**THE RAAC CORPORATION LIMITED**
**ACN 156 250 958**
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**Senate Foreign Affairs, Defence and Trade Committee**
**PO Box 6100**
**Parliament House**
**CANBERRA ACT 2601**

The Royal Australian Armoured Corps Corporation (the RAAC Corporation) is an interested party in the development of the new harmonised veterans' legislation scheduled to become law on 1st July, 2026.

A submission (66.pp) was drafted and forwarded the DVA Legislative Reform Team on 14/4/24, for their consideration. A copy of that initial submission accompanies this response to the DVA Thematic Analysis[1] A hard copy of the Analysis also accompanies this submission. The Corporation notes the decision of the Senate Foreign Affairs, Defence and Trade Committee (FADT Committee); viz

1. *the Senate adopted the report. The recommendations of the report were agreed to, with amendments, on Thursday, 4 July 2024.*
2. *the committee met in private session on Wednesday, 3 July 2024 at 7.15 pm.*
3. *the committee recommends that—the **provisions** of the Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 be **referred immediately** to the Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 3 October 2024 (see appendix 5 for a statement of reasons for referral).*

The RAAC Corporation also had access to the submission of the Naval Association of Australia (NAA) and supports the matters discussed therein, with one exception, that being legal practioners appearing at the VRB. It is the RAAC Corporation's standing policy that the statutory prohibition on legal practitioners appearing at a Tier 1 Tribunal (the VRB), is reasonable in all the circumstances, as discussed in our submission to the Legislative Reform Project which accompanies this submission.

The matters addressed in this, and the attached Primary Submission are tendered in good faith and addresses only those matters the RAAC Corporation considers it is competent to comment on and I am prepared to appear before to the Committee to discuss matters related to the proposed harmonised legislation.

**Noel Mc Laughlin OAM MBA**
**Chairman**
**RAAC Corporation**
**(Advocate TIP 4)**
**12 August, 2024**

[1] attachment (PDF 624 KB)

# VETERANS' ENTITLEMENTS, TREATMENT AND SUPPORT (SIMPLIFICATION AND HARMONISATION) BILL 2024

## *The Royal Australian Armoured Corps Corporation submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee*

**BACKGROUND**

The primary fact in issue requiring a formal submission to the Foreign Affairs, Defence and Trade Legislation Committee ('the FADT Committee') of the Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 ('the VETS Bill') has its genesis in the meeting chaired by the Minister for Veterans' Affairs on 20 March 2024.

At that meeting the National President of the TPI Federation asked the Minister the very first question of the evening. She asked that, as the process of bringing the Bill into law had now been increased by another full year to July 2026, would there be an extension of time granted to ESOs past the deadline of 28 April 2024 to prepare their submissions. The request was flatly refused by the Minister.

The RAAC Corporation thanks the Selection of Bills Committee[2] for referring the matter for immediate inquiry by the Standing FADT Committee. This will allow ESOs and other parties sufficient time and space to prepare or argue their submissions and enable their voice and those of their constituent members to be heard rather than being shut off by a blunt refusal.

The refusal by the Minister to allow an extension of time for consultation operated to block ESOs and others' attempts to meet the deadline thereby truncating submissions, through a rush to meet the deadline of 28 April 2024. A rushed submission could miss crucial elements that are directly and materially relevant to this debate. This refusal by the Minister is grossly unfair.

The refusal to extend consultation time also forces the veterans' community and other interested parties to wade through a convoluted Explanatory Memorandum (EM) and the relevant legislation to visit the insertion of the grandfathered provisions and to provide comment. Fault-checking is critical in this phase of the VET Bill's development. A miserly time frame acts as a fetter to good and effective vetting of the Draft and the EM and outgoing Acts.

The eight-week time frame imposed by DVA for submissions is considered, given the nature and complexity of this exercise, coupled with the fact that the veteran community was organising for ANZAC Day, and, as the Minister would have been aware, any reading and commentary was done by people who work on a voluntary basis without the support of a large Department such as DVA, to be manifestly insufficient. It is indicative of an organisation resistant to change and one reluctant to accept any opinion contrary to their own.

It is the RAAC Corporation's submission that a time frame of three (3) months would have been reasonable in all the circumstances.

This contention is given further weight due to the addition by Government of another full calendar year to the legislative schedule before the VET Bill becomes law on 1 July 2026.

[2] Report No 7 of 2024.

The fact the Senate Selection of Bills Committee has seen fit to now refer this matter to the FADT is welcome news and will enable those who wish to do so, to lodge additional submissions with the Inquiry. It is hoped the FADT takes the opportunity to undertake some face-to-face discussions with some of those organisations or individuals who tender submissions to the Committee.

It is the RAAC Corporation's submission that, the process of harmonising is an enormous challenge to all parties and requires careful analysis of the issues in order to prepare a suitable brief.

It is the RAAC Corporation's submission that, the refusal by the Minister in allowing additional time is considered to be an act made in bad faith and does not show the Commonwealth as represented by its agent DVA, to be acting in good faith and as an honest broker.

It is the RAAC Corporation's submission that, a number of issues listed in the Thematic Analysis produced by DVA and listed as Attachment A to the DVA Consultation Report 2024, compel a response and, when taken together with this Corporation's original submission to the DVA Legislative Review Team of 14 April 2024, should be tendered to the FADT Committee Inquiry.

## RESPONSE TO THE THEMATIC ANALYSIS OF SUBMISSION RECEIVED ON THE EXPOSURE DRAFT OF THE VETERANS' ENTITLEMENTS, TREATMENT AND SUPPORT (SIMPLIFICATION AND HARMONISATION) BILL 2024

**NOTE**

1. The page references cited applies to the actual numbers pages of the document (33 pages) and not the file page number.

2. The extracts from previous RAAC Corporation submissions are *italicised* throughout this document.

**MILITARY WAR DOGS (MWDs) (p.1).**

The issue the managing of military dogs post-deployment and service is in fact a matter that does remain firmly within the Commonwealth's purview either through DVA or the ADF itself.

These dogs are enlisted, given a service number and trained very extensively. They bond very deeply with their handlers and, like police dogs, are homed with their handler on retirement.

The contention of destroying a service dog if a handler does not wish to retire the allocated dog there is no choice other than euthanising is egregious in the extreme. To remotely consider such a callous and unfeeling approach defies comprehension.

Its callousness is reminiscent of the earlier decisions regarding the disposal of faithful animal companions such as the Walers ridden by Australian Light Horse troopers in World War One, and the decision by the Australian Army to leave Battalion tracker dogs behind with Vietnamese families to an uncertain fate.

Rather than considering having them destroyed on the mere say-so and refusal of a handler, other avenues must be sought and tried. Destroying a faithful, courageous and loyal canine should be a last resort.

Nothing in the Thematic Analysis Attachment A remotely examines alternative solutions.

Efforts should be made in the first instance by the ADF to:

1. Remove the right of a handler to sentence a dog to death by refusing to retire the animal.

2. Establish a protocol/process whereby such dogs are removed from the military environment and rehouse them in an environment similar to a rescue dog facility where retraining to have them suitable on assessment post-training, for re-homing (out of a military family if necessary), can take place.

3. DVA also owes a duty in this instance to provide whatever support is required through the DVA assistance dog programmes.[3]to allied service dog providers.

**CONTENTION**

The RAAC Corporation does not on any level agree that this is a matter that is out of scope for DVA.

**OVERPAYMENTS AND ROBODEBT (p.1)**

The Government's position on this issue is; *Debt/overpayment recovery administration should reflect findings from the ROBODEBT Royal Commission.*

In its submission to the Legislative Reform Project, the RAAC Corporation addressed the matter of overpayments including clawbacks, financial hardship, incompetent administration and assessment processes and the application of the ROBODEBT Royal Commission's recommendations (the ROBODEBT Principles). The Corporation argued *inter alia* that:

> *The RAAC Corporation proposes the implementation of a debt recovery time frame of six years as for ROBODEBT. The RAAC Corporation contends that such a time frame (statute of limitations), should be introduced.*
>
> *The RAAC Corporation argues that the linking of the sliding scale Topperwein Model and the six-year ROBODEBT Model to manage debt repayments is reasonable in all the circumstances.*
>
> *The implementation of a six-year statute of limitations for debt recovery similar to that flowing from the ROBODEBT Royal Commission has considerable merit.*
>
> *The ROBODEBT debacle demands that persons subject to an adverse decision be given a chance to address the pending decision. Procedural fairness demands it. The same applies for veterans.*
>
> *It is clear on the facts that the Social Security legislation and ROBODEBT Royal Commission report provide significant provisions for DVA to consider and have them incorporated into the MRCA Mk2.*

The Corporation also contended the following:

> *It is the RAAC Corporation's submission that:*
>
> 1. *Where section 428 (write-off) or 429 (waiver) action is being considered, financial assistance by the Commonwealth to a veteran and/or veteran's family should be considered.*

[3] https://www.dva.gov.au/search-results?q=assistance+dogs+program

2. *Discretionary action must always be an option for the Government to consider. However, giving the delegate that discretion will result in inconsistencies associated with write-offs.*

3. *The requirement as discussed by Topperwein, to provide a full and accurate accounting of a veteran's assets real and otherwise, may well require obtaining the services of a financial adviser.*

4. *Access to financial assistance ($2700) be made available to veterans who require professional financial advice; similar in respect of financial assistance available to veterans considering their PI lump sum compensation offers.*

5. *The RAAC Corporation submits that alternative proposals for debt recovery involving the linking of a sliding scale of repayments (Table 3) with a statute of limitations as discussed in parts **24A and 24B** are reasonable in all the circumstances. They should, as a matter of course, be examined and considered before the grandfathering exercise becomes law.*

**CONTENTION**

The position of the Government on the issue of recovery of overpayments and debt administration reflecting the findings and recommendations of the ROBODEBT Royal Commission overpayments is on every level and on any measure completely unsupportable. Debt and overpayments feature in DVA landscape. There must be an equitable and stable administration of overpayments/debt recovery.

To dump this issue in the too-hard basket is a cowardly abrogation and derogation of the duty of care owed by DVA to create a level playing field on this particular issue. It is not good enough.
This particular matter should as a matter of significant importance, be reinstated.

**PRESERVATION OF CASE LAW (p.2)**

The Commonwealth's response that *"All MRCA case law will be retained"* is cause for concern.

1. It must be challenged. It operates to shred a well-established body of case law that that has been established to remedy a wrong and demonstrates an intent by the Commonwealth as represented by DVA to *de minimis* the application of beneficial decisions in case law other than MRCA-related matters. That is on every level, an indefensible position by DVA to take.

2. It is not an exaggeration to contend that such a comment and policy position is not only incompetent but fatally flawed. It is contrary to the principles of common law and is a most egregious abuse of process.

3. Argument by analogy with other cases is the heart of legal reasoning. Limiting the argument to a narrow corridor will deny justice to veterans.

4. To restrict the application of so-called MRCA case law to all future AAT and common law decisions based around MRCA is dangerous and an exercise in complete bad faith.

5. In this instance, individual rights are afforded by Common Law principles. The Common Law principle assumes the legislature does not intend to infringe fundamental freedoms.
This will occur if the VET Bill restricts access to only MRCA cases.

6. It is tantamount to procedural bastardry

7. It gives rise to the not unreasonable contention that by restricting case law to one portion of the veterans' case law landscape, it will neuter the application of non-MRCA case law, thereby affirming any decision to refuse a claim for compensation or any other pension/compensation matter that becomes subject to a higher tier appeal than the VRB.

8. It is a matter of grave concern that such a policy will also adversely affect VRB decisions.

9. The effect of such an unconscionable and indefensible policy decision has a twofold effect; viz

    i. It denies a veteran or widow natural justice through the application of a truncated case law policy; and
    ii. It operates as a policy designed to save the Government money.

10. Governments introduce new legislation to save them money, not to benefit the people for whom the legislation is intended (Daryl Dixon Financial Adviser, Canberra, mid-1990s).

The contentions here are that:

1. Decisions made by a Departmental Determining Officer/Delegate are reviewable decisions.

2. That review of a contested decision can travel from an internal review of the primary decision through merits review (VRB) through to the Full High Court, if need be.

3. Veterans' legislation is considered to be remedial and is, consistent with common law decisions, to be applied beneficially. It is to be construed to the full extent the English language allows.

4. Common Law is there to right a wrong perpetrated on veterans and widows by an incompetent or incorrect Primary Decision adverse to a veteran or widow.

5. Case law applied to support a client's case is absolutely fundamental to the preparation and prosecution of an appeal and must not be restricted to just one portion of the veterans' review and appeal jurisdictions.

6. Case law applied can also apply to non-VEA and non veterans' case law including, for example:

    - British Oxygen House of Lords (1970)
    - Wednesbury English Court of Appeal (1948)
    - Sagnata Investments, English Court of Appeal (1971)
    - Whiteman FCA (1996),
    - Starcevich FCA (1987)
    - Deledio FCA (1997)
    - East FCA (1987)
    - Bushell HCA (1992)
    - Byrnes HCA (1994)
    - Hughes Aircraft Systems International v AirServices Australia FCA (1997)
    - Attorney-General and Australian Iron & Steel v Cockroft FFCA (1986)
    - Australian Doctors Fund Case FCA (1994),
    - Canute HCA (2006);
    - Ridgeway v R HCA (1995).

1. ESOs and interested parties also need to keep a watching brief on this issue in the light of the High Court decision in *Canute* (2006). It is not an exaggeration to postulate that by relying on case law that applies specifically to MRCA matters, that the High Court's decision in *Canute* is not vitiated through it not applying to MRCA.

2. To use a non-MRCA relevance is to try and conceal through subterfuge, the true benefits in *Canute* in respect of common law damages.

3. The beneficial and remedial effects flowing from *Canute* must flow to MRCA veterans and their families. This remains genuine concern and is something the needs to be watched very carefully.

4. By denying access to some Common Law decisions is to move from a rule of law to a rule of man and will result in significant distrust of the legal system as it relates to veterans.

5. In its formal response to the Legislative Reform Team, the RAAC Corporation expressed concerns as to the Commonwealth disguising or remaining silent on the *Canute* decision.

6. The extract below from the Corporation's submission which demonstrates also the beneficial effects of non-MRCA case law as held in *Canute* (*Fellows v MRCC* [2009] followed), puts the issue beyond doubt ; viz

***11 THE SILENCE ON CANUTE***

*The EM addresses the Common Law damages quantum current and future, in vague terms.*

*The EM states that a veteran can initiate Common Law action "for the maximum amount that a member or a former member can recover" (at p.28). The inference to be gained here is that a genuine expectation arises in the mind of a veteran that they will receive up to the single complete amount for all listed and accepted disabilities, not knowing that the amount applies to each accepted condition.*

*The RAAC Corporation contends that, the whole of that term is misleading and deceptive and can be construed as an attempt to defeat by subterfuge, the High Court decision in Canute v Comcare.*

*The reference to the Common Law damages matter is completely silent in a material particular, namely that, the total amount applies not to all conditions as an overall lump maximum lump sum of $110,000/$177,000, but in fact applies to* ***each accepted condition.*** *This was highlighted in Canute and should not be ignored.*

*In that regard, the RAAC Corporation relies on the High Court decision in Canute[4];in which the High Court noted with approval the Federal Court's decision per Hill J.*

[4] ***Canute v Comcare*** [2006] HCA 47; [2006] HCA 47; (2006) 229 ALR 445; (2006) 80 ALJR 1578 (28 September 2006), per Gummow ACJ, Kirby, Callinan, Hayden and Crennan JJ. Online at https://classic.austlii.edu.au/au/cases/cth/HCA/ [accessed 5/3/24]. *Canute* was followed again by the High Court in ***Fellowes v MRCC*** [2009] HCA 38 ,per Hayne, Hayden, Crennan and Bell JJ.

*In 2002 Mr Canute lodged a second claim for PI for adjustment disorder with depression which was refused. Comcare contended the appellant failed to reach the required threshold of a 10% increase in the degree of Permanent Impairment (PI) under s25(4) SRCA.*

*Comcare interpreted the SRCA that consequences of an injury were a sequalae not a separate injury. The High Court disagreed and held that that Comcare's interpretation of the Act also distorted the definition of "injury" in another way, by folding all other injuries into one single injury; viz*

> *Comcare's preferred construction of the Act also distorts the statutory definition of "injury" in a further way. The task of determining for the purposes of s 25(4) whether there has been "a subsequent increase in the degree of impairment" necessitates reference to the Guide, by reason of s 24(5). But, it is to be recalled, the inquiry mandated by that sub-section is as to the degree of permanent impairment of the employee "resulting from an injury".*
>
> *To treat as going to that inquiry something which independently satisfies the statutory definition of "an injury" tends to conflate into one all injuries suffered after one workplace incident. The flow-on effect in terms of s 24 thereby distorts the concept of "injury" so as to assume the sense of the totality of the effects of a workplace accident, contrary to the terms of the definition. [At 38] (This writer's highlighted emphasis).*

*The High Court found in Canute's favour in that, where a compensable injury gives rise to a subsequent injury (a sequalae), that satisfies the definition of an injury in s 4 of SRCA, and that subsequent injury is to be treated as a separate injury with all entitlements of a separate injury.*
*(This writer's highlighted emphasis).*

> *<u>The decision of Hill J</u>*
>
> *1. The appellant sought review of the AAT decision in the Federal Court. Hill J found in the appellant's favour. On 1 April 2005, orders were made setting aside the decision and remitting the matter to the AAT for redetermination Hill J held that the AAT had erred in failing to consider whether the chronic adjustment disorder was itself "an injury" for the purposes of the Act.*
> *His Honour remarked that:*
>
> > *"The fact that the two injuries were caused by a single event ... is not a relevant question under the Act. The Act is concerned with injuries, not incidents." (This writer's highlighted emphasis).*
>
> *This is correct, having regard to the considerations discussed earlier in these reasons.*
>
> *2. Hill J concluded that it would be wrong to treat two separate injuries, each having different impairments, as one injury for the purposes of the Act because:*
>
> > *"[t]he measure of compensation is determined by reference to percentage impairment. However, the right to compensation is created by the occurrence of an injury."*

*His Honour concluded that the AAT had fallen into error because it characterised the adjustment disorder merely as "psychological sequelae" of the back injury, without considering whether it itself was "an injury".*

*This decision of the High Court means that, where an incident on service - be it operational or non-operational service, where that incident results in a number of injuries, each injury is to be treated as a separate injury which must satisfy the 10% threshold. (This writer's highlighted emphasis)*

*An example of this would be injuries suffered in a single incident while driving or crew commanding a Bushmaster PMV that triggers an IED, resulting in bilateral sensori-neural hearing loss, tinnitus, musculoskeletal (lumbar) , herniated discs, trauma, fractured limbs, PTSD, Bruxism. In following Canute, each injury would be separate and must be assessed separately.*

*In Fellowes [2009][5], the High Court in following Canute, held:*

> *In Canute, this Court pointed out **[14]**that the definition of "impairment" in the SRC Act is not expressed in terms that require assessing impairment on a "whole person" basis. Rather, the definition is expressed in terms conveying a disaggregated sense. As the Court said**[15]** in Canute, **"[t]extually, the Act assumes that 'an injury' may result in more than one 'impairment'". Likewise, it must follow that more than one injury may result (and often will result) in more than one impairment.*** (This writer's bold highlighted emphasis)

*The decision of the High Court in both these matters puts beyond doubt that a single injury may result in more than a single impairment. It follows that, the decision in Canute and Fellowes puts DVA on notice to not succumb to the same error of law as Comcare, namely "Comcare's preferred construction of the Act also distorts the statutory definition of "injury." (This writer's highlighted emphasis).*

***Contentions***

1. *The RAAC Corporation contends that, in its submission to the Senate inquiry, if MRCA Mk2 is not amended and remains as is, veterans will find themselves financially disadvantaged to a significant degree and not treated as beneficially as a civilian who suffers a workplace injury.*

2. *The RAAC Corporation does not agree to the proposed amendment to MRCA as discussed in the EM at **Item 99** (at p.28/104) until further information is forthcoming.*

***Recommendation***

*The RAAC Corporation recommends thorough the Senate inquiry that, DVA undertake remedial action to insert in the Draft an appropriate Guidance Note setting out the correct application of the Common Law lump sum as to mean that it applies separately in toto, to each accepted condition and not a single sum to cover all accepted conditions a veteran may have.*

[5] ***Fellowes v MRCC*** [2009] HCA 38.

**CONTENTION**

The RAAC Corporation contends that:

1. The Commonwealth owes a duty to clarify what precisely it means by its assertion that; '*All MRCA case law will be retained*". This is not on any level or on any analysis, acceptable. It gives rise to the not unreasonable inference that a deliberate attempt by Government (DVA) is afoot to neuter any non-MRCA case law to the detriment of veterans and to the understandable anger of the legal profession.

**2.** Should this nefarious intent be the case, it is not an exaggeration to contend that the Government as represented by DVA, is in fact taking steps to seriously undermine the effectiveness of the Doctrine of Procedural Fairness and the Common Law and Merits Review of remedial and beneficial persuasive authority, instead creating an unacceptable model of the **Doctrine of Unreasonableness.**

3. The RAAC Corporation relies in this regard in the decision of the English Court of Appeal decision in *Associated Provincial Picture Houses v Wednesbury Corp* [1948][6] (*the Wednesbury Case*) in which the Court held that a decision *"is so unreasonable that it might almost be described as being done in bad faith."*

4. The inference here is that any decision to truncate and *de minimis* a considerable body of case law that benefits veterans and their widows, is considered to be on its face, an act done in bad faith.

5. The MRCA case law proposal insults and offends most grievously, the decision of the Federal Court per Beazely J, in the Australian Doctors' case. In that case[7] the Federal Court per Beazely J, held that the term "reasonable" should be construed as defined in the Concise Oxford Dictionary, that is, *"Agreeable to reason, not irrational, absurd or ridiculous".*

6. The RAAC Corporation considers the decision by Beazely J to be the **Test of Reasonableness**. It is a decision that has not been disturbed by a Court of superior jurisdiction.

7. Similarly, in Cockroft[8], the High Court held *inter alia:*

> *'That is to say, they require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous…'*

8. The proposal by DVA to only follow MRCA case law also grievously offends *Cockroft*.

9. The decisions by a Tribunal or Court of competent jurisdiction in a non-veterans' jurisdiction are vital in that they contain findings, decisions and opinions that are directly analogous to the case an Advocate is making for their client. The same applies to legal practitioners.

10. To consider anything less than the entire suite of case law, regardless of jurisdiction is to create a chronically uneven playing field for veterans, widows and Advocates and operates to completely usurp and destroy the doctrine of procedural fairness for veterans and widows.

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[6] ***Associated Provincial Picture Houses v Wednesbury Corp*** [1948] 1 KB 223 per Greene L, MR.
[7] ***Australian Doctors' Fund v Commonwealth*** (1994) 34 ALD 459, per Beazely J; *Department of Industrial Relations v Burchill* (1991) 33 FCR 122; 105 ALR 327, considered).
[8] ***Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft*** (1986) 10 FCR 180 cited and followed in the *Australian Doctors'* at [21].

11. It is an abrogation of the duty owed by the Commonwealth to act in good faith as an honest broker and as a model litigant. The decision by DVA to so cavalierly and arrogantly exclude non-MRCA case law, must not be allowed to stand.

**CLINICAL ONSET (p.3)**

The subject of clinical onset is one that continues to be the subject of debate. The ludicrous decision of the Federal Court in *Boys* has further aggravated the issue (*Boys v Repatriation Commission* (Veterans' Entitlements) [2022] FCA 257 (23 March 2022). Below are two extracts from Statements of Facts, Contentions and Persuasive Authority tendered on behalf of clients, and which have been successful in reminding the Commonwealth as to clinical onset.

The RAAC Corporation commends them to the Senate FADT Inquiry; viz

***THE APPROACH TAKEN BY PROF DONALD***

1. *It is contended that the issue of clinical onset has been well settled since 1998 and has not changed either through expert medical opinion or Common Law decisions.*

2. *This contention finds very strong support from an unambiguously clear statement by the Inaugural Chairman of the RMA **Professor Ken Donald**, himself a world-renowned epidemiologist who stated at the first RMA Conference on Monday 9/11/1998 which I attended; viz*

> *As it is operationalised now, a clinical onset means what the English usage of those words means. It means the first time the veteran noticed anything to do with the disease. Clinical onset is not when it's diagnosed, not when the first laboratory test or X-ray is done. Clinical onset in its ordinary English usage means the first time the patient notices anything to do with the disease. Now, that is a much more generous interpretation than anything we could write in terms of laboratory tests or diagnostic processes, therefore we have refused to codify. We've refused to write it down.* (This writer's highlighted emphasis)

3. The contention here is that the application of the High Court decision in *Bushell* (1992)[9] (the *Bushell Principles*) affirmed by the High Court in *Byrnes* (1993)[10] the **Bushell-Byrnes approach**, is to be taken to apply to Professor Donald's professional expert opinion, in that:

> *"... the case must be rare where it can be said that a hypothesis, based on the raised facts, is unreasonable when it is put forward by a medical practitioner **who is eminent in the relevant field of knowledge**" Conflict with other medical opinions is not sufficient to reject a hypothesis as unreasonable."*[11] (This writer's bold highlighted emphasis).

4. *The statement by Professor Donald, is considered on every level and on every analysis to meet the High Court's test regarding eminence in the relevant field of knowledge in every sense of the word. The failure by the Senior Delegate to have regard to the High Court decision and the statement of Professor Donald **post-Bushell/Byrnes** - is tantamount to incompetent decision-making.*

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[9] ***Bushell v Repatriation Commission*** [1992] HCA 47; (1992) 175 CLR 408; (1992) 29 ALD 1 (7 October 1992).
[10] ***Byrnes v Repatriation Commission*** [1993] HCA 51; (1993) 177 CLR 564; (1993) 30 ALD 1 (15 September 1993).
[11] Per Brennan CJ, Above, n.5, at [10].a

5. *The Commonwealth as represented by the MRCC has failed to properly and relevantly apply the Bushell standard to this matter. Her failure to have regard to the undisturbed statement and opinion of a world-renowned epidemiologist in Professor Donald, is completely unacceptable.*

6. The failure by the Senior Delegate to have regard to a number of Federal Court and AAT decisions defining clinical onset in a manner entirely consistent with Professor Donald's definition, again confirms the failure by the Delegate to apply these definitions consistent with her duty under s.333 MRCA 2004.

7. The failure by the Senior Delegate to properly investigate and validate the veteran's claim in respect of Factor 6(g), further compounds the flawed and incompetent decision-making process with respect to the veteran's situation.

**CONSIDERATION OF CLINICAL ONSET**

1. In considering the issue of clinical onset, a number of common law decisions are directly relevant to and analogous to Mr Doe's[12]' situation regarding when clinical onset actually occurred. An examination of these decisions demonstrates that they are consistent with Professor Donald's definition set in 1998 post-*Bushell and Byrnes.*

2. *In Lees v Repatriation Commission*[13], the Full Court of the Federal Court noted with approval at *[13],* the decision of the Federal Court in *Repatriation Commission v Cornelius*[14] which agreed with the decision of the AAT in *Robertson v Repatriation Commission*, namely that:

> *"... there is a clinical onset of a disease, either 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...."*
> *(*This writer's highlighted emphasis*).*

3. Nothing in Lees conflicts with Professor Donald's definition of clinical onset or that of other Courts of equal or subordinate jurisdiction.

4. *In Newson*[15], the Tribunal followed the decision and reasoning held by the Full Court in *Lees and Cornelius.* In its decision, the Tribunal noted at [25]:

> *"The meaning of "**clinical onset**" was considered by the Full Court of the Federal Court in Lees v Repatriation Commission [2002] FCAFC 398; (2002) 125 FCR 331. The Court referred to the analysis of the Tribunal in Re Robertson and Repatriation Commission (1998) 50 ALD 668, in which Senior Member Dwyer concluded at 670 that:*
> *"...there is a **clinical onset** of a disease, either 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." (This writer's highlighted emphasis).*

[12] Name changed to protect the client's privacy [10/8/24].
[13] ***Lees v Repatriation Commission*** [2002] FCAFC 398 (6 December 2002).
[14] ***Repatriation Commission v Cornelius*** [2002] FCA 750 (14 June 2002).
[15] ***Newson and Repatriation Commission*** [2007] AATA 1539; (2007) 96 ALD 794 (11 July 2007)

5. The consistency in applying the definition of clinical onset by the Courts and Tribunals is on every level, entirely consistent with Professor Donald's definition. As such, Professor Donald's professional opinion completely and unequivocally rebuts the Delegate's statement that:

   *"The Delegate considered the onset of Cervical Spondylosis was 25 June 2018." (**T3:f.9**).*

6. This failure was compounded by the Senior Delegate's refusal to examine the link between factor 6(g) and the veteran's neck trauma on 9th October 2008.

7. There is no evidence to indicate the Senior Delegate examined the information before her. This infected the whole decision which has led to this unnecessary and stressful appeal being lodged on behalf of the veteran (**T4:f.14)**.

8. The matters related to the veteran's trauma in 2008 were properly and relevantly, clearly available to the Commission in order for the Delegate to comply with the statutory duty vide s.333 MRCA 2004, to consider all matters relevant to the claim. The Senior Delegate failed completely to do that and in so doing, offended the mandatory statutory duty binding on her decision-making process.

9. The failure to comply with s.333 compromises the Crown's position as a source and fountain of justice.

10. It was properly and relevantly open to the Commission at all material times, to comply with its statutory duty in s.333. The Senior Delegate failed to do so and shut her eyes to the veteran's statement regarding the 2008 accident and failed to properly and relevantly enquire into the antecedent event that led to the 2008 exacerbation of the veteran's neck injury.

11. Given that the Delegate was considering making a decision adverse to the veteran, she owed a duty to inform him of this fact. The fact she failed to do so is unconscionable and indefensible.

**COMMENTS**

1. The above comments argue that clinical onset is based, apropos the opinion of Professor Donald, namely when *"the first time the patient notices anything to do with the disease"*, supported by common law decisions, remains as stated, that is when a patient first notices the symptoms.

2. The Commonwealth asserts in the thematic Analysis Attachment A (p.3) that " *the bill does allow for some for some clarification or simplification."* An examination of the VETS Bill (327pp), made available for consultation on 28/2/24 shows that it is completely silent on this issue.

3. If, as the Commonwealth asserts, *'the bill allows for some clarification'* it would appear that now is the time for this clarification to be made.

4. It also demonstrates that the Commonwealth acknowledges that this part of the Bill is confusing.

5. If that is the case then it follows that, it will be confusing to veterans and Advocates as well. This is a terrible situation in which to leave veterans and Advocates and needs to be clarified and simplified well before the Bill is enacted.

6. To fail to do so, damages significantly the Government's commitment to operating on a level playing field and complying with its duty to act as an honest broker.

7. Why would a government deliberately allow a section of a Bill to be laid before the Parliament knowing it was confusing?

8. Similarly, the Explanatory Memorandum (EM) shows exactly the same thing.

9. This begs the questions:

    i. What consultation has been undertaken in respect of clinical onset?
    ii. Why is there no reference to this issue in the Draft Bill or EM?
    iii. Why is action not being taken to clarify and/or simplify the Draft Bill.

10. It is the RAAC Corporation's submission that, sufficient persuasive authority exists to assist the Senate Inquiry to agree that the contentions expressed by Professor Donald and in Common Law decisions as to when clinical onset occurs.

11. The common law decisions and Professor Donald's well-stated expert medical opinion is of such strength and probative value as to be well-placed to assist DVA in clarifying and simplifying that which struggles with.

12. It is completely self-evident and the authorities cited puts the issue beyond doubt.

**CONTENTION**

The RAAC Corporation contends to the Committee that:

1. The dichotomy between what is asserted by the Commonwealth and the reality of the matter is clear – no such examination was undertaken. It is contended that no proper examination or proofing of this issue has been undertaken by DVA.

2. The Thematic Analysis is flawed. The policy decision to 'No Further Action' (NFA) the issue makes it demonstrably clear that the Commonwealth as represented by DVA has thrown this issue in the too hard basket.

3. In the Consultation Report [16]released by the Minister in 2024, DVA has classified submissions received from the veteran community concerning the draft Harmonisation Bill, into three categories at p.3:

    *1) 'issues that will be addressed in the draft Bill;*
    *2) an ongoing issue that may be considered in the future; or*
    *3) issues that are out of scope for this legislation reform …'*

4. Significantly, it is worth noting that the number of issues shelved by DVA are of a quantity that could, on any analysis, be further reviewed to ensure no issue has fallen through the cracks, causing veterans and their families detriment.

[16] Consultation Report Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 – Exposure Draft (16.pp),

5. An examination of the Thematic Analysis shows the breakdown of issues to be considered; viz

    i. For policy consideration – total 20
    ii. For later consideration - total 28
    iii. For administration consideration – 28

6. It is not beyond the realms of possibility or reasonableness to seek to have DVA create a small dedicated issue-specific review team comprising Departmental staff and ESO representatives most particularly those practicing in the Advocacy field.

7. Additionally, a total of 282 matters have been deemed NFA. Whilst some of those NFA issues are correctly identified as such, there remains a significant body of NFA-related issues that should be considered and examined for their relevance and suitability for inclusion in the Draft Bill to being legislatively included.

8. This is an exercise that should be conducted with ESO representatives in the immediate aftermath of the Senate FADT Committee's report being handed down, if not sooner.

9. It is unfortunate that the Minister, in point (2) above uses the phrase 'may be considered in the future'. The *Acts Interpretation Act 1901* (Cth) at s.33 defines **'may'** as '…something that may be done at the discretion of the person, court or body'.

10. It is this discretionary power that is of concern to the RAAC Corporation. The use of this discretionary phrase as a shield from further positive/substantive action suggests an intent to close down debate on a particular issue by suggesting it may be considered in the future. That is a weak and insipid statement which does not on any analysis engender confidence that ***"may"*** will become actual action.

11. It connotes a laissez-affaire approach by Government to this exercise.

12. The Consultation Report fails to enumerate and list all ongoing issues for the future, that is considered to be a failure in the consultation process by Government.

13. DVA has generously granted itself a further 12 months (365 days) in which to have all its legislative ducks in a row.

14. It submitted that the enhanced time and space will allow for the addressing and resolution of matters contained in the three categories discussed in paragraph 3 above.

15. A classic example of **"may"** in use, relates to the training of veterans' Advocates which, since being taken over by DVA some four years ago, has proceeded at a sluggish, lethargic pace.

16. This very vital aspect of veterans' support is now a casualty of the **"may"** Syndrome infecting this consultation and drafting process.

17. The application of **"may"** to be considered policy, is in actual fact nothing more than DVA applying an indefensible shield on matters important to the veteran community allowing the Department to hide any issues for the foreseeable and indefinite future.

18. The use of **"may"** is considered by the RAAC Corporation of being in this particular context, another way of saying **"mañana". Mirriam-Webster[17] defines "mañana" as,** an adverb which means; **"at an indefinite time in the future."**

19. An alternative position could reasonably be drawn that the Commonwealth will accept the common law decisions and the opinion of Professor Donald as being the relevant tests as to when clinical onset occurs.

20. Neither the opinion of Professor Donald or the cases cited in the Federal Court, have been disturbed by a Court of superior jurisdiction.

**WITHHOLDING OF MEDICAL REPORTS (MEDICAL EVIDENCE) (p.3)**

1. DVA asserts that *"There is no practice of not including a Medical Adviser opinion that has been provided for the purpose of the primary determination in the s.137 report."*

2. This assertion is false and misleading as to the facts and is completely rejected.

3. The following extract from the Corporation's formal submission to the DVA Legislative Reform Team (14/4/24) is directly relevant to rebutting that baseless claim.

4. The extract also includes evidence given by a senior solicitor from the NSW Legal Aid Commission, Mr Geoff Lazar, to the Royal Commission, into Defence and Veteran Suicide regarding withholding medical reports; viz

***Detriment to Veterans***

*The detriment to a veteran occurs through a refusal by DVA to include in a s.137 Report any and all medical opinions of a DMA in which a claim/application is refused. Such a deliberate action prejudices the administration of natural justice.*

*A practice such as intentionally and willfully withholding critically important evidence is on every level and on every analysis, a most grievous affront to every canon of procedural fairness.*

*It is plainly unreasonable action taken by the Repatriation Commission and MRCC in an unreasonable, unconscionable and indefensible manner. There are no redeeming features in apply such a mean-spirited tactic against veterans and/or their widows/widowers. It has no place in the beneficial and remedial intent of veterans' legislation.*

*Action by the Secretary and full Commission should be taken to have this tactic ceased immediately. It fails every test of reasonableness and fails completely, the duty of DVA as an agent of the Commonwealth, to act as a model litigant and honest broker.*
*The complete absence of a level playing field is plain for all to see.*

*The practice operates to by making the task of a veteran seeking furthers and betters when very difficult when that veteran is a victim of a deliberate withholding of a DMA opinion to enable a veteran's treating medical practitioner or specialist, the opportunity to peruse a DMA's opinion the opportunity rebut that opinion in support of a veteran.*

[17] Online at https://www.merriam-webster.com/dictionary/ma%C3%B1ana [accessed 10/8/24].

*Practice Directions at the VRB*[18] *mandate disclosure by the parties not less than seven days prior to a hearing. The s.137 Reports are completely silent on what the relevant medical advice is.*

*The practice by the MRCC and Repatriation Commission to not produce crucial medical reports by DMAs as part of a 137 Report, constitutes an unacceptable breach of current Practice Directions.*

*As a consequence, submissions must be made to a Conference Registrar at a first-instance ADR hearing seeking furthers and betters by requesting a Direction to Produce Documents vide s.152 VEA including those DMA medical reports at the heart of the contested matter.*

*The effect of unreasonable action taken in an unreasonable manner leads to the following delays:*

1. *Waiting for the documents to be produced;*
2. *Perusing the documents with the veteran;*
3. *Having the veteran make a medical appointment to see their specialist;*
4. *Lengthy waits for the veteran to get in and see their treating practitioner;*
5. *Lengthy delays in specialists providing written reports; and*
6. *Consequential delays in bringing the matter before the Board due to re-scheduling issues affecting timely adjudication.*

*These delays are a considered to be a major contributing factor in exacerbating the stress and distress of veterans undergoing the appeals process and contribute to a drawn-out VRB process which is not in the best interests of the veteran or the Board.*

*All of the above creates a pathway that subjects veterans to additional unwanted stress and trauma resulting from an unjustified and unreasonable delay. If a veteran is deemed by the Board to be a Vulnerable Veteran, then the stress that that veteran is enduring and consequential damage to their health, is potentially even more intense.*

*The shield provisions in s.137(2) (new s.352D(2), protect a veteran in circumstances due to confidentiality or where information or opinion or any other matter, may be prejudicial the best interests of a veteran and results in that information being excised.*

*It is the RAAC Corporation's contention that, no valid reason exists for DVA to breach disclosure and deny a veteran procedural fairness. The comments in Ridgeway*[19] *by Gaudron J, are equally relevant in this instance. In Ridgeway the High Court per Gaudron J, held*:

> *That is not to say that the concept of "abuse of process" is at large or, indeed, without meaning. As already indicated, it extends to proceedings that are instituted for an improperpurpose and it is clear that it extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment.* [32].

*The preceding analysis by the High Court in Ridgeway is unambiguously clear.*

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[18] The author has successfully prosecuted appeals under VEA and MRCA legislation. His authorship of this submission also relies on the benefit of qualified privilege.

[19] ***Ridgeway v R*** [1995] HCA 66 at [32] online at http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1995/66.html?stem=0&synonyms=0&query=Ridgeway at [32] [accessed 23/3/2024].

*It is the RAAC Corporation's contention that, no valid reason exists for DVA to breach disclosure and deny a veteran procedural fairness. The comments in Ridgeway by Gaudron, are equally relevant in this instance.*

*The RAAC Corporation also contends that, there is no reason at all for the deliberate withholding of DMA opinions at that stage of the VRB process, conduct that constitutes a deliberate flouting of the disclosure requirements between the parties.*

*It is not unreasonable to draw the inference that a stop has been deliberately applied to providing documented reasons for DMAs setting out their medical opinion in refusing to support a claim, flouting DVA's duty to act as a model litigant and an honest broker.*

*The following is an extract from a recent case involving a MRCA veteran (one of a number since 2021) handled by this writer, to demonstrate the tactic in action. The veteran's name has been removed to protect that person's confidentiality; viz*

*In her Statement of Reasons (**T3:f.8**), the Senior Delegate stated;*

> *I also received advice from a DVA Medical Adviser to clarify the medical information relating to your claim.*

1. *The s.137 Report is completely silent on what this medical advice is. The deliberate withholding of medical advice is symptomatic of a gravely disturbing trend by the Commonwealth as represented by DVA, to refuse to include Departmental medical advice.*
2. *This tactic is a gross denial of natural justice. It operates to deliberately exclude any medical opinion expressed by a DVA Medical Adviser DMA) thereby denying the veteran and his medical practitioner/specialist from accessing a medical opinion enabling Mr X's medical practitioners to challenge and rebut what has been stated.*
3. *I consider this exclusion of a DMA report to be a deliberate action by the Commission an action carried out in bad faith which offends every principle of procedural fairness.*
4. *It is demonstrably clear that the Senior Delegate's deliberate exclusion of the DMA's report is a tactic designed to disadvantage the veteran and cause him significant detriment.*
5. *I consider this deliberate practice applied in Mr X's case to be a disgraceful example of the Commonwealth not acting as an honest broker in terms of good-faith disclosure.*
6. *The reprehensible nature of this practice by DVA was addressed at the **Royal Commission into Defence and Veteran Suicide in Canberra** on 7th April 2022[20] by Mr Geoff Lazar one of three Senior Solicitors from the Veterans' Advocacy Service of the NSW Legal Aid Commission appearing before the Royal Commission; viz*

[20] ***Royal Commission into Defence and Veteran Suicide***, Block 4 Canberra 7/9/2022, Transcript of Evidence at p. 27-2501.

7. ***PETER SINGLETON**: Thank you. The very last matter I want to discuss arises from what is on our screens. It is the bottom of the same page. You have actually turned to what will become Recommendation 7 and you write this: Often, the delegate relies upon the interpretation of DVA's in-house medical advisor but does not provide the Claimant with a copy of the report or memo from the medical advisor. And, operator, if we could go to the next page, you proposed, back in 2018, that the DVA should be required to provide a copy of all the evidence used to make a determination.*

*The first question is: is it still the case that you are not provided with all of the evidence used to make determinations?*
***GEOFF LAZAR**: Yes.*
***PETER SINGLETON**: And is that routine? **GEOFF LAZAR**: Yes.*
*(This writer's bold highlighted emphasis).*

*The evidence of an eminent legal practitioner in Veterans' Law puts the issue of deliberate actions by DVA to cause detriment to veterans, beyond doubt.*

*Nothing in the Commonwealth's conduct remotely accords with DVA's duty to act as an honest broker or model litigant. Similarly, the conduct discussed, denies any sense of fair play being applied by DVA towards a veteran and causes natural justice to miscarry potentially leading to an error of law.*

*It is a hostile act and one that treats a veteran or war/defence widow/er as an enemy.*

*It is the RAAC Corporation's contention that, the provisions of **Item10** as discussed in the EM be broadened to include a direction that the Secretary to cause to be included in the 137 Report, all opinions of a DVA Medical Adviser, subject to the shield provisions of s.137(2) (new s.352D(2)).*

*Section 137 (new s.352) cannot operate effectively if documentation critical to a veteran's appeal is intentionally withheld, denying a veteran procedural fairness,*

*The RAAC Corporation considers the intentional withholding of vital medical information by Departmental Delegates to be a deliberate act of bad-faith decision-making. It is on every level completely indefensible.*

*The RAAC Corporation considers the continued action by Primary Decision-makers, to refuse to include a DMA's advice to be on every level, an exercise in bad faith.*

*The RAAC Corporation considers the bad faith provision enshrined in the AD(JR) Act 1977 at s.6(2)(d), in fact supports the contention that a refusal to disclose could well offend other provisions in s.6(2); viz*

> *(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:*
> *(a) taking an irrelevant consideration into account in the exercise of a power;*
> *(b) failing to take a relevant consideration into account in the exercise of a power;*
> *(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;*
> *(d) an exercise of a discretionary power in bad faith;*
> *(e) an exercise of a personal discretionary power at the direction or behest of another person;*

*(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;*
*(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;*
*(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and*
*(j) any other exercise of a power in a way that constitutes abuse of the power.*

**Contentions**

It is the RAAC Corporation's contention that:

1. There is a deficiency in a material particular (production of medical evidence), that will operate to maintain a defect in the determining and appeals process that, if left uncured, will continue to frustrate veterans whose matters are before the VRB on appeal.

2. It amounts to DVA instituting a process that for a veteran who is refused access to relevant medical evidence to form part of an appeal bundle and examination by a veteran's own treating medical professional, an action that I s accurately described by Gaudron J., in *Ridgeway*[21] as *"seriously and unfairly burdensome, prejudicial or damaging".* Such a process instituted by DVA is unreasonable and oppressive. It acts to demoralise and demotivate veterans endeavouring to appeal an adverse decision by a Primary Decision-maker.

3. In the later case of *Bailey*[22] the AAT followed the decision of the Federal Court in *Forrester* in which the Court held:

   ***It is not a process intended to put insuperable hurdles in the way of the veteran,*** *while still ensuring that the requisite causal connection between the veteran's war service and the disease, injury or death is established.* (This writer's bold highlighted emphasis).

4. The deliberate practice of denying a veteran and their treating medical practitioner or specialist access by way of disclosure, of a DMA's opinion, is indeed a process in fact places an ***insuperable hurdle*** in the way of veterans endeavouring to have their appeal succeed. The deliberate withholding of medical evidence offends Common Law decisions. I submit that this action by DVA is on every level unconscionable conduct. It follows, that DVA has abrogated its duty is to act as an honest broker and as a model litigant.

5. The application of such a policy is completely illogical and callous. It should be rescinded and a provision included in the harmonising of MRCA, VEA and DRCA compelling disclosure, and that any such direction to disclose, should also be promulgated in Departmental Guidelines in CLIK.

[21] Above, n.19.
[22] ***Bailey and Repatriation Commission*** [2017] AATA 1909 25 October 2017, at [39] ***Forrester v Repatriation Commission*** (2013) FCA 898 followed at [19].

**COMMENT**

1. The practice of withholding medical evidence occurs and prevails to this day. The most recent cases prosecuted by this writer were with no medical evidence being disclosed by the Commonwealth.

2. It necessitated requesting the VRB to seek furthers and betters from DVA, causing further delays, frustrations and distress for clients.

3. The decisions in Ridgeway, Bailey and Forrester put the necessity for case law regardless of whether not it MRCA ,puts the issue of judicial relief for a veteran beyond doubt.

**NATURAL JUSTICE ISSUES – WITHHOLDING EVIDENCE**

1. In view of the facts as enunciated above, it is clear on the facts that as an agency of the Commonwealth, DVA is embarking on a deliberate campaign of obfuscation in an attempt to deprive a veteran and their treating medical practitioner/specialist access to a documented decision made by a DMA that should be able to be challenged by a veteran's medical partitioners.

2. As such, this practice operates to create a very uneven playing field with one victor only, the Repatriation Commission and its stablemate the MRCC.

3. It is a reprehensible practice with a single intent, namely to deprive by deliberately withholding medical evidence, the right of a veteran or veterans' widow/er to procedural fairness based on the **whole of the material directly relevant to his or her case**, and not suffer through DVA selectively withholding evidence.

4. The inference to be gained from this egregious practice is that both the Commissions and DVA have completely abrogated their duty to act in terms of disclosure, as a model litigant.

5. It is the RAAC Corporation's submission that DVA has and continues to breach its duty of care in providing all documentation as part of its disclosure obligations.

6. It is further submitted that DVA has denied and continues to deny, veterans and their medical practitioners access to evidence to which they are entitled. It is a denial of justice and in breach of the Commonwealth's Model Litigant policy.

7. It is also submitted that the VRB is denied the capacity to make a finding of fact if it is prevented from reviewing **the whole of the material before it**. It is not an exaggeration to contend that it is in fact an action that amounts to a contempt of Board by the Commonwealth.

**GOLD CARD (p.15)**

1. The contention by veterans is that *"Automatic granting of Gold Cards for DRCA veterans with 80+ impairment points."* Currently no eligibility exists in law for DRCA veterans to have an entitlement to a Gold Card.

2. This changes with the VETS Bill in 2026. Gold Card eligibility under MRCA arises where a veteran has an impairment rating of **60 impairment points.** No requirement for a Lifestyle Assessment exists where an impairment rating of **80 impairment points** has been reached.

3. DRCA veterans will be grandfathered under the current legislative eligibility. The maximum impairment is capped at **80 impairment** points. It follows that the argument centred on **80-plus** impairment points is misconceived. It fails and falls on fallow ground.

**LIFESTYLE EFFECTS**

1. The Thematic Analysis is deficient in a material particular, namely Lifestyle Effects.

2. The matter of Lifestyle Effects is one factor not considered by DVA in this exercise. This is despite the Productivity Commission Inquiry Report No 93 'A Better Way to Support Veterans' recommending at Recommendation 14.2 and 14.5 that DVA improve its rating system.

3. As such, that is a failure of process that needs to be rectified.

4. It is well settled that eligibility for the issue of a Gold Card vide MRCA is established when a veteran has been assessed at **60 impairment points**. That level of impairment is significant and still requires a veteran to undergo completing a Lifestyle Questionnaire and to also try and work out who should assess or not assess the veteran's responses to the questions.

5. Completing this proforma is an exercise that is fraught with risk though the use of a veteran's own words which may not accord with the terminology applied by Determining Officers/Delegates in their assessments of this document (the Rule of Best Fit).

6. The document is a maze of bewildering questions with insufficient room to allow a veteran to describe adequately the Lifestyle effects in GARP 5 and 5M tat apply to the veteran.

7. This writer has seen veteran clients experiencing significant stress being generated by this document since the first edition of GARP since its inception and subsequent amended editions.

8. It is the RAAC Corporation's considered position that once a veteran has been assessed a 60 Impairment points with automatic grant of a Gold card, no requirement for a Lifestyle should exist.

9. The issue of a Gold Card to a veteran is a significant step and a major waypoint in the veterans' landscape. At that level under MRCA, it is an acknowledgement and recognition that the deterioration in a veteran's quality of life (lifestyle) is of a such a level of significance, no need should exist requiring a Gold Card veteran at that or any subsequently higher level to 79 Impairment points (not required at 80 points), to undergo the egregious process of a Lifestyle Assessment.

10. To subject a broken veteran to that process for 60 Impairment points up to 79 Impairment points amounts to an abuse of process. It is unreasonable and oppressive and acts as a fetter to veterans having a smoother more trouble-free passage in respect of the Gold Card process.

**PRESUMPTIVE LIABILITY and OTHER ISSUES FROM THE HARMONISING (WEBINAR 3/4/24) - DRCA and STATEMENTS of PRINCIPLE (SoPs)**

Under the current DRCA non-SoP regime, a more beneficial threshold is applied to claims.

That beneficial approach will no longer apply from 1 July 2026. Under MRCA Mk 2 the substantive SoPs will be applied to all DRCA claims. The application of SoPs to DRCA matters will introduce, a higher evidentiary bar for claimants.

It will result in a significant number of claims which were previously acceptable under the more beneficial DRCA regime, now refused due to the inflexible black-letter law approach of the SoPs in respect of needing to meet at least one of the factors listed in the relevant SoP.

**WEBINAR - GENERAL MATTERS**

- there are over 40 Primary Conditions and over 40 Sequelae Conditions which are accepted on a presumptive liability basis.
- the availability to all veterans of the higher travel reimbursement amount, regardless of kilometres, when a private vehicle is used to travel for treatment. This provision will eliminate the need for MRCA veterans to travel over 50 kms minimum and who are paid a lower rate of allowance. The provision will now include unlimited kilometres paid at the higher rate of allowance as paid to VEA veterans.
- The change represents an ideal marriage of two policy improvements that will greatly benefit veterans travelling to medical appointments
- Although the Explanatory Memorandum (EM) is silent on the Repatriation Appliances Programme (RAP), the RAAC Corporation supports the retention of the RAP and Treatment Principles in MRCA. Additionally, the harmonising of MRCA provisions opens access to MRCA rehabilitations to **VEA-only veterans** if they choose to access those provisions after 1/7/2026.

- **CRYSTAL BALLING - DATE OF EFFECT FOR PERMANENT INCAPACITY (PI) PAYMENTS**
  The provisions of this policy as they currently stand are confusing to the medical profession in requiring GPs and specialists to **"guesstimate"** the date of effect of a condition for purposes of PI calculations. Consequently, the Act will be simplified to reflect the following:

  1. It will be sufficient for a Doctor's opinion to state in their opinion that the condition claimed *"became permanent and stable*" on a specific date;
  2. The Commission will accept that estimation and will pay PI compensation *"from the first day of that month as it is a daily entitlement."*

- **POSTHUMOUS CONVERSION OF PI PERIODIC PAYMENTS**
  Where a veteran dies before electing to nominate a payment method for his/her PI payments, the estate may be able to convert that payment into an age-based lump sum as though the deceased veteran had made the choice. The conversion will not include applying the Lifestyle effects of the condition.

- **20 DEATH OR INJURY PROVISIONS – EM ITEMS 83 TO 87**
  **(EM p.48).** The death or Injury provisions in **Items 83** to **Item 87** are noted, in particular, *vide* **Item 83** that automatic acceptance of the injury incurred will take effect. Additionally, no requirement will exist to apply either a RH SoP or a BOP SoP in circumstances where a death on service (**Item 84** and **Item 85**) occurs.

  The RAAC Corporation supports the introduction of this policy. It represents a major and positive improvement in removing the unreasonable burden on serving members and the families of members killed on duty, to undertake a ruinous and tortuous process of trying to convince a Primary Decision-maker the injury or death was sustained whilst on duty.

  The RAAC Corporation believes such a major policy change designed to streamline death or injury provisions must be included in CLIK in the Advisory Notes, Commission Guidelines or Departmental Instructions.

- **DRCA VETERANS AND SRDP ENTITLEMENTS (DVA Webinar 3/4/24).**

1. DRCA veterans must meet the threshold test in that they must have a fresh condition accepted after 1 July 2026 or have a 5-point worsening of any condition previously accepted prior to 1 July 2026.
2. DRCA veterans will have a pathway to SRDP eligibility which will include eligibility for a Gold Card if they are assessed at 60 impairment points.
3. The 50-point threshold for grant of SRDP remains.

- **EDUCATION SCHEME**

  Children of severely injured DRCA veterans or children of deceased DRCA veterans will have access to the education schemes enshrined in MRCA.

**FURTHERS AND BETTERS ON PRESUMPTIVE LIABILITY**

In late April 2024, this writer approached the EA to the Repatriation Commissioner seeking furthers and betters as to the exact type of injury/illness that would attract that description. The following email plus a list of conditions eligible for straight through processing(STP), was received on 8 May 2024. A copy of the list is attached. The email below is instructive; viz

*Good morning Noel*

*I have received the below advice from the department regarding your enquiry on presumptive liability.*

*It may be helpful to explain at the outset that, unlike the United States Department of Veterans' Affairs the Australian repatriation system does not currently use 'presumptive' arrangements that automatically enable benefits for certain conditions to be provided where service of a particular type has been rendered. However there are a number of approaches that are utilised under the Acts to simplify claim assessment or where a condition will be considered to be related to military service unless the contrary is demonstrated.*

*The most similar approach to 'presumption' is for declared occupational conditions (referred to as 'deemed conditions') specified under Sections 7(1), 7(2), 7(8) and 7(9) of the Safety, Rehabilitation and Compensation (Defence-Related Claims) Act 1988 (DRCA). These provisions specify certain types of employment or exposure and conditions where employment of the defined type is taken to have caused the condition unless the contrary is proved. Where service of the relevant defined type, timeframe and/or exposure is rendered, under these provisions:*
*the employment in which the employee was so engaged shall, for the purposes of this Act, be taken to have contributed, to a significant degree, to the contraction of the disease, unless the contrary is established.*

*Deemed conditions under DRCA arising from employment involving a specified type of exposure are defined in the Federal Register of Legislation - Safety, Rehabilitation and Compensation (Specified Diseases and Employment) Instrument 2017.*

*Further, there are specific DRCA provisions for defined conditions covering ADF Firefighters who have performed that duty for a specified duration. Details of these conditions are at https://clik.dva.gov.au/military-compensation-srca-manuals-and-resources-library/liability-handbook/ch-22-declared-occupational-diseases/224-specific-types-service/2245-adf-firefighters*

*ADF Firefighters at Point Cook between 1957 and 1986 are also covered for a range of conditions via DRCA deeming arrangements. Details of these conditions are at https://clik.dva.gov.au/military-compensation-srca-manuals-and-resources-library/point-cook-firefighters-adf-firefighters-scheme*

*Finally there are provisions allowing for the deeming of conditions under DRCA relating to employment in the F-111 deseal-reseal program at https://clik.dva.gov.au/military-compensation-srca-manuals-and-resources-library/f1111-desealreseal/list-diseases-and-revised-icd-codes*

*Both the Veterans' Entitlements Act 1986 and the Military Rehabilitation and Compensation Act 2004 contain provisions that specifically state the Commissions are not entitled to presume a condition relates to military service. However, Commissions have authorised the use of streamlining or straight through processing (collectively known as 'decision-ready') to simplify processing, reduce evidence required and enable acceptance of claims in circumstances where evidence available to DVA indicates that cohorts of ADF members will have experienced a relevant exposure and have rendered service of a relevant type and duration (which can vary according to types of service, rank and other factors) where exposures in service will meet a causal factor defined in the Repatriation Medical Authority Statements of Principles (SOP), and where the condition has onset within the relevant latency period required in the SOP. Conditions covered under decision-ready arrangements and the relevant causal SOP factor are attached.*

*DVA continues to explore opportunities and the evidence base to expand conditions covered under these arrangements and to simplify the claims process.*

*Importantly, neither deeming under DRCA nor decision-ready policies enable or require the 'automatic' acceptance of a claim.*

*Should a veteran not meet the relevant parameters for a condition to be accepted under deeming or decision-ready arrangements, a claim would of course be able to be assessed under the normal liability processes to establish a connection to service.*

*It is worth noting that under the proposed reforms to veterans' legislation it is planned to allow presumptive acceptance of liability for certain conditions under the MRCA, with the initial list of conditions being based on those conditions that are currently considered under the 'decision-ready' arrangements noted above. These provisions will have the effect of enshrining into legislation the existing administrative practices that are aimed at reducing the evidentiary requirements for individual liability claims and the time taken to process those claims. The new legislation will allow liability for certain conditions to be accepted under the MRCA on presumed contribution by their employment, without the need to establish a causal link to service on a case-by-case basis.*

*Detailed information regarding the Australian Government's proposed reforms to veterans' legislation can be found here. I hope this information is of assistance, let me know if you need anything further and I can put you in direct contact with the responsible business area.*

*Kind regards*
*Alison Grady | Executive Officer to Kahlil Fegan DSC, AM*
*Repatriation Commissioner Department of Veterans' Affairs*

**CONCLUSION**

(1) The proposed harmonising of all three Acts is one that is welcomed but it still creates a significant degree of suspicion. That suspicion is completely understandable given the history of DVA which has been highlighted in the Royal Commission into Defence and Veteran Suicide.

(2) The work undertaken to grandfather across all relevant parts of the VEA 1986 and DRCA 1988 is commendable.

(3) However, the RAAC Corporation submits that the issues addressed herein and in accompanying documents give rise to the not unreasonable contention that more needs to be done in order to eliminate as many problematic legislative speed humps as possible before 1 July 2026.

(4) It is crucial to the credibility of Government and DVA that all reasonable attempts must be taken to eliminate these matters of concern.

Submitted for your information.

**Noel Mc Laughlin OAM MBA**
**Chairman**
**RAAC Corporation**
**12 August, 2024**

**ACCOMPANYING DOCUMENTS**
1. Formal submission to the DVA Legislative Reform Team 14/4/2024
2. DVA Thematic Analysis of Submissions Received
3 STP Claims Processing (Presumptive Liability)