
Attendant	3 months	No

allowance		
-----------	--	--

## MRCA

Matters	Time limit	Extension of time
All matters	12 months	No

### 5.2 An overview of the VRB: Board members

- The Board carries out its functions by having panels of members hear cases.
- Membership of the VRB is in a number of categories – the Principal Member, Senior Members, Services Members and Members.
- Senior Members are usually lawyers and they preside at hearings.
- Services Members have extensive military service and are selected from nominations submitted to the Minister for Veterans' Affairs by ex-service organisations
- The other Members have a wide variety of qualifications and a range of expertise and experience.
- Each panel usually consists of a Senior Member, a Services Member, and another Member.

### 5.3 An overview of the VRB: Administrative law principles

- VRB powers are found only in the Act
  - has no 'inherent' powers
- Merits review
  - correct or preferable decision; the Board stands in the shoes of

the original decision maker, and only exercises the same powers as the original decision maker.

- Procedural fairness
  - parties must have opportunity to put case and address adverse material
  - must be unbiased and be seen to be unbiased

#### **5.4 An overview of the VRB: Board hearing process**

- Members will do their best to make applicants and representatives feel at ease.
- When the hearing begins, there will usually be a brief discussion about what the case is about.
- The members might talk about what they need to know to make a decision.
- Applicants may be asked to tell the members what happened and they may ask some questions to clarify the evidence and to help them decide whether a claim should be granted or refused.
- Hearings are recorded on audio tape and are kept for two years.
- The members will not be able to tell applicants and representatives their decision at the hearing.

## **5.5 An overview of the VRB: The rules of evidence**

The Board is not bound by technicalities, legal forms or the rules of evidence when making its decisions but must 'act according to substantial justice'.

While it would be unusual for the Board to refuse to admit any material into evidence, the weight that the Board gives to material must be considered carefully if the rules of evidence would normally exclude such evidence.

Under the VEA subsection 138(1) is in substantially the same terms as s 119(1) which applies to the Repatriation Commission and the AAT. This provision has been discussed in a number of cases, in which the courts have said that it cannot be used to fill substantial evidentiary gaps, or to take a more benevolent view of the applicant's case than the decision-maker would otherwise have taken.

Under the MRCA, subsection 138(1)(b) of the VEA has been modified, so that it now provides that:

"..the Board is to have regard to a reason attributable to the absence of, or a deficiency in, relevant official records, including one resulting from the fact that something that happened during warlike service or non-warlike service rendered by a person was not reported to the appropriate authorities..."

## **5.6 Incident Reports**

It is critical that the medical conditions are immediately reported and placed into the member's Unit Medical Record, along with AC596 Incident Report.

However, section 138(1)(b) recognises that in some circumstances there will be an absence of medical personnel, or in such cases where a person experiences a severe stressor, it can later manifest itself into a particular psychological illness.

## **5.7 An overview of the VRB: Independent legal advice and free representation**

The Board encourages unrepresented applicants to find and engage a representative who can assist them in preparing and presenting their case.

A number of ex-service organisations and the Legal Aid Commission in some states and territories provide representatives free of charge, whether the applicant is a member of their organisation or not. A list of these organisations is available from the VRB in each location (enclosed).