

**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	13
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VETERANS' ENTITLEMENT ACT 1986 (VEA) DISABILITY PENSION AND THE MILITARY COMPENSATION SCHEME (MCRS) OFFSETTING

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Prepared for and on behalf of the Armed Forces Federation of Australia (ArFFA)

1. Introduction

1.1. The Armed Forces Federation of Australia (ArFFA) and KCI Lawyers welcome the Inquiry with respect to the offsetting calculations applied to current and former Members of the Australian Defence Force (ADF). We submit that offsetting has been a vexed and difficult issue for ArFFA's members when attempting to inform them in order that they can make an informed decision with respect to accepting a lump sum pursuant to the MCRS scheme on their Disability Pension (DP).

1.2. Our experience with respect to acting on behalf of many current and former members of the ADF who are not only members of the ArFFA (for whom we have been acting since 1995) has provided insight and experience as to the number of inequities, and misguided assumptions by DVA that we submit ultimately erodes the legislative intent of providing just compensation for those who are injured or suffer from diseases out of the course serving in the ADF.

1.3. The DVA in their fact sheet DP-82 (Enclosed) attempt to explain the DP and compensation offsetting. We shall refer to this document together with relevant sections of the legislation and practical examples to highlight the anomalies for those in receipt of a DP when obtaining a lump sum for permanent impairment from the MCRS.

1.4 We hope to outline how the current principle underpinning the offsetting rationale whereby a 'person should not be compensated twice for the same incapacity' is not comparing like compensation for the principle governing 'offsetting'

2.MCRS—Permanent Impairment (Lump Sum) Payments

2.1 We note s 24 and s 27 of the *Safety Rehabilitation and Compensation Act 1988* (SRCA) are the relevant sections regarding entitlements to lump sum payments for permanent impairment under the MCRS scheme.

The weekly compensation payments with respect to a person's incapacity to undertake employment is pursuant to s19 of the SRCA. (See the discussion in para.3 generally)

Therefore a member can receive BOTH incapacity payments AND a lump sum payment for the permanent impairment as a consequence of the injury or disease pursuant to the MCRS without any 'offsetting'.

2.2 The lump sum is paid for a permanent impairment whereby ‘impairment’ is defined under s.4 of the SRCA as meaning the *"loss of use, damage, malfunction of any body or part of such system or function"* and the definition of ‘Permanent’ is defined as *"likely to continue indefinitely"*.

2.3 Although a lump sum is paid as one amount it is made up of two parts:

The first part is for the level of Whole person Impairment (s24) and the second is with respect to the Non Economic Loss (NEL) (s27) generally described as the pain and suffering associated with the whole person impairment.

2.4 The entitlement to a lump sum is pursuant to s.24 of the SRCA whereby an injury or disease resulting in permanent impairment will entitle a Member to a lump sum only if they have sustained a minimum 10% impairment of their whole person using “The Guide To the Assessment of the Degree of Permanent Impairment ‘(PIG)’”

2.5. Once a member establishes that they have a minimum 10 percent whole person impairment using the Guide, s .27 of the SRCA entitles them to a separate payment for the NEL associated with the condition. i.e.: pain, suffering and other losses affecting mobility, recreation and leisure and social and other relationships.

2.6. Unlike the DVA ‘*Guide To Assess Rateable Pension*’ (GARP, 5th Ed) pursuant to section 29 of the VEA the MCRS "PIG" as referred to in s28 of the SRCA has not been re-edited or amended since its inception in 1988.

Therefore, it is arguable that the DVA guide (GARP) and the MCRS guide (PIG) are largely incomparable to assess like with like injury and resultant permanent impairment.

3. DVA and MCRS Definition of Incapacity

3.1 Incapacity referred to by MCRS scheme and the SRCA is contained in s.19 of the SRCA that means "an employee who is incapacitated for work as a result of an injury".

It is a principal tenant of a Workers Compensation scheme that a person can receive both incapacity payments **and** permanent impairment payment (i.e.: lump sum payment) because they are two separate and distinguishable payments. There is no ‘offsetting’ by MCRS

3.2 A DP is based on calculating the combined effects of the member’s medical impairment caused by the injury or disease with the effects of the condition on the person's lifestyle as assessed using the GARP.

The Lifestyle rating refers to the degree that the injury or disease effects the day to day lifestyle of the member on a scale of 0 to 7 into a number of categories. For example, mobility, social and recreational activities, domestic relationships, and employment.

The section of the VEA that actually considers ‘incapacity to work’ are with respect to Special Rate, (s24) Intermediate Rate (s23) Temporary pensions (s25) and Service Pensions (s36)

3.3. Therefore in our view the DP fact sheet definition of 'incapacity' that equates to a lump sum for permanent impairment cannot be considered to be the same as a pension and therefore capable of being offset.

That is we are not comparing 'Like with Like' payments for the purpose of off setting one with the other.

4. Definition of the Award of Compensation for Damages

4.1 We submit that the DVA facts sheet, DP82, is incorrect when considering and defining a lump sum or an "award of compensation or damages" being a paid by MCERS or a third party (i.e. Common law claim) in respect of 'incapacity', 'damages', or 'in the nature of compensation' for the underlying disease or injury.

We refer to the paragraphs 3 generally and submit that a DP is not paying a person for incapacity to earn as defined under the MCERS scheme or is comparing "like for like payments".

4.2 The definition of an award for compensation or damages as defined by the DVA fact sheet 82 could be interpreted to mean that a person for example who does not suffer an incapacity following an injury or disease under the MCERS scheme but is still entitled to a lump sum for permanent impairment may be able to argue that as they are not receiving any "incapacity" benefits then they are entitled to receive the DP without any 'offsetting'.

We refer to the recent Federal Court decision on the 10th of April 2003 by Justice Cooper in *Australia Post v Oudyn [2003] FCA 318* whereby a decision had been made pursuant to the SRC Act that notwithstanding that an Applicant had suffered from an injury but was no longer suffering from any incapacity or need for medical treatment was still entitled to be assessed and to pursue a lump sum for '**permanent impairment**'.

4.3 A further anomaly may arise if an injured member in receipt of a DP pursuant to the VEA and then received a lump sum at Common law, a Crimes Compensation Tribunal or through the Human Rights and Equal Opportunity Commission (HREOC) for the same condition that was made up taking into account both incapacity and permanent impairment it would be open impossible for DVA to try and discern what part should be offset or whether the pension should be suspended on a dollar for dollar basis.

5. Comparison of Injuries/Diseases and Secondary Impairment by DVA and MCERS

5.1 The DVA Fact sheet again refers to the fact that irrespective of whether a disease or injury is

'described in a different way when compensation or damages are claimed (or) paid or an accepted condition is aggravated in a later mishap unrelated to service. Neither the different description nor the later mishap affects the application of offsetting'.

We submit that this approach is not factually, medically or legally correct when considering some examples as follows:

5.2 There are a number of members who have a principal condition accepted, by DVA and receive a Dp pursuant VEA and thereafter seek a lump sum payment from MCRS.

For example a back condition with a neurological component due to a disc injury that produces secondary sciatica affecting lower limb function may also be assessed by MCRS for a lump sum for not only the primary condition but also the secondary condition on their mobility pursuant to a separate table under the MCRS Guide.

However, DVA may not have accepted any secondary condition and their primary determination is only with respect to a back condition. Using this example we have acted for a number of members for whom we have obtained a lump sum and thereafter receive a letter from DVA advising of the "offsetting" together with the reduction of ongoing disability pension payment.

Conversely, DVA have not, for example agreed to undertake a retrospective reassessment of the member's secondary condition and to back pay the Dp retrospectively.

6 A Practical Example

6.1 Our office was instructed to act on behalf of the former member of the ADF who sustained a significant back injury in 1986 causing a disc prolapse at the L5/S1 disc level. The condition resulted in his medical discharge in approximately December 1988. Prior to and following his discharge he required spinal surgery on two separate occasions and numerous facet joint injections into the spine to assist with pain management.

A claim was lodged pursuant to the VEA for the condition of L5/S1 disc prolapse for which liability was accepted with effect from 10 April 1987 initially at 30% and thereafter increasing up to 60% of the general rate of Dp.

6.2 The Member lodged a claim with MCRS in 1987 and liability was accepted pursuant to the SRCA for a condition described as lumbar back strain with internal disc disruption. The condition, however described under the 2 schemes resulted in not only a significant spinal injury with disc damage but secondary effects on his mobility due sciatica effecting his left leg.

The sciatic condition and the secondary effects on mobility had never been the subject of a claim with DVA nor had there ever been a determination and payment made pursuant to the VEA.

6.3 The Member applied for a lump sum payment with respect to the back condition together with secondary effects on his mobility pursuant to s.24 and s.27 of the SRCA in approximately August 2000. The claim was rejected by MCRS on the basis that the back injury arose and became permanent prior to December 1988 and the legislation at that time (the 1971 Act) did not provide for a lump sum payment for spinal conditions.

6.4 Following the adverse decision by MCRS an application was issued to the Federal Administrative Appeals Tribunal (AAT) and medical evidence was obtained from the treating neurosurgeon and orthopedic surgeons regarding not only the back condition but the secondary impairment i.e. sciatica nerve damage and the effects on mobility.

6.5 As part of the AAT proceedings a conciliation conference was convened between our office and the legal representatives for MCRS whereby a compromise was achieved so that the member received a lump sum payment at 20% for the loss of efficient use of the left leg arising and being considered permanent as at 5 December 1988 that was in accordance with the overall medical evidence.

The member received a total lump sum payment of \$16,500 made up of \$8,997 representing the 20 percent loss of use of the left leg as at December 1988 together with payment for pain and suffering assessed at \$7,503.00.

6.6 During the course of AAT proceedings and prior to the settlement of his matter we had discussions with the Member and made it clear that in the event he continued proceeding with his AAT application and was successful whereby he received a lump sum for not only his left leg condition due to the sciatica and resultant effects on mobility but also his **back** condition there would be the 'compensation offsetting' by DVA for that part of the lump sum claim that related to his back condition and for the pain and suffering associated with back condition

Conversely, as DVA had never accepted liability for the secondary and distinct condition being "sciatica" and its effects on our client's mobility the settlement was a favorable compromise and one that was unlikely to effect his DVA pension or to be 'off set'.

Accordingly our client instructed our office to accept the offer and the AAT made a formal decision on 23 September 2002 clearly indicating that the lump sum payment was for 20% loss of use of the left leg that became permanent on 5 December 1988 together with non economic loss totaling \$16,500.00.

6.7 On 21 January 2003 DVA advised the Member in writing that they had been notified that he had received a payment of \$16,500.00 in respect of 'left leg sciatica' and advised that the accepted DVA disability was not only the disc condition but for 'left leg sciatica'.

Furthermore, the letter advised that this was the equivalent of \$24.16 per fortnight and that there would be a recovery of \$9,952.00 being that amount that had be supposedly paid on and from 10 April 1987 together with the ongoing reduction in that amount in the Dp.

6.8 The letter contained no notice of rights as to what he could do regarding the decision with the exception of telephoning the DVA as there would be a delay if he wanted to make a personal appointment .The letter was drafted in terms that the decision was absolute without any recourse notwithstanding that the member and our office maintained it to be patently incorrect. It simply contained a 'repayment advice sheet' that directed the member as to how to make payment within twenty eight (28) days or to make a telephone appointment in preference to a personal interview to discuss the matter.

Thereafter our office requested in writing that the Department clarify the basis upon which it made their decision. To date, notwithstanding four requests in writing, for this information we are yet to receive a response.

The factual, medical and legal considerations in our view demonstrates the inequities that arise and the discretion that Department engages in to unilaterally make decisions that cannot be reviewed in a cost efficient, timely and reasonably manner.

7. Reconsideration and Review Rights Regarding Offsetting

7.1 Given that there is no avenue of appeal to either the Veterans Review Board or the Administrative Appeals Tribunal regarding compensation offsetting the only recourse that Members have is the costly administrative review pursuant to the *Administrative Decisions (Judicial Review) Act 1977(AD (JR) Act)*.

This right of review to the Federal Court or Federal Magistrates' Court depending on the quantum is costly, complicated and may result in an adverse cost order against a member who seeks to review the arbitrary discretion by the Department.

7.2 It is noted in the example in paragraph 6 8 DVA made no reference to the right to challenge the decision to the Federal Court pursuant to AD (JR) Act within 28 days that is the statutory requirement.

8. Actuary Table

8.1 The use of the Commonwealth Actuary Table is formulaic and again provides no consideration of a Veteran's lump sum payment based on for example, the severity of the injury, overall income support and their particular needs.

For example, we would submit there might be members who do require some consideration whereby they may have only received a lump sum payment after experiencing many years in significant pain due to their permanent injury and impairment whilst only being in receipt of a reasonably small Dp.

8.3 The lump sum in those circumstances may be a reasonable attempt to provide a member with compensation that reflects the years of legacy that the injury has caused but not the subject of fair and timely compensation other than a Dp that may be significantly effected by the arbitrary use of the Tables to discriminate on the basis of age.

It is submitted that for a Veteran to be referred to in the life table and to experience an offsetting and reduction of pension and/or repayment retrospectively without reference to their particular circumstances is inequitable.

9. Conclusions and Alternatives

9.1 Offsetting 'Like with Like'

It is submitted that if there should be any compensation offsetting for the Dp then it should only be for that portion of the lump sum from MCRS pursuant to s.27 being the non-economic loss i.e.: pain, suffering and other losses) and not for the whole person impairment pursuant to s.24.

This would ensure a reasonable and comparable offsetting to conform to the rationale whereby a member is not compensated twice if the Dp component is truly a measure of and for the effects of the medical impairment caused by the injury or disease on the member's overall lifestyle.

9.2 Right of Reconsideration

There should be some degree of flexibility by DVA to enable a member the right to request a reconsideration of the current or future system for compensation offsetting through the avenue of appeal to the VRB and the AAT thereafter.

This would ensure that in the event that arbitrary decisions are made to offset that are not in accordance with the accepted conditions there can be scrutiny without the member incurring or being exposed to significant legal costs via the AD (JR) Act review to the federal Court.

9.4 Retrospectivity

It is inequitable to expose a member to a retrospective decision to recover from their MCRS lump sum an amount that is deemed by DVA using the Actuarial Table as they may have only been advised of their right to pursue a claim under MCRS due to their ignorance of dual eligibility that is common through out the Veteran community.

Alternatively, if the current system remains in place members should be offered a repayment schedule that is more flexible to their particular circumstances, severity of injury and other considerations. This would require DVA however to engage in or have recourse to flexibility when looking at an individual's circumstances which they currently lack or refuse to adopt when considering this vexed issue. (See Para 6 generally)

9.5 Commuting Disability Pension to Lump Sum Payment

If DVA maintain that the principal behind a Dp and compensation offsetting is that a person is being compensated twice for the same 'incapacity' then in our submission it is reasonable for a person to use the same Actuarial calculation and Tables to request that their Dp be commuted into a lump sum payment similar to the redemption payment pursuant to s. 30 and s.137 of the SRCA.

Further Information

Please do not hesitate to contact Mr Graham Howatt of the Armed Forces Federation or Greg Isolani for an expansion of any of the above aspects of our submission.

We are available to attend the Committee Inquiry Hearing on the 23rd of June and look forward to the details as to where the hearing will be conducted.