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Dr Kathleen Dermody
Committee Secretary
Senate Foreign Affairs, Defence and Trade Legislation Committee

By email: Kathleen.dermody@aph.gov.au

Dear Committee Secretary

Re: Veterans' Affairs Legislation Amendment (Military Compensation Review and Other Measures) Bill 2013

Slater & Gordon is Australia's largest consumer law firm and is recognised as the leading provider of legal advice and representation to injured Australian Defence Force (ADF) personnel and Veterans' in every State and Territory. We have a dedicated military compensation team that has assisted thousands of ADF personnel, Veterans' and their families. We have a longstanding commitment to working with the Department of Veterans' Affairs and the Defence Department on improvements to repatriation and military compensation schemes.

Accordingly, we welcome the invitation to comment on this Bill. We support most of the provisions in the Bill. However, the Bill could be improved by further clarification in some areas, the inclusion of measures to address administrative problems and delays with decision making and further measures to address benefit inequities. In relation to the later, we note that these issues have been raised in previous Slater & Gordon submissions and direct communications to the Department of Veterans' Affairs.

We **enclose** a copy of our original submission to the Military Compensation Review dated 30 June 2009. The submission relates to important rights of ADF personnel and Veterans' whose claims deserve timely and considered attention. In addition to recommendations that we make to improve administration of the scheme, we have outlined as a key concern that benefits and support under the *Military Rehabilitation and Compensation Act* 2004 (MRCA) from inception did not match the *Veterans' Entitlement Act* 1986 (VEA) or the *Safety, Rehabilitation and Compensation Act* 1988 (SRCA). Some of the measures in this Bill address these concerns but some inequities remain.

Our suggestions to further improve the Bill are outlined below.

1. **Matters not addressed by the Bill**

    1.1 Time frames for making decisions should be included in the legislation in line with other Compensation schemes.

We submit that the Department and the Military and Rehabilitation and Compensation Commission, like all large organisations, are susceptible to administrative challenges in the handling of individual claims.

Despite the best will of the many people involved, and despite the *Service Charter*, claims, correspondence and even whole files continue to be lost in the system, causing delay and

frustration for injured and ill personnel. This system is one of the few compensation schemes that does not include time frames for responding to claims or for making key decisions. Whilst the *Service Charter* is important, it is largely symbolic because it is not enforceable by a claimant.

The first recommendation in our submission of June 2009 was that the system would be improved for claimants if time frames were inserted in the MRCA and the SRCA modelled on those in the *Seafarers Act.* We recommend as follows:

- Decisions in relation to acceptance or refusal of liability for claims (within 30 days of the claim or 30 days after receipt of information requested by the decision-maker);
- Decisions in relation to compensation (30 days); and
- Re-consideration of original determination (30 days).

If a decision is not made within the specified time frame, the claim should be deemed to have been rejected and the claimant able to apply for re-consideration or review.

To complement these timeframes, DVA should meet requests to provide medical records, within 14 days.

If the time periods suggested are considered insufficient to allow DVA to determine a claim then it is our submission that a deemed time period should be included to provide some deal of certainty to a claimant. The present Guidelines have been proven to be a failure.

1.2 Treatment of superannuation in relation to incapacity payments – superannuation should be preserved for its intended purpose.

We note that the Bill does not address the current practice of offsetting the Commonwealth contribution to military superannuation (retirement pay) against payments for incapacity, especially in relation to the SRDP. This is disappointing in light of the Government's overall commitment to encouraging the preservation of retirement incomes. We believe that superannuation should be protected and not treated as pre-retirement income maintenance.

We recommend that the Committee consider amendments to the Bill that would safeguard superannuation (retirement payments) from offsetting provisions.

1.3 Service Differentiation

We believe that the compensation scheme should treat people similarly, regardless of where and when they served. Prior to the enactment of the MRCA, there was no service differentiation for the purpose of permanent impairment benefit rates under the VEA or SRCA.

We also believe that there should not be a differentiation in relation to compensation following loss of life. We contend that needs of families and dependants following the death of an ADF member are not altered by the location or type of service that resulted in a tragic loss of life.

1.4 Making review processes fairer and more efficient – remittal power of the VRB

On receipt of a primary decision, a claimant may choose between review by the VRB and the MRCC.

The jurisdiction of the VRB extends to making whatever determination the MRCC could have made.

However, where liability for the injury or disease was rejected by the MRCC and subsequently accepted by the VRB, the information required to determine entitlements would not be available to the VRB as the MRCC would not have conducted a Needs Assessment.

The Bill allows the VRB to remit a matter to the MRCC to assess the rate of compensation payable to a person.

We have previously submitted that two appeal paths creates unsatisfactory outcomes and have raised particular concerns in relation to the VRB producing outcomes that are less beneficial to claimants. From this point of view, it is disappointing to see the Bill increasing the VRB's powers.

Further, despite the Irwin Federal Court decision, claims in relation to liability and compensation on the one claim are still not being dealt with concurrently, causing delays and frustration for claimants and additional costs.

It is noted that most liability decisions also require a medical opinion and there appears to be no logical reason why the current practice of dealing with matters separately would be continued. We draw to the attention of the Committee that this practice results in files being passed from one area of the Department to another, often involving interstate transfers and resulting in delays and the loss of files.

2 Matters requiring further clarification in the Bill

2.1 Compensation for Permanent Impairment – Interim Payments and Offsetting

The intention of amendments to this Section of the MRCA is to:

- make the date of effect for periodic compensation on the basis of each accepted condition rather than all accepted conditions;
- incorporate an impact on lifestyle factor in the calculation of interim lump sum compensation; and
- Insert a transitional provision applicable to the re- calculation of amounts of lump sum compensation paid prior to 1 July 2013, where the person already has an accepted injury/disease under SRCA and/or VEA.

We welcome these changes because they will result in a greater component of a person's overall entitlements being paid earlier and when they need it.

The amendments also allow for payment in relation to one stable permanent condition, even if other conditions are not stable. We agree with this in principal.

2.2 Clarification is needed in the Bill to ensure that payments in relation to stabilized conditions that meet the 10 'whole person impairment' points threshold, do not result in failure to compensate conditions that stabilize later but on their own, do not meet the impairment threshold.

We raise a concern regarding the wording of the Bill that we believe should be addressed. This concern may be an unintended consequence of the legislative drafting and is illustrated below.

Presently a person must have at least 10 impairment points (excluding compensation for hearing loss, loss of or loss of use of a toe or finger and loss of sense of taste or smell) to receive compensation. Under the MRCA'whole person impairment' (WPI) is assessed and a client may have two separate injuries which attract, for example, 5 points and 10 points respectively.

Currently, the claimant receives compensation for the combined 15 points when both impairments are stable. Under the amendments as they are currently worded, if the 10 points WPI condition was stable and the 5 point was not, the MRCC could pay compensation for the 10 points condition immediately. Our concern is that, when the 5 point condition stabilizes and the claimant seeks payment, unless the Bill is clarified, lump sum compensation could be denied on the basis that the impairment is less than the 10 points threshold.

We recommend that the Bill be clarified to ensure that conditions assessed following an initial condition that has stabilized and that meet the 10 points WPI threshold, be compensated even though on its own, the subsequent condition is less than 10 points.

2.3 Transitional provision- recalculation of amounts paid before 1 July 2013. Proposed changes to the GARP M methodology will need to be scrutinized to ensure they are fair.

Section 13 of the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* provides for a methodology to be included in the GARP M, under section 67 of the MRCA, to calculate the amount of compensation a person is to be paid where they already have an accepted injury or disease under the SRCA and/or VEA. This methodology has been found to result in lower or higher net permanent impairment payment than expected (when taking into account the impairment points flowing from MRCA conditions).

This methodology will now be changed and will be applied retrospectively and prospectively. Retrospectively, where the new methodology would result in a higher payment, the additional amount will be paid as soon as is practicable.

The new methodology is provided for through the GARP M and therefore no amendments are made to the legislation.

We agree in principle with the intention to amend the GARP M to avoid inequities. However, we have not had the opportunity to review the proposed changes to the GARP M methodology. As the legislation does not need to be amended to change the methodology, a description of the changes is not included in the explanatory memorandum.

We are also concerned in relation to an administrative matter that we understand is beyond the scope of this Committee's deliberations. It is proposed that retrospectively, the MRCC will pay an additional amount to any claimant who would have received a higher payment (in the past) had they been assessed under the new methodology. While we applaud this in theory, we are concerned that the burden this will place on the MRCC will result in additional delays in determining ongoing claims, a matter which is already an issue.

2.4 Aggravation of or material contribution to war-caused or defence-caused injury or disease - removal of the election process will result in inequities

The amendments to these sections will require all claims for conditions accepted under the VEA and aggravated by defence service after 1 July 2004 to be determined under the VEA. The claimant will no longer be able to elect between claiming the aggravation under the VEA or MRCA. The amendments remove the section 12 election provisions.

We believe it is unjust to remove the entitlement to claim under MRCA simply because an earlier claim was made under VEA. An earlier VEA claim may have been made prior to enactment of MRCA, so it cannot be suggested that the claimant made a choice between the Acts when submitting an initial claim.

The following inequities and concerns result from this amendment:

- for an aggravated injury after 1/7/04 (and previously accepted under VEA) the claimant is limited to the pension options available under VEA and cannot claim a lump sum under MRCA; and

- the election may have been confusing for claimants, but this was most likely due to poor written advice and poorly drafted letters from the Department to claimants and lack of understanding of the MRCA.

Yours faithfully

Brian Briggs
Practice Group Leader
SLATER & GORDON