

Chapter 4

The principle underpinning compensation offsetting

4.1 The main reason for this inquiry is to better understand the offsetting of compensation arrangements under the legislation and to explore fully whether there are any unintended consequences or any issues arising from the proposed changes that need further consideration.¹

4.2 The main stated purpose of Schedule 2 is to clarify offsetting rules for veteran compensation under the *Veterans' Entitlement Act 1986* (VEA). The measure will cost \$2.7 million over four years, to be met from within the existing resources of DVA.² Compensation offsetting under the VEA involves a reduction in the level of a disability pension where another compensation payment has been made for the same incapacity. This clarification is intended to ensure that offsetting continues to be applied on the basis of a person's level of incapacity. Mrs Andrews explained:

Currently, under Australia's repatriation system, compensation is paid for incapacity, not for a specific injury. These amendments have come about in response to the ruling of the full Federal Court in the case of the Commonwealth of Australia v Smith in 2009. In essence, the court found that the facts of Mr Smith's case meant that the Repatriation Commission's determination to offset his compensation under each scheme, in line with the principle of compensation offsetting, was inappropriate. Therefore, the full Federal Court determined that Mr Smith's separate incapacities should be separately compensated because they were different injuries with different incapacities.³

4.3 The Explanatory Memorandum noted that the majority of compensation offsetting cases arise from an entitlement under the VEA and the *Safety, Rehabilitation and Compensation Act 1988* (SRCA) and their predecessors, for the same incapacity. Compensation from other sources, including third party insurance and common law cases may also be subject to compensation offsetting under the VEA.⁴

Relevant legislation—VEA and SRCA

4.4 Schedule 2 amends the *Veterans' Entitlement Act 1986* (VEA). The roots of this legislation reach back to the *Australian Soldiers' Repatriation Act 1917* which among other things, provided for benefits and assistance to discharged servicemen;

1 Mr Stuart Robert, *House of Representatives Hansard*, 16 June 2011, p. 6342.

2 Australian Government, *Budget Paper no. 2, Budget Measures 2010–11*, 'Part 2: Expense Measures, Veterans' Affairs', p. 327.

3 Mrs Karen Andrews, *House of Representatives Hansard*, 16 June 2011, p. 6352.

4 Explanatory Memorandum, p. 8.

children under 18 of the deceased or incapacitated; and to widows in special circumstances. This legislation was repealed by the *Australian Soldiers' Repatriation Act 1920* which expanded the entitlement for pensions providing cover in respect of death or incapacity resulting from any incident occurring during the period of service. It also introduced the concept of a 'special rate' pension for those totally and permanently incapacitated. Over the decades, it was amended approximately 80 times before being replaced by the VEA in 1986.⁵ The VEA has also undergone many changes since then.

4.5 In this chapter, the committee also refers to the *Safety, Rehabilitation and Compensation Act 1988* (SRCA). Under its predecessors, the *Commonwealth Employees' Compensation Act 1930* and later *the Compensation (Commonwealth Employees Act) 1971*, ADF members were entitled to compensation in respect of periods of service not covered by deployments to conflicts such as Korea or Vietnam. The SRCA provides the legislative basis for the Commonwealth Government's workers' compensation arrangements and provides for the compensation and rehabilitation of employees who are injured in the course of their employment. The legislation covers Commonwealth and ACT Public Service employees and includes members of the ADF.⁶

Background to offsetting

4.6 Before the early 1970s, there were effectively two separate compensation systems running in parallel under the repatriation and compensation arrangements for ADF members. One applied to veterans of overseas conflicts and the other to members on peacetime service. Thus, warlike and non-warlike service ('operational service') were covered under the repatriation system and peacetime service in Australia came under the Commonwealth employees compensation system.⁷

4.7 This system changed in 1973 when serving members with certain peacetime service became eligible for benefits under the *Australian Soldiers' Repatriation Act 1920* (replaced by the VEA).⁸ At that time, they also retained eligibility under the *Compensation (Government Employees) Act 1971–1973* (replaced by the SRCA). This development created a situation of dual entitlement for incapacities relating to defence service. As a consequence, provisions were included in the Repatriation Act to avoid the payment of double compensation by the Commonwealth. These provisions were designed to offset payments made under the Compensation (Government Employees)

5 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 1, pp. 81–91.

6 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 3, p. 576.

7 *Submission 2*, p. 3.

8 DVA explained that this change was intended 'to encourage additional personnel to join the ADF following the cessation of national service'. *Submission 2*, p. 4.

Act against entitlements under the Repatriation Act to ensure that an individual could only be compensated once for service-related incapacity.

4.8 According to the RSL these offsetting provisions applied only 'to disability pensions paid in respect of incapacity from disabilities arising out of "defence service"'.⁹ They did not apply to pensions in respect of incapacities from disabilities arising out of 'war service', 'special service' or 'Malayan service' (collectively known under the VEA, as 'operational service').¹⁰ Offsetting provisions were included in the VEA when it replaced the Repatriation Act in 1986.

4.9 In 1994, the enactment of the *Military Compensation Act 1994* removed dual eligibility, under the VEA and SCRA, for ADF members rendering peacetime service. There were some exceptions.¹¹ The Act, however, extended compensation coverage under the SRCA from peacetime defence service only to include operational service. This extension resulted again in dual eligibility under the VEA and SRCA. DVA explained that, in response, 'identical offsetting provisions were introduced for cases where otherwise duplicate compensation would have been paid'.¹²

4.10 The RSL also noted that the changes to legislation in 1994 allowed veterans who rendered operational service after April 1994 to make compensation claims under the Military Compensation Scheme in the SRCA, as well as under the VEA. It explained:

Taking advantage of consequential requirements of that amendment, the Act was amended in a way that further extended offsetting of disability pensions for any compensation received in respect of a war-caused injury or disease after that date, even if it related to operational service for which claims could not be made under SCRA.¹³

4.11 Dual eligibility under the two Acts continued until the commencement of the *Military Rehabilitation and Compensation Act 2004* in July 2004 which provides compensation for all service-related injuries, diseases and deaths, related to either peacetime or operational service occurring after 20 June 2004.

4.12 The Explanatory Memorandum stated that since compensation offsetting was first introduced in 1973, it has applied 'on the basis of the same incapacity, irrespective of whether or not a common injury or disease exists'. The VEA defines 'incapacity' as the 'effects of that injury or disease and not a reference to the injury or disease itself'.¹⁴

9 *Submission 3*, [p. 4].

10 *Submission 3*, [p. 4].

11 *Submission 2*, p. 4.

12 *Submission 2*, p. 4.

13 *Submission 3*, [p. 5].

14 Explanatory Memorandum, p. 9.

The purpose of compensation offsetting

4.13 Compensation offsetting is a longstanding practice under Australia's repatriation system and rests on the fundamental principle that payments of compensation are for incapacity not for a specific injury. The Department of Veterans' Affairs (DVA) submitted that:

The policy intention of the offsetting provisions has always been to offset where a person is compensated twice for the same incapacity and the policy has consistently been implemented on this basis.¹⁵

Recent reviews

4.14 The 1999 Tanzer review of the Military Compensation Scheme considered the eligibility arrangements to claim disability compensation under both the VEA and SRCA. It defined this dual eligibility as having 'an entitlement to claim benefits under both the VEA and SCRA for an injury or illness that arises out of or in the course of ADF service'.¹⁶ It noted, however, that this arrangement:

...does not mean being compensated for the same injury/illness twice. Claimants are required to make two separate claims and where the benefits are for the same injury/illness under different Acts, offsetting arrangements apply.¹⁷

4.15 The Clarke review in 2003 also looked at dual eligibility. It noted that in effect, veterans are able to access, simultaneously, different benefit components of each Act. The Clarke review explained:

The result is that these veterans are able, with some restraints, to construct a package of benefits to suit their individual circumstances. In many cases, this results in a veteran receiving a higher level of benefit than would be possible under the provisions of one Act alone.¹⁸

4.16 It found that this arrangement can result in 'inequitable outcomes amongst veterans with identical disabilities'. The review supported the principle that a person should not be compensated twice for the same disability. Payments received for similar purposes, including invalidity superannuation, would be offset dollar for dollar against a veteran's economic loss compensation.¹⁹ It stated that 'where a veteran is

15 *Submission 2*, p. 4.

16 Review of the Military Compensation Scheme (N Tanzer, chair), *Report of the Review of the Military Compensation Scheme*, Department of Defence, March 1999, p. 20.

17 Review of the Military Compensation Scheme (N Tanzer, chair), *Report of the Review of the Military Compensation Scheme*, Department of Defence, March 1999, p. 20.

18 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 1, p. 637.

19 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 1, p. 28; vol. 3, p. 624.

provided with workers' compensation, invalidity superannuation or other disability insurance benefits, any compensation provided under the VEA for the same disability would be reduced first on a dollar-for-dollar basis. This would be consistent with offsetting arrangements in workers' compensation schemes.²⁰ It recommended that:

A veteran who has dual entitlement to claim disability compensation under both the VEA and the SRCA, but has not yet made a claim, be required to make a one-time election that restricts him to receiving benefits under one Act at that time and in the future.²¹

4.17 Released in June 2011, the report on the Review of the Military Compensation Arrangements also considered offsetting arrangements between the VEA and SRCA. In its opinion, the arrangements had 'been the subject of widespread criticism and concern in the veterans' community for some years'.²² It explained that offsetting occurs because certain claimants have dual eligibility and are able to claim compensation under different legislation. It explained:

Offsetting typically occurs when a claimant receives a pension under the VEA and subsequently elects to receive a SRCA lump sum payment for the same incapacity or death. The legislation that governs the offsetting arrangements requires that the lump sum be converted to give a fortnightly payment equivalent.²³

4.18 The report noted that while submissions were critical of the methodology to determine the offsetting amounts, they did not take issue with the principle underlying offsetting. It stated:

The driving principle behind compensation offsetting is equity, in that it ensures that an ADF member with eligibility under two or more pieces of legislation does not receive more compensation for impairment compared to what another member might receive under one piece of legislation for the same impairment. More generally, compensation offsetting is also intended to ensure an individual is only compensated once for incapacity resulting from accepted conditions.²⁴

4.19 Thus, in its view:

20 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol. 3, p. 624.

21 Review of Veterans' Entitlements (J Clarke, chair), *Report of the Review of Veterans' Entitlements*, Department of Veterans' Affairs, January 2003, vol 1, p. 37.

22 Department of Veterans' Affairs, *Report of the Review of Military Compensation Arrangements*, February 2011, p. 259.

23 Department of Veterans' Affairs, *Report of the Review of Military Compensation Arrangements*, February 2011, p. 259.

24 Department of Veterans' Affairs, *Report of the Review of Military Compensation Arrangements*, February 2011, p. 298.

Total compensation under all three Acts should not exceed the maximum compensation intended to be paid by the Commonwealth for a person's defence service under the MRCA. Compensation should therefore remain capped at the maximum permanent impairment compensation under the MRCA.²⁵

4.20 While recognising that the offsetting principle was widely accepted, the Review of the Military Compensation Arrangements found, however, that:

Dual eligibility continues to be a key source of complexity, confusion and misunderstanding among administrators, claimants and their representatives. It was a central reason for the development and enactment of MRCA as a single piece of compensation legislation covering all forms of service.²⁶

4.21 In the following chapter, the committee considers how the principle of offsetting will apply under the proposed changes and, as a result of the changes, whether there are any unintended consequences.

25 Department of Veterans' Affairs, *Report of the Review of Military Compensation Arrangements*, February 2011, p. 293.

26 Department of Veterans' Affairs, *Report of the Review of Military Compensation Arrangements*, February 2011, p. 262.