SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE

SUBMISSION

Inquiry into aspects of the Veterans' Entitlement Act and the Military Compensation Scheme (MCRS)

Submission no	**4**
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No of pages (including cover)	5
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The Secretariat
Senate Foreign Affairs, Defence and Trade Legislation Committee
Suite S1.57
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Canberra ACT 2600

Dear Committee Members

Enclosed is a personal submission in respect to the inquiry into aspects of the Veterans' Entitlement Act 1986 and the Military Compensation Scheme (MCRS).

I respectfully request that my telephone number and private address not be published. I have no objection to the publication of my name for record purposes.

Yours sincerely

(signed)

J R D Gabriel OAM, JP (NSW), CD (WA)

13 May 2003

08 9535 7739

1. IMPACT of Section 74 and 30d of the Veteran's entitlement Act 1986.

Since 7 December 1972 Veteran's are eligible to receive Disability Pension from both Department of Veterans' Affairs and Department of Defence (now MRCS).

In the scenario where the Veteran claims lump sum payment from Defence and accepts fortnightly disability payments from DVA certain conditions apply. I fully understand and ACCCEPT that you cannot be compensated by both Departments for the same disability. Consequently should a veteran accept a lump sum payment from Department of Defence his or her DVA Disability Pension is limited to offset the lump sum payment. On the surface this seems fair and equitable until Section 74 of the VE Act raises its ugly head.

There is NO MECHANISIM IN SECTION 74 to restore a Veteran's disability Pension to its original status once the lump sum payment has been satisfied (REPAID). Therefore many veterans once having repaid the lump sum will find themselves in the unique position of paying the Commonwealth for their accepted disability - in some cases many times over. Section 30D does not allow appeal rights by Veteran's. Legal opinion sought advises that this is not consistent with Common Law.

I am sure this was not the intention of the Legislators at the time when introducing this matter before Parliament for consideration as it is clearly not in the interests of Veterans or in the spirit of any Legislation.

For information I have enclosed a copy of an article on this subject which was published in the newsletter CAMARADERIE (July 1994) - Regular Defence Force Welfare Association which gives a background on the subject matter.

Also enclosed is a Legal Opinion on lump sum payments under Section 24 and 27 of the SRC Act. the document was made available at a public meeting of an ex-service organisation meeting in W.A. Accordingly I wish the document be included with my submission as another view on Lump Sum Payment for consideration.

Recommendation:

* Section 30D of VE Act be amended to allow Veteran's a right of appeal.

* Section 74 be amended to allow a mechanism to be put in place that once a lump sum payment has been repaid that the veteran's Pension is restored to the last Determination made by DVA.

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3 March 2002

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Lump Sum under Section 24 and 27 of the SRC Act

Under most Australian workers' compensation schemes, an injured person is entitled to incapacity payments and a lump sum payment for loss of use of a bodily system (permanent impairment). For example; if a worker loses an arm he or she will be entitled to weekly compensation and to a lump sum payment for loss of the arm. The lump sum payment stems from the old Statute of Mains, which appears to have been introduced to compensate a person for not being able to function, or for being permanently impaired, outside of work hours.

Under the *Veterans Entitlement* Act there is no provision for a lump sum payment. In most cases the person would have an entitlement under Sections 24 and 27 of the *Safety Rehabilitation and Compensation* Act. However, under the VE Act if a person recovers under Sections 24 and 27 of the SRC Act then any monies received will reduce their VE entitlements, eg their TPI.

The above appears to be unfair. Why is a Veteran offered less by way of compensation than a carpenter? A carpenter will be paid weekly compensation in addition to a payment for permanent impairment. The payment for permanent impairment will not in any way interfere with their weekly entitlements.

Veterans who have served our country, whether at war or otherwise, should be entitled to a payment for loss of use of a bodily system (permanent impairment) which does not interfere with their TPI or other VE Act entitlements. The VE Act should be amended to exclude recovery for payments made under Sections 24 and 27 of the SRC Act

David Richards
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NB: The above is not legal advise and is merely the opinion of the writer. The above advice is not intended to be a full explanation of the law and is merely an opinion about the deficiency in legislation protecting Service personnel.

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REGULAR DEFENCE FORCE WELFARE ASSOC. NEWSLETTER JULY 1994 ISSUE

A THORNY PROBLEM ATTACKED SECTION 74 VETERAN'S ENTITLEMENTS ACT

A common sense rule of law is that a man cannot be compensated twice for the same injury.

Since 1972 the Regular Serviceman has had the right to claim benefits under both the Commonwealth's compensation legislation and the Repatriation (now Veteran's Entitlements) legislation for the same service caused impairment/disability or incapacity to work. How this curious state of affairs came about is another subject. Where a serviceman has exercised rights and received benefits under both pieces of legislation for the same injury, one or the other benefit must be repaid. Section 74 VE Act provides the mechanism and it does not do a brilliant job.

The compensatory principles differ. Commonwealth Compensation compensates by periodic (fortnightly) payments for incapacity to work, or by lump sum award for impairment/disability, or both. Veterans' Entitlements compensates by DVA pension (fortnightly) which is generally for impairment/disability up to 100% General Rate and incapacity to work at Intermediate and Special (TPI) rates.

The number of combinations that can arise are many and complicated. Only one situation is dealt with here - the case of a man granted a DVA pension and subsequently awarded lump sum Commonwealth compensation for the same injury. The problem arises - how is a lump sum to be recovered from a periodic pension.

The serviceman was granted a DVA pension in 1982 and then in 1984 he was awarded lump sum compensation. S.74(3) "deemed" that the 1984 lump sum award was to be treated as if it were paid in fortnightly payments over the actuarial life (life expectancy) of the man as determined by the Australian Government Actuary. The 1984 award was also "deemed" to have been paid to him in 1982 when the grant of DVA pension was made. The man's actuarial life was calculated on his age in 1982 giving his life expectancy to the year 2003 inclusive.

In the result, the lump sum award was spread out as fortnightly "deemed" payments 1982 to 2003 inclusive and deducted from his pension payments. When the lump sum was awarded in 1984 the sum of the "deemed" payments from 1982 pension date to 1984 award date was deducted from the award. The balance of the award or the "over-payment" was paid over to the man with the intention of being recovered by deduction of the "deemed" payments from future fortnightly pension. On a dollar-for-dollar basis though complicated this sounds fair enough but, it was not on such basis. S.74(3) said more.

The Actuary also had to make the sum of all the "deemed" payments equivalent to (not equal to) the 1984 award "deemed" made in 1982. This required the Actuary to employ present value principles and the problem gets sticky.

Suppose a man is awarded $1,000 in damages and his life expectancy is 10 years. He is expected to make a prudent investment at interest of any money given to him now that will amount in accumulated value to $1,000 at the end of his actuarial life. What is this amount invested at say 2% p.a. compounded annually. This is the amount he will actually receive and not the $1,000 damages awarded. He gets the present value of his damages award and it works out to $820.35. It is the discounted value and 2% is the discount rate. The $1,000 is the equivalent of this in 10 years.

In rounded figures the man was awarded $2,567. This is the present value. It was assumed that he invested this in 1982 at compound interest and he is expected to repay the accumulated value 1982-2003. The accumulated value equivalent to the $2,567 works out to be $3,707 and he repays this by pension deductions calculated by the Actuary to be $6.76 fortnightly. If the man expires at his actuarial life he will have repaid $1,140 more than he was actually awarded.

Now the man didn't get the award in 1982. He got it in 1984 when a part was paid over to him and a part was deducted from the award. The part deducted, $335, was still "deemed" to be part of the 1982 notional investment even though it was before he had anything to invest. The result was that the deduction was inflated by $103 more that a sensible $232 deduction based on dollar-for-dollar rather than present value for this pre-award period. There might be some justification for applying present value principles beginning when a man has something to invest but there is no obvious justification for applying the principles before he has been given anything to invest.

When all this happened the man and his RDFWA advocate did not complain. The man still got a needed $2,232 in pocket of the $2,567 award and on the surface the $6.76 fortnightly pension deductions did not seem onerous. He had no practical way of checking the figures anyway and a study of s.74 (then s.107R Repatriation Act) was not done.

In 1992 however, he was successful in a review of the Commonwealth Compensation claim and he was awarded an additional $2,567. Of this, $2,170 was deducted and $397 was paid over to him. A deduction based on dollar-for-dollar 1982 to 1992 would have been $1,210 and so the amount deducted was inflated by $960 by a notional investment in 1982 that could not have been made until 1992. Also, on a dollar-for-dollar basis the $397 paid over to him would have been repaid in late 1993. The Actuary determined the pension deductions here to be $8.99 per fortnight so by the time the man reached his actuarial life he would have repaid $2,277 more than the over payment of only $397 to him. Something appeared wrong. Also, if the man lives to get the telegram from the Queen, deductions will still continue. There is no clear mechanism to cease deduction.

The serviceman's Advocate asked Defence Compensation, agent here for Commonwealth Compensation, to withhold this second award at least until the Actuary could explain how the calculations were made. The RDFWA set out all the facts known to it in a letter 29.6.92. Unfortunately, probably for good reason, the Actuary could not or would not explain. Defence Compensation was asked to assist in obtaining an explanation but it's role was simply to apply tables provided by the DVA, make the deduction and, pay over the balance. It was the DVA that determined the pension deduction on advice from the Actuary and then otherwise apply s.74.

The DVA was co-operative but apparently unable to provide answers and so on 2.9.92 the matter was referred to the Commonwealth Ombudsman. Conference were held and the Ombudsman took the view that when money is given or taken then it ought to be explained how it was done- really the nub of the question the RDFWA asked the Actuary. The DVA promised a full report and there, with many letters from the Ombudsman seeking the state of play, the matter rested until April this year (1994). An experienced DVA officer had just been given the task of reporting on the operation of s.74 and he contacted the RDFWA directly. As one can imagine, there had been more