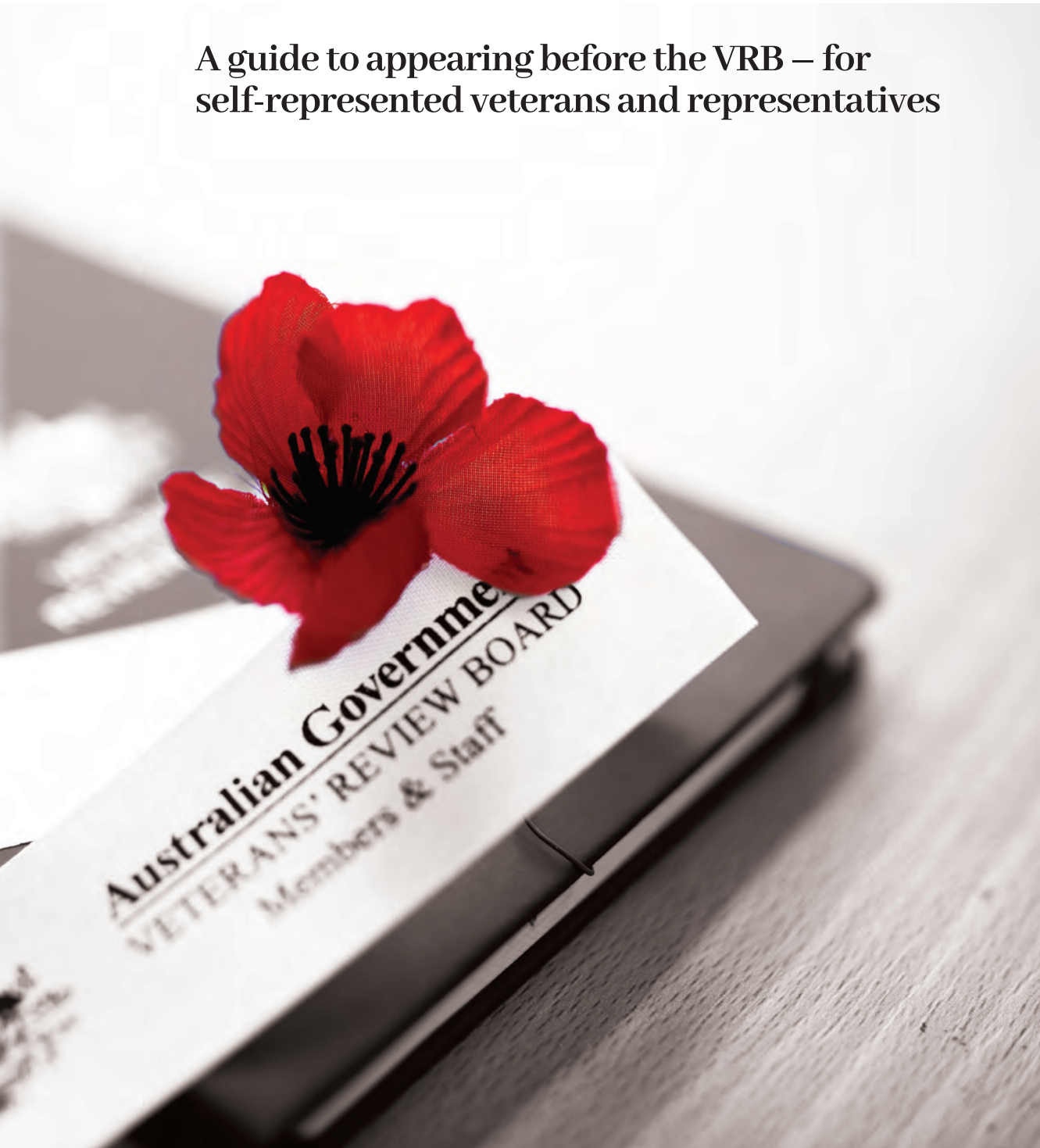
Veterans' Review Board

A guide to appearing before the VRB – for self-represented veterans and representatives



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About this guide

This guide is for people who wish to exercise their rights of review of decisions made by the Repatriation Commission or the Military Rehabilitation and Compensation Commission. This guide is to designed to provide information to applicants who may not have a representative, as well as representatives who assist veterans and their families through the VRB review process.

Read this guide to find out:

- what type of applications can be reviewed by the VRB
- what it means to represent yourself
- stages in the process and what you need to do at each stage
- documents you need to provide

This guide contains general information only and is not intended to be legal advice.

The content in this guide is based on the Practice Directions issued by the Principal Member of the VRB. The directions set out the process to be followed.

Chapter 1 - Overview of the VRB

Delivering justice for veterans: your right to be heard

Role of the VRB

We deliver justice for veterans, current serving members and family members seeking to challenge decisions that affect their interests. More broadly, we also contribute to improving the quality of government decision-making.

We are less formal than a court. Where possible, we help veterans or their family members resolve their applications by talking through the issues at an 'outreach' with a Conference Registrar, or at a conference with a Commission representative. If an application cannot be resolved in this way, our members will decide your case at a hearing.

Our objective

Our objective is set out in law. In carrying out our functions, we must pursue the objective of providing a mechanism of review that:

- is accessible
- is fair, just, economical, informal and quick
- is proportionate to the importance and complexity of a matter, and
- promotes public trust and confidence in the decision-making of the VRB.

Establishment

It has been over 90 years since the first external appeal tribunals were established for veterans seeking review of decisions relating to entitlements and assessment of war pensions.

In its current form, the VRB was established in 1985 under the *Repatriation Act 1920* and continued in existence by the *Veterans' Entitlements Act 1986* (VEA).

Our powers

In reviewing a decision, we take a fresh look at the facts, law and policy relating to that decision. In many cases, new information is provided to us that was not available to the original decision maker. We consider all of the material before us and decide what the legally correct decision is or, if there can be more than one correct decision - the preferable decision. We can exercise all the powers and discretions available to the original decision-maker.

We have the power to:

- affirm a decision (the original decision is unchanged)
- vary a decision (the original decision is changed in some way)
- set aside a decision and substitute a new decision (we make a new decision), or
- remit a decision to the decision-maker for reconsideration (we ask the original decision maker to reconsider the whole decision again, or some aspect of it).

Our Jurisdiction

We can only hear cases where the law gives us this authority. The types of decisions that we most commonly review relate to:

- Claims to accept liability or entitlement for a service injury, disease or death
- Applications for increase in disability pension
- Compensation for permanent impairment or incapacity for work
- Claims for war widow(er)'s or orphan's pension

Veterans' Entitlements Act 1986 (VEA)

Where a person has made a claim under section 14, 15 or 98 of the VEA and is dissatisfied with any decision of the Commission in respect of the claim or application, the person may apply to us for a review of the decision: section 135, VEA.

We may also review the effective date of a decision under the VEA but only if it was set under section 20 or 21 of the VEA.

If the Commission revokes, substitutes, or varies the decision under review using its powers in section 31 of the VEA, we must review the decision as varied, not the original decision that was the subject of the application for review: subsections 135(6), (7), VEA.

We may also review some types of decisions made under section 31 of the VEA: subsections 135(2), (3), VEA.

Military Rehabilitation and Compensation Act 2004 (MRCA)

Where an 'original determination' has been made by the Commission or a service chief under the Act, a person may apply to us for a review of the determination: section 352, MRCA.

An 'original determination' is defined in s 345(1) of the MRCA to mean any determination of the Commission under the Act other than those specified in s 345(2) of the MRCA or any determination of a service chief that relates to rehabilitation for a person if the service chief is the rehabilitation authority of the person.

Our Organisation

Our need for specialist expertise is met by the appointment of appropriately qualified and experienced members in the categories of Senior Member, Member and Services Member. Each member is appointed by the Governor-General on the recommendation of the Minister for Veterans and Defence Personnel. Additionally, to be considered for appointment, Services Members (who have military experience) must be nominated by an ex-service organisation.

Members of the VRB are statutory appointees and are not public servants employed by the Department of Veterans' Affairs.

All our members must have:

- a high level of integrity
- sound judgment
- legal, military, health or other professional skills
- excellent communication and interpersonal skills
- the ability to conduct hearings
- a capacity to make fair decisions quickly.

Principal Member

The Principal Member is responsible for the efficient operation of the VRB and the arrangement of its business, including procedures and the constitution of panels of members to hear cases.

The Principal Member issues directions from time to time relating to the operations of the VRB. However, the Principal Member cannot direct any member on the law or on the decision to be made in a particular case.

National Registrar

The National Registrar's statutory function is to assist the Principal Member in managing the functions of the VRB across Australia.

Staff

The National Registrar is supported by VRB staff, employed under the *Public Service Act 1999* and made available by the Secretary of the Department of Veterans' Affairs. Staff are organized into two groups: client services and tribunal services.

Client Services teams include:

- South Eastern Registry
- North West and South Australian Registry; and
- Alternative Dispute Resolution team.

The Tribunal Support team includes member support, business support and financial management.

Staff in our client service teams:

- provide a dedicated single point of contact for each veteran, ensure applications are 'event-ready' and facilitate the listing of alternative dispute resolution processes and hearings;
- liaise with veterans and advocates about their cases and give them information, and
- provide support services to conference registrars and members.

Conference registrars conduct VRB alternative dispute resolution processes.

How to contact the VRB

You can contact us by phone, email, post or in person. You can also use the VRB Justice Portal.

By phone

Call us on 1800 550 460 Monday to Friday from 9.00am to 5.00pm.

By email

Email us at the address which relates to your location:

New South Wales, Victoria, Tasmania and Australian Capital Territory:

- clientserviceofficerSE@vrb.gov.au

Queensland, South Australia, Western Australia and Northern Territory:

- Client.Service.Officer.NWSA@vrb.gov.au

By post

Please send your correspondence to us at the address which relates to your location:

New South Wales, Victoria, Tasmania and Australian Capital Territory	Queensland, South Australia, Western Australia and Northern Territory
GPO Box 1631, SYDNEY NSW 2001	GPO Box 349, BRISBANE QLD 4001

In person

We hear cases across Australia. Our main registries are located in:

Sydney	Brisbane
Level 2, Building B Centennial Plaza 280 Elizabeth Street Surry Hills NSW 2010 (Directly opposite Central Train Station)	Level 8, NAB Place 259 Queen Street Brisbane QLD 4000 (A short walk from Central Train Station)

VRB Justice Portal

The VRB Justice Portal puts you at the centre of your application.

You and your representative can interact with the VRB at any time through our online, easy-to-use portal.

You can use the portal to track your application and upload documents in support of your case.

If you have already registered, you can access the VRB Justice Portal from our website: www.vrb.gov.au.

If you have not registered, please contact the VRB Justice Portal Helpline on 0436 847 130 and we will talk you through the registration process

Case Study 1

The veteran made a claim for service osteoarthritis of the left knee, which had been diagnosed as a sprain or strain of the left knee in the decision under review. The veteran contended that this condition was attributable to service-related weight-bearing and lifting.

The application was referred to the VRB's ADR program and was subject of an outreach with a VRB Senior Member. The veteran was represented and the VRB Senior Member used the outreach session to assist the representative to identify the issues in dispute and develop options to resolve the application. This included obtaining more detailed information from the veteran in relation to lifting and weight-bearing on service and requesting the Department to obtain a specialist medical opinion on diagnosis of the knee condition.

The new specialist opinion, which concluded that the available X-ray and MRI reports supported a diagnosis of osteoarthritis of the left knee. The additional information provided by the veteran about the duties he performed as a cargo handler indicated that the SOP factor relating to lifting and weight-bearing in the SOP for osteoarthritis was met. The VRB Senior Member was therefore able to make a new decision on the papers which varied the diagnosis of the claimed condition to osteoarthritis of the left knee and found that this condition was related to the veteran's service. The VRB provided the veteran with a draft decision which was accepted. Following this, VRB published a final decision and a copy was sent to the veteran, his representative and the respondent.

Chapter 2 - What it means to represent yourself

It's important that you can fully participate in the review process and present your case.

Representing yourself at the VRB means you take responsibility for the tasks that a representative would otherwise do for you. If you choose to represent yourself, things you may need to do include:

- understand and follow the correct VRB procedures
- discuss your application with a VRB Conference Registrar or Member
- gather relevant documents that support your application
- prepare a written statement that explains your case
- Present your application to VRB members at a hearing, explain your case and answer any questions the members may have.

Who can help me?

Registry staff can provide information on how the VRB application process works but are not allowed to give legal advice. There are professional people and other organisations that can help you with your case. . We cannot recommend a particular individual or organisation to help you.

Free and low-cost help

An ex-service organisation (ESO) may be able to help you by providing advocacy services or other types of support. Search the Accredited Advocate Register (www.advocateregister.org.au) to find an ESO that can help you.

Can a lawyer represent me?

You can elect to have a lawyer represent you throughout each of the VRB's ADR processes. You can also seek legal advice and provide legal submissions to support your case prior to any hearing. However, the current law prohibits lawyers from appearing at VRB hearings.

Asking someone to represent you

You must provide us with the details of any representative you have appointed to represent you.

You can nominate your representative on your application for VRB review. When we receive a copy of your application for review from DVA or the MRCC we will contact you to confirm your nominated representative.

If you wish to appoint a new representative you can provide us with those details in writing, including by email.

What can a representative do?

A representative can:

- receive all documents on your behalf which relate to the review
- discuss your application with a VRB Conference Registrar or Member
- provide us with relevant documents that support your application
- prepare a written statement that explains your case
- Present your application to VRB members at a hearing (If your representative is legally qualified they cannot appear on your behalf but he or she can provide written submissions).

What happens if I want to change my representative?

You must tell us immediately if there are any changes to your representative's details.

Where can I find other types of support?

Engage (engage.forcenet.gov.au) is an online portal that current, transitioning, and former ADF members, their families, and/or those involved in their support can use to locate support services.

Open Arms offers individual, couples and family counselling and group programs to help current and ex-serving Australian Defence Force personnel and their families. You can contact Open Arms on 1800 011 046.

Case Study 2

Following the death of her partner of more than 60 years from heart disease, a widow made a claim for a war widow's pension. In support of her claim, the widow advised that her husband had an alcohol habit, stating in an alcohol questionnaire that she thought he drank to relieve stress during service. The veteran had rendered operational service in New Guinea during World War 2.

The veteran did not have a service-related psychiatric condition and the primary decision maker did not accept the widow's evidence that the veteran consumed alcohol as a result of his service. As such, the primary decision maker found that none of the factors existed in which alcohol consumption could be linked to that service, and so refused the claim.

The application was referred to the VRB's ADR program. An outreach was conducted by a legally qualified Senior Member who also had military experience, including operational service. The Senior Member asked the widow's representative to obtain further service records that were not contained in the Department's section 137 report. In the context of this further information and using his informed knowledge of service conditions and history, the Senior Member was able to resolve the application on the papers, without the need for a full VRB hearing.

The Senior Member found that the relevant factor in the SOP was raised by the evidence in the case and that the material raised a reasonable hypothesis that the late veteran had commenced drinking at the age of 19 during his service and continued to drink until the clinical onset of his heart disease.

The VRB provided the late veteran's widow with a draft decision, which she accepted. Following this, the VRB published a final decision and a copy was sent to the widow, her representative and the respondent.

Chapter 3 — Representatives

All veterans have a right to be represented in proceedings before the VRB

The parties to the review

Each review before the VRB has two parties. They are called "the applicant" and "the respondent".

The applicant is the person who has sought review of a decision.

The respondent is the party who made the decision, either the Repatriation Commission or the Military Rehabilitation and Compensation Commission.

All parties to a review before the VRB have a right to appoint a person to represent them.

Who can be a representative?

Many Ex-Service Organisations (ESO) and some private individuals provide representation for VRB applicants. You can search the Accredited Advocate Register (www.advocateregister.org.au) to find an advocate to assist you.

Legally qualified persons can also provide representation for VRB applicants in the following ways:

- Help prepare an application;
- Participate in all aspects of the Alternative Dispute Resolution (ADR) program; and
- Provide written submissions for a hearing.

However, lawyers are prevented from appearing for a party at a hearing.

The Repatriation Commission, the Military Rehabilitation and Compensation Commission, or Service Chief may be represented, but they rarely choose to do so at VRB hearings. However, in some cases representatives for the respondent are required to attend ADR events or directions hearings.

Conduct of representatives

Representatives are an integral part of the veterans' review framework and play an important role in assisting and supporting veterans, serving members, and their families.

Where a lawyer acts as a representative for a veteran, he or she is bound by the Conduct Rules and any statement of ethics made by the relevant state-based law society. Non-lawyers may be bound by other codes, such as the Advocacy Training and Development Program (ADTP) Code of Ethics.

The legislation requires all representatives before the VRB to use their best endeavours to assist the VRB to fulfil its objective of providing a mechanism of review that is accessible, fair, just, economical, informal and quick.

To do this, representatives should present the case to the best of their ability and promote the timely resolution of the case consistent with the best interests of the applicant. This includes:

- only taking on an amount of work that can be done efficiently in order to comply with timetables set by the VRB;
- obtaining clear written, signed, authorisation from the person who is being represented;
- having the case ready to be progressed as soon as practicable including, wherever possible, providing written submissions in advance of an ADR event or hearing;
- being available for ADR events and hearings scheduled by the VRB or ensuring files are accessible to another representative in the case of any absence (for example, this may require liaising with another organisation to make any necessary arrangements);
- presenting the identified issues and relevant evidence clearly and succinctly at ADR events and hearings; and
- complying with the time limits and directions made by the VRB, including fulfilling any undertakings that have been made to a Conference Registrar or VRB Member.

In addition, representatives before the VRB have a duty too:

- not mislead the VRB;
- maintain objectivity and exercise independent judgment in the conduct and presentation of the case to the VRB;
- be aware of the relevant legislation, Statements of Principles and case law which are relevant, regardless of whether they support or detract from the case; and
- act courteously and behave in a proper manner before the VRB including treating other parties, including Commission representatives, and all members and staff of the VRB with courtesy and respect.

Case Study 3

The veteran made a claim for service related ischaemic heart disease. The veteran submitted that his accepted disabilities of osteoarthritis of the hips and knees had the effect of rendering him unable to undertake any physical activity greater than 3 METs for at least the five years before the clinical onset of his ischaemic heart disease.

The application was referred to the VRB's ADR program and was subject of an outreach with a VRB Conference Registrar. The veteran was represented and the VRB Conference Registrar used the outreach session to assist the representative to identify the issues in dispute and develop options to resolve the application. This included obtaining new medical evidence from the veteran's general practitioner including all clinical notes for the relevant five year period requirement in the statement of Principles (SOP).

On the basis of the new medical material and further statement evidence of the veteran, a VRB Member was able to make a new decision, finding that the clinical notes and medical reports consistently confirmed a history of bilateral hip and knee replacements during the relevant period required by the SOP. Based on this evidence, the VRB Member was satisfied that the evidence pointed to the veteran being limited to an activity level corresponding to 2-3 METs from the time of his hip replacement to the clinical onset of ischaemic heart disease.

In *McKenna v Repatriation Commission*[1], the Federal Court held that if a hypothesis relies on other sub-hypotheses, each part of the causal chain is required to satisfy the relevant SOP along the causal chain. The fact that a condition or disease within that causal chain might have been accepted previously as war-caused does not create a presumption that it is related to service for purposes of another claim. The VRB must consider the entire chain of causation.

In this case, the VRB Member went on to consider the terms of the SOP for osteoarthritis, noting that the claim for osteoarthritis of the left hip was accepted on the basis of service-related lifting and weight bearing.

Based on the veteran's lifting questionnaires and evidence of the veteran's duties as an operator at various radar stations, including a mobile radar station, the VRB Member was satisfied that there was no grounds for departing from the finding that the veteran's osteoarthritis was war-caused. The requirements of *McKenna* were therefore satisfied in this case.

Overall, on the basis of new medical evidence and the statement evidence of the veteran, the VRB was able to make a new decision. The VRB provided the veteran with a draft decision which was accepted. Following this, VRB published a final decision and a copy was sent to the veteran, his representative and the respondent.

[1] *McKenna v Repatriation Commission* [1999] FCA 323

Chapter 4 — Steps to resolve your case

The VRB serves veterans and their families by listening and making decisions about their applications for review

How to apply online

There is no application fee for a review by the VRB.

Your application for VRB review must be made to the Department of Veterans' Affairs (DVA).

You can make your application online via the DVA website. If you don't wish to apply online, DVA will accept applications sent by post, email or fax.

Currently, the law does not allow applications for review by us to be lodged directly with the VRB.

Time limits

There are strict time limits to lodge an application for review. We don't have any discretion to extend the time for lodging applications for review.

Veterans' Entitlements Act 1986

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 allowance	3 months	No

Military Rehabilitation and Compensation Act 2004

Matters	Time limit	Extension of time
All matters	12 months	No

What happens when an application is lodged?

DVA or the MRCC must provide you with a copy of all of the evidence under their control that is relevant to the review. The documents are provided in a report prepared by DVA or the MRCC called a "section 137 report."

The VRB is not involved in this process. You should talk to DVA if you have any concerns.

Once we receive the section 137 report from DVA or the MRCC, we will contact you to start your application.

Receipt of application

When we receive the section 137 report from DVA or the MRCC, one of our registry staff will check that the application was lodged within the specified time limits.

A notice (called the "applicant's advice") will be sent to the applicant and he or she will be asked to tell us within 28 days:

(1) The name and contact details of their representative (if they have one); and

(2) If they wish to participate in any ADR events or hearing.

We also need to confirm if the applicant wishes to receive our correspondence by email.

To provide this information, the applicant can simply call us or email us a response to the notice. A reply can also be submitted directly into the VRB Justice Portal.

Steps to resolve an application

Each application is different and we will work with veterans to find the best way to resolve their applications. Application management at the VRB includes:

- online dispute resolution;
- outreach; and
- in some applications a case appraisal, neutral evaluation or a two-party conference.

If an application cannot be resolved by one of these processes, a veteran can elect to proceed to a hearing before a panel of three VRB members.

Stages in the application for review process at the VRB

Stage 1: DVA or the MRCC provide us with the section 137 report**

Stage 2: We send you a notice seeking your advice

Stage 3: You participate in Online Dispute Resolution (ODR) or Alternative Dispute Resolution (ADR)

Stage 4: You may participate in a hearing*

Stage 5: We make a decision

*The majority of applications before us are resolved without the need for you to participate in a hearing.

** Please note you do not make your application for review to us and we are not involved in the preparation of section 137 reports. You need to talk to DVA or the MRCC about these processes, which occur before we receive your application.

Resolve your application online 24/7

The mission of the VRB is to deliver justice by listening to veterans and making high quality decisions in a timely, cost effective and efficient way.

The VRB is now trialling online dispute resolution (ODR) to increase access to justice by providing a modern, simple, efficient, user-friendly and accessible forum for those seeking review of decisions that affect their interests.

ODR lets current serving members, veterans and their family members resolve applications when and where it's convenient for them. This can be at home, at work or on a phone.

How it works

There are three steps involved:

Request ODR

1. After you have made your application for review you can ask for ODR by using the VRB Justice Portal.

Facilitation

2. A Conference Registrar will help you to resolve your application online.

Decision

3. If your application can be resolved by ODR, you will be given a binding decision, delivered online.

You can read more about each step below.

How do I request ODR?

ODR provides you with an opportunity to resolve your application fairly and quickly.

It is your choice to request ODR.

There is no form required. You can simply upload a document (eg. a screen shot or word document) into the VRB Justice Portal saying, "*I would like my application to proceed to ODR*".

You only do this after:

1. You have lodged your actual application for review with DVA;
2. DVA provides your application and the Section 137 report to us;
3. You tell us if you have a representative; and
4. You (or your representative) have registered for the VRB Justice Portal.

How do I register for the VRB Justice Portal?

To register for the VRB Justice Portal you (or your representative) can simply email VRB.SUPPORT@dva.gov.au

One of our registry staff will then contact you and talk you through the registration process.

Once you have registered, you can read the tip sheets to learn how to use the VRB Justice Portal.

Facilitation

Facilitation is about helping you to resolve your application.

Our Conference Registrars are experts in the veterans' entitlements and compensation system and will help you through the process.

They may ask you to provide material to support your application. This will be done online via the VRB Justice Portal so you can respond where and when it suits you.

If you can't resolve your application during facilitation, you can ask to participate in offline VRB ADR or request that your application proceed to hearing before a panel of three VRB Members.

Getting a VRB decision

If you resolve your application by facilitation and agree to a draft decision, a VRB Member will ask you to join a short online hearing at a place and time that suits you.

At the online hearing you can confirm your consent to the decision and a VRB Member will provide oral reasons for the decision.

Outreach

Outreach is about helping you to resolve your application.

Our VRB Conference Registrars and Members are dispute resolution experts who will guide you through the process. They are also independent.

At an outreach, you can talk to an independent VRB Conference Registrar or Member about the decision you have received from DVA. We will contact you to set up a time for this discussion. It can take place by phone, video or face-to-face.

The VRB Conference Registrar or Member will explain the review process and ask you to tell us why you are unhappy with the decision. They will also help you to identify the issues in your case and discuss the next best steps to resolve it.

Outreaches are private, confidential sessions and the VRB Conference Registrar or Member will not disclose anything you have said without your consent.

To ensure you understand the next steps to resolve your application, at the end of every outreach session the VRB Conference Registrar or Member will issue a direction which may:

- require things to be done;
- set time limits; or
- ask for submissions or other information to be provided

Communication is the key

When it comes to preparing for your outreach, these tips may help:

- Express your views clearly and listen carefully to what the VRB Conference Registrar or Member is saying.
- Have an idea of what you want to achieve, and what you may be willing to compromise on.

Decisions on the papers

In some cases, following an outreach the VRB Conference Registrar or Member may recommend that your case can be resolved by a favourable decision 'on the papers'.

If the case can be resolved in this way, you will be sent a copy of a draft decision. If you accept the draft, the VRB will make a final decision, a copy of which will sent to you and DVA.

If you do not accept the draft decision, the application will be listed for a full hearing before a panel of three members (who are not bound by the draft decision).

It is important to note, whether or not a favourable decision can be issued is a matter for the Principal Member or Senior Member and cannot be pre-determined by the VRB Conference Registrar or Member conducting the outreach.

Obtaining further evidence

At an outreach, a VRB Conference Registrar or Member may identify the kind of evidence you need to progress your application and discuss how that material can be gathered. This can be done a number of ways:

- you may be requested to obtain the further material within a certain time frame; or
- DVA or the MRCC may be asked to obtain the further material (a section 148(6A) request).

As is the case for many tribunals, the VRB does not apply the strict rules of evidence. Rather, we encourage the parties to obtain relevant and probative material in a manner that is informal, economical and quick.

In order to avoid unreasonable costs to the parties and reduce the risk of unreasonable delay to the finalisation of veterans' applications, we may ask the parties to consider:

- Where appropriate, obtaining oral evidence from a doctor or specialist (who has reviewed the veteran) over the telephone, rather than requiring the veteran to undergo a further medical assessment and obtain a full medical report. The oral evidence can be confirmed in writing following an ADR outreach event;
- Where a medical report is required, the examination of the veteran is conducted by video or telephone conference, to avoid unnecessary travel, expense or delay;
- Witness statements provided by colleagues or other persons by email;
- The parties agreeing to obtain reports jointly, using a collaborative approach.

You are welcome to ask a VRB Conference Registrar or Member during an ADR event if evidence can be obtained via one of the ways noted above.

Types of evidence

We commonly receive the following types of evidence:

- Medical evidence: including service medical records, hospital notes or surgery reports and doctors' expert opinions.
- Documentary evidence: including service records, unit diaries or other published historical or contemporary accounts of events that took place during service.
- Witness statements: including those of fellow service personnel who can confirm the details of incident/s, participation in a sporting activities/occupations, or postings or deployments.
- The veteran's own story that describes the details of the disability, incident, or service event.

The veteran's own personal story is often the most important evidence we receive. It may be new evidence that the original decision-maker did not have when the primary decision was made. A veteran's own story is often an important factor in the VRB making a favourable decision for a veteran.

Assistance in obtaining your own evidence

Rather than asking DVA or the MRCC to obtain material, it may be quicker and more economical for you to obtain your own medical evidence. It also gives you more control over the choice of health professionals, location and timing of appointments, including the option of using tele-health where appropriate.

You are welcome to ask a VRB Conference Registrar or Member in an ADR event for help in drafting a schedule of questions for a health professional. The schedule of questions can be included in the direction that is issued following the ADR event.

If you choose to obtain material to support your application, DVA will reimburse the costs of obtaining medical evidence up to a maximum amount of $1000.00 per claimed condition.

Additionally, reimbursement of reasonable travelling expenses incurred in obtaining such medical evidence may also be paid by DVA.

A direction to adjourn the outreach

In addition to making a direction about the required evidence and the time frame in which it should be provided, the VRB Conference Registrar or Member will also make a direction to 'adjourn the outreach'. This means you will have an opportunity to further discuss the new material that has been obtained with the VRB Conference Registrar or Member once it becomes available. Usually, the VRB Conference Registrar or Member will set a time and date for the next discussion to take place, with your agreement. For this reason, it is important to have easy access to your diary (such as in your smart phone or tablet) during any outreach.

Two party conferences

In some applications a VRB Conference Registrar or Member may recommend that a two-party conference is appropriate. Conferences require your active participation and as well as the participation by a representative from the respondent. The aim is to reach agreement.

Conferences at the VRB work in a similar way to a conciliation model. There is a 'hands-on' and facilitative approach by the VRB Conference Registrar or Member, which includes the ability to suggest terms of agreement that accord with the requirements of the legislation.

The VRB Conference Registrar or Member will advise the parties of any material, such as a 'Statement of Issues', required before the conference. If the parties are directed to provide a statement of issues, each must prepare a brief statement setting out the issue(s) they consider to be in dispute. The parties must exchange their statements with each other and send a copy to us at least one working day prior to the conference. The statement of issues must address the specific issue(s) in question and must not be expressed in general terms.

If an application is not resolved at a first conference, the VRB Conference Registrar or Member may direct that it be listed for a further conference. If an application proceeds to a second conference the parties may be requested to provide a 'Statement of Facts and Contentions'.

What happens if you reach an agreement?

We encourage you and the respondent to enter into discussions (independent of us) before or after any conference, with the objective of reaching an agreement.

Where the parties reach agreement, we will ask for the terms of this agreement to be set out in writing; which we refer to as the "terms of agreement." The terms generally reflect the first page of a VRB decision. The terms of agreement will need to be signed and dated by both parties.

We will review the agreement to ensure it is acceptable and lawful. If so satisfied, a VRB Member will confirm the agreement by issuing a consent decision.

Case appraisals and neutral evaluations

In addition to outreaches and conferences, a VRB Conference Registrar or Member may also recommend a 'case appraisal' or 'neutral evaluation'. These are written assessments undertaken by VRB Members to help you make choices about your application, including those that may have conflicting or insufficient evidence and/or are unlikely to be successful.

Discontinuing or withdrawing your application

You can withdraw your application (or a part of it) at any time before a VRB decision is made.

You must withdraw in writing. You can use the 'withdrawal of application for review' form available on our website, or simply send us an email.

What happens after the review is withdrawn

An application is not regarded as withdrawn until we decide that we have no jurisdiction to review the application as a result of the withdrawal. Once we decide we have no jurisdiction, the review will be brought to an end. We will send you a VRB decision to confirm this. The original decision under review remains unchanged. We also notify the respondent that you have withdrawn the application.

When can we dismiss an application?

If you do not attend your ADR event or hearing, or fail to progress your application in a reasonable time we may dismiss your application. We can also dismiss your application if you consent. The original decision under review remains unchanged.

Listing for hearing

If your application is not resolved by one of the processes outlined above, the VRB Conference Registrar or Member will make a direction that your application be listed for hearing.

At the final ADR event, the VRB Conference Registrar or Member will also confirm if you wish to remove any material provided during the ADR process. The material in question includes responses to section 148(6A) request/s, case appraisals or neutral evaluations.

Once the direction is made, your application will proceed to be listed for the next available hearing time by our registry staff. You will receive a telephone call and listing notice from registry staff confirming the hearing date.

We will not agree to a request to delay listing your application for a hearing unless there is a good reason to do so, and it is fair in the circumstances. For example, if you are seeking to gather further evidence after having participated in our ADR processes we may list your application for a hearing in any event. If you wish to pursue your request, you would need to ask for an adjournment at the hearing. The VRB members hearing your application will make a decision about whether to grant an adjournment, having regard to all of the facts and circumstances.

Chapter 5 — Hearings

We encourage all veterans to participate in their hearings. Attending a hearing may seem daunting, but our hearings are much less formal than a traditional legal hearing. Our hearings are held in private and they are not open to the public. A representative from DVA will generally not attend VRB hearings. You are welcome to bring a friend or support person to your hearing, regardless of whether you are represented.

We will write to you to tell you the date, time and location of the hearing. We can hold a hearing in a VRB office, by telephone or video conference. VRB hearings are recorded.

Our members will do their best to make you feel at ease. If you are appearing in person, one of the members hearing your case will meet you in the reception area of our registry and invite you into the hearing room.

If you are appearing by video-conference, our registry staff will help you prepare for the virtual hearing, by explaining the online platform we use, identifying any connectivity issues, and testing your equipment.

Our hearings generally take less than one hour.

Your case will usually be heard by three members: a Senior Member, Member and Services Member. Members of the VRB are independent. All of our Services Members (and some of our other members) have military experience.

Telling us about your case

The members hearing your case will ask you to explain why you are unhappy with the DVA decision being reviewed. The members may ask you questions.

Generally, witnesses do not appear in person at VRB hearings. If you have a witness, the VRB may ask to speak to them by phone. The VRB may also wish to speak to a medical professional who has provided a written report for the case, in order to obtain clarification on an issue.

Decisions on the day of your hearing

The members will listen to you, and any witness that takes part in the hearing. They will then analyse all the evidence presented and make a decision based on the law that applies to your situation.

Where possible, the members will make their decision on the day of your hearing and tell you the reasons for their decision. You will also receive a written copy of the decision and the DVA will also be sent a copy.

If a decision cannot be made on the day of the hearing, we will send you a copy of the VRB decision and reasons at a later date. DVA will also receive a copy of the decision and reasons.

VRB decisions and reasons are not published or made public. They are only provided to you and DVA.

What happens if I don't participate in a hearing?

A decision will be made by a panel of three VRB Members based on written materials provided by you and the staff of Department of Veterans' Affairs, including the section 137 reports, without verbal evidence or oral submissions.

Chapter 6 — Service Eligibility

Service and eligibility under the VEA for a disability pension

A disability pension is paid to a veteran as compensation for injuries or diseases caused or aggravated by war service or defence service. It is also paid to a dependant of a veteran whose death was caused by war service or defence service. A prerequisite for eligibility for disability pension is the rendering of one of the following types of service:

- eligible war service
- operational service
- peacekeeping service
- hazardous service
- defence service
- warlike service
- non-warlike service

Each of these types of service is discussed further below.

The structure of the VEA legislation

Part II of the VEA concerns pensions for incapacity from war-caused injury, war-caused disease, or for war-caused death. The relevant type of service for Part II is 'eligible war service', which may include 'operational service'.

If a person has rendered 'operational service', they have certain advantages in how their claims are determined, including a more beneficial standard of proof and additional means by which the Commonwealth may be liable to pay pension.

Part III of the Act concerns service pensions (equivalent to the age pension) for persons who have rendered 'qualifying service'. The VRB does not review decisions under Part III of the VEA. Qualifying service for service pension is different from operational service for a disability pension.

Part IV of the Act concerns pensions for incapacity from defence-caused injury, defence-caused disease, or for defence-caused death. The relevant types of service for Part IV are 'defence service' (which may include 'hazardous service', 'peacekeeping service' and 'British nuclear test defence service).

As with 'operational service' under Part II, if a person has rendered 'hazardous service' ,' British nuclear test defence service' or 'peacekeeping service', they have similar advantages in how their claims are determined. However, it is important to note that a person is not taken to be rendering 'defence service' while they are rendering 'peacekeeping service'.

What is a disability pension?

A disability pension is paid to compensate a **veteran**, **member of the Forces**, **member of a Peacekeeping Force** or **Australian mariner** for injuries or diseases caused or aggravated by war service or certain defence service on behalf of Australia.

Who is a 'veteran' or 'member'?

A **'veteran'** is a person who has rendered **eligible war service**.

A **'member of the Forces'** is a person who has rendered **defence service**.

A **'member of a Peacekeeping Force'** is a person who has rendered **peacekeeping service**.

Eligible war service

Eligible war service is:

- operational service, or
- continuous full-time service (not being operational service) as a member of the Australian Defence Force (ADF) during World War 1, or
- continuous full-time service (not being operational service) as a member of the Australian Defence Force during World War 2, being service that commenced before 1 July 1947, or
- continuous full-time service (not being operational service) as a member of the Interim Forces during World War 2, being service on or after 1 July 1947, or
- employment on a ship as an Australian Mariner during World War 2, between 3 September 1939 and 29 October 1945.

Section 7 of the VEA provides a full definition of eligible war service.

For service during World War 2 (**WW2**), a person has rendered eligible war service if he or she rendered continuous full–time service as a member of the Defence Force for any period between 3 September 1939 and either 2 January 1949 or 30 June 1951.

The end date of eligible war service depends on the terms of the person's enlistment. If a person served only after 30 June 1947 and did not serve outside Australia they are not eligible unless they rendered operational service, or enlisted in the Interim Forces for a period of two years.

A person (an **'Australian mariner'**) has rendered eligible war service if they served in the Australian merchant navy between 3 September 1939 and 29 October 1945. Their eligible service extends only to each individual period of employment during that time.

Operational service

Operational service is generally service performed:

- outside Australia,
- during war like operations in which Australian Defence Forces were involved, and
- in areas where the incurred level of risk is considered above that of normal peacetime conditions.

Section 6 to 6F of the VEA are the provisions in the VEA that relate to operational service.

A person is taken to have rendered operational service during WW2 if, during a period of eligible war service, the person served 'outside Australia'.

Whether a person has 'rendered continuous full-time service outside Australia' depends on the essential purpose of any trip outside Australia. If the person was merely a passenger on a ship that sailed from one port in Australia to another port in Australia, but which happened to sail outside the territorial waters in the course of the voyage, it does not mean that the person had rendered 'continuous full-time service outside Australia'. The purpose of the voyage must be connected with rendering service outside Australia.[2]

In characterising such service it is relevant to consider the length of the voyage, the purpose of the voyage, and the risk of contact with the enemy.[3]

Some service *within Australia* during WW2 qualifies as 'operational service'. For example, service in the northern part of the Northern Territory (north of Katherine) for a continuous period of at least 3 months between 19 February 1942 and 12 November 1943 is regarded as constituting operational service.

Similarly, service by a person who enlisted on a Torres Strait island and who served there for at least 3 months between 14 March 1942 and 18 June 1943 is taken to have rendered operational service.

If a person has rendered operational service by any of these means, any eligible war service rendered immediately before and immediately after such operational service is also taken to be operational service.

Another means by which a person within Australia can be taken to have rendered operational service is if the Repatriation Commission considers that the person should be treated as having been involved in 'actual combat against the enemy'.

'Actual combat against the enemy' involves 'integral participation in an activity directly intended for an encounter with the enemy, whether offensive or defensive in character'.[4]

If a person is taken to have rendered 'operational service' under this provision, there is no extension of operational service to any eligible war service either before or after that 'actual combat' period of operational service.

Allotment for duty in an operational area

For most operational service after WW2, the person or their unit must have been be 'allotted for duty in the operational area'.[5] Allotment must be demonstrated by a written instrument produced for the purposes of the VEA by relevant Defence authorities or the Minister for Defence.

Warlike and non-warlike service for eligibility under the VEA

Amendments were made to the VEA in 1993 to permit the Minister for Defence to declare certain service to be either 'warlike' or 'non-warlike' service by written instruments.[6] This system has also been used to give eligibility for some earlier overseas involvements of Australian forces that had been denied benefits under the previous legislation. An example of such an extension is the service in Vietnam by embassy guards in Saigon from 1973 to 1975. Certain recent service in East Timor,

[2] *Repatriation Commission v Kohn* [1989] FCA 244
[3] *Proctor v Repatriation Commission* [1999] FCA 32
[4] *Repatriation Commission v Ahrenfeld* [1991] FCA 243
[5] VEA, s 6C, Schedule 2 to the VEA
[6] VEA, s 5C, s 6F

Afghanistan and Iraq has been determined to be warlike service, while other service has been determined to be non-warlike service.

A veteran whose service is recognised as warlike service has both qualifying service and operational service. Accordingly, such a person's service makes them eligible for both service pension and disability pension. By way of comparison, non-warlike service is taken to be only 'operational service', and not 'qualifying service'.

Defence service

A member of the Defence Force who has served for a continuous period of effective full-time service of not less than three years between the period 6 December 1972 and 7 April 1994 has rendered defence service.

Section 68 of the VEA provides a full definition.

In 1973, Repatriation legislation was amended, with effect from 7 December 1972, to extend coverage to all full-time service personnel during peacetime, subject to completion of 3 years' service (unless a person was discharged before 3 years on medical grounds).

This meant that service personnel could claim benefits under both the Repatriation legislation and the Commonwealth employees' compensation legislation for normal peacetime service. Offsetting provisions applied to ensure that double benefits were not paid.

On 7 April 1994, upon the introduction of the *Military Compensation Act 1994*, eligibility for 'defence service' under the VEA ceased to apply, except for those persons whose period of enlistment or appointment in the Defence Force began before 22 May 1986 (the date of commencement of the VEA).

Hazardous service

Hazardous service is service of a kind determined in writing by the Minister for Defence. It was introduced into the legislation in 1986, with the introduction of the VEA. It covers defence service outside Australia that was especially hazardous.

Unlike other defence service, hazardous service does not involve a 3 year minimum of service in the Defence Force before a person becomes eligible.

Peacekeeping service

Peacekeeping service means service with a Peacekeeping Force outside Australia and includes:

- any period after a person's appointment to the Peacekeeping Force during which the person was travelling outside Australia for the purpose of joining the Peacekeeping Force, and
- any period (not exceeding 28 days) of authorised travel outside Australia after the person has ceased to serve with the Peacekeeping Force.

To qualify as a member of a Peacekeeping Force, a person needs to:

- have served as an Australian member of a Peacekeeping Force outside Australia; or
- have served as a member of the Australian contingent of a Peacekeeping Force.

Unlike other defence service, peacekeeping service does not involve a 3 year minimum of service in the Defence Force before a person becomes eligible.

Peacekeeping service can apply not only to ADF members but also to civilians. One of the largest groups of peacekeepers is the civilian police who have served in Cyprus since 1964. Civilian police have also rendered peacekeeping service in Cambodia and East Timor.

If a person has rendered peacekeeping service, they get certain advantages in how their claims are determined, including a more beneficial standard of proof and additional means by which the Commonwealth might be liable to pay pension.

British nuclear test defence service

From 1 July 2010, former Australian Defence Force (ADF) personnel who were British Nuclear Test (BNT) participants have eligibility for compensation under the VEA for service related injury, disease or death. This new category of service eligibility under the VEA is known as "*British nuclear test defence service".*

Section 68 of the VEA defines *British nuclear defence service* as given the meaning by subsections 69B(2),(3),(4), (5) and (6) . A person has rendered *British nuclear test defence service* if they satisfy any of the subsections of S69(B).

If a person has rendered British nuclear test defence service, their claims are determined under the more beneficial standard of proof applicable to operational service.

Because the new category of service was introduced from 1 July 2010, this is the earliest date of effect which can be set for a claim.

Domicile of choice for British Commonwealth and Allied (BCAL) veterans

A member of Commonwealth or Allied forces who was domiciled in Australia immediately before their enlistment can potentially meet the requirements for rendering operational service. To make it easier for these veterans to show that they were domiciled in Australia, the VEA was amended on 1 July 2010 to lower the age at which a person is capable of selecting a domicile of choice from 21 to 18 years.

Service on submarine special operations

As of 1 July 2010, service on certain submarine special operations is classified as operational and qualifying service under the VEA, extending entitlement to a variety of benefits under the Act. Due to the continued sensitivity around these operations, the vessels in question have not been assigned for duty in an operational area for the purposes of the VEA. Rather, operational and qualifying service under the VEA will stem from service by a member of the defence force who rendered continuous full time service during the period between 1978 and 1992 and is eligible for the Australian Service Medal (ASM) with the 'Special Ops' clasp. The Department of Defence has compiled a list of personnel considered by the Royal Australian Navy to meet the eligibility criteria.

S6DB of the VEA defines this type of operational service for the period on or after 1 January 1978 to 31 December 1992.

Because the legislative changes were not introduced until 1 July 2010 the earliest date of effect is 1 July 2010.

Service from 1 July 2004 that is still covered by the VEA

Service eligibility under the VEA generally ends on 30 June 2004. Service in the ADF on or after 1 July 2004 is covered by the MRCA. There are two types of service rendered on or after 1 July 2004 that continue to give eligibility under the VEA. They are:

- peacekeeping service rendered by civilians; and
- warlike service, which is regarded as 'qualifying service' for service pension and gold card purposes under the VEA.

Service not covered by the VEA

Generally, the VEA does not cover part-time service in the ADF and it would be difficult for an ADF Reserves member to satisfy Part IV of the VEA. Part time service is not continuous full time service and periods of part time service cannot be added together to count as full time service. However a person with reserve service could be covered for VEA service if they have also rendered hazardous, peacekeeping or warlike/non-warlike VEA service.

The VEA also does not cover most service rendered from 3 January 1949 until 6 December 1972 except if a person has rendered periods of operational service (in Korea, Japan, Malaya, Singapore, Malaysia, Thailand, Vietnam).

From 3 January 1949, eligibility for most members of the Forces under Repatriation legislation ceased and they became eligible to claim compensation under Commonwealth employees' compensation legislation in respect of service on or after that date. That eligibility was previously covered by the *Safety, Rehabilitation and Compensation Act 1988* (DRCA) and from 12 October 2017, all claims that were considered under the provisions of the DRCA are now considered under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act* 1988 (DRCA).

Coverage under the DRCA can extend to members of the Reserve forces, Cadets and Officers and Instructors of Cadets.

However, it is important to note that at the present time the VRB cannot review decisions made under the DRCA.

Service eligibility under the MRCA

Any member or former member of the ADF, whether on full-time or part-time service, including cadets, are eligible to claim compensation under the MRCA for an injury or a disease related to service rendered on or after 1 July 2004.

Kinds of service covered the MRCA

Service under the MRCA is categorised as:

- warlike service;
- non-warlike service; and
- peacetime service.

All such service is called 'defence service'.

The Minister for Defence determines warlike and non-warlike service by a determination in writing. All other service is peacetime service.

For details of ADF operations determined to be warlike or non-warlike service refer to www.legislation.gov.au

Service eligibility under the VEA, DRCA and MRCA

Type of service	3 Sep 1939 to 2 Jan 1949	3 Jan 1949 to 6 Dec 1972	7 Dec 1972 to 21 May 1986	22 May 1986 to 6 Apr 1994	7 Apr 1994 to 30 June 2004	On or after 1 July 2004
Continuous full-time service (CFTS) or 'Defence service' from 7 Dec 1972						
Service ended before 7 Apr 1994 (did 3 years CTFS or was discharged on medical grounds)	VEA	DRCA	DRCA & VEA	DRCA & VEA		
Did not do 3 years CFTS nor was discharged on medical grounds	VEA	DRCA	DRCA	DRCA	DRCA	MRCA
Enlisted before 22 May 1986 (served up to and after 7 Apr 1994)		DRCA	DRCA & VEA	DRCA & VEA	DRCA & VEA	MRCA
Enlisted on or after 22 May 1986 (did 3 years CFTS or was discharged on medical grounds by 6 Apr 1994)				DRCA & VEA	DRCA	MRCA
Enlisted on or after 7 Apr 1994					DRCA	MRCA
Eligible war service (non-operational) Enlisted before 1 July 1947 or enlisted for 2 years in Interim Forces on or after 1 July 1947	VEA	VEA (ended 30 June 1951)				
Operational service (Eligible war service)	VEA	VEA	VEA	VEA	DRCA & VEA	
Hazardous service (Defence service)				DRCA & VEA	DRCA & VEA	
Qualifying service	VEA	VEA	VEA	VEA	VEA	VEA
BNT defence service (Defence service)		VEA				
Peacekeeping service	VEA	DRCA & VEA	DRCA & VEA	DRCA & VEA	DRCA & VEA	DRCA & VEA (civilians only)
Peacetime service						MRCA
Warlike service or Non-warlike service	VEA	VEA	VEA	VEA	DRCA & VEA	MRCA
Part-time service (Citizen Forces, Reservists, Cadets)	VEA	DRCA	DRCA	DRCA	DRCA	MRCA

Note: The VRB cannot review any matters under the DRCA.

Chapter 7 — Liability

Liability is about whether the Commonwealth is responsible for paying pension or compensation for a veteran's or member's death, injury or disease. Before liability can be accepted it must be established that the veteran or member's injury, disease or death was caused by the person's relevant VEA or MRCA service. This is achieved via one of the 'heads of liability' that apply under the VEA or MRCA and is known as 'the service relationship'. The Statement of Principles (SOPs) apply under both VEA and MRCA when considering the heads of liability and the service relationship, with the exception of section 29 (unintended consequence of medical treatment) and 30 (aggravation of signs and symptoms) of the MRCA. No SOPs apply to these two heads of liability.

The heads of liability

To be related to a person's service, under either the VEA or MRCA, an injury, disease, or death must be related in one of the following ways:

occurrence	If it resulted from an occurrence that happened while the person was rendering VEA operational service or VEA peacekeeping service or MRCA service.
arose out of, or was attributable to	If it arose out of, or was attributable to VEA service or MRCA service.
but for	If it would not have been the result of an accident suffered or a disease contracted but for having rendered VEA or MRCA service or but for a change of circumstances or environment due to rendering VEA or MRCA service.
accident	If it resulted from an accident that happened while travelling to or from duty.
aggravated or materially contributed to	If the injury or disease, or the injury or disease from which the person died, did not arise out of service or preceded service, but was aggravated or materially contributed to by VEA or MRCA service.

Additional relationships to service under the MRCA

The MRCA liability provisions are largely modelled on the VEA, but it has the following additional means by which a service relationship can be accepted:

Injuries and diseases caused by treatment	If the claimed injury or disease is a consequence of that treatment provided under the *Defence Act 1903*.[7]
Injuries and disease aggravated by treatment	If the claimed injury or disease or sign or symptom is aggravated as a consequence of that treatment.[8]
Death caused by treatment	If a person died as a consequence of treatment provided under the *Defence Act 1903*.
A sign or symptom aggravated by defence service	If a sign or symptom of the claimed injury or disease has been aggravated, or materially contributed to, by MRCA service.[9]

Scope of service

'Scope of service' case: Captain Holthouse received a new posting. In preparing to lease his house he moved a pot plant and injured his back. Moving the plant was not a part of the removal to the new post. Whether he let the house, and whether he moved the plant were matters of no concern to the Navy. As they were matters within Captain Holthouse's private life, they were not within the scope of his defence service: *Holthouse v Repatriation Commission*[10].

Whether an activity that occurred (whether off duty or on duty) is within the scope of service may depend on its nature and the degree of connection with the Defence Force, military discipline, and the performance of duties.[11]

The scope of service rendered depends on the nature of the person's service and the circumstances under which the person served. It involves not only what the person was required to do but includes those activities that the person was reasonably expected or authorised to undertake in order to carry out the person's duties. It also includes activities that were reasonably incidental to the performance of duty.

An activity that was reasonably expected to be have been undertaken is one that the person understood was expected of the person by a relevant authority or by the person's colleagues in connection with the performance of the person's duties.

[7] MRCA, s 29
[8] MRCA, s 29
[9] MRCA, s 30
[10] *Holthouse v Repatriation Commission* [1982] FCA 113
[11] *Roncevich v Repatriation Commission* [2005] HCA 40

An activity is authorised if it was approved for the purpose of, or in connection with, the performance of the person's duties.

An activity is reasonably incidental to the performance of duties if the person understood it to be necessary or appropriate to be done in order to carry out or in connection with the person's duties.

Social events: A social event that a person was expected to attend because of its connection to the military and an expectation of attendance by superiors, or because of regularity of practice, may give rise to a relevant association with the person's duties.

Sporting activities: Merely because a person is expected to keep fit does not mean that every fitness promoting activity is authorised or expected to be performed or is incidental to the performance of the person's duties.

Personal matters: Service must be more than merely the setting in which things occur: service must contribute to the cause. Merely personal or domestic matters while occurring in the context of a service environment are not necessarily related to that service.

Occurrence

'**Occurrence' case**: Mr Gundry died from asthma, which his widow attributed to a respiratory infection that he contracted during his service. It was alleged that the respiratory infection was an occurrence that happened while rendering service, and that his death resulted from that occurrence. The Federal Court found that the connection between the respiratory infection (the occurrence) and the disease causing death (asthma) had to be a direct causal connection ('resulted from') and it had to satisfy the SoP concerning death from asthma. As 'suffering a respiratory infection' was not a factor in the SoP, the claim could not succeed: *Woodward & Gundry v Repatriation Commission*[12].

It is not necessary to show that service was the cause of the occurrence. The occurrence merely had to happen during the period of relevant service.

The occurrence must be the direct cause of the injury, disease or death.[13]

An occurrence is something that occurs, happens, or takes place. It must be something different from ordinary day-to-day events. The development of a habit is not an occurrence.[14]

The occurrence connection applies only to operational and peacekeeping service under the VEA, but to all kinds of service under the MRCA.

[12] *Woodward & Gundry v Repatriation Commission* [2003] FCAFC 160
[13] *Repatriation Commission v Law* [1980] FCA 92; *Woodward & Gundry v Repatriation Commission* [2003] FCAFC 160
[14] *Repatriation Commission v Law* [1980] FCA 92

Arose out of or was attributable to

'Arose out of' case: Mr Bendy suffered solar skin damage. He ordinarily lived in Sydney, but served for 2 years in Darwin. The Court held that 'Exposure to sunlight is, in itself, a natural feature of life and, though all servicemen suffer some exposure to sunlight during their service, that exposure is not a matter which, in the ordinary case, is attributable to … service. … [It is] a factor which can be connected causally to war service only if the war service placed the veteran in a position of special risk as to its occurrence'. If it were shown that his service in Darwin created such a special risk the claim could succeed: *Repatriation Commission v Bendy*[15].

For the 'arose out of, or attributable to' connections to apply, the relevant circumstance of service must have contributed to the cause but need not be the sole, dominant, direct or proximate cause of the injury, disease or death.[16]

Service must have caused the relevant circumstance and not merely be the setting in which the circumstance occurred.[17]

If the causal factor is something that occurs in everyday life, as well as in a service context, such as solar exposure, the circumstances of service must have made a special contribution over and above that of the person's everyday life.[18]

But for changes of environment or circumstances

'But for' examples:

1. A member contracts a tropical disease while on a goodwill visit to another country. She was unlikely to have contracted that disease but for her ship having been sent to that area.

2. A member is attacked by local inhabitants of another country. The member is unlikely to have been injured in that way but for his having been posted to that country.

3. The change of environment from one part of Australia to another may result in a member developing a disease that would not have been contracted in the member's former local environment.

4. A member contracts a disease such as tuberculosis through living in a barracks environment.

The 'but for' test is a causal test, requiring a connection between the incident giving rise to the injury or disease and circumstances of service. It is not sufficient if service was merely the environment in which the incident occurred.[19]

It is a more direct causal test than the 'attributable to 'test, and the 'changes in environment' referred to in the provision could refer to social and other attributes of the situation in which the person was placed during service.[20]

[15] *Repatriation Commission v Bendy* [1989] FCA 170
[16] *Repatriation Commission v Law* [1980] FCA 92
[17] *Repatriation Commission v Tuite* [1993] FCA 39
[18] *Repatriation Commission v Bendy* [1989] FCA 170
[19] *Holthouse v Repatriation Commission* [1982] FCA 113
[20] *Repatriation Commission v Keenan* [1989] FCA 410

Travelling to or from duty

'**Travelling accident' case 1**: Mr Fish had been out on private business, and was returning to his quarters on base. He had intended to prepare his uniform once he returned to his quarters. If he had not had the motor vehicle accident, he would have arrived there the day before he was due to commence duties. The Tribunal held that the fact that Mr Fish would have returned early and been there to prepare for undertaking duty, meant that he was not travelling to a place for the purpose of performing duty, so the travelling provision did not apply to him: *Re Fish and Repatriation Commission*[21].

'Travelling accident' case 2: Mr Alcock ceased duty at 3.15pm on Friday. He planned to drive to his parent's home (about 2 hours drive by direct route) . He left his barracks at 10am on Saturday morning and then detoured by a route that added 3 hours to the journey. He stopped for lunch and resumed the journey in the late afternoon. At 6pm he was involved in an accident. It was dark at the time. The AAT held that the substantial delay and the particular route chosen did not substantially alter the risk. However, the AAT held that the fact that the journey during which the accident occurred took place in darkness did substantially increase the risk of injury, and so the claim was refused. *Re Alcock and Repatriation Commission*[22].

Whether a particular journey is covered depends on the purpose of the journey. It is not sufficient that the person was going to or from the place of duty. If the accident occurred while travelling to the place of duty, the question is whether or not the person was going there to commence duty or merely going there for some other reason or because that was where he or she was residing.[23]

An injury or disease cannot be accepted as war-caused or defence-caused if the person's risk of injury was substantially increased because:

- the journey was delayed;
- the route was not reasonably direct; or
- there was a substantial interruption in the journey.

Death from an accepted disability

If a person dies from an injury or disease that has already been accepted under the VEA or MRCA, there is no need to link that death to service. The death will be deemed to be a service death.

The kind of connection between the accepted injury or disease and the death must be a reasonably proximate and direct cause.[24]

Liability for the death cannot be accepted under this provision if the injury or disease had been accepted on the basis of it being aggravated by service, and immediately before the death, that injury or disease was no longer aggravated or contributed to in a material degree.

[21] *Re Fish and Repatriation Commission* [2003] AATA 675
[22] *Re Alcock and Repatriation Commission* [1992] AATA 686
[23] *Commonwealth v Wright* [1956] HCA 79
[24] *Re Shaw and Repatriation Commission* [2005] AATA 354

Aggravation or material contribution

'Aggravation' case: Mr Yates had an ankle condition that became symptomatic when he did strenuous activity such as running. At the time he made his claim he was symptomatic, but by the time of his AAT hearing he was not. While service had temporarily aggravated his symptoms, the disease was, at the time of the hearing, no worse than it would have been without that aggravation. The Court held that a temporary worsening of symptoms is not necessarily an aggravation of the underlying disease, which is required before aggravation can give rise to liability under the Act: *Repatriation Commission v Yates*[25].

In the VEA and MRCA, an aggravation of an injury or disease is not a separate injury or disease in its own right. Instead, if an injury or disease has been aggravated by service, that ***entire*** injury or disease is treated as 'war or defence-caused' or a 'service injury or disease'.

Under the VEA and MRCA, *the aggravation* of an injury or disease *is not* to be regarded as an injury or disease in itself. Both the VRA and MRCA specifically exclude aggravation from the definition of injury and disease.

Under the VEA the entire incapacity from that injury or disease is pensionable (not merely the effects of the aggravation). Unlike the VEA, the MRCA restricts some forms of compensation for aggravated injuries or disease to the impairment resulting from the aggravation rather than impairment from the entire injury or disease (e.g. paragraph 70(2) and section 72 of the MRCA). Some compensation and benefits under the MRCA are provided for aggravated injuries or diseases without regard to the effects of the aggravation (e.g. paragraph 43(2), subsections 61(2) and 62(2)). In other cases, compensation and benefits are only provided in respect of an aggravated injury or disease while the effects of the aggravation persist (e.g. sections 119 and 275).

When considering Statements of Principles, the only factors that relate to aggravation are those that concern the 'clinical worsening' of the injury or disease.

Aggravation or material contribution to a sign or symptom

Aggravation or material contribution to a sign or symptom of an injury or disease is one of the additional liability provisions under the MRCA.

If a part-time member of the ADF twists their ankle, aggravating a pre-existing ankle condition, the effects of this might only last a few days or weeks, but the member might have been incapacitated for their civilian work and need compensation for lost earnings. This might be able to be provided under s 30 of the MRCA, which concerns aggravation or material contribution to a sign or symptom of an injury or disease. There is no equivalent to this in the VEA.

Section 30 of the MRCA covers temporary aggravation, which is not covered by s 27(d).

[25] *Repatriation Commission v Yates* [1995] FCA 1234

A symptom may be aggravated by service if it is worse than it previously was. A symptom may be contributed to in a material degree if the symptom is worse or if it develops due to service. Aggravation under s 27(d) of the MRCA will apply only if the underlying injury or disease is made worse, but s 30 will apply if it is merely a symptom that is affected by service.

An injury or disease that is accepted on the basis of an aggravation of a sign or symptom is just as much a 'service injury or disease' as one that is accepted under s 27(d) of the MRCA. The type and extent of compensation available will tend to be limited by the extent of the persistence of the effects of the aggravation.

Permanent impairment payments are not paid for a service injury or disease that has been accepted on the basis of an aggravation of a sign or symptom because the signs and symptom would be only temporary and the underlying condition has not been made worse. A sign or symptom that persists or is much more severe than on previous occasions might indicate the aggravation of the underlying condition rather than just a sign or symptom. In that case, liability would be considered under s 27(d) rather than s 30.

Section 30 (aggravation of signs and symptoms) does not apply to claims for liability for death.

Unintended consequence of treatment

Under s 29, liability can be accepted for an injury or disease that is the unintended consequence of medical treatment. Treatment covered is:

- treatment for a service injury or disease under the MRCA; or
- any treatment under the *Defence Act 1903*.

Section 29 does not apply to treatment for a non-service injury or disease under the MRCA.

Members of the ADF (including Reserves) are entitled to treatment for any injury or disease, whether a service injury or disease or not, under regulation 49 of the *Defence Regulation 2016*. Section 29 applies to treatment for any condition under these Regulations.

The leading case *Comcare v Houghton*[26] set out a number of steps:

Step 1	Identify the injury or disease that is said to have resulted from the treatment
Step 2	Decide whether that injury or disease was caused by the treatment and was not merely associated with the treatment.
Step 3	Decide whether the injury or disease was 'unintended'

[26] *Comcare v Houghton* [2003] FCA 332

An unintended consequence of medical treatment is a consequence of the treatment that is both:

- not desired nor aimed for by the provider of the treatment; and
- not a likely consequence of the medical treatment.

It is not an unintended consequence if it was known to be an unavoidable outcome of the treatment even though not desired. 'Treatment' is defined in section 5 of the MRCA.

Exclusion provisions under the VEA

Under the VEA an injury or disease cannot be accepted as war-caused or defence-caused if it:

- resulted from the veteran's serious default or wilful act;[27]
- arose out of a serious breach of discipline; or
- is related to the person's service *only* because the person used tobacco products on or after 1 January 1998 or increased his or her use of tobacco products after that date.

Exclusion provisions under the MRCA

Unlike under the VEA, if the injury or disease causes serious and permanent impairment or the exclusory circumstance causes the person's death, not all of the exclusions apply.

The exclusions that *do not apply* to serious and permanent impairment or death include:

- serious default;
- wilful act;
- serious breach of discipline;
- self-inflicted injury;
- consuming alcohol or unauthorised drug;
- resulted from reasonable counselling in connection with performance as a member;
- resulted from failure to obtain a promotion, transfer, or benefit.

[27] A 'wilful act' indicates conduct that is blameworthy and deserving of serious censure: *McPherson v Repatriation Commission* [1989] FCA 84

The exclusions that ***do apply*** to injury and disease including those resulting in serious and permanent impairment, and to death include:

- wilful and false representation in connection with the person's defence service or proposed defence service that he or she did not suffer, or had previously not suffered, from the claimed injury or disease or that resulted in his or her death;[28]
- in relation to journeys to or from undertaking duty:
- substantial delay in commencing the journey;
- indirect route;
- substantial interruption to the journey,
- which substantially increased the risk of injury, disease or death;[29]
- if the only service-related cause of injury, disease or death is the use of tobacco products.[30]

The exclusions relating to travel apply not only to the specific travelling provisions in s 27(e) and s 28(1)(f), but also to any other provision in ss 27, 28, 29 or 30 that, in a particular case, raises a connection between a peacetime service-related journey and injury, disease or death.[31]

[28] MRCA, s 34
[29] MRCA, s 35
[30] MRCA, s 36
[31] MRCA, Note to s 35(1)

Chapter 8 — Statements of Principles

In 1994, the VEA was amended so that the issue of whether commonly occurring injuries or diseases are connected with a person's service is to be determined according to legislative instruments called Statements of Principles (SoPs) (issued by the Repatriation Medical Authority (RMA)), rather than by medical evidence adduced in each case.

Statements of Principles

Statements of Principles set out the minimum factors that must exist and be related to service before it can be said that a hypothesis or contention has been raised connecting an injury or disease with the circumstances of a person's service. If a SoP exists for a kind of injury or disease then all decision-makers, including the VRB, must apply it when considering a claim for such an injury or disease.

Why are there two SOPs for each medical condition?

As the legislation provides that claims should be assessed by using two different standards of proof for any given condition, there are two SoPs in existence. In most cases there are at least slight differences and in many cases the more generous reasonable hypothesis version of the SoP will contain more causal factors. Often, a veteran or current serving member will have more than one type of service eg. peacetime and a period of warlike service. The appropriate SoP to use will depend upon exactly when the exposure or event was experienced on service.

Which Statements of Principles does the VRB apply?

The RMA often amends, revokes or determines new SoPs. This means that throughout a veteran's claim journey a number of different SoPs may have been in force. The VRB must apply the SoPs currently in force. However, for VEA applications if the veteran cannot succeed under those SoPs, he or she may have an accrued right to have the SoPs apply that were in force at the time of the decision under review. Unlike the VEA, section 341 of the MRCA expressly takes away any accrued right and requires the current SoP to apply in all instances.

A chain of SOPs?

A hypothesis or contention of a connection between an injury, disease or death and a person's service may include a chain of causation linking the circumstances of a person's service to an injury or disease leading to another injury or disease, or to the person's death.

If there is a SoP in force concerning the injury, disease or death that is the subject of the claim as well as a SoP for an injury or disease that is said to have led to that injury, disease or death, then all the relevant SoPs must be met for the hypothesis to succeed.[32] In *McKenna's* case,[33] each part of the causal chain were called 'sub-hypotheses', and the Court held that each sub-hypothesis along a causal chain must satisfy the relevant SoPs. The same principle applies in cases concerning the reasonable satisfaction standard of proof.

[32] *McKenna v Repatriation Commission* [1999] FCA 323.
[33] *McKenna v Repatriation Commission* [1999] FCA 323.

The fact that an injury or disease within a causal chain has been accepted previously as war-caused or defence-caused does not create a presumption that it is related to service for the purposes of a claim for a different injury or disease.[34] The VRB must consider the entire chain of causation afresh. There is a limited exception to this rule in applications involving the death of a veteran.[35]

Clinical onset

Most SoPs contain factors that refer to the time of clinical onset of the relevant injury or disease. The factors in SoPs that refer to 'clinical onset' relate to those connections to service that concern the cause of the injury or disease rather than the aggravation of, or material contribution to the injury or disease.

Clinical onset is when there were sufficient signs or symptoms of the disease, as defined in the SOP, that would have enabled a medical practitioner to have diagnosed the disease at the relevant time. The time of clinical onset is either: [36]

- when a person becomes aware of some feature or symptom which enables a doctor to say the disease was present at that time, or
- when a finding is made on investigation which is indicative to a doctor of the disease being present at that time.

If a SoP identifies a minimum set of signs and symptoms for a disease to be present, at least that minimum must be present for clinical onset to have occurred at that time.[37] However, it is important to note that clinical onset is not necessarily the date the condition was diagnosed.

Clinical worsening

SoPs contain factors that refer to the time of clinical worsening of the relevant injury or disease. The factors in SoPs that refer to 'clinical worsening' apply only in relation to aggravation of, or material contribution to an injury or disease that existed at the time of the person's relevant service.[38]

The time of 'clinical worsening' is when there were sufficient signs or symptoms that would have enabled a medical practitioner to have found that the disease itself (rather than merely its signs and symptoms) had worsened and that worsening was more than a temporary change, and was not due merely to the natural deterioration or progression of the injury or disease.[39]

[34] *Langley v Repatriation Commission* [1993] FCA 299
[35] Paragraph 8(1)(f), s 70(5)(e), s 70(5A)(e), VEA, and s 28(1)(e), MRCA
[36] *Re Robertson and Repatriation Commission* [1998] AATA 127; *Repatriation Commission v Cornelius* [2002] FCA 750; *Lees v Repatriation Commission* [2002] FCAFC 398, (2002) 36 AAR 484, 74 ALD 68, 18 *VeRBosity* 109
[37] *Lees v Repatriation Commission* [2002] FCAFC 398
[38] *Re A'Bell and Repatriation Commission* [1999] AATA 739
[39] *Repatriation Commission v Yates* [1995] FCA 1234

Material contribution

In considering whether a SOP factor is met in a particular case, the relevant service does not have to be the only cause of a particular condition. However, the person's relevant service must make a material contribution to the development of the condition.

In *Kattenberg v Repatriation Commission*[40], the Federal Court explained how a SoP factor can be related to service. If a factor in a SoP requires a minimum accumulation of consumption or exposure over time, that factor need not be satisfied by an accumulation that is wholly related to service. It is sufficient to meet the factor if:

- the person had the level of consumption or exposure specified by the SoP; and
- the level of consumption or exposure that can be related to the person's service made a material contribution to the overall consumption or exposure.

There is no set formula or threshold for what proportion of the SoP-specified minimum accumulation is a 'material contribution'. This will be depend on the on a variety of factors relating to the relevant SoP and the veteran's specific circumstances.

Case study material contribution: The SoP for intervertebral disc prolapse required the smoking of 219,000 cigarettes before clinical onset of the disease (which was in 1994). The smoking history accepted by the AAT was:

(a) 1963 to 1964 — 1,560 (30 a week)

(b) 1964 to 1966 — 10,400 (100 a week)

(c) 1966 to 1967 — 20,800 (400 a week)

(d) 1967 to 1994 — 195,160 (140 a week)

The veteran's only eligible service was his operational service in period (c). The AAT accepted that the increase in his smoking in this period was related to his operational service. The AAT held that the veteran's operational service had contributed to the cause of his intervertebral disc prolapse (*Re Aldcroft and Repatriation Commission*.[41]

[40] *Kattenberg v Repatriation Commission* [2002] FCA 412

[41] Re *Aldcroft and Repatriation Commission* [2002] AATA 432

Chapter 9 – Standards of Proof

There are two standards of proof that apply, depending on the type of service the veteran or current serving member has rendered and the issue that has to be decided. These include:

- the 'reasonable satisfaction',[42] and
- the 'beyond reasonable doubt / reasonable hypothesis' standard.[43]

Standards of Proof in VEA Entitlement Cases

Reasonable satisfaction (balance of probabilities)	Reasonable hypothesis / beyond reasonable doubt
Connection between injury, disease or death and: – Defence service – Eligible war service (not operational service) and; all other decisions made under VEA except for decisions on liability concerning operational, hazardous or peacekeeping service. For example, diagnosis or whether the person is a veteran, member, or dependant	Connection between injury, disease or death and: – Operational service – Hazardous service – Peacekeeping service

All decisions made under VEA other than decisions on entitlement are made by applying the reasonable satisfaction test.

Standards of Proof in MRCA Liability Cases

Reasonable satisfaction (balance of probabilities)	Reasonable hypothesis / beyond reasonable doubt
Connection between injury, disease or death and: – Peacetime service; and All other determinations made under MRCA except for decisions on liability concerning warlike/non-warlike service	Connection between injury, disease or death and: – Warlike Service – Non-Warlike Service

Applying the reasonable hypothesis (RH) process

The Federal Court in *Deledio v Repatriation Commission*[44] set out a 4-step decision-making process (as modified by later Federal Court cases) for matters concerning operational, peacekeeping and hazardous service:[45] The steps set out in *Deledio* are also relevant when considering MRCA matters concerning warlike and non-warlike service.

[42] Subsection 120(4), VEA, and s 335(3), MRCA
[43] Subsections 120(1), (2), and (3), VEA, and subsections 335(1) and (2), MRCA
[44] *Repatriation Commission v Deledio* [1998] FCA 391
[45] *Repatriation Commission v Deledio* [1998] FCA 391; *Bull v Repatriation Commission* [2001] FCA 1832

The first step requires there to be material that points to a hypothesis connecting the claimed injury, disease or death with service.[46] This requires more than speculation or a mere allegation of a connection with service.

The material must raise 'facts' or inferences, which if they were true would raise a hypothesis relating the claimed injury, disease or death to the particular circumstances of the person's service.

There is no fact-finding at this step. All the material must be considered, not only that supporting the claim.

The 'raised facts' (or inferences) must be pointed to by the material, but do not have to be proved.

If no hypothesis is raised, the claim fails. In other words, if the contentions put forward are not supported by the material, the claim cannot succeed. For example, if it is alleged that a veteran suffered trauma to the knee, there needs to be material pointing to that trauma occurring due to service.

Step two involves identifying whether there is a Statement of Principles (SOPs) for the kind of injury, disease or death, the subject of the claim.[47]

If there is a SoP for the claimed injury, disease or kind of death, then SoPs must be applied to all the links in the chain of causation.[48]

If there is no SoP for the claimed injury, disease or kind of death, no SoPs apply for any causal link.[49]

Step three involves consideration of whether any of the hypotheses raised are reasonable. This step will be met if a hypothesis:

- fits the requirements of a factor in the relevant SoP(s), if any;
- is pointed to by the evidence;
- is more than a mere possibility;
- is consistent with known facts; and
- is not too tenuous, remote, fanciful, impossible, or speculative.[50]

There is no fact-finding at this step. The 'known facts' are facts that are indisputable. The decision-maker cannot draw conclusions from the evidence but may draw inferences

If there is no relevant SoP, the other tests in step 3 must still be met. The 'raised facts' must be supported by the material.

If the hypothesis meets these tests, it is 'reasonable', and step 4 must next be considered. If the hypothesis is not reasonable, the claim fails.[51]

[46] VEA, s 120(3)
[47] VEA, s 120A(3)
[48] *McKenna v Repatriation Commission* [1999] FCA 323
[49] *Spencer v Repatriation Commission* [2002] FCA 229
[50] *East v Repatriation Commission* [1987] FCA 242; *Bushell v Repatriation Commission* [1992] HCA 47
[51] *Byrnes v Repatriation Commission* [1993] HCA 51

If there is a relevant SoP, in addition to meeting the other tests in step 3, the hypothesis must be 'consistent with the template' of a factor in the SoP. This involves consideration of the case law that has interpreted factors within SoPs. For example, a number of Court cases have examined the meaning of 'experiencing a severe stressor'.

If a factor in a SoP prescribes a number of elements, they must all be pointed to by the material.[52]

If the factor is not met, the claim fails.

Step four involves whether the reasonable hypothesis is disproved beyond reasonable doubt and the claim fails.[53] This is the only step at which facts are found, and then only those facts that would disprove the claim. If not disproved beyond reasonable doubt, the claim succeeds unless an exclusion provision applies.

Applying the reasonable satisfaction (BoP) standard

The steps set out below should be followed in applying SoPs in cases to which the reasonable satisfaction standard of proof applies:[54]

- Determine, to the decision-maker's reasonable satisfaction, whether the material before it raises a connection between the claimed disability and the person's service.
- Identify whether there is a SoP for the kind of injury, disease or death, the subject of the claim.
- Determine whether the relevant SoP upholds the contention that the person's disability is, on the balance of probabilities, connected with the person's service.
- If there is no relevant SoP, the matter is decided on the available medical and other evidence as to whether, on the balance of probabilities, there is a relevant connection between the claimed injury, disease or death and the person's service.

If the connection with service is found to exist on the balance of probabilities, the claim will succeed unless an exclusion provision applies.

[52] *Connors v Repatriation Commission* [2000] FCA 783
[53] VEA, s 120(1), (2)
[54] *Somerset v Repatriation Commission* [2005] FCA 1399

Chapter 10 – Cases involving smoking or alcohol contentions

War/Operational Service Cases

Since the decision in *Repatriation Commission v Law*[55], smoking-related conditions have been accepted as due to service.

In *Repatriation Commission v Tuite*[56], the Court upheld an AAT decision finding a connection between smoking and service in a World War 2 veteran who had served only in Australia. The relevant factors identified were:

- Circumstances of camp life (boredom, peer group pressure, provision of cigarettes in rations and apprehension).

In *Smith v Repatriation Commission*[57], the factors identified were:

- Peer group pressure, youth and absence of knowledge of harmful effects.

Defence Service Cases

In Roncevich v Repatriation Commission[58] the High Court considered an activity or exposure to be service-related where it was the result of something a Defence member was required to do or reasonably expected to do to carry out their duties.

The effect of the High Court's decision in *Roncevich* means that there would need to be evidence to show that a Defence member was either required or reasonably expected to smoke as an incident of their duties.

Exclusions

There are exclusions in the legislation in relation to smoking contentions. They include:

- MRCA s36 – MRCC must not accept liability for a condition/death related to use of tobacco products.
- VEA ss.8(6), 9(7) – A veteran's condition/death not taken to be war-caused if it is related to a veteran's service only because of the commencement of or increase in the use of tobacco products after 31 December 1997.
- VEA s.70(9A) – Commonwealth not liable for a member's condition/death if it is related to a member's service only because of the commencement of or increase in the use of tobacco products after 31 December 1997.

[55] *Repatriation Commission v Law* [1981] HCA 57
[56] *Repatriation Commission v Tuite* [1993] FCA 39
[57] *Smith v Repatriation Commission* [1999] FCA 1484
[58] *Roncevich v Repatriation Commission* [2005] HCA 40

Repatriation Commission Guidelines

The Repatriation Commission Guideline CM5030 dated 15/04/99 remains relevant when considering cases involving smoking. The guidelines state that:

- Smoking is strongly addictive.
- There is evidence that military populations smoke more than civilian populations.
- Little weight should be given to the effect of anti-smoking warnings and of bans on smoking in certain places in the community as a whole.
- There needs to be material that points to a temporal link between smoking and service.
- If the temporal link exists, a causal link between smoking and service can frequently be inferred in operational service cases.
- If the temporal link exists, material positively supporting the claimed causal connection to service is needed in non-operational service cases.
- A mental illness may lead to the commencement of smoking.
- As a general rule, where smoking has ceased, the resumption of smoking within two years of cessation can be taken to be a recommencement of the former smoking habit. Where smoking recommences after two years, the material would have to point to a service-based reason for recommencement for the claim to be able to be accepted.

Cases involving passive smoking

A number of the SoPs contain factors relating to passive smoking. For example:

- Being in an atmosphere with a visible tobacco smoke haze in an enclosed space where the person was a non-smoker.
- Being in an enclosed space and inhaling smoke from burning tobacco products or smoke that has been exhaled by a person who is smoking.
- Being in an atmosphere with a visible tobacco smoke haze in an enclosed space.
- Being in an enclosed space and inhaling smoke from burning tobacco products or smoke that has been exhaled by another person who is smoking.

Often there may be little or no evidence available about the veteran's exposure to passive smoke. It is generally known that exposure to second-hand smoke in enclosed spaces was quite common during World War 2, given the prevalence of smoking generally at that time, particularly in workshops, offices, messes and accommodation spaces. However, all cases require an examination of the circumstances of the veteran's service. For example, veterans in tropical areas during World War 2 were often working in spaces that were well-ventilated.

Relevant factors to consider in cases involving passive smoking contentions may include:

- Service environment (e.g. service on ships, service in particular types of buildings)
- Accommodation
- Military occupation (indoors v outdoors)
- Geographical area (greater level of ventilation in tropics)
- Prohibition of smoking in Commonwealth facilities from late 1980s
- Continuation of exposure to second-hand smoke after service (material contribution by service)

Repatriation Commission Guidelines

The Repatriation Commission Guideline CM5030 dated 15/04/99 also remains relevant when considering cases involving alcohol. The guidelines state:

- Alcohol consumption does not necessarily result in addiction or dependence.
- Service-related Psychoactive Substance Abuse (PSA) is not the sole means of satisfying the alcohol factors within Statements of Principles.

The consumption of alcohol can be related to service in the following ways:

- Alcohol consumed during eligible or operational service and as a causal result of that service
- As a part of service related PSA involving alcohol
- As a part of a service-related psychiatric condition
- Alcohol used as "self-medication" or coping as part of a service-related condition

Relevant factors to consider in cases involving alcohol contentions may include:

- A history of alcohol consumption prior to service
- Very limited supply of alcohol to troops deployed in some areas in WWII
- More liberal access for some units
- Post WWII 'dry' operations
- Disciplinary issues resulting from excessive alcohol consumption

Defence Service Cases

In *Roncevich*, the High Court considered that an activity or exposure was service-related if it was the result of something a Defence member was required to do or reasonably expected to do to carry out their duties.

The effect of the High Court's decision in *Roncevich* means that there would need to be evidence to show that a Defence member was either required or reasonably expected to drink as an incident of their duties. For example, expectation of attendance at particular Defence functions and the consumption of some quantity of alcoholic drinks.

Chapter 11 – Multiple Act Coverage

Some veterans or current serving members may have entitlement under all acts ie. VEA, DRCA and MRCA. By way of example, a veteran who rendered operational service under the VEA and peacetime service under the DRCA may also have continued to service after 1 July 2004.

To clarify which Act compensation can be paid under, for veterans and current serving members who have eligibility under one or more acts, the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* (the 'transitional provisions') was enacted at the same time the MRCA was introduced.

The transitional provisions do not have any effect for those people who have eligible service only under the VEA or have eligible service only under the MRCA.

When does a claim fall under the MRCA?

As part of the transitional provisions, s 9A and s 70A of the VEA (the 'closing-off' provisions) were enacted to close off liability under the VEA if the injury, disease or death is related to service rendered on or after 1 July 2004.

Under subsection 7(1) of the transitional provisions, a claim falls under the MRCA where two criteria are met:

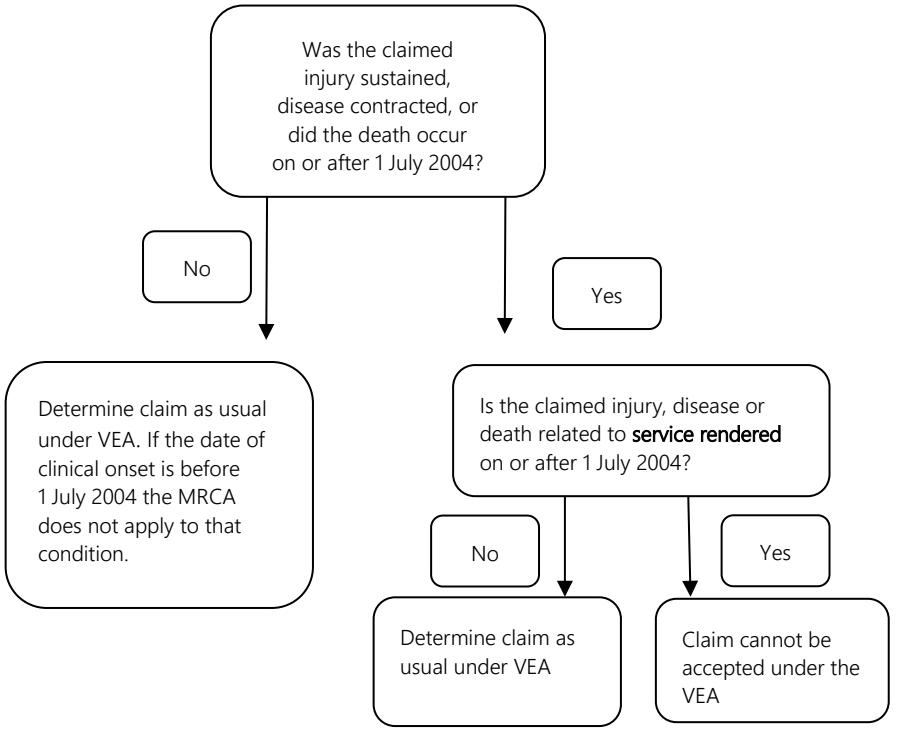
- the condition occurred on or after 1 July 2004; and
- the condition relates to defence service rendered by the person on or after 1 July 2004.

Both criteria must be met before the MRCA can apply. For example, the MRCA does not apply to a claim where the clinical onset of the condition occurred after 1 July 2004 and the condition ***only*** relates to defence service rendered ***before*** 1 July 2004.

However, where the clinical onset occurs of a condition on or after 1 July 2004, it cannot be taken to be war-caused or defence-caused under the VEA if it related to MRCA service ***and*** is also related to VEA service.

Example – a veteran served in the Army from 1993 to 2006 and made a claim for diabetes. The veteran was diagnosed with diabetes in 2018 and her GP confirmed clinical onset in 2018. As the date of clinical onset is after 1 July 2004, the MRCA may apply to this claim, but only if the veteran's diabetes also relates to her service rendered on or after 1 July 2004.

VEA claim for pension for injury or disease — s 9A(1) and s 70A(1)



Sections 9A and 70A of the VEA provide that an injury, disease or death is taken not to be war-caused or defence-caused under the VEA if it is related to MRCA service rendered on or after 1 July 2004.

Aggravation of VEA Conditions by MRCA Service

Prior to 1 July 2013, section 12 of the transitional provisions required that any person with an accepted disability under the VEA who lodged a claim under the MRCA in respect of an aggravation of their accepted disability must be given a choice between:

- making an Application for Increase (AFI) of their Disability Pension under section 15 of the VEA in respect of the aggravation; or
- continuing with a claim under section 319 of the MRCA for acceptance of liability for the aggravation.

However, section 12 of the transitional provisions was removed on 1 July 2013. Consequently, any aggravations of accepted VEA conditions are considered as an application for increase made under the VEA.

Chapter 12 – Compensation for partners under the VEA

What is a war widow/er's pension?

War widow/er's pension is compensation for the widow or widower (including a partner) of:

- an Australian veteran (this includes an Australian mariner),
- a member of the Forces, or
- a member of a Peacekeeping Force,

whose eligible service has caused or contributed to their death.

Who can claim?

The person claiming compensation must have been legally married to, or have been in a de facto relationship with, the veteran or member immediately before their death. The person claiming the pension cannot have since remarried, married or entered into a de facto relationship with another person. The criteria for a de facto relationship is set out in s 11A of the VEA.

Kind of death

After deciding that a person is entitled to claim a war widow(er)'s pension, the next step is to consider the 'kind of death' suffered by the veteran or member. [59]

The word 'death' appears in ss 8 and 13 of the VEA and it means the medical cause(s) of death. The 'kind of death' referred to in ss120A(2) and (4) also refers to the medical causes(s) of death.[60] This includes the contributing or underlying medical cause(s) of death, but may be distinct from the terminal event.[61]

A kind of death is concerned with causation. It is not concerned with how slow, fast or otherwise the death occurred. A medical condition that only affects timing but does not play a real role in the pathological changes leading to the death, should not be considered a kind of death in terms of the VEA.[62]

When it has been determined what the 'kind of death' was, it is then necessary to consider whether the veteran's death arose out of or was attributable to service, which requires the identification of any SoPs relevant to the kind(s) of death.

Relating a death to the person's service

Medical evidence should be obtained to support any contention that a particular disability played a part in the person's death.

[59] *Repatriation Commission v Hancock* [2003] FCA 711

[60] *Collins v Repatriation Commission* [2009] FCAFC 90, *Hill v Repatriation Commission*[2009] FCAFC 91

[61] *Repatriation Commission v Codd* [2007] FCA 877

[62] *Collins v Repatriation Commission*[2009] FCAFC 90

Once a relevant connection between a disability and death has been identified, the relevant SoPs should be considered to see whether there is material that indicates that any of the factors in the SoP can be related to the person's service.

If an injury or disease from which the person died has already been accepted as war- or defence-caused, then death can be accepted without re-linking that injury or disease to service, provided that the injury or disease was a reasonably direct cause of the person's death.[63]

Other ways a person may be eligible to claim a war widow/er's pension?

Additionally, a war widow/er's pension may be granted where the veteran or member at the time of death had been receiving:

- an Extreme Disablement Adjustment,
- a disability pension at the Special or Intermediate Rate
- a disability pension at the Temporary Special Rate, or
- a disability pension, at an increased rate due to being a double amputee or blinded, or
- had been a former Australian prisoner of war.

What happens to a pension on re-marriage?

A war widow/er is entitled to *continue* to receive a pension regardless of remarriage.

[63] See VEA, s 8(1)(f), s 70(5)(e), s 70(5A)(e)

Chapter 13 — Compensation for dependants under the MRCA

Compensation is available to certain dependants of deceased members and former members under the MRCA.

Eligibility

A person's dependants may be eligible for compensation and other benefits under the MRCA if:

- the death of a member or former members of the ADF is determined to be a service death; or
- the member was eligible for the SRDP during his or her lifetime; or
- immediately before death the member had 80 impairment points from accepted disabilities.

Compensation is not provided to dependants while the member or former member is still alive except for dependent children of severely disabled former members.

Eligible young persons who are dependent on a former member who is or was eligible for the SRDP, or whose impairment from service injuries or diseases is at least 80 impairment points, are eligible for education assistance.[64]

Who is a 'dependant'?

Section 15 of the MRCA sets out who is a 'dependant' for the purposes of the Act. It sets out a number of family member relationships that can be regarded as a 'dependant' provided the person was wholly or partly dependent on the member or former member.

What is meant by being 'dependent'?

The adjective, 'dependent', is defined in s 5 of the MRCA as meaning 'dependent for economic support'.

Who can be regarded as being wholly dependent?

Some relationships are *taken to be* 'wholly dependent' even if in fact the person is not dependent or only partly on the member or former member for economic support.

Section 16 of the MRCA provides that an 'eligible young person' or the 'partner' of the member is taken to be wholly dependent on the member or former member if:

- the young person or partner lives with the member; or
- would be living with the member but for a temporary absence or absence due to illness of the member, young person or partner (as the case requires).

Even if a partner or eligible young person is not wholly dependent they might still be eligible for some compensation or benefits.

[64] MRCA, s 258

Other categories of dependant

If the member or former member stood in the place of a parent for a person, then that person could be a dependant of the member or former member.[65]

Similarly, a person who stands in the place of a parent of a member or former member can be a dependant.[66]

Dependent for economic support

For a person other than an 'eligible young person', or the member's or former member's partner, that person is a 'dependant' only if the person was dependent on the member or former member for economic support.[67]

The state of dependency for economic support is determined at the date of the member's or former member's death.

The concept of 'economic dependence' is concerned with whether or not the person is financially self-supporting, or is dependent in whole or in part on the member for economic support.

If a person is able to maintain their usual lifestyle on his or her own income, that person is not dependent on someone else for economic support.[68]

Definition of a partner

From 1 July 2009, changes made to definition of' 'dependant' by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-General Law Reform) Act 2008.* The definition of a "partner" in section 5 of the MRCA was amended to amended to include:

- Another individual (whether of the same or a different sex) with whom the member is in a relationship that is registered under a State or Territory law prescribed for the purposes of subsection 22B of the *Acts Interpretation Act* as a kind of relationship prescribed for the purposes of that section; and
- Another individual who is, in the Commission's opinion in a de facto relationship with the member and is not an ancestor, descendant, brother, sister, half brother or half sister of the member.

The effect of these amendments is that the same sex partner of a member is recognised for the purposes of the MRCA. This definition extends to married couples, and to opposite and same sex de facto couples.

[65] MRCA, s 15(2)(b)

[66] MRCA, s 15(2)(c)

[67] MRCA, s 5

[68] *Re Buck and Comcare* [1999] AATA 171; *Re Mason and Comcare* [2000] AAT 138

Compensation for wholly dependent partners

A wholly dependent partner of a member or former member whose death has been accepted as a service death[69] is entitled either to:[70]

- a tax-free periodic payment equivalent to the rate of the VEA war widow's pension; or
- a lump sum equivalent to that pension (determined by reference to the claimant's age and gender).

Manner of payment

Compensation can be paid as a periodic payment or a lump sum. Until the person chooses one or the other, it is paid as a pension. The person has 6 months to advise of their choice.[71]

A partner is entitled to compensation towards the cost of financial advice in making a choice between a periodic payment and a lump sum.[72]

Additional lump sum death benefit for wholly dependent partners

A wholly dependent partner of a member or former member whose death has been accepted as a service death is entitled to a lump sum in addition to the periodic compensation (which can be converted to a lump sum).[73]

While the periodic compensation is available if the member or former member had been assessed at 80 impairment points or had been entitled to the Special Rate Disability Pension, the additional lump sum is not available unless the death has been determined to be a service death.

The amount of the lump sum depends on the partner's age. The maximum lump sum provided in s 234(2) (as indexed by s 404) is multiplied by the 'partner's age-based number'.

[69] MRCA, s 12(1), s 28, s 29
[70] MRCA, s 233, s 234(1)(b), s 234(5)
[71] MRCA, s 234, s 235, s 236
[72] MRCA, s 239, s 240
[73] MRCA, s 234(1)(a), s 234(2)

Compensation for eligible young persons

An eligible young person is a person who is:

- under 16 years of age; or
- aged between 16 and 25 and receiving full-time education and not in full-time work.

An eligible young person need not have been a child of the member (or former member), but in order to be a 'dependant', the eligible young person must have been at least partly dependent on the member at the time of the member's death.

Wholly or mainly dependent eligible young person

An eligible young person who was wholly dependent on a member to whom s 12 of the MRCA applies because:

- the member's death has been accepted as a service death; or
- permanent impairment had been assessed at 80 impairment points immediately before the member's death; or
- at some time the member had been entitled to the Special Rate Disability Pension,

may be entitled to:

- lump sum compensation;[74] and
- weekly compensation;[75] and
- gold card health care; and
- pharmaceutical allowance; and
- education assistance.

To be entitled to all these benefits, the eligible young person must have been wholly or mainly dependent on the member immediately before the member's death.[76]

Compensation for other dependants

Section 15 lists a variety of classes of persons who may qualify as an 'other dependant' of a member or former member.

Partly dependent partner

A partner who does not qualify as being wholly dependent, but who was *partly dependent* on the member or former member, might be entitled to compensation under s 262 of the MRCA as an 'other dependant'.

[74] MRCA, s 251, s 252
[75] MRCA, s 253, s 254
[76] MRCA, s 253(1)(c)

How is the amount of compensation determined?

In deciding what is a reasonable amount to be paid to any particular dependant, regard must be had to:[77]

- any financial loss suffered by the dependant as a result of the death of the member or former member; and
- the degree to which the person was dependent on the member or former member; and
- the length of time the person would have been dependent on the member or former member.

No other matters can be taken into account in making that decision. In particular, regard cannot be had to any amount paid or payable under the MRCA before the member or former member died.[78]

[77] MRCA, s 263(1)
[78] MRCA, s 263(2)

Chapter 14 - Compensation under the VEA

Once an injury or disease has been accepted as war-caused or defence-caused under the VEA, the degree of incapacity must be assessed using the *Guide to the Assessment of Rates of Veterans' Pensions* (GARP).

Degree of incapacity

The two elements of assessing incapacity are:

- Medical impairment, and
- Lifestyle effects.

Impairment involves two components:

- physical loss of, or disturbance to, any body part or system; and
- the resultant functional loss.

Lifestyle effects involve five elements:

- personal relationships;
- mobility;
- recreational and community activities;
- domestic activities; and
- employment activities.

Chapter 23 of GARP provides the means by which impairment and lifestyle effects are combined to give a 'degree of incapacity'.

Impairment

The level of impairment is assessed using a 'whole person' system, expressed in 'impairment points', out of a maximum rating of 100. On this scale, zero points correspond to no or negligible impairment and 100 points correspond to death. Effectively, impairment points are percentages of the impairment of the whole person.

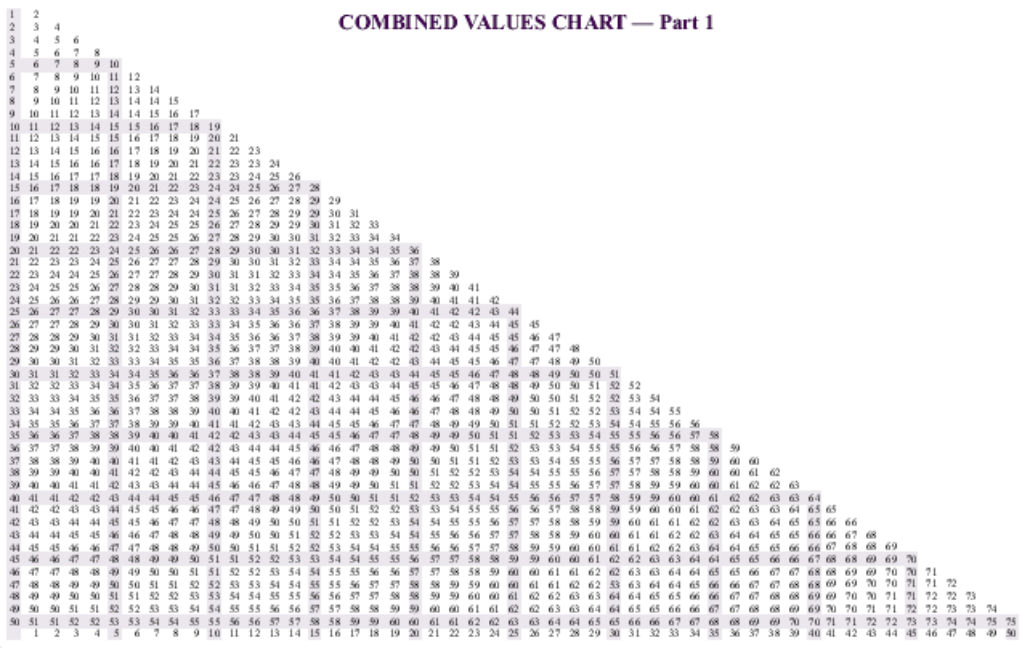
GARP addresses medical impairment under 12 system-specific chapters and 5 non-system specific chapters.

The decision-maker must determine, based on medical evidence, what are the medical and functional effects of each war-caused or defence-caused injury or disease, and then go to each relevant system-specific chapter to determine the relevant medical impairment resulting from that injury or disease in the particular veteran's case.

If a particular injury or disease results in impairment effects in more than one body system, then each relevant chapter must be consulted and separate impairment points determined for each functional effect or loss.

Impairment points are not added to each other arithmetically, but must be combined using a special table in Chapter 18, the 'Combined Values Chart'.

Using this method of combination ensures that the combination of impairment points is properly apportioned as a percentage of the 'whole person'.



Partially contributing impairment

If an accepted disability and a non-accepted disability contribute to the same impairment, only that portion of the impairment attributable to the accepted disability can be included in the assessment of impairment. Chapter 19 of GARP provides rules by which impairment is determined in this circumstance.

Apportionment

Generally, impairment from particular types of disabilities is assessed using 'functional impairment' tables and 'other impairment' tables. Ratings from those tables are not combined, but only the higher of the ratings from either of those tables is used. Usually this is fairly straightforward. If two different conditions contribute to the same type of impairment, there is a potential that a simple comparison of the overall impairment from the two tables would not accurately reflect the effects of each condition.

Chapter 20 of GARP provides a method to enable the effects of each condition to be considered. The ratings that result from the application of apportionment can never be less than those which the same conditions would have attracted had apportionment not been applied.

Chapter 20 can be used only if there are two or more accepted disabilities and it is necessary to distinguish between them for the purpose of making a comparison with the result from some other table in GARP.

Age Adjustment

Some tables in GARP contain age dependent criteria and some impairment ratings are separately adjusted for age.

Lifestyle

Lifestyle effects are assessed under Chapter 22 of GARP. GARP divides lifestyle effects into 5 categories:

- personal relationships;
- mobility;
- recreational and community activities;
- domestic activities; and
- employment activities.

Personal relationships

Personal relationships refer to the veteran's ability to take part in and maintain customary social, sexual and interpersonal relationships. GARP attempts to establish how the physical and psychological effects of accepted conditions affect these relationships.

Mobility

Mobility refers to the veteran's ability to move about effectively in carrying out the ordinary activities of life. GARP measures the effects of the accepted conditions on the veteran's mobility. It allows for the veteran's ability to use available forms of transport. Both physical and psychological impediments to mobility are taken into account when determining a mobility rating.

Recreational and community activities

Recreational and community activities refer to the veteran's ability to take part in any activities of the veteran's choosing. When determining a rating the limitation placed by the accepted condition

on the veteran's normal recreational and community activities is measured. The need to modify recreational activities or seek alternatives is taken into account.

Employment and domestic activities

Employment activities refers to the veteran's ability to work and domestic activities refers to the veteran's ability to sustain effective routines in a domestic environment The effects of the accepted conditions on the veteran's ability to work and/or perform domestic activity is taken into account.

Assessment of lifestyle effects

A rating from 0 to 7 is given for each category in accordance with Lifestyle Effects Tables 22.1 to 22.5. The higher of the domestic activities and employment activities ratings is taken and added to the ratings from the other three tables. The resultant figure is then divided by 4 and rounded to the nearest whole number (0.5 is rounded up). This gives the overall lifestyle rating.

When assessing lifestyle effects only the effects of the war- or defence-caused injuries and diseases can be considered. The effects of other disabilities must be ignored.

Degree of incapacity

Once an overall lifestyle rating has been determined and an overall combined impairment rating has been determined, these two ratings are combined using Scale 23.1 in Chapter 23 to obtain a degree of incapacity.

The degree of incapacity and other eligibility criteria determines whether the veteran will receive:

- The general rate,
- the extreme disablement adjustment,
- the intermediate rate, or
- the special rate.

If the person's degree of incapacity is at least 70%, eligibility for the intermediate rate or special rate must be considered.

If the person's degree of incapacity is 100% and the person is aged over 65, eligibility for the extreme disablement adjustment must be considered.

If the person is not eligible for any of those rates, then whatever the percentage degree of incapacity is, will become the percentage of the general rate of pension that applies.

Chapter 15 - Above General Rate Assessment under the VEA

Special rate (TPI)

For veterans whose employability is affected by their war or defence-caused disabilities alone, there are two higher rates of disability pension. In very broad terms, the special rate is the rate paid to veterans assessed as unable to work more than 8 hours a week as a result of their service-related incapacity alone. If such inability is permanent, the rate paid is known as the totally and permanently incapacitated (TPI) rate.

Temporary special rate (TTI)

The special rate can also be paid if the relevant incapacity for work is temporary, in which case the rate is called the temporarily totally incapacitated (TTI) rate.

Blinded special rate

The special rate is also payable, without having to meet any work-related tests, if the person is blinded as a result of accepted disabilities.

Intermediate rate

The intermediate rate of pension is set at halfway between the special rate and the 100% general rate. The criteria for the intermediate rate are the same as for the special rate, except that the veteran's incapacity from accepted disabilities alone must prevent him from undertaking remunerative employment for more than 20 hours a week.

Extreme disablement adjustment (EDA)

An extreme disablement adjustment (EDA) rate is paid at approximately 150% of the general rate to a veteran aged over 65 years who is severely disabled and is already entitled to a disability pension at the 100% general rate, but only if the veteran is ineligible for either the special or intermediate rate. As the name suggests, the degree of incapacity must be extreme. The veteran must have medical impairment of at least 70 points and a lifestyle rating of 6 or 7.

Eligibility for pension at the Special and Intermediate Rate

Under 65 special rate and intermediate rate

In a special rate or intermediate rate case in which the applicant was under 65 on the application day, the evidence needs to address the following questions:

Q 1. What are the applicant's trade and professional skills, qualifications and experience?

Q 2. What kinds of remunerative work might a person with the applicant's skills, qualifications and experience reasonably undertake?

Q 3. To what degree does the applicant's physical or mental incapacity from war- or defence-caused injury or disease reduce the applicant's capacity (in hours per week) to undertake the kinds of remunerative work referred to in question 2? (8 hours or less for special rate; less than 20 hours for intermediate rate.)

Q 4. What was the kind of remunerative work that the applicant was undertaking?

Q 5. Is the applicant, by reason of war- or defence-caused disabilities, prevented from continuing to undertake that kind of work?

Q 6. If the answer to previous question is 'yes', is the incapacity from war- or defence-caused disabilities the only factor preventing the applicant from continuing to undertake that kind of work?

Q 7. If the answers to the last two questions are, in each case, 'yes', is the applicant by reason of being prevented from continuing to undertake that work, suffering a loss of salary, wages or earnings on his own account that the applicant would not be suffering if he or she were free of that incapacity?

If the applicant has ceased to engage in remunerative work for reasons other than incapacity from war- or defence-caused injury or disease; or the applicant is incapacitated or prevented from engaging in remunerative work for some other reason, then the applicant is treated as if he or she has not had such a loss, and so will not be entitled to the special rate.

If the applicant is unemployed and has been genuinely seeking to engage in remunerative work that the applicant would, but for incapacity from war- or defence-caused injury or disease, be continuing to seek to engage in, is that incapacity 'the substantial cause' of the applicant's inability to obtain remunerative work? If so, the applicant is taken to meet Question 6.

To be 'the substantial cause', incapacity from war- or defence-caused disabilities must at least be the operative factor that, more than any other, explains why the applicant could not obtain remunerative work.

Over 65 special rate and intermediate rate

In a special rate or intermediate rate case in which the applicant was over 65 years on the application day, the evidence needs to address the following questions:

Q 1. What are the applicant's trade and professional skills, qualifications and experience?

Q 2. What kinds of remunerative work might a person with the applicant's skills, qualifications and experience reasonably undertake?

Q 3. To what degree does the applicant's physical or mental incapacity from war- or defence-caused injury or disease reduce the applicant's capacity (in hours per week) to undertake the kinds of remunerative work referred to in question 2? (8 hours or less for special rate; less than 20 hours for intermediate rate.)

Q 4. What was the last remunerative work that the applicant was undertaking?

Q 5. Was the applicant undertaking that work since before turning 65 as well as after turning 65?

Q 6. At the time of cessation of the last remunerative work, had the applicant been undertaking remunerative work continuously for 10 years?

Q 7. Is the applicant, by reason of war- or defence-caused disabilities, prevented from continuing to undertake that kind of work?

Q 8. If the answer to Question 7 is 'yes', is the incapacity from war- or defence-caused disabilities the only factor preventing the applicant from continuing to undertake that kind of work?

Q 9. If the answers to Questions 7 and 8 are, in each case, 'yes', is the applicant by reason of being prevented from continuing to undertake that work, suffering a loss of salary, wages or earnings on his own account that the applicant would not be suffering if he or she were free of that incapacity?

If the answers to any of Questions 5, 6, 7, 8 or 9 is 'no', the special rate of pension is not payable.

In order to answer Question 9, the 'loss' test is qualified by deeming a person to fail it if the applicant has ceased to engage in remunerative work for reasons other than incapacity from war- or defence-caused injury or disease, or the applicant is incapacitated or prevented from engaging in remunerative work for some other reason.

Extreme disablement adjustment

The extreme disablement adjustment (EDA) rate of pension applies only if:

- the applicant is aged over 65
- has at least **70** impairment points (by applying GARP) from war- or defence-caused injury or disease
- and a lifestyle rating of **6** (by applying GARP) from war- or defence-caused injury or disease

It should be noted that 68 impairment points rounds up to 70 and 5.5 lifestyle points rounds up to 6. Thus these ratings would qualify an applicant for the EDA rate.

Chapter 16 — Compensation, rehabilitation and treatment under the MRCA

Permanent impairment

Permanent impairment (PI) payments compensate for medical impairment and lifestyle restrictions that are permanent and result from service injury or disease. These payments are not related to loss of earnings.

A needs assessment must be carried out before a claim for compensation can be determined.

How is it assessed?

1. Permanent impairment is assessed under the MRCA in a similar manner to degree of incapacity under the VEA.
2. A Guide based on the VEA's GARP V is used under the MRCA, with changes to the way impairment and lifestyle are combined to determine the amount of compensation payable.
3. This Guide is called the 'Guide to Determining Impairment and Compensation' and was determined by the MRCC under s 67 of the MRCA. It is commonly known as '**GARP M**', and is given this 'short title' in the Guide itself.
4. GARP M has much the same impairment and lifestyle chapters as GARP V.
5. Impairment is assessed using chapters 1 to 21 of GARP M. Impairments points are combined using the Combined Values Chart in Chapter 18 of GARP M.
6. Impairment points are on a scale of 0 to 100. Unlike the VEA's GARP V, impairment points are not rounded to the nearest 5 points.
7. The effects of lifestyle are determined using Chapter 22 of GARP M, and are on a scale of 0 to 7.
8. While evidence should be obtained similar to that used for VEA GARP assessments, medical evidence will also need to address the 'permanence' and 'stability' of each of the impairments flowing from the service injuries and diseases.
9. That evidence should refer to the prognosis having regard to both current and potential treatment or rehabilitation.

Determining Compensation

Compensation for permanent impairment is determined by reference to tables of compensation factors in GARP M, which combine the impairment and lifestyle ratings to give a 'compensation factor'.

Different tables are used depending on whether the injury or disease was accepted as being related to:

- warlike or non-warlike service; or
- peacetime service.[79]

If there are service injuries related to warlike or non-warlike as well as peacetime service, GARP M combines the compensation factors from each table in a way that is proportionate to the impairment due to each type of service.[80]

Once the 'compensation factor' has been determined, it is then multiplied by the maximum amount of weekly compensation that is possible to be paid under the Act to give a dollar value to the compensation as a weekly amount.

Who qualifies for permanent impairment compensation?

Permanent impairment compensation is paid only if:[81]

1. the person has suffered an impairment as a result of a service injury or disease;
2. the impairment is likely to continue indefinitely; and
3. the injury or disease has stabilised.

Likely to continue indefinitely

To decide whether impairment is likely to continue indefinitely, the decision-maker must have regard to:[82]

- the duration of the impairment; and
- the likelihood of improvement in the relevant service injuries or diseases; and
- whether the person has undertaken all reasonable rehabilitative treatment for the impairment; and
- any other relevant matters.

Minimum impairment threshold levels

Before compensation can be paid, minimum impairment threshold levels must be met:[83]

if the impairment results only from:

- hearing loss;
- loss, or loss of use of, a finger or toe; or
- loss of the sense of taste or smell,
- the threshold is 5 impairment points;

in all other cases the threshold is 10 impairment points.

Impairment threshold for aggravated injuries or diseases

The amount of compensation payable for an aggravated injury or disease is 'the amount payable in respect of the impairment points of the person, and the effect on the person's lifestyle, from the aggravation or material contribution'.[84]

This means that only those impairment and lifestyle effects that resulted from the aggravation can be considered when determining the compensation payable.

Aggravations are subject to the same minimum IP requirements discussed above i.e the thresholds of 5 and 10 points. The impairment suffered as a result of the aggravation must meet the relevant threshold.

Compensation is payable only for the permanent impairment effects of the aggravation and not for the total permanent impairment effects of the injury or disease. GARP M contains no specific method for apportioning the aggravated component of a condition. The Commission policy recommends delegates use Chapter 19 and

"*treat the impairment from the pre-existing condition as if it were an impairment from a non-accepted condition. Impairment from the aggravation should be treated as if it were an impairment from an accepted condition. The relative contributions of the pre-existing condition and the aggravation should be based on appropriate medical advice*."

How is PI compensation paid?

Compensation for permanent impairment is paid primarily as a periodic payment, but this may be converted, in whole or in part, to a lump sum.

Payment choices are administered by the MRCC and are not dealt with by the VRB when reviewing permanent impairment determinations.

Date compensation payable - for more than one condition where person became entitled prior to 1 July 2013

If PI compensation is payable under section 68 of the MRCA for more than one accepted condition from a date prior to 1 July 2013, that compensation is payable from the later of:

- the date the most recent claim for liability was lodged for one of the conditions; and
- the date that the delegate determines to be the date on which all of the following applied:
  - as a result of the accepted conditions, the person has suffered an impairment; and
  - the impairment is likely to continue indefinitely; and
  - all of the accepted conditions have stabilised; and
  - the requirements of section 69 (or section 70 for an aggravation) have been satisfied regarding the level of impairment.

[79] Tables 23.1 and 23.2 of GARP M.
[80] See 'Combined ratings' in Chapter 23 of GARP M.
[81] MRCA, s 68(1)
[82] MRCA, s 73
[83] MRCA, s 69
[84] MRCA, s 70(2)

Date compensation payable - for more than one condition where person became entitled on or after 1 July 2013

If PI compensation is payable under section 68 of the MRCA for more than one accepted condition and the date of effect is not earlier than 1 July 2013, the date that compensation is payable may vary for each of the conditions.

In such cases the date of effect for each condition to which section 68 applies is the later of:

- the date liability for each condition was claimed; and
- the date that the delegate determines to be the date on which all of the following applied:
  - as a result of the accepted conditions, the person has suffered an impairment; and
  - the impairment is likely to continue indefinitely; and
  - the accepted condition has stabilised; and
  - the requirements of section 69 (or section 70 for an aggravation) have been satisfied regarding the level of impairment.

Interim compensation where a condition has not stabilised

Compensation for accepted conditions may be payable in the form of permanent impairment payments where an ongoing impairment is both permanent and stable, and is assessed as reaching a minimum level of impairment points. However, where an impairment is permanent but not yet stable, interim compensation may be payable.

For example, interim compensation may be relevant where a serving member or veteran is undergoing active treatment that is expected to result in significant improvement in the impairment.

Minimum impairment threshold levels

One of the criteria for payment of interim compensation is that the impairment suffered by the serving member or veteran must constitute a minimum number of impairment points, as explained on page 71 above under "*minimum impairment threshold levels*."

Where additional compensation is being considered, and the outcome continues to be interim, the threshold points required is a 5 point increase.

It is not necessary for the unstable condition alone to meet the threshold points. Impairment points from more than one service injury or disease can be combined to make up the impairment points needed for compensation to be payable.

Amount of interim permanent impairment payable

The amount of interim compensation is based on the estimated permanent impairment rating and a lifestyle rating. Please note, determinations in respect of interim compensation made prior to of the amount payable was made prior to 1 July 2013, the calculation of his interim PI did not include a lifestyle effect.

Date interim compensation is payable – single condition

Interim compensation for a single condition is payable from the later of[85]:

- The date the claim for liability was lodged; and
- The date the impairment suffered by the person:
    - Where the claim for PI was made prior to 1 July 2013 - constituted 10 impairment points;
    - Where the claim for PI was made on or after 1 July 2013 and the claimant had no previous compensable conditions under the MRCA - constituted 10 impairment points;
    - Where the claim for PI was made on or after 1 July 2013 and the claimant had previous compensable conditions under the MRCA - contributed at least 5 additional impairment points to the overall impairment rating.

Date interim compensation is payable – multiple conditions

Interim compensation for multiple conditions, where one or more condition was claimed prior to 1 July 2013 and at the time of those conditions being determined at least one of them is permanent but not stable, is payable from the later of[86]:

- The date of the latest claim; and
- The date the Commission determines that the conditions met the threshold of 10 impairment points.

Interim compensation for multiple conditions claimed after 1 July 2013 may be payable from different dates, as the date of effect for each condition is the later of[87]:

- The date the claim for liability for that condition was lodged; and
- The date the impairment suffered by the person as a result of that condition (either separately or in conjunction with another condition):
    - Where the claim for PI was made prior to 1 July 2013 - constituted at least 10 points;
    - Where the claim for PI was made on or after 1 July 2013 and the claimant had no previous compensable conditions under the MRCA - constituted 10 impairment points;
    - Where the claim for PI was made on or after 1 July 2013 and the claimant had previous compensable conditions under the MRCA - contributed at least 5 additional impairment points to the person's overall impairment rating.

[85] MRCA, s77(4)

[86] MRCA, s77(4)

[87] MRCA, s77(4)

What if liability is accepted for another injury or disease? — Additional compensation

Additional compensation may be payable for additional injuries or diseases to members who have been paid, or are entitled to be paid, permanent impairment compensation or an interim payment if: [88]

- the person makes a claim for additional compensation;
- liability is accepted for additional service injuries or diseases;
- the additional injury or disease results in the person suffering an additional impairment;
- the impairment is likely to continue indefinitely;
- the condition has stabilised; and
- the increase in the person's overall impairment rating is at least 5 points.

If additional compensation is payable under s71(1) of the MRCA for a single service injury or disease, that compensation is payable from the later of[89]:

- The date the claim for liability was lodged for the new service injury or disease; and
- The date that the delegate determines to be the date on which all of the following applied:
    - The person has suffered additional impairment as a result of the new service injury or disease; and
    - The additional impairment is likely to continue indefinitely; and
    - The increase in the person's overall impairment constitutes at least 5 impairment points (which includes aggravations under s72); and
    - The new injury or disease has stabilised.

If additional compensation is payable under s71(1) of the MRCA for more than one service injuries or diseases from a date prior to 1 July 2013, that compensation is payable from the later of[90]:

- The date the most recent claim for liability was lodged for one of the service injuries or diseases concerned; and
- The date that the delegate determines to be the date on which all of the following applied:
    - The person has suffered additional impairment as a result of the new service injuries or diseases; and
    - The additional impairment is likely to continue indefinitely; and
    - The increase in the person's overall impairment constitutes at least 5 impairment points (which includes aggravations under s72); and
    - All of the new service injuries or diseases have stabilised.

[88] MRCA, s 71(1)

[89] MRCA, s77(2)

[90] MRCA, s77(2)

If permanent impairment compensation is payable under s71(1) of the MRCA for more than one service injuries or diseases on or after 1 July 2013, the date that additional compensation is payable may vary for each of the service injuries or diseases. The date of effect of the additional permanent impairment compensation for each service injury or disease to which s71(1) applies is the later of[91]:

- The date liability for each service injury or disease was claimed; and
- The date that the delegate determines to be the date on which all of the following applied:
    - The person has suffered additional impairment as a result of the new service injuries or diseases; and
    - The additional impairment is likely to continue indefinitely; and
    - The increase in the person's overall impairment constitutes at least 5 impairment points (which includes aggravations under s72); and
    - Each of the additional injuries or diseases have stabilised.

The impairment points from more than one service injury or disease can be combined to make up the 5 impairment points needed for compensation to be payable.

What if the impairment from an accepted injury or disease gets worse? — Additional compensation

Additional compensation may also be paid if:[92]

- the person makes a claim for additional compensation;
- the person suffers additional impairment directly related to the deterioration of an injury or disease for which permanent impairment compensation or an interim payment has already been paid;
- the impairment is likely to continue indefinitely;
- the condition has stabilised; and
- the increase in the person's overall impairment rating is at least **5** points.

If additional compensation is payable under s71(2) of the MRCA for deterioration of a single service injury or disease, that compensation is payable from the later of[93]:

- The date the Commission was notified of the deterioration in the service injury or disease; and
- The date that the delegate determines to be the date on which all of the following applied:
    - The person has suffered additional impairment as a result of the deterioration in the service injury or disease; and
    - The additional impairment is likely to continue indefinitely; and
    - The deterioration is directly related to the natural progression of the service injury or disease; and
        - The increase in the person's overall impairment constitutes at least 5 impairment points; and
        - The service injury or disease has stabilised.

[91] MRCA, s77(2)
[92] MRCA, s 71(2)
[93] MRCA, s77(3)

If additional compensation is payable under s71(2) of the MRCA for the deterioration of more than one service injuries or diseases from a date prior to 1 July 2013, that compensation is payable from the later of[94]:

- The date the Commission was notified of the deterioration in one or more of the service injuries or diseases concerned; and
- The date that the delegate determines to be the date on which all of the following applied:
  - The person has suffered additional impairment as a result of a deterioration in their service injuries or diseases; and
  - The additional impairment is likely to continue indefinitely; and
  - The deterioration is directly related to the natural progression of the service injuries or diseases; and
  - The increase in the person's overall impairment constitutes at least 5 impairment points; and
  - All of the service injuries or diseases have stabilised.

If permanent impairment compensation is payable under s71(2) of the MRCA for the deterioration of more than one service injuries or diseases on or after 1 July 2013, the date that additional compensation is payable may vary for each of the service injuries or diseases. The date of effect of the additional permanent impairment compensation for each service injury or disease to which s71(2) applies is the later of[95]:

- The date the Commission was notified of the deterioration in each of the service injuries or diseases concerned; and
- The date that the delegate determines to be the date on which all of the following applied:
  - The person has suffered additional impairment as a result of the deterioration in their service injuries or diseases; and
  - The additional impairment is likely to continue indefinitely; and
  - The deterioration is directly related to the natural progression of the service injuries or diseases; and
  - The increase in the person's overall impairment constitutes at least 5 impairment points; and
  - Each of the additional injuries or diseases has stabilised.

How is additional compensation claimed?

Additional compensation must be claimed by completing and lodging the approved form: 'claim for liability and/or reassessment of compensation'.

[94] MRCA, s77(3)

[95] MRCA, s77(3)

Transitional provisions - permanent impairment

If a person who is entitled to a permanent impairment payment under the MRCA also has accepted disabilities under the VEA or DRCA, the combined impairment from all the disabilities (VEA, DRCA and MRCA) must be determined under the MRCA.[96]

This process is called 'bringing across' the impairment points from the VEA and/or DRCA injuries or diseases.

It involves an assessment of the impairment points for these disabilities using GARP M (rather than the VEA GARP or the DRCA Guide).

Chapter 25 of GARP M sets out how the 'bringing across' process operates.

The veteran made a claim for additional compensation for deterioration of his accepted conditions under the MRCA. The application was referred to the VRB's ADR program and was subject of an outreach with a VRB Conference Registrar. The veteran was represented and the VRB Conference Registrar used the outreach session to clarify the issues in dispute and to identify any additional evidence which would be relevant in resolving these issues. The main issue in dispute was whether treatment for an accepted orthopaedic condition had significantly improved the symptoms of this condition.

The Commission was therefore requested to obtain an up-to-date medical report from the treating orthopaedic surgeon. This report confirmed that the treatment of the veteran's accepted orthopaedic condition had not been as successful as anticipated in medical reports provided to the original decision maker, that further treatment was unlikely to reduce the symptoms further and that the condition could now be considered to be permanent and stable. The application was therefore referred to a Senior Member for consideration of a decision on the papers.

The VRB Senior Member was able to make a new decision on the papers which revised the impairment rating to reflect the current incapacity from the veteran's accepted orthopaedic condition. The VRB provided the veteran with a draft decision which was accepted. Following this, VRB published a final decision and a copy was sent to the veteran, his representative and the respondent.

[96] CTPA, s 13

What are incapacity payments?

If a member or former member is 'incapacitated for service' or 'incapacitated for work' due to a service injury or disease, the person may be entitled to compensation for economic loss; that is loss of salary or wages due to a service injury or disease.

Incapacity payments are payable only until the person reaches 65 years of age. Payments are calculated by reference to the person's normal weekly earnings immediately before the person was incapacitated for work.

The Act makes a distinction between 'incapacity for service' and 'incapacity for work'. Different rules apply to the calculation of incapacity payments depending on the nature of service and work.

Incapacity for service

Incapacity for service means an incapacity of a person to engage in the defence service that the person was engaged in before the onset of the incapacity at the same level at which he or she was previously engaged.[97]

Incapacity for work

Incapacity for work means:[98]

- an incapacity of a person to engage in the work that he or she was engaged in before the onset of the incapacity, at the same level at which he or she was previously engaged; or
- if the person was not previously engaged in work (for example, a cadet, or an unemployed Reservist)—the person's incapacity to engage in any work that it is reasonably likely he or she would otherwise be engaged in.

Link between service injury or disease and incapacity

The incapacity for service or work must 'result' from a service injury or disease.[99] This means that there must be a direct causal connection between the service injury or disease and the incapacity for service or work.

Incapacity from aggravated injury or disease

If a service injury or disease was accepted on the basis that it was aggravated by service, the person may be entitled to compensation only if the incapacity for service or work resulted from the aggravation.[100]

[97] MRCA, s 5
[98] MRCA, s 5
[99] MRCA, s 85(1)(c), s 86(1)(c), s 87(1)(c)
[100] MRCA, s 88

Assessing compensation

In general terms, compensation for incapacity for service or work is intended to make up for lost earnings caused by that incapacity. To assess the amount of compensation payable, a number of concepts are used, including:

- 'normal earnings';
- 'actual earnings';
- 'able to earn';
- suitable work';
- 'normal weekly hours'.

The legislation for incapacity for service or work is quite complex and covers over 100 pages of the Act and so the following is merely a general overview of the topic.

Normal earnings

A person's 'normal earnings' depends on a number of factors, but in general terms, they are a notional amount per week that the person was earning before he or she was incapacitated by the service injury or disease.[101]

For each type of member or former member, there are different rules for determining a person's normal earnings.

Actual earnings

In general terms, a person's 'actual earnings' are a notional amount per week based on what the person actually earns or earned in a particular week.[102]

In relation to 'incapacity for work' but not 'incapacity for service', the actual earnings may be affected by how much the person is 'able to earn in suitable work'.[103]

For each type of member or former member, there are different rules for determining a person's actual earnings.

Able to earn in suitable work

For members or former members who are incapacitated for work in civilian employment, their actual earnings for a week are the greater of:[104]

- the weekly amount, if any, that the person is able to earn in suitable work; and
- the amount, if any, that the person earns for that week.

'Suitable work' is defined to mean work for which the person is suited having regard to:[105]

- the person's age, experience, training, language and other skills;
- the person's suitability for rehabilitation or vocational retraining;
- if work is available in a place that would require the person to change his or her place of residence—whether it is reasonable to expect the person to change his or her place of residence;
- any other relevant matter.

Whether the person is 'able to earn in suitable work' requires consideration of:[106]

- if the person is working in suitable work—the amount the person is earning in that work;[107]
- if the person fails to accept an offer of suitable work:[108]

- the amount the person would be earning in that work if the person had accept the offer, and
- whether the failure was reasonable;
- if the person accepted an offer of suitable work but fails to begin or continue that work:[109]
- the amount the person would be earning in that work if the person had begun and continued that work, and
- whether the failure was reasonable;
- if the person was offered suitable work on condition that a rehabilitation or vocational training program is completed, but the person fails to complete the program:[110]
- the amount the person would be earning in that work if the person had not failed to complete the rehabilitation or vocational training program; and
- whether the failure was reasonable;
- if the person failed to seek suitable work after becoming incapacitated:[111]
- the amount the person would reasonably be expected to earn in suitable work having regard to the state of the labour market at the relevant time; and
- whether the failure was reasonable.

Normal weekly hours

A person's 'normal weekly hours' are defined in s 132(2) of the MRCA.

Generally, for a person who, when the service injury was sustained or service disease was contracted, was:

- a Permanent Forces member; or
- a Full-time Reservist; or
- a part-time Reservist who was not engaged in civilian work,
- the 'normal weekly hours' are 37.5 hours per week.[112]

Generally, for a person who was in civilian work when the injury was sustained or disease contracted, the person's 'normal weekly hours' are worked out by combining:

- the number of hours of civilian work usually performed in a week, with
- the number of hours of defence service usually performed in a week.

[101] MRCA, s 91(1), s 95(1), s 104(1), s 108(1), s 132(2), and MRC Regs 5-8
[102] MRCA, s 92, s 101, s 105, s 115, s 131(2), and MRC Regs 5-6
[103] MRCA, s 101, s 105, s 115, s 132
[104] MRCA, s 101(4)(a), s 105(4)(a), s 115(4)(a), s 132(1)
[105] MRCA, s 5
[106] MRCA, s 181
[107] MRCA, s 181(2)
[108] MRCA, s 181(3)(a), s 181(4)
[109] MRCA, s 181(3)(b), s 181(4)
[110] MRCA, s 181(3)(c), s 181(4)
[111] MRCA, s 181(5)
[112] MRCA, s 132(2)

The veteran made a claim for compensation for incapacity for service, on the basis that he was posted off the ship he had been serving on early due to the effects of an accepted MRCA condition and had therefore lost his entitlement to maritime disability allowance. He submitted that, while he was granted some compensation for incapacity for service in the determination under review, this did not correctly reflect the period of his posting to the ship in question.

The veteran was represented and the VRB Conference Registrar used the outreach session to identify any additional evidence which would be relevant in resolving the issue of the period for which the veteran was eligible for compensation for incapacity for service. The veteran's representative indicated that the veteran would be able to obtain a copy of the relevant extract from the List of Sailors' Postings. The Conference Registrar therefore directed the veteran to provide a copy of this document.

The veteran's entry in the List of Sailors' Postings for the relevant period confirmed that his posting to the ship had been intended to be for a longer period than that considered in the determination under review. The application was therefore referred to a Senior Member for consideration of a decision on the papers.

The VRB Senior Member was able to make a new decision on the papers which revised the period for which the veteran was entitled to compensation for incapacity for service. The VRB provided the veteran with a draft decision which was accepted. Following this, VRB published a final decision and a copy was sent to the veteran, his representative and the respondent.

What is the SRDP?

SRDP is an ongoing payment that can be made to a former member in lieu of incapacity payments. The SRDP rate is based on the Special Rate of disability pension provided under the VEA. However, it is offset dollar-for-dollar by the weekly value of any permanent impairment compensation under the MRCA, lump sum compensation paid under the DRCA and disability pension paid under the

VEA. SRDP is also reduced by Commonwealth superannuation in the same way as incapacity payments are reduced.

It is important to note that the criteria for the SRDP is very different from that of the special rate of pension under the VEA.

SRDP can be chosen instead of receiving incapacity for work payments.

The choice may be a very difficult one to make. The SRDP is paid for life at the same rate of the VEA special rate pension and is non-taxable, whereas incapacity payments are paid only up to age 65 and are taxable.

The choice involves significant financial implications. The person must obtain independent financial advice before payment of SRDP can be granted.

SRDP eligibility attracts eligibility for the Gold Card, education assistance for dependent children and, in the event of death, death benefits for dependants and funeral assistance.

Eligibility for SRDP

To be eligible to be offered the SRDP the person must:[113]

- be receiving compensation for incapacity for work;
- have a permanent impairment from service injuries or diseases;
- have a permanent impairment determined under Chapter 6 of Part 2 of the MRCA at least 50 impairment points; and
- be unable to work more than 10 hours a week, and rehabilitation is unlikely to increase the person's work capacity.

As a result of legislative amendments made by the *Veterans' Affairs Legislation (Military Compensation Review and Other Measures) Act* 2013, from 1 July 2013 the eligibility criteria for SRDP was expanded to include two new criteria:

- a person who would otherwise meet the criteria in s 199 of the MRCA except for the person having received a lump sum incapacity payment under s 138 of the MRCA; or
- a person who is receiving a nil rate of incapacity payment because the amount of the incapacity payment is fully offset by Commonwealth superannuation.

The 50 impairment points may include impairment from VEA and DRCA injuries and diseases. This is because VEA and DRCA disabilities are included in the calculation of the combined impairment rating under s 13 of the CTPA and Chapter 25 of GARP M.

[113] MRCA, s 199

Rehabilitation

Rehabilitation is a very important part of the legislative scheme in the MRCA. The 'aim of rehabilitation' is to maximise the potential to restore a person … to at least the same physical and psychological state, and at least the same social, vocational and educational status, as he or she had before the injury or disease.'[114]

The Chief of the Defence Force is responsible for rehabilitation whilst the person is serving as a member of the Permanent Force or the Reserves.

The Military Rehabilitation and Compensation Commission (MRCC) is responsible for the rehabilitation of:

- former ADF members
- cadets
- declared members
- certain persons holding honorary rank or appointment
- certain accredited representatives of a registered charity
- certain persons receiving assistance under the Career Transition Assistance Scheme; and
- serving members identified for medical discharge.

Current Eligibility Criteria

Rehabilitation under the MRCA will be available to a member or former member of the ADF and cadets who:

- has an impairment as a result of an injury or disease for which liability has been accepted under the MRCA (ie. the condition is accepted as related to ADF service rendered on or after 1 July 2004); or
- is incapacitated for service or work as a result of an injury or disease for which liability has been accepted under the MRCA.

Rehabilitation assessment

The rehabilitation assessment is separate from a 'needs assessment'. An assessment must be conducted if a person asks for one.[115] Presently, it is the Commission's policy to refer a person to rehabilitation provider for an assessment.

The person may be required to undergo an examination as part of the assessment.[116]

[114] MRCA, s 38
[115] MRCA, s 44
[116] MRCA, s 45, s 46

The vocational assessment and rehabilitation consists of or includes any one or more of the following:

- assessment of transferable skills;
- functional capacity assessment;
- workplace assessment;
- vocational counselling and training;
- review of medical factors;
- training in resume preparation, job-seeker skills and job placement; and
- provision of workplace aids and equipment.[117]

Once the assessment is done, the Chief of Defence Force or MRCC decides if the person should undertake a rehabilitation program provided by an approved program provider.

Varying a rehabilitation program

The Chief of Defence Force or MRCC can stop or vary a program once it has begun, but must first carry out another assessment and consult the person.[118]

A person's right to compensation can be suspended if the person fails to undergo an examination or fails to undertake the program as required.

The suspension of compensation for this reason ***cannot*** be reviewed by the VRB or reconsidered by a delegate. All other determinations concerning rehabilitation are "original determinations" and are subject to merit review.

Review of a rehabilitation program

If a person is dissatisfied with their rehabilitation program, he or she can seek a reassessment.

If the person is still unhappy, he or she can seek review (by the VRB) or reconsideration (by a reconsideration delegate) of the rehabilitation assessment or of the rehabilitation program itself.

Seeking review or reconsideration of a rehabilitation program is a preferable course of action than ceasing the program and risking suspension of compensation.[119]

Determinations made under the health card system are not reviewable by the VRB or a reconsideration delegate.[120]

[117] MRCA, s 41(1)
[118] MRCA, s 53
[119] *Pascoe v Australian Postal Corporation* [2004] FCAFC 4
[120] MRCA, s 345(2)(h)

Chart 1 - Time limits to apply to the VRB

People who wish to exercise their rights of VRB review need to lodge their application for review within the following time frames, following notification of the original decision.

Matter	**Issue**	**Time limit for VRB appeal**
VEA disability claim or WWP claim	Entitlement	12 months, but 3 months for maximum benefits
VEA AFI	Assessment of pension	3 months
MRCA	All	12 months

Chart 2 – Making a fresh claim or application for increase

People who have been unsuccessful in previous claims and applications for increase (including those unsuccessful on VRB review) are not prevented from lodging fresh claims in respect of the same condition**s** and/or assessment/s. The table below sets out the time frames for the lodgement of fresh claims or applications for increase.

WHEN CAN A FRESH VEA CLAIM/AFI BE LODGED?

Matter	**No VRB appeal lodged**	**Where VRB decision made but no AAT appeal lodged**	**Where AAT decision made but no Federal Court appeal lodged**
Claim for disability pension (for the same condition/death)	12 months after notification of primary decision*	12 months after notification of VRB decision*	28 days after notification of AAT decision*
Application for increase	3 months after notification of primary decision*	Note: section 154 and s178 of the VEA states the a VRB or AAT decision which: • assesses a rate of pension or increased rate of pension • refuses to grant a pension (insufficient incapacity) • refuses to increase the rate of pension • reduces the rate of a pension is binding for a period of 6 months unless the applicant thinks incapacity has increased.	

WHEN CAN A FRESH MRCA CLAIM BE LODGED?

Matter	No VRB appeal lodged	Where VRB decision made but no AAT appeal lodged	Where AAT decision made but no Federal Court appeal lodged
All MRCA claims	12 months after notification of primary decision** Note: section 322 of the MRCA states that another claim for liability; loss of or damage to a medical aid; or compensation; must be supported by additional evidence.	12 months after notification of VRB decision** Note: section 322 of the MRCA states that another claim for liability; loss of or damage to a medical aid; or compensation; must be supported by additional evidence.	28 days after notification of AAT decision**

* No fresh claim can be made under the VEA for a condition or for re-assessment until a previous claim for the same condition or application for increase in the rate of disability pension has been finally determined[121]. A claim or application is not finally determined until the decision on the claim or application is no longer subject to any form of appeal or review[122]. A decision is no longer subject to any form of appeal or review when the time limit for seeking an appeal or review (including any facility for an extension of time to seek an appeal or review) has expired[123].

** No fresh claim can be made under the MRCA until a previous claim for the same condition or a previous claim for compensation has been finally determined[124]. A claim is not finally determined until the decision on the claim is no longer subject to any form of reconsideration or review[125].

[121] VEA, ss.14(5), 15(5)
[122] VEA, ss. 14(6), 15(6)
[123] *Re Repatriation Commission and Booth* [2004] AATA 322
[124] MRCA, ss.322(1), 322(4)
[125] MRCA, s.322(6)

Chart 3 – Dates of effect VEA

VEA Entitlement Matters

Matter	Circumstance	Date of effect	Section
Claim for pension (disability, war widow's, or orphan's pension)	If applied to VRB within 3 months of notice of the Commission's decision.	3 months before the claim was lodged ('earliest date').	s 157(2)(a)(i)s 20(1)
	If applied to VRB more than 3 months after notice of the Commission's decision.	6 months before the application for review was lodged ('earliest date').	s 157(2)(a)(ii) s 20(1)
Disability pension	If incapacity arose after the earliest date.	The date the person had pensionable incapacity from the injury or disease.	s 20(3) s 21(3)
War widow's or orphan's pension	If veteran or member died after the earliest date.	Where death occurred after 1 July 2007 and the claim was lodged within 6 Months of the date of death then the pension can be back dated up to six months. The earliest date being the day after the date of death.	s 20(2A) s20(2B)

VEA Assessment Matters

Matter	Circumstance	Date of effect	Section
Application for increase		The date the application for increase was lodged.	s 157(2)(a)(i) s 21(1)
Assessment of pension	If the degree of incapacity changes or the person becomes eligible for another rate in the assessment period.	The rate of pension changes from the date of the change in degree of incapacity or eligibility unless it would result in a reduction in the rate of pension.	s 157(2)(a)(i) s 19(5C)
Temporary special rate		Must set date when temporary rate will cease as well as the rate of pension to which pension will be reduced.	s 157(2)(a)(i) s 25(3)

VEA Other Matters

'Informal' claim or application	If a person makes a claim or application for increase other than in accordance with the approved form, and within 3 months of being notified that a formal claim or application must be made makes a formal claim or application.	The date of lodgement of the informal claim or application is taken to be the date of the claim or application for the purpose only of setting a date of effect. A document is an informal claim only if it was intended to be a claim and not merely an inquiry, or an expression of intention to make a claim in the future, or an application for a review.[126] If a person's eligibility is dependent on the date of making the claim (eg, if the person's age at the date of claim is important for eligibility), it is the date of the *formal* claim that counts, not the date of the *informal* claim.[127]	s 20(2) s 21(2)
Attendant allowance	Application for the allowance made within 3 months of grant of pension.	The date of the grant of the claim for pension.	s 157(2)(a)(i) s 114(2)(a)
	Application not made within 3 months of grant of pension.	The date the application for the allowance was lodged.	s 157(2)(a)(i) s 114(2)(b)

VEA - when no date of effect can be set

Affirmation	of decision under review	As there is no change, no date can be set.	s 156(1)(a)
Reduction	in rate of pension	VRB must remit setting the date to the Repatriation Commission.	s 157(2)(b) s 157(3)
Suspension	of pension	VRB must remit setting the date to the Repatriation Commission.	s 157(2)(b) s 157(3)
Cancellation	of pension	VRB must remit setting the date to the Repatriation Commission.	s 157(2)(b) s 157(3)
Revocation	of cancellation or suspension of pension	The decision that has been set aside is deemed not to have had any legal effect.	s 156(1)(b)

[126] *Morrow v Repatriation Commission* [1997] FCA 64, *Re Clough and Repatriation Commission* [1997] AATA 40, *Re Feben and Repatriation Commission* [1998] AATA 28

[127] *Re Feben and Repatriation Commission* (1988) 50 ALD 600, *Re Clough and Repatriation Commission* (1997) 44 ALD 457

Chart 4 – Dates of effect MRCA

Matter	Circumstance	Date of effect	Section
Permanent impairment payment – single service injury or disease	If the person had impairment of at least the minimum threshold impairment level that was likely to continue indefinitely and had stabilised *when the claim was made*.	The date of the claim for liability for that injury or disease.	s 77(1)(a)
	If the person has impairment of at least the minimum threshold impairment level that is likely to continue indefinitely and has stabilised but only *after the claim was made*.	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	s 77(1)(b) s 68 s 69
Permanent impairment payment - more than one service injuries or diseases - prior to 1 July 2013	If the person had impairment of at least the minimum threshold impairment level that was likely to continue indefinitely and had stabilised *when the claim was made*.	The date the most recent claim for liability was lodged for one of the service injuries or diseases concerned.	s 77(1)(a)
	If the person has impairment of at least the minimum threshold impairment level that is likely to continue indefinitely and has stabilised but only *after the claim was made*.	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	s 77(1)(b) s 68 s 69

Permanent impairment payment - more than one service injuries or diseases - on or after 1 July 2013	If the person had impairment of at least the minimum threshold impairment level that was likely to continue indefinitely and had stabilised *when the claim was made*.	The date liability for each service injury or disease was claimed	s 77(1)(a)
	If the person has impairment of at least the minimum threshold impairment level that is likely to continue indefinitely and has stabilised but only *after the claim was made*.	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	s 77(1)(b) s 68 s 69
Additional permanent impairment payment – single service injury or disease	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised *when the latest claim was made*.	The date of the most recent claim for liability for an injury or disease that gave rise to the increased combined impairment.	s 77(2)(a) s 71
	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised but only *after the claim was made*.	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	s 77(2)(b) s 71

Additional permanent impairment payment - more than one service injuries or diseases - prior to July 2013	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised *when the latest claim was made*.	The date the most recent claim for liability was lodged for one of the service injuries or diseases concerned.	s 77(2)(a) s 71
	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised but only *after the claim was made*.	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	s 77(2)(b) s 71
Additional permanent impairment payment - more than one service injuries or diseases - on or after 1 July 2013	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised *when the claim was made*.	The date liability for each service injury or disease was claimed	s 77(2)(a) s 71
	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised but only *after the claim was made*.	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	s 77(2)(b) s 71
Additional permanent impairment payment – deterioration - single service injury or disease	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised *when the deterioration was notified to the MRCC*.	The date of the notification to the MRCC	s 77(3)(a)
Additional permanent impairment payment – deterioration - single service injury or disease	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised but only *after the claim for additional compensation was made*.	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	s 77(3)(b) s 71(2)

Additional permanent impairment payment - deterioration - more than one service injuries or diseases - prior to July 2013	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised *when the deterioration was notified to the MRCC*.	The date the MRCC was notified of the deterioration in one or more of the service injuries or diseases concerned	s 77(3)(a)
	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised but only *after the claim for additional compensation was made*.	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	s 77(3)(b) s 71(2)

Additional permanent impairment payment - deterioration - more than one service injuries or diseases - on or after 1 July 2013	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised *when the deterioration was notified to the MRCC*.	The date the MRCC was notified of the deterioration in each of the service injuries or diseases concerned	s 77(3)(a)
	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised but only *after the claim for additional compensation was made*.	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	s 77(3)(b) s 71(2)
Interim compensation for impairment - single service injury or disease	If the person had impairment of at least 5 or 10 impairment points (whichever applicable) *when the claim was made*.	The date of the claim for liability for that injury or disease.	s 77(4)(a)
	If the person had impairment of at least 5 or 10 impairment points (whichever applicable) *only after the claim was made*.	Where the claim for PI was made prior to 1 July 2013 - the date on which the impairment was at least 10 impairment points. Where the claim for PI was made on or after 1 July 2013 and the claimant had no previous compensable conditions under the MRCA - the date on which the impairment was at least 10 points. Where the claim for PI was made on or after 1 July 2013 and the claimant had previous compensable conditions under the MRCA - the date on which the impairment contributed at least 5 additional impairment points to the overall impairment rating	s 77(4)(b) s 75(3)
Interim compensation for impairment - more than one service injuries or diseases - prior to July 2013	If the person had impairment of at least 5 or 10 impairment points (whichever applicable) *when the claim was made*.	The date of the latest claim	s 77(4)(a)
	If the person had impairment of at least 5 or 10 impairment points (whichever applicable) *only after the claim was made*.	The date on which the impairment was at least 10 impairment points.	s 77(4)(b) s 75(3)

Interim compensation for impairment - more than one service injuries or diseases - on or after 1 July 2013 *(Continued)*	If the person had impairment of at least 5 or 10 impairment points (whichever applicable) *when the claim was made*.	The date liability for each service injury or disease was claimed	s 77(4)(a)
Interim compensation for impairment - more than one service injuries or diseases - on or after 1 July 2013	If the person had impairment of at least 5 or 10 impairment points (whichever applicable) *only after the claim was made*.	Where the claim for PI was made prior to 1 July 2013 - the date on which the impairment was at least 10 impairment points. Where the claim for PI was made on or after 1 July 2013 and the claimant had no previous compensable conditions under the MRCA - the date on which the impairment was at least 10 points. Where the claim for PI was made on or after 1 July 2013 and the claimant had previous compensable conditions under the MRCA - the date on which the impairment contributed at least 5 additional impairment points to the overall impairment rating	s 77(4)(b) s 75(3)
Additional compensation	If impairment has stabilised from an injury or disease for which interim compensation has been paid	The date on which all the person's service injuries or diseases stabilised.	s 77(5) s 75(5)
Permanent impairment compensation	Decision made to choose lump sum	30 days after the day the MRCC became aware of the choice made by the person to take a lump sum.	s 79
Incapacity for service or work	If incapacity for service or work resulted from a service injury or disease not accepted on the basis of aggravation.	The date of onset of incapacity for service or work resulting from the service injury or disease.	s 89 s 342
	If incapacity for service or work resulted from an aggravated injury or disease.	The date of onset of incapacity for service or work resulting from the aggravation of the injury or disease.	s 88 s 89 s 342
Special Rate Disability Pension	Decision made to choose SRDP	The day on which the MRCC became aware of the person's choice to accept that pension.	s 203(2)(b)
Household services		The date the person obtained household services that he or she reasonably required because of the service injury or disease (or the aggravation of the injury or disease if liability was accepted on that basis).	s 214

Attendant care services		The date the person obtained attendant care services that he or she reasonably required because of the service injury or disease (or the aggravation of the injury or disease if liability was accepted on that basis).	s 217
Telephone allowance	If person who does, or has at some time, satisfied the special rate disability pension (SRDP) criteria	The date on which the person first satisfied the eligibility criteria for the SRDP, was an Australian resident, and had a telephone connected in their own name or jointly with someone else.	s 221(1)
Telephone allowance	If person who has 80 or more impairment points	The date on which the person had 80 or more impairment points from service injuries or diseases, was an Australian resident, and had a telephone connected in their own name or jointly with someone else.	s 221(2)
Compensation for wholly dependent partner	Commencement of payment of weekly amount	The date of death.	s 234(5)
Compensation for eligible young person	Commencement of payment of weekly amount	The Act does not specify a date of effect other than, if the person was born after the member died, compensation is payable from the week in which the person was born. As this is not specified as an earliest date, but as *the* date of effect, and it might be before the date a claim was made, it implies that the same date of effect would apply as that applicable to the wholly dependant partner – the date of death.	s 253
Compensation for cost of treatment	If service injury or disease not accepted on the basis of aggravation.	The date from which treatment was first provided for the service injury or disease.	s 271 s 272 s 273
	For injury or disease from which the person died, and whose death from that cause is accepted as a service death.	The date from which treatment was first provided for that injury or disease.	s 271 s 272
	For service injury or disease accepted on the basis of aggravation.	The date from which treatment was first provided after the aggravation of the injury or disease was sustained (and ending when the effects of the aggravation cease).	s 271 s 272 s 273 s 275
Pharmaceutical allowance		The date from which the person was entitled to treatment under the MRCA.	s 300

MRCA - When no date of effect can be set

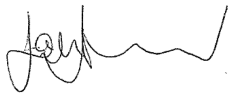
When no date of effect can be set			
Affirmation	of decision under review	As there is no change, no date can be set.	VEA s 156(1)(a) as applied by MRCA s 353(1), (2) item 19
Acceptance of liability		No date from which liability is accepted is necessary. Instead, a date of effect is determined later as part of the process of determining the level or amount, if any, of compensation that is payable.	
Compensation for other dependants		As it is a lump sum, no date of effect is required.	s 262 s 263
Compensation for travel	accommodation or travel costs relating to treatment	No date of effect is necessary.	s 290 s 291 s 297

CONCLUSION

The VRB prides itself on providing a system of justice that is fair, just, accessible, economical, informal and quick. We hope that this guide assists people who elect to exercise their rights of review, by providing information about the VRB's broad range of resolution processes and the legal framework in which the VRB operates. The VRB strives to meet the evolving needs of its users and we will continue to further develop ways of improving access to justice for applicants seeking our review. For details of new VRB projects, programs and practices, the VRB website provides regular updates. And, importantly, the VRB's registry staff are there to actively assist you during the review process.

This guide is also designed for representatives who appear before the VRB. We recognise and acknowledge the challenges that can come with navigating a complex legislative framework - while advocating and advancing the interests of the veterans and family members you represent.

This guide has come about due to the diligence and commitment of a number of VRB people, including National Registrar & Chief Legal Counsel Katrina Harry, ADR Registrar & Senior Legal Officer Jane Warmoll and Senior Member Robert Douglass. Their significant efforts have resulted in a guide which is comprehensible and informative, and which demonstrates their impressive knowledge and expertise in veterans' law and procedure. My thanks for their shared determination and vision to provide unique and accessible guide to the VRB's system of justice for veterans, serving members and their families.



Jane Anderson
Principal Member

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