THE RAAC CORPORATION LIMITED
ACN 156 250 958
ABN 29 156 250 958

The Responsible Officer
Legislative Reform
DVA
PO Box 9999
Brisbane QLD 4001

SUBJECT: RESPONSE TO THE DRAFT HARMONISATION BILL 2024

Thak you for the invitation from the Minster's Office dated 28 February 2024, to provide a response to the legislative harmonising exercise currently under way.

I am pleased to inform you that a submission has been prepared and is attached for your consideration.

This document is tendered in good faith and with sincere intent. It is hoped it is accepted in the spirit in which it was tendered.

Yours sincerely,

Noel Mc Laughlin OAM MBA
Chairman
RAAC Corporation
14th April, 2024

THE ROYAL AUSTRALIAN ARMOURED CORPS CORPORATION RESPONSE TO THE VETERANS' ENTITLEMENTS, TREATMENT AND SUPPORT (SIMPLIFICATION AND HARMONISATION) BILL 2024

It appears there has been a catastrophic failure of leadership at a government level and within the military to prioritise the urgent reforms and implement effectively the previous recommendations required to deliver improved health and wellbeing outcomes for defence personnel and veterans – and, as such, the senseless loss of life continues today.
It is a national disgrace.
Commissioner Kaldas APM, Opinion piece dated 29 February 2024 online at https://defenceveteransuicide.royalcommission.gov.au/news-and-media/media-releases/opinion-piece-royal-commission-chair-nick-kaldas-guardian

The 21st century ESOs and kindred organisations will continue to advocate for all current and former serving veterans and their families to ensure beneficial and remedial legislation delivers to veterans and their families, the full range of support and compensation that is their due, and will fight to ensure such rights duties and aspirations enshrined in law by Government are never derogated by Government. **Noel Mc Laughlin OAM Chairman RAAC Corporation Limited**.

Noel Mc Laughlin OAM MBA
Chairman
RAAC Corporation
14th April, 2024

THE RAAC CORPORATION LIMITED
ACN 156 250 958
ABN 29 156 250 958

PURPOSE

To brief you on the RAAC Corporation's response to the *Veterans' Entitlements, Treatment And Support(Simplification and Harmonisation) Bill 2024* (the Bill) following the release on Wednesday 28 February 2024 by the Minister of the proposed Draft Bill (327pp) and the accompanying Explanatory Memorandum (EM) (104pp). This brief attempts to address the issues discussed and to also inform you on matters arising from that examination.

This brief examines the proposed legislative landscape sent out from the Minister's office, including the need to travel down a number of lateral pathways and address issues that are also organic to the matters arising from this such a major policy initiative.

The sponsor agency is the Commonwealth Department of Veterans' Affairs (DVA) vide the Responsible Minister, the Honourable Matt Keogh MP.

1 INTRODUCTION

The **Royal Australian Armoured Corps Corporation Limited** (the RAAC Corporation) is a Tier 1 ASIC and ACNC - registered entity which was stood up on 14/3/2012 and subsequently registered with the ACNC on 15/7/2021. The RAAC Corporation is a limited company[1] formed for a charitable purpose.

The RAAC Corporation represents the interests of 3000 former serving members of the RAAC and the interests of up to 2000 serving members of the RAAC. It is supported by an Advisory Board which represents the interests of the RAAC. The Advisory Board achieves this through advocating on major issues up to and including, the highest levels of Government.

[1] http://asic.gov.au/regulatory-resources/financial-reporting-and-audit/preparers-of-financial-reports/companies-limited-by-guarantee/obligations-of-companies-limited-by-guarantee/

2 EXECUTIVE SUMMARY

"Veterans know better than anyone else the price of freedom, for they've suffered the scars of war. We can offer them no better tribute than to protect what they have won for us."
US President Ronald Reagan, in a radio address to the nation 5th November 1983.[2]

'Lest we forget' is not just a slogan, it is a commitment'. Australian veterans and their families have never shirked their duties for the nation, it is unfortunate that successive governments and bureaucracies do not exhibit the same sense of duty to those same veterans and their families.

As the Minister for Veterans' Affairs, The Honourable Matt Keogh MP said in a speech on the Government's commitment to veterans dated 13 April 2023; *"It is fair to say that consecutive Governments have not always lived up to their end of the bargain".*

The Commonwealth Department of Veterans' Affairs (DVA) is a Department of State, owned and paid for by Australian taxpayers, including veterans who are considered to be the Department's primary shareholders. DVA has borne the brunt of sustained criticism in recent years causing it to suffer reputational damage.

It is acknowledged that there are many veterans whose matters have been handled professionally, successfully and with empathy, by DVA Delegates.

DVA is a 108-year-old niche, specialist pioneer Department of State, delivering an enormous suite of pension and support services, to veterans and their families. It is considered to be a market leader in the veterans' support sphere, with a durability and dominant brand awareness level throughout Australia and internationally, giving it a strategic competitive edge.

DVA is considered world's best practice in the veterans support sphere.

DVA's length of unbroken service to veterans and veterans' widows places it firmly in the description of a pioneer Government organisation in that, it is considered to be a pioneer within the Australian Government in developing and delivering a range of highly specialised services to support veterans. Consequently, the RAAC Corporation considers that this pioneer pedigree and lineage gives DVA a significant advantage in being retained rather than abolished, as some have advocated.

Recent events have seen DVA's best practice suffer damage to its brand image and also caused many veterans and veterans' families to needlessly suffer detriment in their treatment by DVA.

The Department has suffered a catastrophic loss of confidence and trust in the way it manages claims and support to veterans and their families. It has failed in its duty to act as an honest broker, to operate on a level playing field and act as a model litigant, further damaging its hard-earned reputation. Its pedigree and lineage is diminished.

[2] https://www.youtube.com/watch?v=6MXOLzLRzho [accessed 30/3/2024]

It is the height of folly to have three different Acts for just **one only single class** of individual, namely Defence Force members, currently serving and former. It should never have happened and is considered to be a policy disaster resulting in the establishment of a Royal Commission into Veteran and Defence Suicide, which recommended *inter alia*, harmonising the three veterans' Acts into one single operating Act.

The three-Act scheme can best be described as a Triangle of Pain.

The harmonising exercise represents an opportunity for the Commonwealth as represented by DVA, to regain the credibility and respect that it has lost.

The harmonising as recommended by the Royal Commission (2019 and the Interim Report of the Royal Commission (2023) is to be seen to be the end to what is considered on every level to be an unworkable legislative regime.

Although the Royal Commission's Interim Report resulting in harmonising three Acts is cautiously welcomed. It remains to be seen whether or not this rebadged Act is easier to navigate and whether or not it will contribute to DVA regaining the confidence and trust of the veteran community.

In order that past failings in veteran benefits legislation are not repeated at the expense of the veteran community and the Australian taxpayer, it is important that the Harmonisation Bill be given sufficient air time to allow considered not rushed examination and analysis.

Beneficial provisions discussed in this submission are supported. The beneficial provisions which will be now available to DRCA veterans are significant and supported.

The grandfathering of beneficial and other provisions from the VEA and DRCA to MRCA Mk2 is not without its flaws. The RAAC Corporation's examination of the documentation provided by the Minister's office has identified a number of problems, some of which for example, will result in genuine hardship for veterans and families through overpayment claw-back and complete cessation of all payments by DVA, causing inordinate hardship for affected veterans and families until resolution of the debt. . In some cases the debt only occurred due to inadequate DVA internal procedures.

The RAAC Corporation questions how the legislation will proceed with claw backs of overpayments and submits that, flowing from the Royal Commission into the ROBODEBT Scheme, Recommendation 13.3 should e considered y DVA viz, *"Face to face customer support options be made available for vulnerable recipients needing support."* The RAAC Corporation believes that unlike the ROBODEBT Scheme any debt recovery must at every level be equitable and transparent. Furthermore, any clawbacks have as a first external appeal to the proposed Australian Review Tribunal (the ART).

The provisions of the Social Security Act 1991 and the findings of the Royal Commission into ROBODEBT provide interesting insights in how DVA could adopt some of the provisions into managing debt recovery processes.

The RAAC Corporation has proposed a Refund Review Programme to be established to deal with overpayments/claw-backs as no appeal lies with DVA therefore requiring all appeals to be heard by the Federal Court. This places undue pressure on the judicial system when the matter could be resolved by the ART in the first instance.

The RAAC proposes that the inclusion of a sliding scale of debt repayments based on the VEA Model needs to be promulgated and enshrined as a Schedule to the Act. Similarly the RAAC Corporation argues for the implementation of a six-year statute limitations on debt repayments similar that recommended by the ROBODBT Royal Commission at Recommendation 18.1. The RAAC Corporation further proposes that a Guideline Note be inserted in MRCA Mk 2 and that all provisions be promulgated in CLIK.

The RAAC Corporation contends that, in order to prevent a repeat of the ROBODEBT debacle, equitable and transparent debt recovery must occur.

The grandfathering of VEA veterans to access statutory relief in the form of being able to access either the waiver or write-off provisions related to a debt incurred through an overpayment closes an unacceptable gap in VEA veterans being unable to access this beneficial and remedial provision.

The RAAC Corporation has also proposed a review scheme be established for reviewing adverse determinations in respect of applications for assistance from the Vehicle Assistance Scheme, Repatriation Appliances Programme and Health Approvals.

The RAAC Corporation disagrees with DVA's refusal to have the Common Law damages quantum in s.385 MRCA subject to indexation as is the case for the Service Pension.

The lack of indexation and the paltry amount it has been increased to ($177,000), still puts veterans behind their better-paid civilian counterparts in terms of compensation. Any disparity which sees veterans fettered in their ability to pursue claims against the Commonwealth *vis-a vis* civilian counterparts is unconscionable.

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 RAAC Corporation disagrees with the proposal to reduce the time frame for the production of documents (the s.173 – new s.352D Reports) for an appeal to the VRB by 33% from 42 days to 28 days.

This is because a truncated time frame places an additional and oppressive burden on DVA to prepare and issue the relevant reports. This potentially leads to errors in the compilation of these reports due to errors in attempting to meet an unrealistic deadline. The resultant workplace stress on public sector employees and subsequent sick leave (causing staff shortages) will see compensation claims lodged, based on an unsafe and unhealthy workplace, speaks for itself.

Additionally, the RAAC Corporation has identified a flaw in the matter of DRCA claims and the SoPs. The transition by DRCA claimants as at 1 July 2026 to the stricter and more rigid SoP regime is one which spells danger for DRCA veterans given they are presently under a more beneficial threshold for their claims. That will change as of 1 July 2026, when DRCA claims not yet determined, come under the SoP regime with the attendant risks in DRCA veterans' claims being refused.

The RAAC Corporation views such a move to be oppressive and unreasonable, acting as a fetter to ensuring DRCA veterans do not suffer detriment. The RAAC Corporation proposes the establishment of a Special Circumstances Claim (SCC) evaluation process to examine and determine the eligibility or otherwise, of DRCA veterans to come under the shield of the overriding provisions of s.340 MRCA.

The elimination of Internal Review Officers (IROs) under DRCA and the extension of a single appeal pathway to the VRB for DRCA appeals is most welcome. Similarly, the retention of straight-through claims processing is also welcomed.

Additionally, the continuation through grandfathering the statutory prohibition on legal practitioners appearing before the VRB, is also welcomed. The evidence to the Royal Commission of a former Principal Member of the VRB which is discussed in this submission, is on every level a master-class for DVA on how to conduct its business.

The intentional withholding of medical opinions of Departmental Medical Advisers (DMAs) from a veteran's Section 137 Report (new s.352D) - also known as the Departmental Report, is a direct and deliberate breach of disclosure rules. It can be construed as a wilful intent to frustrate a veteran's appeal, leading to criticism by the judiciary which will further damage DVA's already damaged reputation.

This particular Report is integral to and critical for, the prosecution by Advocates of an appeal before the VRB. The RAAC Corporation has commented in detail on this issue. Intentionally withholding medical evidence is manifestly unethical and is an exercise in bad faith by DVA which the RAAC Corporation contends calls into question, the integrity of DVA by the Department's tactic of intentionally leaving out of a s.137 (news.352D) report documents that are critical and central to a veteran's appeal to the VRB.

It is not known how successful the operation of this harmonised MRCA Mk 2 will be.

It is not an exaggeration to contend that flaws still exist wthin the Act that have not been identified.
It is also not an exaggeration to contend that flaws in the grandfathering process may also be carried over undetected.

It follows that, concurrent action should commence from 1 July2026 on a compete rebuild and re-drafting of a new Omnibus Bill to replace the patched-up architecture of MRCA Mk2.

Although operating as a single Act, MRCA Mk 2 will continue to stand tall as an Act that is, at its core, a hybridised cut and paste piece of legislation.

3 PREAMBLE

1. It is the RAAC Corporation's stated position that veterans are the conscience of the Nation.

2. The Government and the nation owes and will continue to owe, an enormous debt of gratitude to those whom Governments send in harm's way in the service of the nation, overseas on operations and domestically, battling natural disasters, never forgetting what veterans gave up to do their duty, as lawfully directed by the elected Government of the day.

3. In addressing the uniqueness of military service, Anderson wrote:[3]

   …this uniqueness tends to lose its sharpness, at least in society's mind, during a long spell of peace, and some would claim that the major threat to Service life is the steady move towards conditions which fail to reflect and properly compensate this uniqueness, and tend to place military personnel gradually closer to the public servant.

That uniqueness which inextricably attaches to military service must never be blunted.

4. The concerns expressed by Anderson were paralleled by the Productivity Commission in unwisely mooting civilianising compensation and support to veterans.
   That is anathema and prejudices the concept of uniqueness. Such a proposal must never be allowed to occur, given the demands and expectations placed by the nation on its Defence Force members - Regular and Reserve and the uniqueness of their service to the Nation.

5. The three current Acts in this exercise are remedial Acts and are beneficial in intent.
   Their intent is to remedy circumstances whereby a veteran, serving or former, suffers an insult to their system during military service, for which remedial action including pensions, compensation payments and rehabilitation, are provided by the Commonwealth through its agent, DVA. Additionally, where relevant, remedial action also extends to the families of veterans who are living or deceased.

6. The RAAC Corporation's position on the proposed restructured MRCA Mk2 is that it too, is remedial in nature and DVA must focus on that fact.

7. Veterans have suffered a catastrophic loss of faith in DVA's commitment to veterans; namely, *"For what they have done, this we will do."*

8. Veterans are entitled to believe the commitment by PM Billy Hughes to troops in 1917 that *"when you come back we will look after you"* has not been met. It could be argued that Billy Hughes's promise is over one hundred years old and the world has changed significantly in the intervening years. However, Australia still sends men and women to fight in its name.

---

[3] Anderson, D., ***The Challenge of Military Service: Defence Personnel Conditions in a Changing Social Context,*** Foreign Affairs, Defence and Trade Group 10 November 1997 online at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/Background_Papers/bp9798/98bp06#1 [accessed 21/9/19]. As of 28/3/2024 the article has been archived by Parlinfo at https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/Archived#1

9. Veterans have a well-founded and reasonable expectation that in return for their service and sacrifice, they will be treated fairly by their Government.

10. Veterans are entitled to feel they have not been so treated. The current legislative framework is ample evidence of this.

11. At the Minister's meeting on 20/2/24 attended by this writer, the Minster was asked by a major ESO leader if an extension of time could be given to complete the proofing, settling and responding by ESOs and stakeholders to complete a thorough review of the package, now that now that the implementation date had been extended to July 2026.

12. The fact that this perfectly reasonable request was met with a flat *"no"* from the Minister is disappointing to say the least and inserts a note of mean-spiritedness into this exercise.

13. The amount of work that has gone into this exercise is significant. This is evident by the release of the consultation package which is accompanied by marked up copies of the four current governing Acts with proposed changes inserted, totalling 2357 pages.[4]

14. The re-badged MRCA is yet to be determined and assessed by the veteran community, their families and other stakeholders as to its effectiveness when it becomes law and; whether or not the legislative and procedural sins of the past, can be extinguished.

4 BACKGROUND

On 28 February 2024, the Minister for Veterans' Affairs and Defence Personnel, the Honourable Matt Keogh MP announced the commencement of public consultation on proposed changes to simplify veterans' entitlements, compensation and rehabilitation legislation, issuing a suite of documents as part of the consultation process. The Government's move to introduce new aged veterans' legislation arose from the Interim Report of the Royal Commission into Royal Commission into Defence and Veteran Suicide vide Recommendation 1; viz

> *The Australian Government should develop and implement legislation to simplify and harmonise the framework for veterans' compensation, rehabilitation and other entitlements.*[5]

The Government has stated it fully supports this Recommendation and intends the new Act to come into force on and from 1 July 2026. The proposed Draft Bill and EM are a result of the consultation process put in place by Government. According to the EM:

> *This Bill will simplify and harmonise the existing tri-Act framework of legislation governing veterans' entitlements, rehabilitation and compensation arrangements that has long been in place.*

[4] MRCA 657pp; VEA 910pp; DRCA 206pp; MRCA (T&CP) Act 166pp.
[5] Veterans' Legislation Reform Consultation Pathway at p.1. Released on 11 August, 2022.

This will involve harmonising of the following three Acts:

- *Veterans Entitlement Act 1986* (VEA)
- *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA)
- *Military Rehabilitation and Compensation Act 2004* (MRCA)

The purpose of the Draft Bill to is implement a new improved veterans' entitlement system and process whereby[6]:

- *All new claims for compensation and rehabilitation from the date of commencement would be assessed under a single Act, an improved Military Rehabilitation and Compensation Act (MRCA);*
- *The Veterans' Entitlements Act 1986 and the Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 would be closed to new claims following commencement of the new arrangements;*
- *All benefits being received under existing schemes will continue unaffected under grandfathering arrangements. Any new claims after the commencement date (including claims for worsening of pre-existing conditions) will be assessed under the improved MRCA.*

The intent to improve the system is supported on the basis that no detriment must be suffered by veterans or their families. That remains the RAAC Corporation's non-negotiable position.

The improvements for consideration include but are not limited to:

- the introduction of a new Additional Disablement Amount (ADA) which is similar to the Extreme Disablement Adjustment (EDA) currently available under the VEA;
- the introduction of 'presumptive liability', which means the Repatriation Commission would be able to specify injuries, illnesses and diseases that can be determined on a presumptive (in other words – automatic unless proven otherwise) basis where the injuries, illnesses or diseases were incurred during service and are known to have a common connection with military service;
- there are over 40 Primary Conditions and over 40 Sequelae Conditions which are accepted on a presumptive basis **(DVA Webinar 3/4/24);**
- consolidation of household and attendant care, travel for treatment, and retention of automatic granting of VEA funeral benefits in the MRCA;
- an increase to $3,000 for funeral allowance for previous automatic grant categories under the VEA, and the availability of reimbursement of funeral expenses up to $14,062 for all service related deaths;

[6] https://minister.dva.gov.au/news-and-media/minister/consultation-now-open-veterans-legislation-reform

- 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 **(DVA Webinar 3/4/24);**
- standardisation of allowances and other payments, including: acute support packages, Victoria Cross and decoration allowances, education schemes, POW ex gratia payments, and additional compensation for children of severely impaired veterans; and
- enhancement of the Commission's ability to grant special assistance to veterans and their dependants.

5 THE RAAC CORPORATION's GENERAL CONTENTIONS

1. The RAAC Corporation has maintained for some considerable time that the current system of three Acts governing one class of person, namely former and current Defence members regardless of rank or branch of Service, is complex, unworkable and broken.

2. As an ineffective regime, the development and application of three separate Acts to cater for just one single cohort, namely military personnel (serving and former), needs no further elaboration. (This writer's highlighted emphasis).

3. The failure by DVA for example, to heed the frustration expressed by the Full Federal Court in *Smith* [2014] per Rares J and *Mc Dermid* [2016] per Logan J) discussed in this submission, represents either bureaucratic laziness or policy paralysis and is inexcusable.

4. The action by DVA in shutting its ears to the remarks made in a court of superior jurisdiction, including the Full Court, has led to the current forensic examination by the Royal Commission with its attendant public opprobrium being levelled by veterans and their families, at the Department.

5. There is a suspicion in the veteran community that the proposed legislative reform process will result in the development of a camel instead of a horse.

6. Had DVA considered the remarks made in the Common Law jurisdiction as far back as 2014 and commenced remedial action, it is not beyond the bounds of reasonableness to contend that that the current situation may not have been allowed to develop.

7. The RAAC Corporation contends that current veterans' entitlement system is an affront to the service rendered by Defence members current and former, by forcing them to fight every single inch of the way to achieve natural justice.

8. The current system is ineffective in delivering what veterans reasonably expect. It destroys the concept of a level playing field for veterans and their families.

9. The current system is described as a procedural nightmare and legislative minefield for those who lodge claims for compensation and/or disability pensions.

10. It is a system that is both confusing and unimaginably stressful for all who enter it, as it currently exists. It is on any measure a fraught process.

11. It has become a procedural and policy minefield through which only skilled operators can navigate. This minefield has resulted in stress to veterans often at times when stress is the last thing they need to encounter.

12. The fraught process confronting veterans is demoralising, inordinately stressful and demotivating, to say the least. In *Bailey*[7] 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).

13. The placing of insuperable hurdles in the way of a veteran is what is occurring and it is reasonably expected that these hurdles will be eliminated as proposed in the Simplification and Harmonisation Bill.

14. For quite a number of years, this legislative and procedural minefield has operated to cause significant stress to veterans resulting in veterans walking away form proceeding with or continuing with, their claims.

15. It has resulted in veterans self-harming, sometimes with fatal consequences.
To have veterans be subjected to the current regime is indefensible.

16. The current veterans' entitlements system is on any view, a complete shambles and should never have been considered in the first place.

17. The current system of three Acts has resulted in claiming compensation for injuries, illness or death linked to veterans' service to Australia, to be confusing and in many cases stressful (See *Bailey*).

18. The RAAC Corporation welcomes the opportunity to comment on the Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 (the Bill).

19. The proposal to close the VEA and DRCA to new claims from date of commencement along with incorporating DRCA matters into a single appeals (VRB) pathway (1 July 2026) and fold both Acts into a reset MRCA Mk2, is not before time.

---

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

6 RELEVANT PERSUSASIVE AUTHORITY (CASE LAW)

This submission also addresses case law in High Court and Federal Court decisions that must as a matter of course remain very much relevant in respect of decisions made the Commonwealth.
Such decisions, be they Common Law or Merits Review, have exposed faults and flaws by DVA Decision-makers in the determining process which have been set aside in favour of veterans.

Their importance in the veterans' entitlements continuum, cannot be overstated.

The RAAC Corporation considers relevant persuasive authority to be a critical component that must at all times be taken into consideration by the Decision-makers in Repatriation Commission and MRCC when investigating, assessing and determining matters that come before them. To do any less is to act in bad faith.

It is well held that suspicion in the veteran community exists as to the integrity of the legislative reform process and a well-founded fear that very hard-won rights and entitlements which have been comprehensively validated by decisions of Courts of superior jurisdiction and Tribunals, will be extinguished by the new legislation. This must not be allowed to happen.

The importance of case law in veterans' matters is best exemplified by the fact Creyke and Sutherland[8] list a considerable total of 1788 case law citations in their published work.

Regardless of commitments to grandfather all beneficial provisions and streamline/improve other provisions, the RAAC Corporation contends that it is crucial relevant persuasive authority (case law) is not extinguished at any stage by legislative chicanery and subterfuge, in the drafting process. To do so will see DVA breaking faith with its huge constituent veterans and veterans' families base.

7 CAVEAT

This brief will discuss only those matters the RAAC Corporation believes warrant a response and only on matters it considers it is competent to comment on. The Corporation acknowledges the wealth of expertise among ESOs such as ADSO[9], the RSL, VVAA, VVFA, and kindred organisations, who also contribute to this debate.

[8] Creyke, R., and Sutherland, P., ***Veterans' Entitlements and Military Compensation Law*** 3rd edn, 2016, Federation Press, Leichhardt NSW, 870pp.
[9] The RAAC Corporation has been a proud and active member of ADSO since March 2015.

8 PROPOSED LEGISLATIVE REFORM – A NEED TO GET IT RIGHT

The RAAC Corporation welcomes the Government's intent to reform what is on any analysis, a confusing and treacherous legislative minefield across three different Acts.

The Full Federal Court decision in *Smith*[10] (cited in 44 cases)[11], discussed the extraordinary difficulty in navigating this minefield, in emphatic remarks made by Rares J in his concluding remarks, albeit for a VEA matter, are considered by the RAAC Corporation to be directly analogous to and emblematic of the entire multi-Act legislative system currently in place; viz

> ***The conditions specified in each of ss 23 and 24 are bedevilled with bewildering complexity. Regrettably the fog of the drafting style of this, like many Commonwealth Acts, has created a nearly impenetrable shroud over the meaning that the Court is expected to attribute to the intention of the Parliament. The cost to the community of this obscurity must be enormous.***
>
> ***Two days of hearing by this Court were largely devoted to an attempt to make sense of key entitlements provided in the Act to persons who have been injured in war conditions in service of this nation.***[12] At [26]. (This writer's highlighted and bold emphasis.)

The facts as brutally enunciated by Rares J, make it unambiguously clear, the legislative process currently in place is failing the veteran community badly. To allow matters regarding the three-Act minefield to get to the position enunciated by His Honour, is truly indefensible.
In the ten years that have elapsed since that decision, very little if any improvement, was made.

In *Mc Dermid* [2016][13] Logan J echoed similar frustrations in respect of the complexity of the legislative regime confronting veterans; viz

> *Mr McDermid had the misfortune to suffer a number of injuries over the course of his naval service, which have had sequels to his health, detailed below. Latterly, he has also had what he doubtless sees as the added misfortune of becoming enmeshed in the complexity of the provision made from time to time by Parliament in the VEA in an endeavour to prevent any duplication of benefits in respect of like injuries or incapacity as between those payable under the SRC Act or its predecessors and those otherwise payable under the VEA*
>
> *In turn, that complexity is but one pathway in the labyrinth that is the VEA, an Act which has been amended no less than 127 times over the 30 years since its enactment in 1986*. [at 4]. (This writer's highlighted and bold emphasis.)

---

[10] ***Smith v Repatriation Commission*** [2014] FCAFC 53; 2014 FCR 452; 142 ALD 410, per Rares, Buchanan and Foster JJ, per Rares, J. http://classic.austlii.edu.au/au/cases/cth/FCAFC/2014/53.html [Accessed 12/3/2023].
[11] Online at https://jade.io/j/?a=outline&id=330727 [Accessed 12/3/2023].
[12] Cited in the Royal Commission's Interim Report 2011 Part 4 Veteran compensation and rehabilitation legislation, at [39] at p.180. Transcript Nikki Jamieson, Hearing Block1, 1 December 2021, p. 1-66 [34-35].
[13] ***Mc Dermid v Repatriation Commission*** [2016] FCA 372 (15 April 2016),per Logan J. Online at http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2016/372.html?stem=0&synonyms=0&query=McDermid [accessed 26/3/2023].

> *Mr McDermid is a member of a class of Australian ex-servicemen and women subject to this complexity. Both for the members of that class and for the respondent Repatriation Commission (the Commission) and those of its delegates within the Department of Veterans' Affairs (DVA) who must administer it, that complexity, to say nothing of the wider labyrinth, presents considerable challenges of comprehension as to its application.*
>
> *Even with the able assistance of counsel for Mr McDermid and for the Commission, for whose helpful and candid submissions I am truly grateful, I have found that those same challenges remain.* [at 5]. (This writer's highlighted and bold emphasis.)

Notwithstanding significant Common Law frustrations being expressed by Courts of superior jurisdiction, no action was taken by the Government to address the issue of complexity.

The complexity and procedural hurdles placed in front of veterans and their families has caused enormous pain, suffering, frustration and suicides to finally see the establishment of a Royal Commission into Veterans and Defence Deaths to shame the Government into action.

The enormity of the harmonisation process recommended by the Royal Commission is evidenced by the enormous amount of marking up in the three current Acts to accomplish the Government's grandfathering objectives.

Tellingly, in echoing the words of Rares J above, the Royal Commission's Interim Report found that the DVA system was in fact *"so complicated that it adversely affects the mental health of some veterans and can be a contributing factor to suicidality*".[14] Nothing has disturbed the Court's analysis of both matters by a court of superior jurisdiction. The onus now lies with the Commonwealth to redress this failure of statutory repair.

It is a damning indictment on the veterans' entitlements regime when the legislative vicissitudes experienced by the Courts are laid bare as in *Mc Dermid*[15] where His Honour struggled with the complexity of the legislation; viz

> *Even with the able assistance of counsel for Mr McDermid and for the Commission, for whose helpful and candid submissions I am truly grateful, I have found that those same challenges remain.* (This writer's highlighted and bold emphasis.)

It also falls to the Government to heed the scathing commentary on the complexity of legislative drafting. It must get it right with this proposed harmonisation exercise.

[14] Above, n.10.
[15] Above, n.13.

9 ISSUES

Schedule 1 - Single ongoing Act main amendments

Part 1 - Closing eligibility to DRCA and VEA

The Corporation notes that benefits currently made to veterans and widows/ers under the VEA will not suffer detriment with all entitlements remaining under the restructured MRCA, including automatic grants of pensions to widows/ers and orphans where no application for such pension is required. The commencement of action for all new pension as of 1 July 2026, is noted.

Defence Force Reservists

There may be significant movement in grandfathering all relevant provisions into MRCA Mk 2 but nothing in respect of Defence Reserves. The RAAC Corporation notes that there are no references in the Draft Bill for Defence Reservists. There are two mentions only and they relate to the Far East Strategic Reserve. An examination of the EM also notes that it too is completely silent on the matter of Defence Reserves.

As has been shown in deployments from East Timor and the Solomon Islands to Afghanistan, Defence Force Reservists have supplemented the Regular ADF. This supplementation has not been restricted to critical technical professions such as health or IT specialists but has also been in the callings of Armoured Vehicle crews and Infantry. To ignore Reservists in the Draft Bill is impossible to comprehend.

The Defence Strategic Review 2023[16] made *inter alia*, the following comments regarding Defence Reserves:

> *11.4 We believe there is a need for a comprehensive strategic review of the ADF Reserves and reserve service as part of National Defence and in light of the current strategic circumstances* (2024, p.87).
>
> *11.5 The ADF Reserves must not just complement the total Defence workforce but also provide the expansion base for the ADF in times of crisis. In order to achieve such an effect, Defence needs to investigate innovative ways to adapt the structure, shape and role of the Reserves, as well as reconsider past programs, specifically the Ready Reserve Scheme* (2024, p.87)

It follows that, in respect of enhancing the legislative and compensatory protections for Defence Reserves above and beyond the minimum 12 months CFTS, legislation needs to be amended to provide non-CFTS Reservists with the same cover and protection. To not do so, commits a grave disservice to Defence Force Reservists.

[16] file:///C:/Users/User/Downloads/NationalDefence-DefenceStrategicReview_edit.pdf [accessed 13/4/2024]

Part 2 - Opening MRCA to pre-2004 conditions

Coverage for all types of military service under VEA will continued albeit under MRCA.

Of particular interest to the RAAC Corporation is a provision to be included in MRCA protecting VEA/DRCA benefit recipients from having to re-contest their claims all over again as a result of this harmonising. It is noted and accepted that any fresh claim will incur MRCA action from 1 July, 2026.

Needs assessment

In addition, the MRCA is amended to avoid any need to recontest medical conditions already accepted under the VEA and/or DRCA. Upon lodgement of a new claim and acceptance of liability under the MRCA, all persons would undergo a needs assessment to identify the types of compensation, rehabilitation, and other assistance they may need. (**EM at p.7, Item 71 at p.24**).

The RAAC Corporation notes the comprehensiveness for example, of the 7-page Needs Assessment and 12-page 'At Risk Needs Assessment' (October 2021) and is concerned that the complexity of such a process may a detrimental effect on veterans compelled by sections 44, 325(2) and 326 MRCA to undergo a needs assessment.

There appears to be no indication in the EM of any proposal to simplify this documentary process in line with the operation of a supposedly simplified MRCA Mk2. Simplifying relevant documentation should be undertaken as a concurrent activity.

The fact no compensation is paid until a needs assessment is conducted is particularly concerning in circumstances where the emotional and psychological insult to a veteran's system may act as a fetter to successful completion of a needs assessment. The resulting delay will prevent payment of compensation placing a veteran and their family in necessitous circumstances.

In order to reduce stress on a veteran and to eliminate any such roadblocks to obtaining compensation, a review of the assessment documentation with a clear view to simplifying the assessment proforma, needs to be undertaken as a matter of priority.

In circumstances where a veteran undergoing a needs assessment to has their assessment refused or derated, there is no formal merits review process available to veterans. In an era where the courts are encouraging applicants to seek redress outside of the judicial process such as the AAT (to be replaced by the ART), this oversight needs to be addressed.

As for the Vehicle Assistance Scheme, Repatriation Appliances Programme and DVA Medical Approvals, any appeal lies with the Federal Court with its attendant costs and significant stress.

This again will only serve to create unwanted and unwelcome backlogs in the court system making it necessary to consider having issues such as the VAS, health Approvals and RAP better managed by an independent merits review process.

The RAAC Corporation believes that where possible more use should be made of independent tribunals such as the VRB operating as a Tier 1 Tribunal, or the soon to be established Australian Review Tribunal (ART).

This writer relies on the benefit of qualified privilege in this regard.[17]. While a veteran may seek a review of the Primary Decision, no formal review process exists in respect of a veteran whose needs assessment has been refused in whole or in part.

Additionally, there is a predilection for decision-makers within DVA and in particular in the three programmes discussed above, to apply too narrow a construction in the application of the Act.
This contention finds support in the following two Federal Court decisions.

In *Tracy's* case [18] which heard a successful appeal against a decision of the VAS, the Federal Court per Lee J held *inter alia*:

> *According to the foregoing principle of construction* ***such a provision is not to be construed narrowly so as to deprive an incapacitated veteran of a benefit to which that person would otherwise be entitled.*** *(See:* ***Repatriation Commission*** *v Hawkins [1993] FCA 479; (1993) 117 ALR 225 at 231;* ***Repatriation Commission*** *v Law [1981] HCA 57; (1981) 147 CLR 635 per Aickin J at 652;* ***Repatriation Commission*** *v Hayes [1982] FCA 107; (1982) 43 ALR 216 per Keely J at 219; Secretary, Department of Social Security v Cooper (1990) 97 ALR 364 at 370.)* At [13]. (This writer's bold emphasis).

The Repatriation Commission appealed against Lee J's decision to the Full Court of the Federal Court.[19] The Full Court found again in Mr Tracy's favour. In so doing, the Court addressed the widening of the language used in s.105 VEA noting that:

> *In our opinion, the history of the provision shows that it has undergone a very gradual widening up to the time of the presentation to Parliament of the final Bill which became the Veterans' Entitlements Act. As enacted, the provision was further widened by the insertion of general language, no longer tied either to specified categories of amputation or to complete paraplegia.* ***This history simply provides no warrant for reading into the general provision a specific limitation, or specific limitations, not suggested by the language of the section.*** *It would require a strong reason to enable the Court to do that, in the face of the established principle of construction requiring an extension of a benefit under beneficial legislation to be construed generously, though of course not more generously than its terms allow.* **At[16].** (This writer's bold emphasis). *It follows that the application succeeds, the decision being one that involved an error of law***. At [17]**(This writer's bold emphasis).

[17] The author has been a Practising Lay Advocate at the VRB since 6 June 1986. He holds a TIP 4 Practising Certificate to appear before the Commonwealth AAT. He has represented veterans who have been denied statutory relief under the Repatriation Appliances Programme (RAP); The Vehicle Assistance Scheme (VAS); and Medical Approvals.

[18] ***Tracy v Repatriation Commission*** [1999] FCA 1523 (4 November 1999), per Lee J.

[19] ***Tracy v Repatriation Commission*** [2000] FCA 779 (9 June 2000), per Burchett, Sundberg and Healy JJ.

Both Courts were very scathing of the Repatriation Commission's mean-spirited approach to construction, and beneficial interpretation and application. These examples make it demonstrably clear to the reasonable person that DVA is deviating from the legislatures intention to serve Australia's veterans.

By ignoring the protective, and ameliorating remedial measures enforced by the courts, the Department is ignoring significant persuasive authority to hamper the entitlement of veterans to natural justice.

It is for reasons such as *Tracy* (No 1 and No 2) the RAAC Corporation's very strong submission in respect of maintaining a link between persuasive authority and legislation must not at every level, be extinguished by legislative drafting subterfuge as discussed in **Part 11** The Silence on Canute.

Simply put, it is clear that DVA Decision-makers are guilty of continuing to offend established Common Law precedent in applying too narrow an approach to interpreting the language in the Act, in a manner similar to that discussed in respect of lump sum Common Law damages at pp.8-9. This is indefensible and is tantamount to DVA abrogating its duty to operate on a level playing field, to act as a model litigant and an honest broker.

It is contended that, the decision by a Delegate of the Commission to ignore the Federal Court's decision in *Tracy* (No 1) meets the High Court's test related to an abuse of process in *Ridgeway*.
The failure by DVA to broaden their approach to the relevant policy constitutes a course of action that is considered to be consistent with the decision of Gaudron J, namely for an improper purpose, completely devoid of any probity, integrity or altruistic motives. In *Ridgeway* [1995][20] 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 andharassment"* [32].

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

The decision by Departmental Delegates must not be instituted for an improper purpose –including not having regard to the nature, extent and devastating impact on a veteran in respect of impairments arising from their service-related injury, illness or disease.

Although the 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. (**DVA Webinar 3/4/14**).

[20] ***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 [accessed 23/3/2024].

Contentions

1. The RAAC Corporation contends that, it is manifestly unfair to place upon a veteran, a profoundly burdensome impost (an insuperable hurdle), when navigating any part of the current three-Act process that confronts them including navigating a needs assessment.
   The legislative and administrative framework operates to cause veterans significant detriment.

2. The RAAC Corporation contends that, the onus lies with DVA to ensure Primary

   Decision-makers and Internal Review Officers (IROs) when determining any matter before them, to not apply too narrow a construction of the matter under consideration and that they apply the Test of Reasonableness.

3. The RAAC Corporation further contends that, the DVA Consolidated Library of Knowledge (CLIK) takes action to have the relevant guidelines (Advisory Notes, Commission Guidelines or Departmental Instructions) amended to reflect that the onus lies absolutely with Decision-makers and IROs to not apply too narrow an interpretation of the legislation as held by the Federal Court.

4. The RAAC Corporation supports the cross-vesting of the RAP and Treatment Principles to MRCA and the extension of access to MRAC rehabilitation provisions to VEA-only veterans.

Recommendation

The RAAC Corporation recommends that:

1. Development of a Miscellaneous Ancillary Programme Review process be considered to address requests for a review of a decision to refuse an application or request for assistance from these Programmes.

2. Simplification of all needs assessment documentation be undertaken to simplify their contents and reduce the stress on veterans completing them.

3. Part 3 – Other amendments

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. (**DVA Webinar 3/4/24**). 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."* (This writer's highlighted emphasis).

Liability Issues on tobacco use (See also Item 81)

An exclusion exists on the MRCC accepting liability for any claim resulting from tobacco consumption vide s.36 MRCA. This is a highly prejudicial and punitive approach to veterans seeking a form of post-battle stress relief after engaging an enemy force. The VEA is only marginally better with the 1998 prohibition enshrined in MRCA that act to the exclusion again of any and all MRCA claimants.

The Draft Bill is designed to remedy that MRCA prohibition by including the VEA 1997 provisions, whereby using tobacco products up to and 31 December 1997 will be permitted in terms of lodging a claim for compensation.

As of 1 July 2026, pre-1998 service with tobacco products were used, will come into effect under MRCA. The 1 January 1998 prohibition (the date of effect) currently applied to VEA claims, will operate under MRCA from 1 July 2026, also.

While not as punitive as s.36 this lessening of the tobacco usage restrictions have ameliorated the **'them and us'** division such provisions create, by now enabling MRCA veterans who use tobacco products pre 1/1/98 the opportunity to lodge a claim on the basis a veteran used tobacco products before the date of effect.

10 SCHEDULE 2 – COMMON LAW DAMAGES FOR NON-ECONOMIC LOSS (NEL) (Item 99 amends subsection 389(5)).

The Common Law damages for NEL are currently capped at $110,000 under MRCA from 1 July 2004. The current capped amount was set in 1988 upon the enactment of the SCR Act in December 1988. It follows that, the capped amount has been unreviewed for a period of 36 years and by the date this proposed Act comes into force, will have remained unreviewed at $110,000 for 38 years.

That is unacceptable. It leaves veterans submitting Common Law claims with no sign or hope of the capped amount being subjected to regular review and subsequent increases to keep pace with inflation and cost of living and offends the High Court decision in *Canute* discussed in Part 11 (The Silence on Canute).

Once again as previously contended in this submission, such an action can only be reasonably interpreted as th e Government putting in place a process deigned not to benefit a veteran but to save a parsimonious Government money at considerable cost to the veteran's physical and mental well-being.

Item 99 amends s.389(5) to upgrade the NEL from $110,000 to $177,000. Given that the current amount and that of the proposed amount ($177,000) will remain unindexed, this places the total quantum or whatever portion a veteran is awarded, at risk of falling behind in terms of purchasing power once again, impeding the ability of a veteran to make the best use of any NEL payment. It does not accord with DVA's duty to act as an honest broker in its parsimonious approach to veterans and their families.

Recommendation

The RAAC Corporation recommends that, the NEL quantum be indexed twice-yearly to keep up with inflation and cost of living increases as is currently the case for all Military Comsuper recipients and veterans receiving the Service Pension.

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.**

In that regard, the RAAC Corporation relies on the High Court decision in *Canute*[21];in which the High Court noted with approval the Federal Court's decision per Hill J.

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".*

[21] ***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.

> *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).

> *The decision of Hill J*
> *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][22], the High Court in following *Canute*, held:

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

> *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, 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 **Item 99** (at p.28/104) until further information is forthcoming.

Recommendation

The RAAC Corporation recommends 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.

12 SCHEDULE 3 – SINGLE REVIEW PATHWAY (EM p.13 & p.59)

Two issues in this Schedule give rise to a response, namely:

- Human Rights Considerations *vis-a vis* DRCA ;and
- Production of documents.

Human Rights Considerations (p.13)

The DVA Human Rights Statement of Compatibility (at p.13) asserts: *The right to a an independent, impartial and competent court or tribunal.*

The decision to finally enable DRCA veterans to access the Veterans' Review Board (VRB) for merits review of their claims, creating a unified appeal structure for veterans, is welcome and is supported. The RAAC Corporation has long argued for the inclusion of all three veterans' legislative regimes to come within the purview of the VRB's jurisdictional template.

To deny DRCA veterans access to this process – a process available to every other veteran, constitutes a denial to access a benefit to who veterans who on any measure, should reasonably be entitled to access.. It is grossly unfair. It militates against veterans exercising their rights to put their case at first instance to an inquisitorial, independent, impartial and competent Tier 1 Tribunal (VRB) other than the adversarial AAT.

The cross-vesting of DRCA veterans to a single appeal stream to facilitate their access to the VRB now completes the single path merits review process. This action now completes the Human Rights continuum in drawing DRCA into the *de novo* inquisitorial processes applied by the VRB operating as a Tier 1 Tribunal.

The RAAC Corporation contends that, the amendments are compatible with the right of a veteran or veteran's widow/er to an independent, impartial court or tribunal of competent jurisdiction.

The RAAC Corporation considers that the achievement of DVA's human rights compatibility is achieved through ensuring consistency by a single common appeal pathway for all veterans regardless of compensatory legislative status. The compatibility is achieved by making the VRB, which is a less adversarial, veteran-friendly environment, available to all veterans where matters can be resolved without the involvement of legal practitioners.

The lack of a Tier 1 Tribunal for DRCA appeals constitutes a grievous injustice and has operated to paint DVA as abrogating in this respect, its duty to act as a model litigant and an honest broker.

Abrogation by DVA was achieved through by forcing veterans to appeal to the AAT, an intimidatory and adversarial environment with a complete focus on points of law and not on the merits of the matter being appealed and the consequential stress re-traumatising the veteran.

Schedule 3 - Production of Documents (p.59)

The RAAC Corporation notes and agrees with the need to *"standardise the review pathway for all compensation claims"* where a veteran has lodged an appeal against a decision of a Primary Decision-maker. It is acknowledged that s.137 Reports (soon to be s.352D Reports) may be produced electronically or in hard copy.

The RAAC Corporation also notes with concern the proposal to modify the time frame for the production of documents (disclosure), of the section 137 Report by reducing the time taken to produce documents, by 33%; viz

> *Appeals on an original decision of the MRCC are to be made directly to the VRB. The Bill also amends the timeframe for the Secretary of DVA (or their delegates) to provide reports to the VRB from 42 days of being notified of an application to the Board, to within 28 days.*

The reduction in time will in the Corporation's submission, operate to compress an already demanding time frame to produce documents, to a time frame where a consequential and unwelcome increase in pressure to produce, is placed Departmental staff in the Strategic Business Unit (SBU) tasked with the production of documents, resulting in compilation errors.

The current production regime is not perfect with incomplete Reports being produced, with incorrect folios included from different veteran's files, or even production of an entire report containing documentation on accepted condition/s instead of on a contested decision.

The resulting delays and frustrations in rectifying these procedural errors needs no further elaboration. What is required is further training or re-training staff in the correct compilation of these reports and not truncating by 33%, the time to produce. The truncated timeline can reasonably be seen to exacerbate the current situation.

Significantly, the process is affected by the following issues which are out of the control of veterans and their representatives. These include but are not limited to:

- An ASL with positions nominal/actual unfilled.
- Staff shortages due to resignations, sick leave, maternity leave, stress leave, secondments, offsite training, career development courses/seminars, HDA role in a different location.
- No backfilling available to cover staff shortages.

These factors are part of the daily public sector vicissitudes of trying to have a full staff and a fully functioning SBU available to undertake this task. Consequently, these issues go to the heart of organisational efficiency and effectiveness.

Nothing in the EM justifies how a 33% reduction in time to 28 days will contribute to organisational and operational efficiency. It is not an exaggeration to contend that the opposite will in fact be the case.

The effect of a 28-day turn around will be more problematic and may well result in staff suffering workplace stress and taking sick leave.

The consequential effects of this occurring will potentially result in the relevant SBU becoming an area that is not conducive to a safe and healthy workplace and will compromise the duty of care owed by DVA to its staff to maintain a safe and healthy workplace.

The veteran and the SBU both have a right and an interest to protect. The veteran to an entitlement to a timely, smooth and trouble-free appeal process without the deleterious effects of a document production backlog. For the SBU staff, an entitlement to a safe, healthy and fully-functioning workplace. Nothing less on both counts, will suffice.

The facts in issue discussed in respect of the proposed reduction in time to produce will have a ripple effect on veterans and their representatives through a backlog of outstanding s.137/352D Reports. The backlog will create considerable anger and stress (again) and could well result in the submission of Ministerials.

A truncated timeline and consequential backlog will also operate to prejudice the administration of natural justice through to the VRB due to an untenable situation resulting from an unreasonable and oppressive time to produce. A 28-day deadline will for the reasons discussed, act as a fetter to organisational efficiency and effectiveness. It will prejudice the administration of natural justice through unwelcome backlogs.

It is the RAAC Corporation's contention that, the proposal to truncate time to produce by 33% is a poorly thought-out proposal and should not be remotely considered for the reasons discussed herein.

It is the RAAC Corporation's submission that in truncating the current production of documents process veterans will suffer detriment.

The RAAC Corporation will not support this unreasonable and unjustified reduction in time to produce and recommends in the strongest possible terms that the current *status quo* of 42 days to produce documents, be retained.

It is also noted that s.352D (1)(a) requires the Commission to *"cause a report to be prepared that refers to the evidence on which the original determination was based."* The RAAC Corporation has difficulty with the term 'refers'. The Macquarie Essential Dictionary 4th Edition defines ***"refer"*** to mean *inter alia*: *"4.to hand over for information, consideration etc,"* (2006, p.669). Consequently the term *refer* means handing over all information relevant to the appeal and not just that which the Department deems suitable. It can be reasonably interpreted as meaning the provision of the full suite of documents and not cherry-picking documents to cause a veteran detriment in mounting their case on appeal. As has been discussed elsewhere in this submission the Commission has in the past refused to provide the Departmental medical Adviser's (DMA) report to a veteran.

This is a denial of due process and a denial of procedural fairness to the veteran. The amendment as it currently stands means that simply acknowledging a report exists allows the Commission to meet the letter if not the spirit of the legislation.

The RAAC Corporation believes that the section should be amended to read:

> *'cause a report to be prepared that includes all documents used by the Delegate of the Commission in reaching the original decision;'*

The effect of this amendment will ensure a level playing field upon which a veteran or his or her representative, can base a case.

The above amendment would operate to reduce the time delay and any costs incurred by the discovery and disclosure process. This will reduce time spent on fruitless litigation and allow the veteran and/or their Advocate to focus on the facts of the matter. Currently, veterans and/or their advocates are significantly hampered by the Commission withholding critically important documents such as DMA reports.

13 THE VALUE OF THE VRB AS A TIER 1 TRIBUNAL IN THE VETERANS' MERITS REVIEW AND APPEALS LANDSCAPE

The operation of the VRB as the first port of call in the veterans' appeals/review process is cannot be understated. The critical importance of retaining this merits review Tier 1 Tribunal, cannot be over-emphasised.

It is also considered to be a veteran's and veteran's widow/er's Court of Last Resort. The effectiveness of the VRB's operation and its reputation is further reinforced by the Board winning the 2021 Australian ADR Awards for best Courts and Tribunals ARD Group of the year.

As an inquisitorial Tier 1 Tribunal, charged to act according to substantial justice and the merits of the case, the Board is unique in the veterans appeal landscape. A vital component of the VRB's operation also centres on the fact no lodgement fees are charged by the VRB.

With the AAT, the opposite is the case, where lodging an appeal with the AAT attracts a lodgement fee of $1082[23] which can be reduced to $100 in the following circumstances:

- *legal aid has been granted for the review*
- *you hold a health care card, pensioner concession card, Commonwealth seniors health card or other card that certifies entitlement to Commonwealth health concessions*
- *you are in prison, immigration detention or otherwise detained in a public institution*
- *you are under 18 years of age*
- *you receive Youth Allowance, Austudy or ABSTUDY Centrelink payments*
- *we decide payment of the application fee would cause you financial hardship*

It remains to be seen if the new ART replacing the AAT will continue to charge a lodgement fee.

The adversarial nature of AAT proceedings which focus on points of law and legal practitioners at 10 paces with some financial cost to veterans, can be a stressful and traumatic process for veterans, in particular emotionally vulnerable veterans.

The nature of AAT proceedings was no better enunciated than by a former Registrar and CEO of the AAT and more latterly as VRB Principal Member Colonel Douglas Humphreys AM[24], who in his evidence[25] to the Royal Commission to a question by Mr Peter Singleton, Counsel Assisting, stated:

---

[23] Online at https://www.aat.gov.au/apply-for-a-review/other-decisions/fees [accessed 17/3/2024].

[24] ***Royal Commission into Defence and Veteran Suicide***, 7 April, 2022. Mr Humphreys is now a Judge of the Federal Circuit and Family Court of Australia, Division 2. He holds the position of a Senior Reserve Officer for the Army Command Legal Panel with the rank of full Colonel and is a former Infantry officer prior to transferring to the Australian Army Legal Corps.
He was the Principal Member of the VRB from 2010 to 2018 Transcript of evidence at p. 27-2416. His evidence in a 130-page transcript encompasses **Fol.27-2416:25 to 27-2446:8 (30pp).**

[25] Above, n.23, Block 4 Canberra 7/9/20202, Transcript of Evidence at **Fol 27-2416:25 to 27-2420:41 (4pp).**

> *Q. Just to give that some context, DVA decisions made under the DRCA, once they leave the DVA for review, go straight to the AAT; is that right?*
>
> *A. That's right. Look, I've been in both. I was the Principal Registrar and CEO of the AAT for seven years, so I know how both works. That was before, I should add, the AAT was given -- or the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Tribunal folded into the AAT, so it is a much bigger organisation than when I was there.* ***But the fact is the AAT is far more court-like. That frightens veterans. They don't want to go to court.*** (This writer's bold highlighted emphasis).

The evidence by Judge Humphreys is instructive to say the least and a copy of his remarks[26] are at **ATTACHMENT A** to this submission. It follows that, every attempt should be made at VRB level to have the matters under review dealt with by the Board. The statute-barring of legal practitioners from appearing vide s.147 VEA, is a very good thing. It is noted that this provision will be grandfathered across to a new section 352G(2) MRCA.

The no legal practitioner policy removes a considerable amount of stress and confusion for a veteran at a first-instance appeal from being confused by lawyerly arguments.

This contention finds support from Judge Humphreys who provided in his evidence a very powerful and compelling justification to retain the s.147 VEA (new section 352G(2) MRCA) prohibition on legal practitioners appearing before the VRB.

As a Tier 1 Tribunal, the VRB process is designed to be as stress-free as possible and the application of s.147 (now s.352G) goes a long way towards ensuring the stress for a veteran or veteran's widow/er is as minimal as possible.

The RAAC Corporation does not support the introduction of legal practitioners at the VRB.

The RAAC Corporation's very strong position is that the *status quo* statute-barring legal practitioners from appearing, must never change and supports the provisions of new s.352G(2) continuing this prohibition.

Similarly, it is this writer's experience that the Board is not overly legalistic as has been suggested. The Board is as a matter of settled law, obliged to make decisions in which it is required to apply where necessary, relevant persuasive authority (case law) as is necessary. To do any less would constitute an error of law.

The Board's decisions are reviewable all the way to the High Court. To do any less without oversight by Courts and Tribunals of superior jurisdiction, opens the Board to committing serious errors of law.
It follows that, jurisdictional oversight from the AAT and courts of superior jurisdiction exists all the way to the High Court.

[26] Above, n.23, Transcript of Evidence 27-2418:25 to 27-2420:41, 7 April, 2022. Judge Humphrey's evidence covers pp.27-2418:25 to 27-2446:8 inclusive (28.pp) and is a master class for DVA on how to conduct its business.

The Alternate Dispute Resolution (ADR) processes now in place enables veterans to be managed more effectively.

The introduction of the Vulnerable Veterans Protocol[27] which has been applied to this writer's clients, is an outstanding initiative.

A Conference Registrar is always allocated a Senior Member as a riding Senior Member who, on examination of the evidence with the Conference Registrar following a telephone outreach conference or a video conference, is able to exercise a power and function to affirm the decision under review or vary or revoke the decision under review and substitute it with another decision.

A Board Member stands in the shoes of the Board in that regard. VRB Outreach *"Conference Registrars and Board Members are dispute resolution experts"*[28] and are available to guide veterans through the process. A telephone outreach decision that does not favour a veteran can be appealed by a veteran directly to an ADR process or elect for the matter to be heard by the full Board.

The number of options available to veterans is a major strength of the Board which now uses the following pathway for resolution to a contested matter; viz

1. Online Dispute Resolution event (ODR);
2. Outreach – telephone or AV conferencing; and
3. Final full Board hearing or Board sitting as a quorum.

Based on this writer's experience, the options open to veterans encountering this process after many years of only being able to appear before a full Board, represent a major and significant improvement on the older appeals and review process of the past.

Equally importantly is the capacity now for the Board to hand down an *ex tempore* decision.
The exercise of that power and function eliminates weeks of anxious waiting by an applicant to receive the decision. The processes *in toto,* now in place can be considered to be a jewel in the crown of the Board.

Notwithstanding the granting of Legal Aid, it is common ground that Legal Aid funding has enormous demands on its resources and veteran's Legal Aid funding is not at present segregated from general Legal Aid funding.

All Legal Aid funding comes from the same budget allocation creating a pool of competitive bidders (Immigration appeals, Social Security, NDIS etc.,) for the Legal Aid dollar which is a finite resource. Given that Legal Aid also includes means testing, it follows that the more one looks at the VRB at first instance, it is a much more palatable option than the AAT.

The depth and breadth of merits review now available to first-level veteran appellants through the VRB processes speaks for itself and establishes firmly the presence of the relevant Human Rights considerations; viz

The right to a an independent, impartial and competent court or tribunal.

---

[27] https://www.vrb.gov.au/vulnerable-veteran-protocol [Accessed 15/3/2023].
[28] ***A guide to appearing before the VRB – for self-represented veterans and representatives*** (2021) at p.21.

The powers and functions exercised by the Board works effectively, in this writer's experience, as part of the ADR process. Its value to that process cannot be overstated.

The resolution strategies now in place obviate completely, the need for legal representatives to be permitted. The natural justice continuum afforded to veterans by the Board in all its resolution Protocols and full Board processes including Vulnerable Veteran protocols, is on its face considered by the RAAC Corporation to enhance to a significant degree, the administration of natural justice.

By acting as a Court of last Resort, the Board in all its manifestations operates to the satisfaction of the parties to a matter before the Board.

The preceding analysis supports the contention that the VRB model *sans* legal practitioners is on every level an excellent, completely fit-for-purpose Tier 1 Tribunal.

Similarly, the RAAC's proposition that the prohibition on legal practitioners vide s.147 of the VEA 1986 (new section 352G(2) MRCA) must be retained, is on the facts as enunciated, reasonable in all the circumstances.

The RAAC Corporation is cognisant of the decision by the Government (per the Commonwealth Attorney-General) to do away with the AAT in its present form and replace it with another creature it intends creating.

Should that proceed and until such time as a new model AAT is operational, it is the RAAC Corporation's contention that, the work of the VRB as the Court of Last Resort for veterans takes on added critical importance.

It follows that, as a consequence of the Government's decision to do away with the AAT in its present form, the RAAC Corporation contends that, the necessity to have an operating Board capable of service delivery of a high order is even more critical. It must include having determinative powers throughout the ADR process.

The cross-vesting of access to the VRB for MRCA matters should also have included cross-vesting of DRCA matters to the VRB also. That is an unacceptable policy failure.

The harmonisation process will see removal of the DRCA Internal Review Officer (IRO) from the internal review process. This action which will now enable referral to the VRB has considerable merit and ensures all veterans and widows/ers have access to an inquisitorial review process.

The forecast tailing off of DRCA internal review and AAT appeals is noted and is seen to be a consequence of these changes.

14 SCHEDULE 4 MERGING COMMISSIONS – AN END TO SILOING

The abolition of two separate Commissions is a welcome action.

The operation of this Schedule will result in the formal transfer of the powers and functions of the MRCC to the Repatriation Commission resulting in a single governing body under the new MRCA. That is a significant step forward in eliminating the firewalls and barriers to information-sharing that occur from siloing with the unfortunate result that it falls to the veteran to suffer detriment.

This action spells the death knell for the siloing of and unnecessary duplication in like entities within DVA and the establishment of a single chain of administrative command. This change will enhance information sharing and establish a single policy application path.

15 SCHEDULE 5 - RMA AND SMRC

The EM asserts (at p.6) *"that the SoPs framework for decision-making about injury, disease or death causation will be substantially replicated."* It does not specify what class of SoP will no longer be replicated. The high evidentiary burden inherent in some SoPs is a matter requiring remedial action and if possible, revocation of the offending SoPs. It should also be noted that in an email to this writer, from the Registrar of the RMA[29], the following was stated *inter alia;*

> *On 29 August 2023 and in accordance with its power under section 196 (2)(b) of the VEA, the Chairperson of the RMA wrote to the Secretary of the DVA requesting that she cause primary research to be undertaken in order to obtain SMSE concerning a possible and probable relationship between dementia pugilistica and chronic repetitive blast injury in veterans. The Secretary's response is pending.*

It is the RAAC Corporation's very strong contention that research and investigation into conditions such as the one stated and any other condition being subject to action vide s196(2)(b) must not be adversely affected or delayed by the current harmonising exercise.

There are a total of **788 SoPs** in two even categories of SoPs – namely **394 RH SoPs** and

394 BOP SoPs listed by name and SoP numbers in the RMA's SoP Summary spreadsheet prepared by that organisation and published on its website[30], and is correct as of 6 March, 2024.

It is self-evident that the bewilderingly large array of SoPs currently in force will operate to create confusion and distress in veterans place a significant workload burden on Advocates and ESOs. The sheer size of the SoP suite cries out for review, reform and culling.

The RAAC Corporation contends that, all stakeholders should be provided with information relating to what SoPs are being *"substantially replicated"* and what SoPs are not.

---

[29] Email Evans/Mc Laughlin 29/11/2023 1705hrs.

[30] http://www.rma.gov.au/SoPs/ [accessed 16/3/2024]. The Spreadsheet and pdf SOP lists can be found in the right-hand column listed under **SOP Summary**. The Excel spreadsheet numbering convention commences at entry 33 and ends at 427.

Item 47, New s.24A. The addition of a new s.24 in MRCA protects claims lodged under VEA or DRCA prior to the commencement date of the proposed Act described in the EM as *deemed liability* (at p.18).

As such, the RAAC Corporation considers this section to be a beneficial provision designed to maintain a veteran's continuity of claim and to not force a veteran to resubmit a fresh claim under s.319 MRCA.

The elimination of the stress and anxiety resubmitting a new claim would cause, is self-evident and is supported. Significantly, the provisions of s.23A(3) distinguish the beneficial provisions as not applying in certain circumstances; viz

> *a person is not entitled to compensation under this Act in respect of the injury or disease if the person is receiving, or has received, any of the following in respect of the same injury or disease:*
>
> *(a) compensation under the DRCA;*
>
> *(b) a pension under Part II or IV of the VEA.*

The provisions of s.24A(3) are taken by the RAAC Corporation to ensure double-dipping and the inevitable claw-back, do not occur.

Item 60 (p.19). Section 6 provides for the grandfathering of deemed Peacekeeping and similar operations currently enshrined in s.68(1) and Schedule 3 of the VEA to the proposed new Act.

The EM asserts at p.20:

> *To date, those declared to be members of a Peacekeeping Force include mainly members of the ADF and members of Federal, State and Territory Police. Australian employees of the United Nations Organisation or of private or government welfare organisation during a peacekeeping mission are neither part of an Australian contingent nor members of a Peacekeeping Force.*

Section 6C will retain a Ministerial Determination for hazardous service.
The provisions of s.335(1) MRCA will be amended to draw British Nuclear Test defence service and hazardous service under this section. The effect of this action will operate to apply the reasonable hypothesis test for both categories of service as for operational warlike and non-warlike service.

The application of the more beneficial rule of evidence is welcome news for these two categories of veterans and for families of deceased veterans in those categories, whose service will now be covered by a more beneficial approach to meeting that test.

16 RETESTING CLAIMS: EM (p.23)

The proposal by DVA is that in circumstances where a claim is refused under VEA or MRCA, and an applicant wishes to have their claim reconsidered *, "an application may be made for consideration under the MRCA, provided the claimant can present new evidence to support their claim"*(at p.23). This is particularly concerning. (This writer's highlighted emphasis).

As the law stands, a refused claim can be heard and determined by the VRB through a *de novo* merits review hearing from ADR (Outreach). The provision cited above implies in very strong terms that an onus is imposed on a veteran in these circumstances, which is contrary to law. It is not an exaggeration to contend that the ordinary reasonable reader would also form the same opinion.

No onus of proof lies with an applicant seeking a reconsideration. That includes in circumstances discussed in **Items 68 and 69** of the EM which is silent on the no onus provision.

The inference to be reasonably gained here is that this is a clear intention by the Government to eliminate access to the no onus rule for veterans seeking a reconsideration vide MRCA Mk 2.

It is common ground that it is in a veteran's best interests to provide furthers and betters to support a claim or reconsideration. However the proposed forced submission of evidence cited in the EM falls into serious error and cannot be allowed to stand.

The RAAC Corporation considers that the applications of **Items 68 and 69** to be an abuse of a power clearly designed to *de minimis* the beneficial application of the no onus rule currently existing in both Acts, in a manner clearly designed to disadvantage a veteran.

As an alternative proposition the MRCA language for seeking an increase in PI payments uses the term reconsideration (recon) whereas the VEA's language states an application for an increase (AFI).

Contention

It is the RAAC Corporation's contention that, should retesting mean either of these two descriptors, it follows that it would be to a veteran's advantage to provide furthers and betters to support a reconsideration. The no onus applies in this instance, too.
The provisions addressing this topic at pp23-24 in the EM are considered to be vague at best and incoherent at worst.

Comment

The RAAC Corporation does agree to the proposed amendment to MRCA as discussed in **Items 68, 69 and 70** (at p.22-23/104) until clarification of what precisely is meant by the term **reconsideration**, is forthcoming.

17 ITEM 70 - FINAL DETERMINATION (p.24)

In the EM, the following at p.24 is stated:

> *New subsection (5A) precludes a claim under this Act for an injury or disease while a claim under the DRCA or VEA in respect of the same injury or disease has not yet been finally determined.*

This provision is noted, in that that a prohibition exists on double-submitting claims.

> *A claim is finally determined when a claimant has no possible further avenue for any form of appeal. New subsection (5B) requires that a claim for acceptance of liability for an injury or disease previously claimed under the DRCA or VEA must be supported by new evidence.*

Once initial liability has been established and accepted at any initial determination, internal review, merits review (VRB), AAT and Common Law appeals, it follows that the claim must as a matter of law be granted.

This is predicated on the investigation and assessment of a veteran's claim for compensation or a reconsideration. These processes are notoriously slow and extraordinarily time-consuming. Notwithstanding DVA's proud boast in respect of reducing the claims backlog, the data suggests otherwise.

The extract from DVA's TTTP data in Table 1 is significant in terms of the still lengthy delays up to and including final determination in the top three major categories listed, as cited for January and February 2024.

Table 1 Claims processing data as at 29 February 2024[31]

	Target	2020-2021	2021-2022	2022-2023	Jul-23	Aug-23	Sep-23	Oct-23	Nov-23	Dec-23	Jan-24	Feb-24	Current FYTD	Last FYTD	% change from last FYTD
Time Taken to Process - Claims [1]	Average total processing time in calendar days														
DRCA Initial Liability	100	246	336	460	491	493	487	479	472	452	430	468	477	439	8.7%
MRCA Initial Liability	90	233	302	441	448	421	413	373	352	345	387	414	386	422	-8.5%
VEA Compensation Payment	100	272	357	480	536	535	504	510	517	492	452	497	481	457	5.3%
VEA Application for Increase	100	100	151	162	243	163	209	180	185	146	197	171	186	153	21.6%
MRCA Permanent Impairment	90	164	221	262	263	248	244	240	244	230	224	208	236	256	-7.8%
DRCA Permanent Impairment	100	188	196	259	296	292	318	295	272	312	353	324	305	244	25.0%
MRCA Incapacity	50	45	65	99	117	104	94	87	77	65	84	60	86	94	-8.5%
DRCA Incapacity	50	47	72	100	124	114	93	88	82	54	79	96	92	99	-7.1%
VEA War Widow	30	61	77	88	106	125	98	126	114	89	92	130	108	90	20.0%

1. Time is measured from date of receipt to date of determination. The overall time taken to process includes periods external to the DVA process, e.g. time taken to obtain medical information from a treating GP or specialist.

Source: Adapted from DVA Spread Sheet ***Claims Processing Data as at 29 February 2024.***[32] This writer's highlighted emphasis

[31] https://www.dva.gov.au/sites/default/files/2024-03/Claims%20processing%20data%20as%20at%2029%20February%202024_0.pdf [Accessed 19/3/2024].

[32] https://www.dva.gov.au/sites/default/files/2024-03/Claims%20processing%20data%20As%20at%2029%20February%202024%20%28002%29_0.xlsx See also

Table 2 Claims processing statistics February 2024

Source: Accessed by the author from DVA web page *Claim Processing Times* [33]

Although the backlog clearance is improving, there is still an unacceptably long time in TTTP from initial claim to final determination. This cannot be allowed to become a long-tail process and cries out for significant improvement. The DVA policy guidelines to enhance time to process claims (TTTP) set out in CLIK[34] are instructive; viz

CLIK 2.1.5 Timely Approach to Claims Processing

It is the duty of all delegates to determine all claims for compensation in an accurate and timely manner. The accuracy of determinations is not negotiable. No compromise can be accepted in the degree of care and diligence in deciding any entitlement under the Act. Claims assessors should always aim to meet the targets for time taken to process of 75 days for the VEA and 120 days for the SRCA and MRCA.

Where possible, the assessment of claims should commence as soon as possible after receipt and the regular ongoing management of those claims conducted in a reasonable timeframe. To achieve this it is important that both the claims assessors and their managers closely monitor the claims that are received and on hand to ensure a good awareness of the status of claims and circumstances of the clients.

The principles to be applied to claims processing to assist in achieving this goal are as follows;

- *Start the investigation of all claims within 7 days of assignment;*
- *Complete all follow up actions on the day they become due;*
- *Refuse to get stuck, ask for help the day a problem becomes evident.*

https://www.dva.gov.au/sites/default/files/2024-03/Claims%20processing%20data%20as%20at%2029%20February%202024_0.pdf at p.5/7 [Accessed 19/3/2024].

[33] https://www.dva.gov.au/claim-processing [accessed 19/3/2024].

[34] https://clik.dva.gov.au/military-compensation-srca-manuals-and-resources-library/liability-handbook/ch-2-initial-liability/25-priorities-actioning-compensation-claims/251-timely-approach-claims-processing [Accessed 19/3/2024].

In some cases however, the urgency associated with the matter means that a claim must be dealt with ahead of older claims and significant attention needs to be given to obtaining the necessary information to make a determination. This is a judgement call for the delegate and/or the manager based on the degree of personal distress, financial hardship and medical or rehabilitation concerns of the client. Priorities need to be attributed by the claims assessor and their manager, and based on the circumstances of the claim at the time of receipt and allocation. These priorities will need to be regularly reviewed during the progress of the claim where changes to the claimant's circumstances may provide a greater urgency. This regular review can be conducted as part of the case conferencing process between claims assessors and their team leader or Director/Manager. (This writer's highlighted emphasis).

Based on the total TTP for each class of claim as cited in Table 1, it begs the question as to how effective TTTP actually is. While the Department may boast of the reduction in backlogs, final determinations should be the ultimate consideration.

Veterans are hugely accustomed to being briefed as a part of their military service. To then find themselves in a situation directly involving them and not receiving regular communications, is not acceptable. Where these deadlines cannot be met, the Commission owes a duty to a veteran to inform them of any delays encountered and if possible where there are information gaps that the veteran or his or her advocate can address. This enhances improved communications between the parties, the lack of which has generated considerable anger and frustration among veterans this is, not being informed.

While DVA may be satisfied with achieving a reduction in a backlog of claims as shown in Table 2, that boast is offset by the picture painted of a stubbornly high TTTP in the top three major categories as cited in Table 1.

They paint a conflicting picture of a significantly intractable problem in achieving TTTP reductions. The current high TTTP matters does not augur well for the introduction of MRCA Mk2.

It follows that, in order to achieve a meaningful reduction in TTTP before MRCA Mk 2 becomes law, CLIK 2.5.1 needs to be reinforced more vigorously to staff.

18 DIVISION 3 – MEDICAL EVENT ON SERVICE

Item 82 *insert new paragraph 27(da) in relation to the definition of service injury, that an injury can be accepted on the basis that it occurred while the member was on Defence duty regardless of whether or not the injury was a result of the member's duties. The approach is broadly modelled on section 6 of the DRCA, for an injury that took place 'in the course of employment'. This would allow conditions such as heart attacks and other acute occurrences to be accepted as service related under the MRCA as they are under the DRCA.*

The proposal to broaden the provisions of s.27 MRCA with a new s.27(da) to provide compensation coverage, regardless of whether or not a serving member incurred an injury that was not a result of a member's duties is noted, as it gives statutory effect to the High Court decision in *Roncevich*, [35] where the Court fond that the appellant's injury did arise in the course of his Defence service. The proposed amendment to MRCA now uses the term in the course of *"the member's duties."*

The use of the completely civilianised Public Service descriptor of "*course of employment'* should never on any level be used to refer to military service.
The unique nature of military service mandates a significant difference to be applied that is not civilian in nature. Anything less insults that unique service and that sacrifice.

19 DIVISION 4 – POSTHUMOUS CONVERSION OF PI PERIODIC PAYMENTS (EM pp26-27)

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 through the deceased veteran had made the choice. The conversion will not include applying the Lifestyle effects of the condition. **(DVA Webinar 3/4/24).**

20 DEATH OR INJURY PROVISIONS – EM ITEMS 83 TO 87

(EM p.48). The death or Injury provisions in **Items 83** to **Item87** are noted, in particular vide **Item 83** that automatic acceptance of the injury incurred will occur.

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. **(DVA Webinar 3/4/24)**.

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.

[35] ***Roncevich v Repatriation Commission*** [2005] HCA 40; (2005) 222 CLR 115; (2005) 218 ALR 733; (2004) 79 ALJR 1366 10 August (2005), per Mc Hugh, Gummow, Kirby, Callinan and Heydon JJ. Online at www.austlii.edu.au [accessed 17/3/2024].

The RAAC Corporation believes such a major policy change designed to streamline death or injury provisions must on every level be included in CLIK (Advisory Notes, Commission Guidelines or Departmental Instructions). The fact the EM is silent on that requirement, is unacceptable.

Contention

The RAAC Corporation argues that, the insertion of a provision in CLIK regarding the death or injury of a veteran, automatic acceptance provisions, without reference to any SoPs, needs be actioned.

21 DRCA CLAIMS AND STATEMENTS OF PRINCIPLES – OVERRIDING THEIR APPLICATION

The power of the Commonwealth to override the application in some circumstances is enshrined in **s.340 MRCA.** This power to override is considered to be a very relevant consideration in examining the potential plight of DRCA veterans, once the legislative changeover takes effect on 1 July 2026. DRCA claims are not subject to the jurisdiction of the SoPs. The SoPs were never cross-vested to DRCA.

Although not binding in respect of DRCA claims, the provisions in **CLIK Clause 13.1.1** *SoPs not binding in DRCA cases*[36] enable Decision-makers to refer to the SoPs solely as a guidance tool, viz;

> *Although the SOPs are binding on VEA and MRCA delegates, they have no legal standing under the DRCA. Nonetheless, SRCA delegates are advised that the SOPs can provide useful information about the aetiology (causation) of various medical conditions.*
> *If referring to any SOP condition for DRCA purposes, it is important to remember that it is the BOP SOP – which applies to peacetime service – that must be used. Although the SOPs can be a useful guide when making a determination under DRCA, they should never be the sole consideration, particularly where injuries or temporary aggravations are concerned.*
> (This writer's highlighted emphasis)

As of 1 July 2026, that will change and DRCA matters will be subject to the SoP regime.

The protection of DRCA claims from the application of the SoPs will result in Chapter 13 in CLIK becoming redundant. The fact that this grandfathering will occur has created a significant degree of anxiety in the DRCA veteran cohort. That is entirely reasonable and understood.

[36] https://clik.dva.gov.au/military-compensation-srca-manuals-and-resources-library/liability-handbook/ch-13-status-rma-sops-drca-purposes/131-what-are-statements-principles-sop/1311-sops-not-binding-drca-cases [Accessed 21/3/2024].

The other provisions of Chapter 13 include:

13.1.2 SoP factors may advise DRCA delegates

> *SOP factors are sometimes of interest to RCG Delegates, in that these protocols outline what factors are generally to be considered when diagnosis is to be made. On occasion, a DRCA Delegate may at their discretion use these documents to form a view whether further questions need to be asked of an examining doctor (i.e. with regard to the reliability of a diagnosis). However, sections of these protocols are very specific to VEA/MRCA needs and non-compliance in the case of an DRCA case need not, in most cases, be cause for concern.*

13.1.3 Limitations of SoPs for DRCA purposes

> *However, DRCA cases can seldom be accepted on the strength of an RMA SOP alone. To accept liability for a particular medical condition requires more than confirmation that the disease may be caused by the factors cited in the relevant SOP. A medical examination and opinion confirming or discounting employment factors as 'probably' causing the particular condition will generally be required. All of the available evidence must be considered. RMA SOPs can be an effective tool for quickly eliminating fanciful contentions or for elucidating other likely causes of the particular condition claimed. They can also provide a useful check on the credibility or otherwise of a specialist report. Where there is a clear conflict between the two, the doctor should be invited to comment in the light of the relevant SOP. The decision should reflect the delegate's judgement on the response provided.*

Under the current DRCA non-SoP regime, a more beneficial threshold is applied to claims as can be seen from the provisions of all three clauses above. 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 through no fault of their own, a higher evidentiary bar for claimants.

This 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.

The rigidity and inflexibility of the SoPs grievously offend the beneficial intent of the provisions of the legislation and its remedial intent. On every level this offends the concept of procedural fairness.

This is the regime the Government is forcing on a class of veterans who have no control over their destiny under DRCA with that Act and their fate being subsumed by new MRCA.

It is the regime the Government is now intent on foisting on DRCA veterans to come within the SoP template.

It is a grievously unfair application of a policy applying a more rigid process without any consideration being given to the effect this change will have on a class of veterans.
It is a policy that is completely without merit.

It follows that, DRCA veterans will be disadvantaged and will suffer detriment with its attendant consequences on affected veterans and their families. The stress and anger generated by the application of SoPs will be significant with its attendant risks to family harmony, self-harm or worse. Veterans will feel they have been dudded and will feel their service to the nation was all for naught.

DRCA veterans will have gone from a regime with a more beneficial claim threshold to one where, even though DRCA claimants are still carrying compensable injuries, illnesses or diseases, those compensable conditions will not be accepted due to a legislative change.

Part 22 (Legislative Relief for Veterans), discusses a proposal in respect of legislative relief for DRCA veterans.

22 LEGISLATIVE RELIEF FOR DRCA VETERANS

In s.322 MRCA, the Guidance Notes state:

> *The Commission can also override an RMA decision about a Statement of Principles under section 340 of this Act.*

Section 340 states *inter alia:*

340 Determination by Commission overriding Authority's decision in relation to Statements of Principles

Commission may make determinations

(1) If:

(a) the Repatriation Medical Authority has determined, or has declared that it does not propose to make or amend, a Statement of Principles in respect of a particular kind of injury, disease or death (see section 196B of the Veterans' Entitlements Act 1986); and

(b) the Commission is of the opinion that, because the Statement of Principles is in force, or because of the decision by the Authority not to make or amend the Statement of Principles:

(i) claims for acceptance of liability for injuries or diseases of that kind made by members or former members of a particular class; or

(ii) claims for acceptance of liability for the deaths of such members or former members made by dependants of those members or former members;

cannot succeed; and

(c) the Commission is also of the opinion that, in all the circumstances of the case, those persons or their dependants should be entitled to receive compensation under this Act;

the Commission may, in its discretion, make a determination in respect of that kind of injury, disease or death under either or both subsections (2) and (3). (This writer's highlighted emphasis).

Sections (2) and (3) relate to the application of the Reasonable Hypothesis (RH) test and the Balance of Probabilities (BOP) standard of proof. DRCA claims will not be exempt from meeting either of these two Rules of Evidence.

The statutory relief in s.340 could well be seen to be the avenue by which DRCA claims may be saved from falling victim to the SoP Factors.

However, it is the RAAC Corporation's submission that further action needs to be taken by DVA to ensure DRCA claimants are not in any way disenfranchised due to the SoPs.

Proposed remedial action

The RAAC Corporation has asserted in its submission that the three Acts are remedial.

In order to preserve that remedial and beneficial intent, the RAAC Corporation proposes that DVA give full and serious consideration to the following:

1. Deem all DRCA claims that arise on and from **1 July 2026**, as Special Circumstances Claims (SCCs).

2. Refer all DRCA claims for SCC determination by a dedicated, knowledgeable

   DRCA-experienced review team to determine whether or not a DRCA claim meets SCC status to have the s.340 overriding provisions apply.

3. Assessing and determining a SCC claim should be undertaken applying ameliorating and beneficial overriding provisions in s.340. That will enable the assessing delegates to ensure due diligence as cited in **CLIK 2.1.5**.

4. Where a DCRA claim is determined not to meet the SCC s.340 overriding requirements and is refused, that decision is a reviewable decision.

5. Consequently, a claimant must have the right to seek a review of that decision by appealing to the VRB at first instance.

6. Where a claim has been granted SCC s.340 overriding status, but the claim for the injury, illness or disease is refused, that is also a reviewable decision and as such, a veteran may lodge an entitlement appeal with the VRB.

If no thought is given to DCRA veterans at any level to rectify this potentially dangerous flaw, it follows that, the DCRA cohort will be the losers. That is on every level anathema to the RAAC Corporation and all other ESOs.

23 DIVISION 5 – OVERPAYMENTS AND DEBTS

Items 92 to 97

It is acknowledged that, from time to time, instances will occur where overpayments have been made for a variety of reasons. The notification of an overpayment and total amount owing to be repaid causes enormous stress and distress to debt action recipients.

Overpayments would include Disability Pension Payments, Service Pension, War/Defence Widows/ers Pensions, PI Payments, Incapacity Payments etc., all of which are presently administered by the Repatriation Commission and MRCC.[37]

Add to that, the non-pension-style schemes which the RAAC Corporation calls a Miscellaneous Ancillary Programme Review.

The totality of the areas where a decision adverse to a veteran or other affected person involving a refusal of entitlement or notification of overpayment, offers no grounds for appeal other than to the Federal Court, is disturbing.

An affected person may seek a review of the overpayment and repayment demand (claw-back).

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.

Procedural fairness through a lack of a formal internal review process is denied to persons seeking to challenge by review, an overpayment notice and demand for repayment (claw-back). Veterans and other persons adversely affected by a DVA claw-back decision face a fraught process in trying to sort out what has occurred.

The RAAC Corporation contends that, it is issues such as these which have a similarity of distress, trauma loss of dignity, loss of hope, fear of debt collectors at the door, self-harm and worse, that resulted in the Royal Commission into the Banking, Superannuation and Financial Services Industry, the ROBODEBT Scheme and more currently the Royal Commission into Defence and Veteran Suicide. The hardship impositions are noticeably from the bland wording of s.415 MRCA.

The provisions of **Item 125** and **Item126** create incredible hardship for veterans and their families should this proposal be applied. It creates a grievous inequity in its application and must not be allowed to stand. It is inconsistent with DVA's duty to to act with courtesy and sensitivity to the rights duties and aspirations of all veterans.

[37] The author has represented clients who have received overpayment notices and repayment demands.

Contentions

1. The RAAC Corporation contends that;

2. The provisions of Item 125 and item 126 are unconscionable and indefensible in that they propose a process clearly designed to create enormous hardship by the application of a claw-back policy that ceases all payments until the debt is repaid.

3. The provisions of Items 125 and 126 are draconian of such an egregious nature they should be excised from the harmonising process and a more equitable and humane policy be adopted by the Government.

4. For example, if the only source of income for a veteran is his or her DVA pension or a fortnightly PI payment, the proposal, if enacted has a genuine potential to result in a veteran and his or her family being left destitute. A process of garnishee, or a negotiated settlement commonly used for debt recovery should be entered into. That will then limit the amount of money that can be recovered. Even this can produce hardship. Nevertheless, it is a starting point and is more in keeping with a modern, civilized society

5. Urgent action is required to address this defect in their system of administering the Department's huge constituency base.

6. A genuine need exists for affected persons to access a form of Compensation Refund Review Programme to examine and adjudicate on overpayments.

24 CLAW-BACK of DEBT

Items 125 and 126 (at p.30).*The outcome is that the plaintiff is not entitled to any further compensation under the MRCA, the DRCA or the VEA until the amount of compensation that would have been payable equals the amount of damages that has been recovered. The intention is that the plaintiff cannot receive double payments for the same injury, disease, death or loss and can only resume compensation payments once the damages have been exhausted.*

What is proposed compels a detailed response.

The clear and disturbing inference to be gained from reading **Item 125** and **Item 126** is that action recover the amount of damages is only achieved by imposing a complete debt recovery stoppage on any further compensation payments (claw-back). The bland wording of s.415 belies the harshness of what is proposed in the EM at **Items 125** and **Item 126**.

It is noted the overpayment provisions in the VEA are completely silent on the matter of overpayments and debt recovery.

VEA and DRCA veterans subject to debt recovery action will be dealt with in MRCA vide s.415 - overpayments generally and via s.416 - overpayments involving veterans receiving Commonwealth superannuation. In addition, the discretionary beneficial provisions in respect of waiver or write-off of debts will then apply also vide ss.428 and 429 MRCA. Reduction of payments due to overpayments, is governed by s.317.

Section 415 MRCA also addresses only those overpayments made as a consequence of dishonest actions by a veteran. A proposed model for determining a scale of repayment of debts are discussed in **Part 24A**. Where no avenue exists for a review to the AAT (or the new ART), a targeted veteran may be forced to appeal to the Federal Court.

It is well settled that instances ay occur form time to time where overpayments cannot be blamed on any one instance or individual. However overpayments can cause significant stress and hardship (claw-back) to affected persons.

The Royal Commission into the ROBODEBT Scheme found *'One percent of Australia's population has received money they are not entitled to and owe a debt to the other 99% of Australians'*. The Royal Commission recommended there be a limitation period of six years for debt recovery.[38]

There is no evidence available on the percentage of veterans who owe money to the Commonwealth but it is unlikely veterans would be greater in number than the rest of the population. Therefore, there is no reason why a debt recovery regime should be more onerous on veterans and their families than it is for other Australians.

Significantly, it is pertinent to note that the ROBODEBT debacle in Australia and the Post Office scandal in the UK, are prime examples of the suffering caused to individuals by system failures and obtuse and obdurate bureaucratic refusals to listen to stakeholder concerns.

In *' A Better Way to Support Veterans'*, The Productivity Commission (2019) stated:

> *'In addition to providing assistance to claimants, if the Department of Human Services gives incorrect advice about payment eligibility, its legislation:*
>
> - *requires that the government not recover debts that are attributable to administrative error (s. 1237A of the Social Security Act 1991)*
> - *allows it to pay special benefits in circumstances where there is demonstrated financial hardship and unique circumstances, including when misleading advice has been given.*[39]

[38] Commonwealth, Royal Commission into the ROBODEBT Scheme, Report (2023) vol 2, 508 [6.1] [Accessed 3/4/2024] .
[39] Productivity Commission, *A Better Way to Support Veterans*, Report No 93, Vol 2, 539. [Accessed 13/4/2024]

Additionally, an examination of the current *Social Security Act 1991* states:

> ***Waiver of small debt***
> *(1) The Secretary must waive the right to recover a debt if:*
>
> *(a) the debt is, or is likely to be, less than $200; and*
> *(b)it is not cost effective for the Commonwealth to take action to recover the debt.*
>
> *(2) Subsection (1) does not apply if the debt is at least $50 and could be recovered by deductions under section 1231 from a social security payment of the debtor.*
>
> *Note: Section1237AAE limits the circumstances in which an assurance of support debt may be waived under this section, and the amount of the debt that may be waived.*

Similarly, under the extensive provisions of s.1236 9ss1 and 1A of the *Social Security Act 1991* the Secretary may exercise a power and a function to write off the debt in circumstances where;

> *Subject to subsection (1A), the Secretary may, on behalf of the Commonwealth, decide to write off a debt, for a stated period or otherwise.*
>
> *(1A)The Secretary may decide to write off a debt under subsection (1) if, and only if:*
> *(a)the debt is irrecoverable at law; or*
> *(b)the debtor has no capacity to repay the debt; or*
> *(c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or*
> *(d)it is not cost effective for the Commonwealth to take action to recover the debt.*

If this type of legal opening s shown by way of example above is available to members of the Australian community at large, it begs the question why is it not applicable to veterans and their families under veterans' legislation?

Contentions

1. The RAAC Corporation contends that the Commonwealth must not shut its ears to considering a Debt Repayment (Refund) Programme using structured fortnightly offsetting provisions agreeable to the parties.

2. The RAAC Corporation proposes a Schedule of payments be promulgated that is designed to minimise any adverse financial effects on veterans and veterans' families who have incurred a debt to be repaid as discussed in **Part 24A** (Recovery of Overpayments).

3. The RAAC Corporation also contends that, the process proposed for a stop-payment debt recovery claw-back is inconsistent with the Human Rights Compatibility that the Draft Bill is asserted as meeting.

4. The grandfathering of VEA veterans to the provisions of ss.428 and 429 (waiver/write-off of a debt) has considerable merit as the Act is silent on the ameliorating provisions found in DRCA and MRCA. The lack of these provisions in VEA deny VEA veterans access to a beneficial provision to which they should be entitled.

5. Its inclusion in the grandfathering exercise will provide VEA veterans with another level of statutory relief in the form of a waiver or write-off of an overpayment subject to terms and conditions.

6. DRCA veterans who already have access these provisions vide ss.114C and114D of that Act will also be grandfathered to mirrored MRCA provisions without detriment.

Th RAAC Corporation submits a sliding scale of payments discussed in the Topperwein Model in **Part 24A** should be considered.

The RAAC Corporation further submits that the six-year statute of limitations in respect of ROBODEBT repayments discussed in **Part 24B** (A Proposal for a statute of limitations) should be considered with a linking of both models to ensure equitable treatment of veterans and elimination of gross hardship with their debt repayments.

24A RECOVERY OF OVERPAYMENTS

DVA apply a set of general rules to enable the Department to asses and determine the amount of monies to be repaid by recovery action. These deductions are set out in Table 3.

Table 3 Recovery Template (The Topperwein Model)

AMOUNT DEDUCTED	TIME TAKEN TO RECOVER	COMMENTS
Up to $26	One deduction from f/n pension	
Amounts between $26 and $500	6-month period	
Amounts between $500 and $1000	12-month period	
Amounts between $1000 and $5200	12-month period	
Amounts over $5200	Subject to other recovery arrangements	DVA to contact the veteran

Source: Adapted by the author from ***LAW 10070 Veterans' Law 2***, 2004, ***Law and Government Decision-making***, Topic 2 *Service Pension Overview, Overpayment Recovery,* at p.2.13, © 2003 Southern Cross University, Book of Readings, per Topperwein, B. (Tutor).

It is pertinent to note that the quantums of compensation under MRCA are significantly greater that the quantums discussed in Table 3. In that regard, a sliding scale of repayments based on MRCA quantums will need to be developed and promulgated as a Schedule to the Act. Similarly, the recovery templates will need to be promulgated in CLIK.

The RAAC Corporation considers it important to ensure debt recovery repayment amounts are not buried in legislation but must be clearly available for perusal by all interested parties, including the application where necessary of discretionary action where circumstances require it.

24B A PROPOSAL FOR A STATUTE OF LIMITATIONS

The ROBODEBT Royal Commission Report (`1052pp) [40]recommended that a six-year time frame be reinstated for debt repayment (recommendation 18.2 (at p.xvii); viz

> *The Commonwealth should repeal s 1234B of the Social Security Act and reinstate the effective limitation period of six years for the bringing of proceedings to recover debts under Part 5.2 of the Act formerly contained in s 1232 and s 1236 of that Act, before repeal of the relevant sub-sections by the Budget Savings (Omnibus) Act (No 55) 2016 (Cth).*
>
> The Royal Commission also found:
>
> *There is no obvious reason that current and former social security recipients should be on any different footing from other debtors. To the contrary, as a cohort more likely to be in financial difficulty, there is every reason not to pursue ancient debts against them.*
> (Clause 6.1 at p. 509).

The second-last sentence in that recommendation is particularly significant regarding recipients not *"being on a different footing to anyone else."* It makes a compelling case for the same provisions being applied to veterans.

The final sentence regarding *not pursuing ancient debts* is also directly relevant to veterans subject to a repayment order and a such, the implementation of a six-year statute of limitations with debt waiver at the end of that period, should be considered.

It begs the question why is one Government entity operating a specific time frame for debt recovery from it class of recipients (Social Security recipients), why is it not the case for another government agency (DVA) to implement a similar process for its class of recipients,, namely veterans? It does not flow.

In its response (39pp) to the ROBODEBT Royal Commission, the Government stated:[41]

> *The Government has **accepted** or **accepted in principle all 56 recommendations** made by the Royal Commission.*
>
> *The Government Response commits to action to implement the recommendations, and reinforces the Government's commitments to improve trust in government, deliver strong institutions, invest in a capable public sector and ensure people are at the centre of policy development and government service delivery.* (Government's bold emphasis).

[40] https://robodebt.royalcommission.gov.au/system/files/2023-09/rrc-accessible-full-report.PDF [accessed 12/4/2024].
[41] https://www.pmc.gov.au/resources/government-response-royal-commission-robodebt-scheme [accessed 12/4/2024].

In its response to **Recommendation 18.2**,[42] the Government stated:

> *The Government **accepts in principle** this recommendation. The Government will improve social security debt arrangements and is committed to ensuring debt raising and recovery is undertaken in a timely, fair and respectful manner.* (Government's bold emphasis).

It could be argued that the same provision applies equally to veterans who are subject to debt recovery by DVA.

The RAAC Corporation submits that:

1. A case can be made for the introduction a six-year statute of limitations.

2. A case can be made for incorporating a sliding scale of repayments as suggested in the Topperwein Model with the six-year payment plan in the ROBODEBT Model. This will remove the inequity that will result from the application **of Item 125** and **Item 126**.

3. The introduction of such a time frame of six-years is entirely consistent with that of another Government Department - Social Security, in its management of funding for Social Security recipients.

4. The placing of a DVA debt recovery programme under Services Australia as for Social Security arising from the ROBODEBT matter, is not supported and should be resisted.

5. Veterans subject to DVA debt recovery must remain within the jurisdiction of DVA for that action.

6. The implementation of a six-year statute of limitations will operate to provide a sense of certainty to a veteran that debt recovery is an achievable objective and not endless, in that it will have a finite timeframe.

7. Any debt outstanding at the expiration of the six-year period should be forgiven.

8. The ROBODEBT response by Government sees a commitment *"to improve trust in government"*[43].

9. Given the catastrophic loss of trust and faith by veterans in DVA, the RAAC Corporation considers that the establishment of a six-year debt recovery scheme as for ROBODEBT has considerable merit. It can only operate to improve trust in Government.

[42] https://www.pmc.gov.au/sites/default/files/resource/download/gov-response-royal-commission-robodebt-scheme.pdf [accessed 12/4/24].
[43] Above, n.40.

Recommendation

1. The RAAC Corporation recommends that, DVA consider a repayment scheme based on the provisions of Table 3 (the Topperwein Model) and incorporate a six-year statute of limitations for debt repayment (the ROBODEBT Model).

2. The RAAC Corporation recommends that at the end of the six-year period, the outstanding balance be waivered and the debt forgiven.

3. The RAAC Corporation recommends the establishment of a form of internal Refund Review Programme completely separate from the VRB in the event of a challenge to a cessation of payments.

4. In the event of a waiver or write-off action a financial grant to access a financial adviser be made available to an affected veteran or veteran's family.

25 DISCRETIONARY ACTION – WRITE-OFF or WAIVER OF DEBT

Item 95 (EM p.27**)**. In any matter in which the Commonwealth initiates recovery action, the discretion to either waive or write off the debt needs to be considered.

The write-off provisions of s.428 MRCA which authorise the Commonwealth to waive a debt allow the Commonwealth the discretion at law to recover the debt.

The temporary waiver action is a beneficial provision enabling a veteran or veteran's family to restructure their finances in order to repay the debt. The Guideline Note is clear in its application to s.428, namely that *"In law, however, the debt still exists and may later be pursued."*

Significantly, section s.429 provides complete statutory relief where waiving a debt results in no further action. The Guideline Note in s.429 is unequivocal. Once waived, *"the debt officially ceases to exist."* This is significant in circumstances where a veteran and/or a veterans' family are in necessitous circumstances or where the veteran has pre-deceased the debt being repaid in full.

The ameliorating provisions of s.429 are considered to be a significant beneficial provision and will operate to ensure veterans and/or their families suffering financial hardship will have a pathway to applying to have a debt written off.

This is consistent with Topperwein (2004), namely both actions have differing effects in that a debt that is waived *"cannot be reinstated"* whereas and a debt that has been written off *"can be reinstated at any time."* In addressing writing off (waiving) a debt, Topperwein wrote:

> *"a waiver would apply in circumstances where the likelihood of the person not having sufficient funds to repay the debt, or the debt arose in circumstances where it would be grossly unfair to require the person to repay it"* (Topperwein, p.2.14).

It follows that, Delegates managing debt recovery action must, consistent with procedural fairness, be cognisant of the discretionary provisions discussed by Topperwein.
According to Topperwein:

> *"Before a waiver or write-off decision is made, the Department will require the person to give a complete accounting of their income and expenses and consider the nature of any disposable assets."* (Topperwein, 2004 p.2.14).

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 *Social Security Act 991*also provides at s.1237AAB an example of the considerations relating to a waiver of a debt. It is recommended that DVA examine and compare the social Security example against what is presently in place for veterans who are subject to a repayment decision.

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.

2. Discretionary action must always be an option for the Government to consider.

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. Their should, as a matter of course, be examined and considered before the grandfathering exercise becomes law.

26 WITHOLDING MEDICAL ADVICE

Item 10 (at p.60) discusses a range of definitions in their application to the VRB, including the definition of *"relevant documentary medical evidence."*

The RAAC Corporation contends that the VRB appeals process is deficient in a material particular which on its face, constitutes an abuse of process and if left uncured will continue to be an impediment to obtaining full disclosure, thereby damaging a veteran's ability to view all matters directly and properly relevant to a veteran's claim.

The abuse contended arises from Departmental Officers refusing to include in the s.137 report any medical opinions (medical evidence) of a Departmental Medical Adviser (DMA) in circumstances where an application or claim (entitlement) is refused or where a decision on assessment is also refused.

The RAAC Corporation takes the definition of *"relevant documentary medical evidence."* to accord with s.133 VEA 1986 to be subsumed by new s.352 Division 1 MRCA. The RAAC Corporation contends that, that *relevant documentary medical evidence* should also encompass the medical reports/opinions of DMAs. The fact s.133and new s.352 is silent on this particular issue, is disturbing.

Creyke and Sutherland[44] write that the amendment to this definition arose from a recommendation of the 1994 Veteran's Compensation Review Committee (aka the Baume Committee). According to the authors, the recommendation of the Baume Committee was *inter alia "intended to encourage veterans to obtain medical evidence for Board hearings…".*[45]

It is inconceivable that any reasonable encouragement in these circumstances would be viewed positively when there appears on its face what appears to be a deliberate tactic employed by the Commonwealth to cause a veteran to suffer detriment.

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 n 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.

---

[44] Above n.8.
[45] Above, n.8, at p.457-458.

Action by the Secretary and full Commission should betaken 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.

Practice Directions at the VRB[46] 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.

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

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*[47] by Gaudron J, are equally relevant in this instance.

The RAAC Corporation also contends that, there is no reason at all for the deliberate withholding of DMAopinions 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

1. 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.
2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

[47] Above, n.19.

7. 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[48] 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

> ***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.

[48] ***Royal Commission into Defence and Veteran Suicide***, Block 4 Canberra 7/9/20202, Transcript of Evidence at p. 27-2501.

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. 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 unconscionable conduct by DVA which has on any analysis, abrogated its duty is to act as an honest broker and as a model litigant.

3. 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.

27 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 1/7/26** or have a 5-point worsening of any condition previously accepted **prior to 1/7/26.**

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 **(DVA Webinar 3/4/24).**

28 DISCLOSURE OF INFORMATION

Item 103 *inserts new section 407A to allow the Department of Defence to disclose information to the Commission for the purpose of assisting the Commission to perform its functions, duties or exercise its powers. It also inserts new section 407B which allows the Commission to use or disclose information if the use or disclosure is for the purposes of the Commission performing its functions, duties or exercising its powers. The changes are designed to consolidate and standardise the authority for information exchange, and support efficient investigation and determination of compensation claims, and the provision of appropriate services.*

The RAAC Corporation supports the insertion of a new ss 407A, and 407B with the proviso that, having regard to the compromised and terminated DVA MATES[49] Joint Venture with the University of SA, that all strict security measures are in place to protect an individual's privacy and their medical and other records.

This can be emphasised sufficiently by reference to recent major cyber attacks including attacks on for example, Optus, Medicare, Woolworths and Latitude Financial.

The security concerns regarding protection of veterans' private data, takes on an added significance in that according to the Australian Cyber Security Centre's (ACSC)[50], they report in their Annual Cyber Threat Report for FY July 2021 to 2022 that;

> *…there has been a heightened level of malicious cyber activity in Australia, with reported cybercrime up nearly 13 per cent from the previous financial year. The report also shares that the average loss per report across organisations rose 14 per cent compared to the previous year.*

Items 105 to 109 (at pp.28-29) also come within security and privacy caveats as discussed above.

[49] Lowis, J., 2024, **Ethics Committee Calls a Halt to the DVA MATES Program**, in *Camaraderie Magazine* Vol 55, No 1 at pp22-25 online at https://dfwa.org.au/update/camaraderie-vol-55-no-1/
[50] https://www.pexa.com.au/content-hub/cyber-attacks-in-australia/ [accessed 17/3/2024].

29 SUMMARY

1. In summary, the proposed changes to the legislation are welcome news.
   It is a significant body of work and drafting staff are to be congratulated for the effort put into designing the package to be reviewed.

2. However, notwithstanding the significant body of work undertaken to grandfather three Acts into one Act, the fact remains that the new MRCA Mk2 will still stand tall as a legislative package that is still a patchwork quilt of grandfathered provisions.

3. There is no guarantee that MRCA Mk 2 will not have embedded in its architecture flaws not removed or corrected through the Governments drafting, proofing and settling process.

4. The argument still remains that at some point in time, a complete deconstruction of the new Act and a rebuilding of veterans' legislation in the form of an Omnibus Act should be considered.

5. Notwithstanding the very welcome efforts by Government to comply with the Royal Commission's recommendation, the veteran community has distrust in this process. That distrust is understood. Veterans enter unknown territory once MRCA Mk2 comes into force on 1 July 2026.

6. There are a number of flaws discussed requiring remedial action which if not, will continue to create a series procedural errors continuing in unnecessary stress and trauma for veteran navigating the claims process.

7. The effect of ignored or uncorrected flaws will adversely affect the performance of the governing legislation and cause detriment to the rights and entitlements of veterans and their families.

8. Should these flaws not be addressed and rectified, a real possibility exists that that all veterans will have is another version of a cut and paste exercise in which MRCA Mk 2 reigns supreme. It remans to be seen how effective the harmonisation exercise will be in terms of simplification and effectiveness

9. It is not an exaggeration to contend that veterans will have been given a camel instead of a horse.

30 CONCLUSION

There are 37 conclusions. These are:

1. The harmonising exercise is presents DVA with the opportunity to regain loss of reputation and eliminate the tarnishing of its 180-year legacy. It is essential that the Commonwealth get the harmonising process right.

2. Relevant persuasive authority (case law) favouring veterans must not be extinguished through subterfuge and chicanery by the manipulation of the wording of provisions related to the harmonisation process.

3. No merits review process has been considered for adverse decisions related to the Repatriation Appliances Programme (RAP); the Vehicle Assistance Scheme (VAS); and Medical Approvals. The lack of a structured review is unacceptable.

4. The provisions for Common Law Damages (NEL) have been increased but are still precluded from indexing to keep up with the cost of living. In the current economic climate, indexing is critical and as such the prohibition on indexing should be removed.

5. The wording of the provision *"for the maximum amount that a member or a former member can recover*" is deliberately vague and is completely silent on the fact that each impairment is in fact, a separate injury as held by the High Court in *Canute* and not a sequela.

6. The vagueness of the wording is considered to be either an attempt to *de minimis* Canute and its beneficial effect or an attempt to completely neutralise through subterfuge a beneficial Common Law decision (precedent) designed to amplify the remedial nature of the legislation and to provide relief for affected veterans.

7. The merging of the two Commissions, putting an end to siloing, is supported.

8. The compassionate posthumous conversion of PI periodic payments is a significant beneficial provision and is supported.

9. Access by children of severely injured or deceased DRCA veterans to the education schemes enshrined in MRCA is supported.

10. The gap between DRCA and MRCA entitlements including a bar on Gold Card and SRDP eligibility for DRCA veterans is unreasonable in all the circumstances and should never have been allowed. The remedial provisions proposed and discussed during the DVA Webinar on 3/4/24 will go a long way to removing this inequity.

11. The RAAC Corporation welcomes and strongly endorses the continuation of the (current s.147 VEA) prohibition on legal practitioners appearing before the VRB under the new grandfathered s.352G MRCA.

12. The RAAC Corporation strongly endorses the significant policy change enabling treating medical practitioners to provide a medical opinion and specify a date when a medical condition becomes permanent and stable.

13. The acceptance by DVA of that specified date and the commencement of PI payments from the beginning of that month is reasonable in all the circumstances.

14. The RAAC Corporation views this matter as being one which my well lead to an improvement in relations between the medical profession and DVA which can only benefit veterans.

15. The EM asserts that SoPs *will be substantially replicated."* The EM provides no examples of which SoPs and whether they be BOP SoPs or RH SoPs will be removed/repealed to identify which SoPs which will survive any purge.

16. The RMA should by now have identified SoPs marked for purging and stakeholders should have been provided with that information.

17. The deemed liability under new s.24 MRCA is noted. The elimination of the stress and anxiety resubmitting a new claim would cause, is self-evident and is supported.

18. *Peacekeeping Force personnel including ADF and Federal, State and Territory Police members. Australian employees of the United Nations Organisation or of private or government welfare organisation during a peacekeeping mission are neither part of an Australian contingent nor members of a Peacekeeping Force.*
    Section 33(1) MRCA Mk2 will now draw Nuclear Testing Veterans and families of deceased members of this class of veteran under a more beneficial rule of evidence, namely the Reasonable Hypothesis Test. It is a major step forward in according this class of veterans a more beneficial and less challenging path towards having their claims substantiated.

19. The RAAC Corporation will not agree to the proposed amendment to MRCA as discussed in **Items 68, 69 and 70** (at p.22-23/104) until clarification of what precisely is meant by the term **reconsideration** has been clarified.

20. The frustrating delays in clearing the claims backlog are common ground. The TTTP for the top three categories of claims (Table 1) remains unacceptably high in excess of 400 days. It is incumbent on DVA to ensure its Delegates are fully conversant with the provisions of Clause 2.5.1 in CLIK and that the policy enunciated in 2.5.1 is vigorously applied by all Delegates. As it stands on examination of the provisions of Table 1 in this submission, Delegates need to be more vigorous in meeting the TTTP targets set out in Clause 2.5.1.

21. The changeover to MRCA Mk 2 will involve DRCA claimants coming under the jurisdiction of the SoP regime. DRCA veterans although injured or ill, may find that they may not meet the rigorous tests and high evidentiary bars that are set out in the SoPs. That is an appalling situation confronting DRCA veterans, with its attendant stress and anxiety.

22. Notwithstanding the overriding provisions of s.340 MRCA, the RAAC Corporation proposes that DVA give full and serious consideration to the following propositions in sub-paragraphs (i) to (vi):

    (i) Deem all DRCA claims that arise on and from **1 July 2026**, as Special Circumstances Claims (SCCs);

    (ii) Refer all DRCA claims for SCC determination by a dedicated, knowledgeable DRCA-experienced review team to determine whether or not a DRCA claim meets SCC status;

    (iii) Assessing and determining a SCC claim should be undertaken applying ameliorating and beneficial provisions in s.340. That will enable the assessing Delegates to ensure due diligence as cited in **CLIK 2.1.5**;

    (iv) Where a DCRA claim is determined not to meet the SCC requirements and is refused, that decision is a reviewable decision;

    (v) Consequently, a claimant must have the right to seek a review of that decision by appealing to the VRB at first instance and

    (vi) Where a claim has been granted SCC status, but the claim for the injury, illness or disease is refused, it is also a reviewable decision and as such, a veteran lodges an entitlement appeal with the VRB.

23. It is a gross injustice if the changeover to the new regime results in veterans being the losers due to the SoP regime. That must not be allowed to happen. Overpayments must have a dedicated overpayment Internal Review process where currently none exists.

24. The gross inequity that will be created if **Item 125** and **Item 126** are included in the harmonising must not be allowed to stand.

25. The RAAC's proposal to have debt repayments enshrined as a Schedule to the Act along with a Guidance Note is reasonable in all the circumstances as is the promulgation of these measures in CLIK.

26. The implementation of a six-year statute of limitations for debt recovery similar to that flowing from the ROBODEBT Royal Commission has considerable merit.

27. A combined repayment scheme incorporating the slicing scale Topperwein Model and six-year ROBODEBT Model should be considered.

28. Similarly, a number of Social Security legislative provisions which may lend themselves in examining a more equitable overpayment and debt recovery process other than the harsh and callous approach mooted in the EM at **Items 125 and 126.**

29. The RAAC Corporation argues that a need exists for the creation of a Miscellaneous Ancillary Programme Review process to address requests for a review of a decision to refuse an application or request for assistance from the Vehicle Assistance Scheme, Repatriation Appliances Programme and Health Approvals. The lack of a structured review process is not acceptable.

30. The retention, disclosure or exchange of information in respect of veterans and their families must have the strictest cyber security protocols in place. The veteran community expects it and seeks assurances that all information held by DVA has those appropriate protocols in place.

31. The RAAC Corporation contends that, section new section 352 Division 1 MRCA (replacing s.133 VEA) relating to *relevant documentary medical evidence* must also encompass the medical reports/opinions of DMAs.

32. The grandfathering of beneficial and remedial debt recovery waiver or write-off action has considerable merit. It will also apply to VEA veterans who do not have similar coverage under the VEA. The statutory relief provided by ss 428 and429 MRCA redresses that anomaly.

33. As for the Vehicle Assistance Scheme and other like Programmes discussed in this submission, no structured overpayment review process exists. As a matter of priority, remedial action by the creation, as discussed in this submission, of a Compensation Refund Review Programme separate from the VRB is required.

34. The unjustified withholding of medical opinions/reports by DMAs from a veteran via the s.137 or new s.352D Report is indefensible and unconscionable conduct.

35. The withholding of DMA medical evidence from veterans is a deliberate act and will prejudice the administration of natural justice. Its operation must not be allowed to continue

36. It is rank bad faith action and is designed to deny a veteran and their treating medical practitioner/specialist access to information that they are reasonably and necessarily entitled o receive, examine and rebut to support the veteran.

37. The application of such an egregious policy should be rescinded and a provision included in the harmonising process compelling disclosure, and that any such direction to disclose, should also be promulgated in Departmental Guidelines in CLIK.

RECOMMENDATION

That you note the above.
Submitted for your consideration

Noel Mc Laughlin OAM MBA
Chairman
RAAC Corporation
14th April, 2024

ATTACHMENT A

EXHIBIT 27-2 (CONFIDENTIAL) - UNREDACTED STATEMENT OF DOUGLAS JOHN HUMPHREYS DATED 1 APRIL 2022

“PETER SINGLETON: Thank you. Mr Humphreys, that will allow me not to have you rehearse the whole lot. But can I draw your attention to paragraph 22, where you point out that the Veterans' Review Board has jurisdiction to conduct merit reviews of decisions made under the VEA and the MRCA, but not the DRCA. We have heard evidence that explains the historical reasons for that, the different streams of legislation and that's the way it turned out. But are you aware of any argument at the level of principle or logic for why the VRB should deal with two but not three of these Acts?

A. I can think of no argument, in logical principle, why there should not be a single stream in relation to all veterans' entitlements, no matter what Act they are under. The Board is well set up -- and it would require some further training and education, but the Board is well set up to deal with these very effectively and quickly. Perhaps we can go into it later, but if you look at the processing times of the Board at the moment, compared to the AAT, they are chalk and cheese. The Board is processing matters far more quickly, far more effectively. The use of ADR within the Board is resulting in much, much better outcomes, and I think if the Board was given the extra jurisdiction, it would be able to get a hold of those matters and deal with them quickly, effectively and to the satisfaction of the applicants.

Q. Just to give that some context, DVA decisions made under the DRCA, once they leave the DVA for review, go straight to the AAT; is that right?

A. That's right. Look, I've been in both. I was the Principal Registrar and CEO of the AAT for seven years, so I know how both works. That was before, I should add, the AAT was given -- or the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Tribunal folded into the AAT, so it is a much bigger organisation than when I was there. But the fact is the AAT is far more court-like. That frightens veterans. They don't want to go to court.

When I arrived at the Veterans' Review Board, it was euphemistically termed by some of the people involved with it as the "Veterans' Refusal Board". We managed to change over the period of time that I was there and it stayed completely the culture, in that it's beneficial legislation, it needs to be applied beneficially.

Now, the Board -- first of all, DVA as the respondent does not appear at the Board. The easiest way I can describe a Board session is a roundtable discussion. There's no bowing. If it is a three-member tribunal, one of the members will go and get the person, they'll come in, they will have their advocate with them.

The biggest thing I have said to members of the Board while I was there is that we wanted people to be heard and I wanted -- and I would say to veterans, "Look, at the end of the hearing,
I want you to feel as if you have had everything that you want to say, say. It doesn't matter whether you think it's relevant or not, don't go away from here not saying something you want to say." Now, what that has meant is that in the long-term, people have been happy with outcomes.

Now, one of the most telling things I got was a letter from a widow, a war widow. She wrote to say she wanted to thank the Board for the hearing, but she said, "I didn't get what I wanted, which was a Gold Card and a widow's pension, but I actually now understand why it is I cannot get what I was told I could, and I want to thank you because you made me feel welcome and you made me feel -- and you went through and you explained the process to me." That is an essential difference of the Board to the AAT.

The Board is there to turn around and engage with veterans. It's there to turn around and go through their claims with them, to talk to them.

We have a preponderance of military members of the Board, and when I say "military members", they are people like me who have military service so they actually feel comfortable talking to us because they understand. They can use the acronyms that are so prevalent in the military, and we can actually get what it's like when they turn around and say -- and a lot of things that people who haven't served would turn around and say, "That's ridiculous, that couldn't have happened", and you can think back to your own service and say, "Well, yeah, it did."

Now, the biggest thing is that -- I have also said we sometimes get people who come in and tell what I can euphemistically describe as recollections that may not necessarily accord with the historical records.

That happens. That's fine. The biggest thing is that we don't call them liars, we don't call them people who are malingering or trying things on. We simply find that the evidence doesn't satisfy the standard of proof. We respect the veteran, we respect their service, that's the important difference. We don't have to necessarily accept what they're telling us, but they're still entitled to respect for being a veteran and having served.

Q. To the extent that you have described a qualitative difference and experience, could I ask you now to turn to what might be called a qualitative difference and that is to ask you about the efficiency of the VRB, how quickly it can deal with processes, what administrative techniques it has got to handle the workload?

A. When I started with the Board, they didn't have alternative dispute resolution as a big thing. There had been a recommendation that ADR be introduced. We went through a fairly exhaustive process of looking at the best models we could come up with and we trialled a number of them.

The fact is that what we call outreach or the Board calls outreach, in which we proactively get in contact with the veteran or the veteran's advocate and say to them, "Well, we've had a look at this case. If you want this, you're going to have to get some more evidence. Can you get that evidence?"

Or we can probably turn around and in relation to -- there might be a number of claims in relation to the assessment of pension. "Well, based on the evidence you've given us, you can probably get this and get that, but you are going to have to go away and get a heap more evidence in relation to the third thing." In many cases what will happen is they will turn around and say, "We're happy with that, please do a decision on the papers and do that." In my statement I describe in my own case where a decision on the papers was done in relation to intervertebral disk prolapse.

Outreach has been an enormously successful thing and it's because we go out, or the Board goes out -- I use "we" because I still have an attachment to the place. The Board goes out and physically engages with people and talks to them about what it is they want, what it is they can get, what they might have to be able to provide. And if they can't provide stuff, as I said, in many cases they're quite happy.

Look, there was some evidence given by Professor Creyke about the Board on Tuesday. I have read what she said. She made some comments about -- that she felt eventually the Board could be folded into the AAT and I'll be honest, I think that would be a disastrous mistake.

When I was at the AAT, the AAT enjoyed bipartisan political support. It doesn't today. That is difficult. What you have is a specialist, small, highly veteran-centric Board that deals with veterans. The AAT is a much, much bigger organisation now than when I was there and its problems are well-known in the media and, indeed, I think the recent Senate report said it should be disestablished. I don't know what that means. It doesn't sound real flash. That's not indicative of a body that enjoys high levels of bipartisan support."