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Preface

This special issue of *VeRBosity* is intended as a guide to practice and procedure at the Veterans' Review Board (VRB). It is designed primarily for the assistance of pension officers and representatives who prepare and present cases at the VRB, and applicants to the VRB.

This *Handbook* deals with the procedural matters, the role and responsibilities of representatives, and the structure of the relevant determining systems. In addition, the *Handbook* outlines the main legal requirements for the pensions, compensation, and other benefits over which the VRB has jurisdiction under the *Veterans' Entitlements Act 1986* (VEA) and *Military Rehabilitation and Compensation Act 2004* (MRCA).

We thank the many ESO representatives who provided valuable comments on draft versions of this handbook, and who trialed earlier versions in TIP training sessions.

Additional copies of this *Handbook* may be obtained from VRB Registries or downloaded from the VRB's Internet site at www.vrb.gov.au/publications.html

Bruce Topperwien
Trina McConnell

May 2006

About this Handbook

This *Handbook* is divided into 4 parts, the first deals with VRB processes and procedures, the second concerns matters particularly relating to the role of representatives, the third relates to the VEA system and benefits, and the fourth concerns the MRCA system and benefits. There are a number of Appendices containing various types of information.

Sometimes it is difficult to avoid using technical terms. These are usually explained when first used in each chapter, but have also been listed alphabetically in the **Glossary** at p 133.

In some parts, references to court cases and decisions are included to illustrate a point or provide a reference for follow-up. These follow the standard style, giving the name of the parties in the case, the year of the case, the volume of the law report in which the case was reported and the page number, for example, *Repatriation Commission v Law* (1980) 31 ALR 140 (this means the Court handed down its judgment in 1980 and is found in volume 31 of the *Australian Law Reports* at page 140). If a case has not been reported the reference will give the year, the abbreviation for the court or tribunal, and a case number, for example, [2005] HCA 72 (this means it is a judgment of the High Court of Australia handed down in 2005, that has been given the case number '72' by the Court at the time it was published). For further information on finding case references, see **Chapter 7**.

This *Handbook* has been written having regard to the law as understood by the authors in April 2006. The legislation may subsequently be amended and the courts may give further guidance on that law. Readers should have regard to any changes or subsequent court cases.

While the authors have made every attempt to ensure that the information contained in the *Handbook* is accurate and up-to-date, no responsibility will be accepted for any errors or omissions. The discussion of matters in the *Handbook* is not intended to constitute legal advice, nor is it a substitute for the legislation.

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Role of the VRB

- 1.1 The Veterans' Review Board (**VRB**) is a statutory body whose role is to provide independent merits review.
- 1.2 The VRB is not a court, but a specialist high volume tribunal. Merits review means the VRB makes a fresh decision that it considers is the correct or preferable decision in all the circumstances. In doing so, the VRB exercises the same statutory powers, and is subject to the same limitations, as the decision-maker whose decision it is reviewing.
- 1.3 The VRB aims to do this in a manner that is timely, fair, impartial, of high quality, and with as little formality or technicality as possible.

Establishment

- 1.4 The VRB was established in 1985 under the *Repatriation Act 1920* and continued in existence by the *Veterans' Entitlements Act 1986 (VEA)*.

Functions and powers

- 1.5 The VRB reviews decisions made by officers of the Department of Veterans' Affairs (**DVA**) who have been given power under the VEA by the Repatriation Commission to decide claims for pension and applications for increase in pension. These officers are called 'delegates' of the Repatriation Commission.
- 1.6 The VRB's role was extended in 2004 to review determinations under the *Military Rehabilitation and Compensation Act 2004 (MRCA)*. It is concerned with rehabilitation, and compensation for members of the Australian Defence Force (**ADF**) and their families for injury, disease or death related to service rendered on or after 1 July 2004.
- 1.7 In conducting a review, the VRB is not bound by the rules of evidence or any of the findings within the decision it is reviewing.

Jurisdiction

- 1.8 The VRB can review only particular types of ‘decisions’ and ‘determinations’ specified in the VEA and MRCA. (See the charts at page 5.)
- 1.9 While the VEA uses the term ‘*decision*’, the MRCA uses ‘*determination*’.
- 1.10 **Under the VEA**, the VRB’s function is to review decisions of the Repatriation Commission concerning:
- claims for the acceptance of injury or disease as war- and defence-caused;
 - claims for war widow(er)s’ pension and orphan’s pension;
 - assessment of the rate of pension payable for incapacity from war- and defence-caused injury or disease; and
 - claims for the grant of an attendant allowance.
- 1.11 The VRB cannot review decisions relating to any other veterans’ benefits, allowances or pensions under the VEA such as those relating to medical treatment, or service pensions.
- 1.12 **Under the MRCA**, the VRB may review ‘original determinations’ of the Military Rehabilitation and Compensation Commission (MRCC) concerning a wide range of matters and benefits. These include whether the Commonwealth is ‘liable’ for an injury, disease or death, whether compensation is payable for incapacity for service or work, for permanent impairment, for cost of treatment, or whether various allowances and other benefits can be provided.

- 1.13 The VRB may also review original determinations of a service chief of the ADF or a delegate of the MRCC concerning rehabilitation programs under the MRCA for members and former members of the ADF.

Organisation

- 1.14 The VRB members are statutory office holders appointed by the Governor-General.
- 1.15 The VRB employs staff under the *Public Service Act 1999*.
- 1.16 The VRB has offices in all States of Australia and in the Australian Capital Territory.

Principal Member

- 1.17 The Principal Member is responsible for the efficient operation of the VRB and the arrangement of its business, including procedures and the constitution of panels of members to hear cases.
- 1.18 The Principal Member issues directions from time to time relating to the operations of the VRB. However, the Principal Member cannot direct any member on the law or on the decision to be made in a particular case.

Membership

- 1.19 The VRB carries out its functions by having panels of members hear cases.
- 1.20 To establish their independence from DVA, members of the VRB are appointed by the Governor-General for terms of up to 5 years. Members may be reappointed from time to time.

- 1.21 Membership of the VRB is in a number of categories – the Principal Member, Senior Members, Services Members (selected from lists submitted to the Minister by ex-service organisations) and Members. VRB members have a wide range of expertise and experience.
- 1.22 Each panel usually consists of a Senior Member, a Services Member, and another Member.

Executive Officer

- 1.23 The VRB's Executive Officer is responsible to the Principal Member for the direction and coordination of the activities of the staff on a national basis.

Registrars

- 1.24 The Registrar in each state is responsible to the Executive Officer and the Principal Member for the administrative operations of the VRB in their state.

Staff

- 1.25 Members of the VRB are assisted by a number of staff. Those staff are provided to the Principal Member by the Secretary of DVA.
- 1.26 The Australian Public Service Code of Conduct and Values set the standards of behaviour and conduct expected of VRB employees.
- 1.27 DVA has no operational control over those staff while they work for the VRB.

Registries

- 1.28 The offices from which the VRB operates are called Registries. The Principal Registry of the VRB is in Canberra and there is a Registry in each State capital. Northern Territory

cases are managed from the South Australian Registry.

Operations manual

- 1.29 The VRB's *Operations Manual* details the procedures to be followed in the processing of applications by VRB staff and members. The *Operations Manual* is available on the VRB's web site.

How to contact the VRB



Telephone

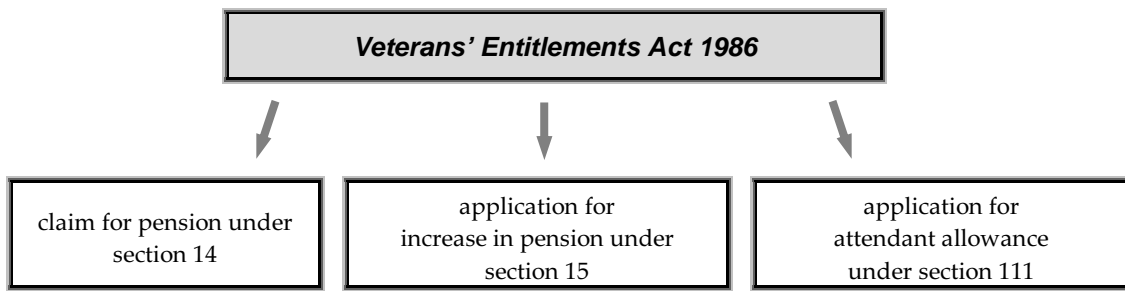
- 1.30 The VRB can be contacted at the cost of a local call from a metropolitan area on **1300 550 460** or from a country area on **1800 550 460**.
- 1.31 The VRB does not provide legal advice about particular cases, but Registrars may give advice and assistance on practice and procedure at the VRB.



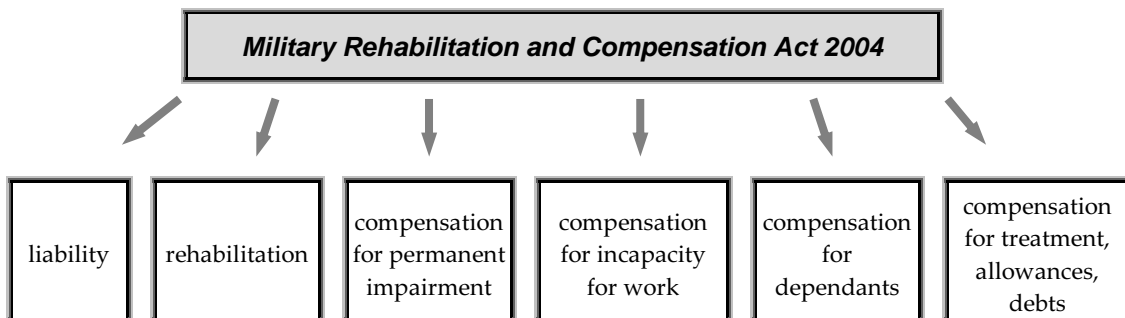
Using e-mail

- 1.32 The VRB has a general e-mail address **contact@vrb.gov.au** by which you can ask questions or seek further information. You can also use this e-mail address to send feedback.
- 1.33 E-mail should **not** be used to provide any personal information to the VRB because the Internet is not a secure environment. Any contact details that you send to the VRB by e-mail will not be used for any purpose other than to respond to your message.

VRB Jurisdiction under the VEA and MRCA



Section concerning the matter	Section determined under	Matter
14	19	Claim for disability pension for injury or disease
14	19	Claim for war widow's or orphan's pension for death
15	19	Application for increase in disability pension
98, 111	98	Application for attendant allowance



Section concerning the matter	Section determined under	Matter
CHAPTER 2		ACCEPTING LIABILITY
23	333	Liability for service injury or disease
24	333	Liability for service death
CHAPTER 3		REHABILITATION
44	44	Whether to carry out an assessment for rehabilitation
45	45	Require a person to undergo an examination

Chapter 1 – About the VRB

Section concerning the matter	Section determined under	Matter
48	48	Payment of costs reasonably incurred in connection with an examination
51	51	Whether the person is to undertake a rehabilitation program
51	51	Content of a rehabilitation program
53	53	Cessation or variation of a rehabilitation program
58	333	Whether an alteration, aid or appliance is reasonably required
58	333	Amount of compensation for alteration, aid or appliance
61	61	Assist the person in finding suitable work
64	64	Appointment of a case manager
CHAPTER 4		COMPENSATION FOR MEMBERS AND FORMER MEMBERS
68	333	Whether the person suffers an impairment that is permanent and stabilised
68	333	Degree of impairment
68	333	Date on which the person became entitled to compensation under s68
71	333	Additional compensation
74	333	The effect on lifestyle
75	333	Interim compensation
78	78	Whether to extend the choice period
82	333	Amount of compensation for financial advice
89	333	Amount of compensation for incapacity for service or work for members
118	333	Amount of compensation for incapacity for service or work for former members
201	201	Whether to extend the choice period
203	333	Whether to receive special rate disability pension
206	333	Amount of compensation for financial advice
214	333	Compensation for household services
217	333	Compensation for attendant care services
221	333	Telephone allowance
226	333	Compensation for loss of, or damage to, medical aids
CHAPTER 5		COMPENSATION FOR DEPENDANTS
233	333	Compensation for wholly dependent partners re death
236	236	Whether to extend the choice period
240	333	Amount of compensation for financial advice
242	333	Compensation for wholly dependent partners re permanent impairment and incapacity
244	333	Directions re payment if 2 or more partners entitled to compensation
245	333	Telephone allowance

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Section concerning the matter	Section determined under	Matter
251	333	Compensation for eligible young person re death
255	333	Compensation for eligible young person re permanent impairment and incapacity
257	333	Directions re payment if 2 or more eligible young persons entitled to compensation
263	333	Compensation for other dependants
267	333	Funeral compensation
CHAPTER 6		TREATMENT
271	276	Compensation for cost of treatment under Part 2
273	276	Compensation for cost of treatment before determination of entitlement under Part 3
291	333	Compensation for cost of accommodation relating to treatment
291	291	Approval of an attendant to accompany the patient
293	333	Compensation for cost of journey relating to treatment
297	333	Compensation for transportation of another person to hospital or mortuary
300	333	Pharmaceutical allowance
315	315	Amount of overpayment to be recovered
316	316	Amount of interest to be recovered
317	317	Reduction of payment because of previous overpayment
CHAPTER 7		CLAIMS
320	320	Approval of person to make claim on behalf of a person
325	325	Needs assessment
328	328	Requiring a medical examination
330	330	Refusal to deal with a claim for failure to comply with obligation notice
333	333	Determination of claim for compensation
340	340	Determination overriding RMA decision concerning a SoP
342	342	Onset date of incapacity for service or work
343	343	Date of death
CHAPTER 10		LIABILITIES APART FROM THE ACT
398	398	Deductions from an award of damages for compensation paid and costs incidental to claim
CHAPTER 11		MISCELLANEOUS
424	333	Special assistance
428	428	Amount of debt that should be written off
429	429	Amount of debt that should be waived

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How to apply for a review

- 2.1 Applications for review have to be in writing and be lodged at an office of DVA or an approved DVA VAN office.
- 2.2 An application can be made by either filling out an application form,¹ or writing a letter. An application cannot be made by telephone. An application must be in writing.

- 2.3 The VEA does not permit applications to be lodged at the VRB.

Reasons for review

- 2.4 Under the MRCA, an application for review must set out a statement of the reasons for the application.²
- 2.5 This is not required under the VEA – the applicant merely needs to be dissatisfied with the decision in order to apply for a review. Nevertheless, it is useful for reasons to be provided. If this

¹ An application form can be downloaded from the VRB's website (www.vrb.gov.au) or obtained from a VRB Registry or DVA office.

² MRCA, s 352

is done, the s 31 review delegate³ will know why the applicant disagrees with the primary decision, and there will be a greater chance of an early resolution of the case.

Information to be included in an application

- Applicant’s name
- Address
- Telephone number
- Date of the decision or determination to be reviewed.
- Name of the delegate.
- Whether it was a Repatriation Commission decision, or MRCC or service chief determination.
- Why the applicant disagrees with the decision or determination.
- Name of representative, if any.



Are there time limits to apply?

- 2.6 There are strict time limits under both the **VEA** and the **MRCA** for the lodging of applications for review. (See the chart below.) When the Repatriation Commission or the MRCC makes a decision or determination on a claim or application, it must send a copy to the applicant together with particulars of their right to have the decision or determination reviewed.
- 2.7 The time for making an application begins to run from when that material is received at the applicant’s postal address as last notified to DVA.⁴

What if an application is out of time?

- 2.8 Unlike the courts and certain other tribunals, the VRB has no discretion to extend the time for lodging applications for review.
- 2.9 If an application for review is lodged outside the time limit, the VRB cannot consider the matter, and a new claim should be lodged with DVA or MRCC.

Time limits for review by VRB

Veterans’ Entitlements Act 1986

Matters	Time limit	Extension of time
Assessment of pension	3 months	No
Entitlement matter	12 months, but 3 months for maximum benefits if successful	No
Attendant allowance	3 months	No

Military Rehabilitation and Compensation Act 2004

Matters	Time limit	Extension of time
All matters	12 months	No

³ A Departmental internal review officer, known as a s 31 review delegate, see page 11.

⁴ *Acts Interpretation Act 1901*, s 28A and s 29.

Electronic lodgement of applications

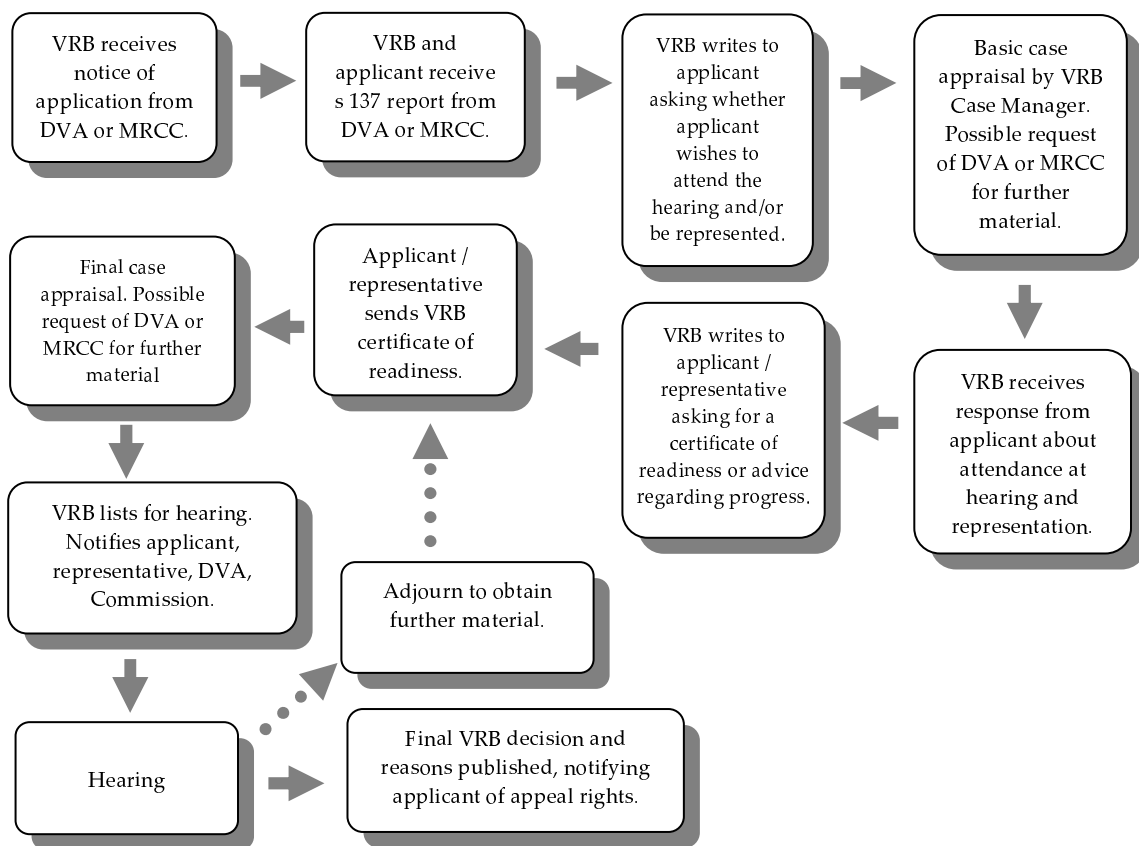
- 2.10 The Repatriation Commission and the MRCC have approved faxing as a form of electronic lodgement and have approved certain DVA fax numbers as electronic addresses at which applications for review can be lodged.
- 2.11 Before lodging an application for review (or other document) by fax, the person should contact DVA (telephone **133 254** from a metropolitan area or **1800 555 254** from a country area) to find out the appropriate fax number.

- 2.12 If an application is faxed to the wrong fax number, it will not be regarded as having been validly lodged.
- 2.13 Unless the relevant Commission has approved a manner and address for electronic lodgement, an application must be posted or delivered by hand to an office of DVA.⁵

Is there a fee?

- 2.14 There is no application fee for applying for a review by the VRB, but the applicant is responsible for the cost, if any, of representation or obtaining further evidence.⁶

The VRB application process



⁵ VEA, s 5T, s 136; MRCA, s 323, s 352.

⁶ Some medical report expenses can be reimbursed. See page 27.

What happens when an application is lodged?

- 2.15 When an application for review is lodged, DVA or the MRCC are required to provide to the applicant, within 6 weeks, a report containing a copy of all the relevant documents. The report is prepared under s 137 of the VEA, and is known as a ‘s 137 report’ (also ‘the Departmental report’ or ‘s 137 documents’). Section 137 of the VEA also applies in MRCA cases.
- 2.16 The applicant has 28 days, or longer if requested, to provide comments on the s 137 report. DVA or the MRCC must then send all documents relating to the decision, including any comments received from the applicant to the VRB.
- 2.17 Confidential material or other material that might be prejudicial to the physical or mental health of the applicant can be excluded from the report.⁷ If such information is withheld from the applicant, the VRB still has a duty to consider whether it should be released to the applicant. If not, the VRB can release it just to the representative.⁸ The VRB must advise the applicant that information has been withheld.
- 2.18 If such material is withheld, the VRB must do what it can to ensure that the applicant is aware of the nature of, and has an adequate opportunity to respond to, any relevant information that might be contained in the material.⁹

⁷ VEA, s 137(2)

⁸ VEA, s 153(2)

⁹ See *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 72.

Review or reconsideration by a delegate

- 2.19 Both the Repatriation Commission and the MRCC can review their decision or determination in light of the applicant’s comments or further evidence.
- 2.20 A case may often be resolved quickly by making a submission and putting new evidence to a delegate. A request for such a review or reconsideration can be made at any time *before* lodging a certificate of readiness with the VRB (see page 12).

Receipt of application

- 2.21 When the VRB receives the s 137 report from DVA or the MRCC, a VRB staff member checks that the application was lodged within the specified time limits and that relevant material appears to have been included and is legible.
- 2.22 A letter is then sent to the applicant giving information about the VRB and asking whether the applicant wants to attend the hearing and whether he or she intends to seek representation.¹⁰ An ‘Applicant’s Advice’ form enclosed with the letter is used for that purpose.
- 2.23 If no response is received to the letter, the VRB sends a reminder advising the applicant that the VRB may proceed to conduct a hearing without the applicant or their representative if a response to the reminder letter is not received within 14 days. If there is no response to that reminder letter, the matter will be heard in the applicant’s absence.

¹⁰ VEA, s 148(1)

Further evidence after application

- 2.24 If either party (that is, the applicant or the relevant Commission) provides further evidence to the VRB after the s 137 report has been sent to the VRB, the VRB is required to provide a copy to the other party.
- 2.25 The VRB does this by adding it to the s 137 report and providing an update to the report to the applicant, the representative, and the relevant Commission.

Case appraisal

- 2.26 Case appraisal is designed to monitor the progress and preparedness for hearing of cases with the VRB.
- 2.27 At various times, applicants or their representatives may be contacted to discuss progress, the issues, and the readiness of their case for a hearing.
- 2.28 In some instances Registrars may seek further investigation or evidence from DVA.¹¹

Case management

- 2.29 The VRB is ready to review applications for review within a short time after being advised that the applicant is ready to proceed.
- 2.30 While the VRB allows applicants and their representatives considerable time to investigate and develop their cases, VRB staff regularly monitor applications for review that have been outstanding for more than 6 months.

- 2.31 If nothing has been heard from an applicant or their representative for more than 3 months, the VRB will write to the applicant asking for advice about the progress of the case. A copy of this letter is also sent to the representative.
- 2.32 Applicants and their representatives can avoid being sent this letter if they advise the VRB of the particular action they are taking to progress their application and when they expect to be ready. That way, the VRB knows why the matter is not yet ready to proceed and need not contact them.
- 2.33 Applicants and representatives should always keep in mind that if they are having difficulties in obtaining particular material for their case, they can contact the Registrar who might be able to provide advice or assistance. This might include suggestions for other avenues of inquiry, or making requests of DVA under s 148(6A) to investigate or obtain further evidence.¹²
- 2.34 Keeping the VRB informed of a case's progress reduces the need for representatives to keep responding to VRB 'follow-up letters'. It also enables Registrars to provide timely assistance to representatives in difficult cases.

¹¹ VEA, s 148(6A)

¹² See page 33, concerning s 148(6A).

Certificates of readiness for hearing

2.35 Applications are usually listed for hearing only after a ‘certificate of readiness for hearing’ has been signed by an applicant or representative and lodged with the VRB. This certifies that the applicant and representative are ready to proceed to a hearing of the application and they have sent all the supporting evidence on which they intend to rely to the VRB.

2.36 This is designed to avoid unnecessary adjournments, which can cause delays to both the adjourned applications and to other applications awaiting hearing.

2.37 Nevertheless, a Registrar may, at any time, direct that a matter be listed for hearing if, in the Registrar’s opinion, special circumstances exist or it is considered that an application is at a stage where there is no apparent further preparation planned or likely.

VETERANS’ REVIEW BOARD
CERTIFICATE OF READINESS FOR HEARING

Name of Applicant:

Board Reference No:

Representative’s Name:

I CERTIFY THAT:

I am now ready to proceed to hearing of this application. I have discussed the brochure ‘About the Veterans’ Review Board’ with the applicant. I have obtained all the supporting evidence upon which I intend to rely and have forwarded that material to the Board.

NOTE

A hearing date will be arranged as soon as possible after receipt of this form at the Board. Please indicate unsuitable dates/times for you or the applicant during the **next 3 months**.

Unsuitable:.....

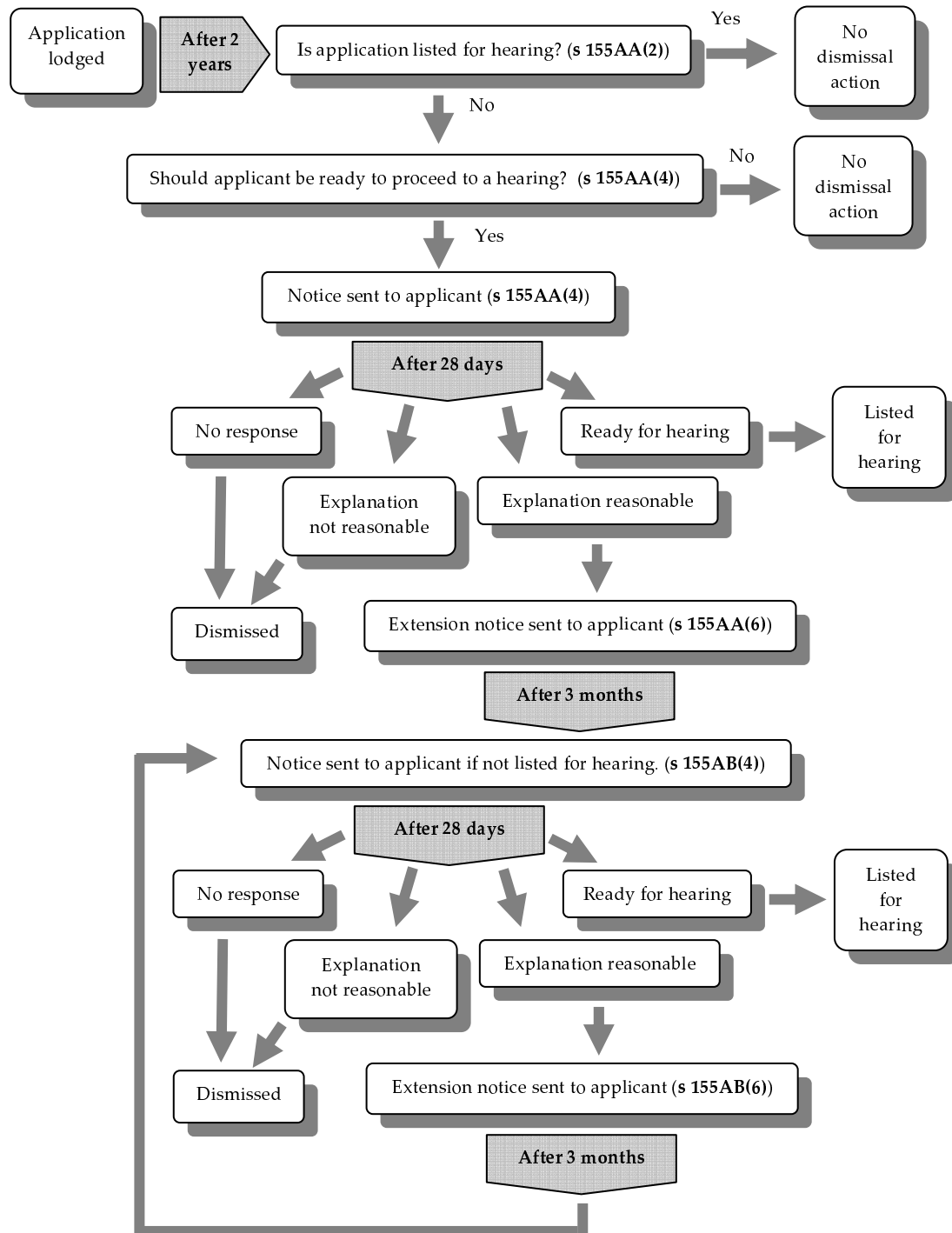
.....

Confirmation of Representative/Applicant Hearing Attendance Details

<u>Representative</u> (please tick one)	<u>Applicant</u> (please tick one)
<input type="checkbox"/> Attending	<input type="checkbox"/> Attending
<input type="checkbox"/> Not Attending	<input type="checkbox"/> Not Attending
<input type="checkbox"/> By Telephone No.	<input type="checkbox"/> By Telephone No.
<input type="checkbox"/> By Video Link at	

Signature of Representative..... Dated/...../.....

The dismissal process



Overview of the dismissal provisions

Section	Effect
155AA	<p>A s155AA(4) notice is sent to the applicant if:</p> <ul style="list-style-type: none"> • the application is more than 2 years old; and • the application is not listed for hearing; and • the Registrar (as delegate of the Principal Member) thinks it should be ready to proceed. <p>The application is dismissed if there is no response to the notice within 28 days or the explanation for not being ready for a hearing is not reasonable.</p> <p>If the explanation is reasonable, an extension notice is sent.</p>
155AB	<p>3 months after the extension notice is sent a s 155AB(4) notice must be sent.</p> <p>The application is dismissed if there is no response to the notice within 28 days or the explanation for not being ready is not reasonable. If the explanation is reasonable, another extension notice is sent.</p>
155AC	<p>Permits an applicant to authorise a representative to respond to a <i>particular s 155AA(4) notice</i> or s 155AB(4) notice.</p>
155A	<p>Enables application to the AAT (within 28 days) if the VRB application is dismissed.</p>

Assessment after 2 years

2.38 If an application is 2 years old, special provisions apply. If a Registrar (as delegate of the Principal Member) forms the opinion that an application should be ready to proceed at a hearing, the Registrar must send a notice under s 155AA(4) to the applicant.

Section 155AA(4) notice

- 2.39 The s 155AA(4) notice requires the applicant to advise the Registrar in writing, within 28 days, either:
- that the applicant is ready to proceed at a hearing; or
 - the reasons why the applicant is not ready to proceed at a hearing.
- 2.40 If the applicant has nominated a representative for the purposes of the review, a copy of the notice will be sent to that representative. However, the obligation to respond to the notice always remains with the applicant.

Representative must be authorised to respond

- 2.41 The representative can make a valid response to the notice *only if* he or she has been properly authorised under s 155AC. Such authorisation can be given only after the applicant has received the s 155AA notice.
- 2.42 Even if a representative has been nominated to represent the applicant for the purposes of the review, such authorisation cannot extend to representing the applicant for the purposes of a s 155AA notice. The applicant must make a *separate authorisation* under s 155AC before the representative can act on behalf of the applicant for a s 155AA notice.

If there is no response to a s155AA notice

2.43 If the applicant or authorised representative does not respond to the notice within the 28 days, the Registrar must dismiss the application. The Registrar has no discretion.

Whether a response is reasonable

- 2.44 If the applicant or the authorised representative responds, but does not give a reasonable explanation for not proceeding at a hearing, the Registrar must dismiss the application.
- 2.45 If the only response given is that the applicant is seeking further evidence, such a reason might not be regarded as reasonable.
- 2.46 To enable the Registrar to decide whether ‘seeking further evidence’ is reasonable, the Registrar needs to know the kind of evidence being sought, its relevance to the application, from where it is being sought, and the timeframe in which it is expected to be obtained.

Delay for section 31 review or s 347 reconsideration

- 2.47 The VRB encourages applicants to seek s 31 review (under the VEA), or s 347 reconsideration (under the MRCA) if they think that the application is likely to be successfully concluded by that means.
- 2.48 However, if a s 155AA notice has been sent and a s 31 review or s 347 reconsideration has already been sought, it is best to respond to that notice by stating that the applicant is ready to proceed to a hearing and also state that a s 31 review or s 347 reconsideration has been sought.

2.49 The Registrar can then check with DVA or the MRCC to determine the status of that review or reconsideration before listing the matter for hearing.

Is waiting 2 years a proper option?

- 2.50 In some cases, representatives have deliberately left applications ‘pending’ for 2 years in the hope that the relevant Statement of Principles might change favourably for the applicant who in the representative’s opinion, and without such a change, has no chance of success.
- 2.51 The VRB discourages this course of action. The VRB is not prevented from bringing a case on for hearing before the 2 year mark if an applicant does not respond to correspondence or even if the applicant says that he or she is not ready to proceed.
- 2.52 If after a reasonable time a Registrar considers that the applicant is not actively seeking further evidence but is merely hoping the law will change, or for some other reason is not actively pursuing the matter, the Registrar can list the case for a hearing.

Extension notice

2.53 If the Registrar is satisfied with the explanation, the Registrar must write to the applicant notifying of the decision.¹³ This is called an ‘extension notice’.

Further notices under s 155AB

2.54 If at 3 months after the extension notice the application is still not listed for a hearing, the Registrar must give a notice to the applicant under s 155AB(4).

¹³ VEA, s 155AA(6)

- 2.55 Like the s 155AA(4) notice, the s 155AB(4) notice requires the applicant to advise the Registrar in writing, within 28 days, either that the applicant is ready to proceed at a hearing or the reasons why the applicant is not ready to proceed.
- 2.56 This process repeats under s 155AB every 3 months after each time that an extension notice is sent.

Responsibilities of representatives in relation to dismissals

- 2.57 While the applicant is primarily responsible for ensuring their application progresses and that responses are made to s 155AA or s 155AB notices, the representative also has particular responsibilities.
- 2.58 In *Re Johnson*¹⁴ and *Re Gregory*¹⁵ the applicant authorised their representatives to respond to s 155AA or s 155AB notices, but they failed to do so in time. In both cases, the Administrative Appeals Tribunal (AAT) affirmed the Registrar’s decision to dismiss the applications.¹⁶

How to avoid a s 155AA notice

- 2.59 If a representative keeps the VRB informed of the progress of the application, and it is clear from the material in the VRB file that the matter is continuing to be progressed effectively, a Registrar will be less likely to form the opinion, at the 2-year point, that the matter should be ready to proceed at a hearing.

- 2.60 If the Registrar forms the view that the case is being effectively progressed, a s 155AA notice cannot be sent.

What to do if a notice is received

- 2.61 When the Registrar sends a s 155AA or s 155AB notice to an applicant, a copy is sent to the representative. The representative should contact the applicant as soon as possible to discuss how to respond to the notice.
- 2.62 In every case, the applicant *must* take some action or else the application will be dismissed.
- 2.63 Before the representative can act in relation to a s 155AA or s 155AB notice (including lodging a certificate of readiness), the applicant must:
- formally authorise the representative under s 155AC to respond to the notice; and
 - instruct the representative how to respond.¹⁷
- 2.64 As there is a strict 28-day limit on responding it is very important that the representative contact the applicant as soon as possible to discuss the response.
- 2.65 Once dismissal action has started, this compulsory process continues every 3 months while the applicant continues to have a reasonable explanation for not being ready to proceed at a hearing.
- 2.66 It is essential that representatives closely manage cases in which dismissal action has begun to ensure that all notices are responded to in time and authorisations have been obtained.

¹⁴ *Re Johnson and VRB* [1999] AATA 745

¹⁵ *Re Gregory and VRB* [2000] AATA 448

¹⁶ See (2000) 16 *VeRBosity* 34

¹⁷ See *Re Andrews and Principal Member, Veterans’ Review Board* [2005] AATA 656

Review of VRB dismissals by the AAT

- 2.67 The applicant can apply to the AAT for review of a decision by a Registrar to dismiss the VRB application.¹⁸
- 2.68 An application to the AAT must be made within 28 days of being notified of the Registrar’s decision.
- 2.69 In reviewing the Registrar’s decision to dismiss the VRB application, the AAT is confined to deciding whether the decision to dismiss was correct. The AAT cannot consider the decision of the Commission that was appealed to the VRB: it only has jurisdiction to consider the decision to dismiss.
- 2.70 If the AAT appeal succeeds, the matter will go back to the VRB Registrar to send a new s 155AA or s 155AB notice or an extension notice.

Withdrawals

- 2.71 There can be many reasons for an applicant to withdraw either a matter within an application, or the entire application. For example:
- the applicant might be satisfied with some aspect of the decision under review; or
 - a s 31 review might have given a more favourable decision on a matter; or
 - the applicant might be satisfied that there is no merit in pursuing a matter.

- 2.72 All aspects of the decision made by the delegate of the Repatriation Commission or the delegate of the MRCC are taken to be part of the VRB’s review unless particular matters are clearly withdrawn.¹⁹ If there are matters with which the applicant is satisfied, they should be withdrawn before the VRB commences its review, because the VRB might make a less favourable decision. The VRB cannot review a matter that has been withdrawn.

How is a matter is withdrawn

- 2.73 If the application for review states that a particular matter is *not* to be reviewed, it is taken to have been withdrawn.
- 2.74 If it is not clear from the application for review that the applicant wants the VRB to review all the matters in the delegate’s decision or determination, the VRB will write to the applicant and the representative seeking clarification on the matters to be reviewed. A form is included that enables the applicant to withdraw those matters the applicant does not want reviewed.
- 2.75 While the VRB’s letter advises the applicant to discuss the matter with their representative before completing the form, the representative should contact the applicant to ensure the applicant understands the issues and the effect of a withdrawal.

Before the review has commenced

- 2.76 Before an application has been listed for a hearing and the VRB members have commenced their review, an applicant

¹⁸ VEA, s 155A

¹⁹ *Repatriation Commission v Stafford* (1995) 11 *VeRBosity* 51; *Stewart v Repatriation Commission* (2002) 18 *VeRBosity* 22.

- can withdraw the application, or matters within the scope of the application, without needing the VRB's consent.
- 2.77 In some instances a matter sought to be withdrawn might be so closely related to another matter that is not being withdrawn, that it cannot be withdrawn from the review.²⁰ For example, two similar psychiatric disorders might not be able to be separated.
- 2.82 For example, if an applicant thought that withdrawing merely meant the application became inactive, it could be said that the applicant did not know what it meant to withdraw. If that were so, the application could be reinstated.
- 2.83 If the applicant knew what it meant to withdraw, but later changed their mind or obtained advice that they should not have withdrawn, that is not a reason to reinstate the application.

After the review has commenced

2.78 Section 155 provides that once the VRB has commenced a review, that is:

- if a hearing has been adjourned; or
- the application is listed for hearing and the members have commenced their consideration,

the application cannot be withdrawn without the VRB's consent.

- 2.79 Consent is not automatic and will not be given without the VRB first considering whether it is proper for the matter to be withdrawn. The VRB must consider the interests of both parties to the review.
- 2.80 If the VRB thinks that it might not consent, it will give the applicant an opportunity to put their case for a withdrawal before deciding whether it will refuse consent.

Reinstating an application

2.81 An application to the VRB cannot be reinstated once it has been withdrawn unless it is clear that the applicant did not understand what it meant to withdraw the application.

Making a new application following withdrawal

- 2.84 If a matter or an application is withdrawn, and the applicant changes their mind, a *new application* to the VRB can be made on the same matter,²¹ but only if the time in which to apply for review has not run out.²²
- 2.85 A *new claim* must be made if time to apply for review has run out.

VEA applied to MRCA cases

- 2.86 When the VRB reviews original determinations under the MRCA, it uses the procedures and powers under the VEA 'as applied' by s 353 of the MRCA. Section 353 of the MRCA modifies the VRB's procedural and review powers in the VEA for the purpose of the VRB's review under the MRCA. In this way the VEA provisions apply for the purposes of the VRB's review under the MRCA.
- 2.87 This means that, whenever this *Handbook* refers to VRB procedures under the VEA, the same procedures and provisions generally apply to MRCA cases.

²⁰ *Bramwell v Repatriation Commission* (1998) 14 *VeRBosity* 92.

²¹ VEA, s 155(2)

²² See page 9 regarding time limits.

Chapter 3 — Hearings

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When is a hearing arranged?

- 3.1 Generally, cases are listed for hearing in the chronological order in which the VRB received the Certificate of Readiness for Hearing.
- 3.2 The VRB then writes to the applicant giving the date, time, and location of the hearing.

How long will a hearing last?

- 3.3 The VRB usually holds three hearings each morning, allocating about an hour for each hearing. In more complex cases, the VRB panel will be allotted 2 hours for the hearing. If a representative thinks that the hearing is likely to last longer than an hour, this should be advised to the VRB when the Certificate for Readiness for Hearing is lodged.

Where will the hearing be conducted?

- 3.4 Most hearings are held in VRB premises in most capital cities. The VRB also holds hearings in some regional centres, and by video link from a range of locations. DVA will pay travel expenses for an applicant to attend the VRB hearing (see page 26).

Urgent hearings

- 3.5 The VRB recognises that some cases should have an urgent listing priority. An early hearing may be arranged if a delay in hearing may cause prejudice to an applicant's health.
- 3.6 With cooperation between applicants, representatives, the Repatriation Commission, the MRCC and DVA, a hearing can usually be arranged at quite short notice.

Respondent parties

- 3.7 The Repatriation Commission is formally a party to all proceedings before the VRB in VEA matters.
- 3.8 The MRCC is formally a party to all proceedings in MRCA matters. The relevant service chief also may seek to be joined as a party in a MRCA matter. As a matter of practice, these ‘respondent’ parties seldom attend VRB hearings.

Postponing a case after it is listed for hearing

- 3.9 An application that has been listed for hearing may be postponed at the request of an applicant or representative.
- 3.10 A postponement is different from an adjournment, which is a break in a hearing (for any length of time, from minutes to months) that occurs after a hearing has commenced.
- 3.11 The VRB understands that some postponements are unavoidable, for example, a sudden illness or other mishap can occur. However, it is the VRB’s aim to ensure that the maximum number of hearings commence as scheduled.
- 3.12 The Registrar may refuse a request for a postponement if the reasons for the request show that postponement was avoidable, such as wishing to attend some other event or appointment that is discretionary.
- 3.13 Requests for a postponement on the day of the scheduled hearing will not be granted. In such cases, the hearing will commence as scheduled and the VRB panel will determine, after

considering all the circumstances and the material before it, whether it will proceed with the hearing or adjourn the matter to a date to be fixed by the Registrar.

VRB panels

Constitution of panels

- 3.14 A VRB panel usually consists of:
- the Principal Member or a Senior Member (who presides);
 - a Services Member; and
 - a Member.
- 3.15 It can also be constituted by the Principal Member (who presides), a Senior Member and a Services Member.
- 3.16 A quorum of two members may sit if one of the three members who was scheduled to constitute the panel becomes unavailable.
- 3.17 As a matter of practice, every reasonable effort is made to replace an unavailable member to avoid the need for the remaining two members to sit as a quorum.

Allocation of VRB members for hearings

- 3.18 The Principal Member gives directions as to those members who are to constitute a panel in a location during a particular week. Registry staff then list cases for hearing by those panels.
- 3.19 These procedures are designed to preserve the integrity of the VRB’s operations by ensuring that both applicants and members have no role in the allocation of individual cases to particular panels.

What happens at a hearing

Hearings are usually in private

- 3.20 VRB hearings are held in private unless the applicant asks, and the presiding member agrees, to have the hearing (or part of it) conducted in public.²³
- 3.21 The presiding member also determines who may be present at a hearing. Friends and relatives of the applicant are usually allowed to be present. If they are going to give evidence, they might be asked to wait outside until they are required to give evidence.

Recording of hearings

- 3.22 Hearings are recorded on audio tape to provide an accurate record of the hearing.
- 3.23 Copies of tapes are made available to the parties on request. The original tapes are held by the VRB for 2 years (after which they are destroyed).
- 3.24 These audio tapes may be used by members when preparing reasons, by the parties and members at the resumption of an adjourned hearing, or by a party considering or preparing an appeal.
- 3.25 Transcripts of hearings are not prepared except in exceptional circumstances.
- 3.26 A representative is not entitled to a tape of a hearing unless it is obtained on the instructions of, and on behalf of, the applicant.



The hearing room

- 3.27 The hearing room has a large table with microphones for tape recording the proceedings. The three members sit on one side of the table and the applicant and representative sit on the other. There is usually no one else present in the hearing room.

Telephone and video hearings

- 3.28 Hearings may be conducted by a conference telephone or by video link. The taking of evidence by telephone or video link is designed to overcome the hardship that personal attendance at the hearing or travelling long distances might cause applicants, particularly the aged and frail.

Does the applicant have to attend the hearing?

- 3.29 Generally, the applicant can choose whether or not to attend the hearing. However, the VRB is often assisted in making its decision by hearing from the applicant, as they are usually best able to explain what the case is about.
- 3.30 It should be noted that s 151(3) of the VEA provides that an applicant is a 'competent and compellable witness.' This means that the VRB may compel an applicant to attend and give evidence, but this rarely occurs.

Control of procedure at the hearing

- 3.31 The presiding member chairs the hearing and determines the procedure to be followed in a particular review.
- 3.32 Hearings are reasonably informal but are conducted in a dignified manner that ensures respect for the importance of the issues for the applicant.

²³ VEA, s 150

The hearing

- 3.33 When the VRB panel is ready to commence the hearing, one of the VRB members will usually greet the applicant and his or her representative and invite them into the hearing room.

Introductory remarks from the presiding member

- 3.34 The presiding member will usually introduce the panel and begin by making a brief statement about what the panel sees as being the subject of the review, and will ask if the applicant agrees that this is their understanding of the scope of the review.
- 3.35 The presiding member may then make some initial observations about the evidence and the issues that the panel sees that need to be addressed. This is aimed at quickly clarifying what the substantive issues are and what facts are readily accepted by the VRB.

Evidence at a hearing

- 3.36 The VRB is not bound by technicalities or the rules of evidence. While the VRB has the power to require witnesses to take an oath or affirmation,²⁴ it is not the VRB's usual practice to do so. This was determined very early on in the existence of the VRB as a means of reducing the formality of proceedings.
- 3.37 This does not absolve the applicant or other witness from telling the truth. It is an offence to make false statements or present false evidence.²⁵

²⁴ VEA, s 151(2)

²⁵ VEA, s 208. In *DPP v Tugwell* [1996] SASC 5563, the Supreme Court of South Australia sentenced a veteran to 28 months imprisonment with a requirement to serve 12 months and then enter

VRB must satisfy itself about the issues

- 3.38 The VRB is under a duty to satisfy itself about all the issues related to the review and as to the appropriate decision to be made in the case.
- 3.39 The members may ask some detailed questions during the hearing in order to clarify the evidence or submissions being made on behalf of the applicant.

Presenting the applicant's case

- 3.40 After the presiding member has made some introductory remarks in relation to the proceedings, the applicant's representative is asked to present the applicant's case.
- 3.41 Applicants and representatives can assume that the VRB members are familiar with the contents of the s 137 report before the commencement of the hearing.
- 3.42 The representative should make an opening statement indicating:
- exactly what the applicant seeks;
 - the theory of the applicant's case;
 - what, in general terms, the evidence shows; and
 - the nature of the evidence the applicant will give (recognising that the applicant should already have made a written statement²⁶ that should be before the VRB).

into a 2 year good behaviour bond for receiving a pension he was not entitled to because he presented false evidence to the VRB, along with making false statements both with respect to service pension and disability pension.

²⁶ The usefulness of such a statement is referred to in *Re Anderson* [2006] AATA 389.

- 3.43 All the evidence and witness statements should have been filed with the VRB at the time that the certificate of readiness for hearing form was provided to the VRB. Ideally, no new documentary evidence should be introduced at the hearing (although it can occur).
- 3.44 If the applicant has made a written statement, the applicant's oral evidence should be a confirmation that the statement is true, and provide the applicant with an opportunity to expand on any aspect of his or her statement that the applicant thinks is important to emphasise or explain.
- 3.45 If the applicant has not made a written statement, the applicant needs to be guided through his or her evidence by telling their story in their own words in a logical and ordered way.
- 3.46 This should be done by asking the applicant simple non-leading questions. These are questions that do not suggest the answer, and which cannot be answered by a simple 'yes' or 'no'. They usually begin with 'What ...', 'When ...', 'Where ...', 'Why ...', or 'How ...'. These are open-ended questions that allow the applicant to explain their situation in their own words.
- 3.47 After the applicant gives their evidence, the VRB members will probably ask him or her a few questions regarding that evidence.
- 3.48 The representative will then have the opportunity to make submissions about the issues and the evidence before the VRB.

Written submissions

- 3.49 A written submission is very useful, and while it does not have to be submitted with the Certificate of Readiness, it is useful to do so as it gives the VRB a good opportunity to consider it at some length and discuss it between themselves before the hearing.
- 3.50 If the submission is to be handed to the VRB on the day of the hearing, ask the receptionist to give it to the members so that they can read it before the hearing is scheduled to begin. This is preferable to interrupting the flow of the hearing by asking them to read it at some point in the hearing.
- 3.51 A well written submission can make the work of representative and that of the VRB easier. It can shorten the time the representative needs to present their case in the hearing and provide the VRB members with a ready reminder of the applicant's case.
- 3.52 Advocacy is the art of persuasion. If the theory of the applicant's case can be clearly stated in a logical fashion, referring to the relevant evidence, and indicating why contrary evidence can be disregarded, the reasonableness of the argument is likely to be persuasive.
- 3.53 Whether or not a written submission has been prepared, it is useful to introduce the case by directing the members' attention to any new information or issues that seem to be central to the case. At the close of the hearing it may be important to reiterate these matters and try to draw together the main threads of your submission.

What happens at the end of the hearing?

- 3.54 At the end of the hearing, the presiding member will normally ask if there are any final comments the applicant wishes to make or matters to clarify. After this, the presiding member will thank the applicant and other persons present for attending and will indicate that the VRB’s decision and reasons will be mailed to the applicant and representative within a few weeks.
- 3.55 The VRB will not tell the applicant the result of the hearing at this time.
- 3.56 After the hearing the VRB will form a view about the decision it will make or decide whether it will adjourn to seek additional evidence.

Adjournments

- 3.57 A VRB panel has the power to adjourn the hearing of an application in certain circumstances. A hearing is adjourned when, after its commencement, a final decision cannot be made on the available evidence.
- 3.58 An adjournment is different from a postponement, which occurs when the hearing of an application does not begin.

Section 151

- 3.59 There are two powers of adjournment. Section 151 of the VEA provides a general power exercisable at the VRB’s discretion. This power is usually exercised at the request of one of the parties but it may be exercised by the VRB of its own volition.

Section 152

- 3.60 A VRB panel can also adjourn a hearing under s 152 of the VEA if it decides to seek further information through DVA or the MRCC.

Circumstances of an adjournment

- 3.61 In broad terms, the VRB may adjourn a hearing in either of two situations:
- if the VRB believes that, in the interests of fairness, a party should have the opportunity to obtain additional evidence that is crucial to the outcome of the case.
 - the VRB panel considers it needs other evidence relevant to and necessary for a proper determination of the issues.
- 3.62 Some adjournments will inevitably occur. However, the aim of the VRB and the parties must be to restrict adjournments to a minimum. The only hearings that should be adjourned are those where, with adequate case preparation, the representative could not reasonably have foreseen the necessity for such an adjournment.
- 3.63 A request for hearing should only be made if the applicant is ready to proceed to a final hearing. A representative should not seek a hearing with the object of asking the VRB for a s 152 adjournment. If the representative thinks DVA or the MRCC could obtain further information, the representative should approach the Registrar, who can make requests of DVA or the MRCC similar to those made under s 152.²⁷

²⁷ See page 33, concerning s 148(6A).

The decision and reasons

- 3.64 Decisions are made according to the opinion of the majority of members constituting the VRB panel.
- 3.65 In its decision or determination, the VRB may:
- **Affirm** the decision or determination under review. This means the original decision or determination has not been changed.
 - **Vary** that decision or determination. This means that part of the original decision or determination has been changed.
 - **Set aside** that decision or determination **and substitute** its own decision or determination. This means the VRB agrees or partially agrees that the original decision or determination was wrong and the VRB has made the decision or determination that the VRB considers is correct or preferable.
- 3.66 The VRB panel always prepares a written statement setting out its reasons for the decision or determination. The reasons must include the VRB's findings of fact and refer to the evidence on which those findings were based together with an explanation of how it reached its decision or determination.²⁸
- 3.67 If a panel member disagrees with the majority's decision he or she must write reasons for their disagreement. These are called 'dissenting reasons'.

²⁸ VEA, s 140

- 3.68 The decisions and reasons are prepared and posted as soon as possible after the hearing, usually within a few weeks.
- 3.69 A copy of the VRB's decision and reasons is sent to each party, the applicant's representative and to DVA.
- 3.70 As VRB proceedings are private, its decisions and reasons are not published on the Internet or made publicly available.
- 3.71 While the representative receives a copy of the decision and reasons so that they can assist the applicant, they should not make their copy available to anyone else without the applicant's permission.

Applicants' travelling expenses

- 3.72 An applicant may receive travelling expenses prescribed by regulation²⁹ for travel within Australia for the purpose of attending a hearing³⁰ or travelling to obtain medical evidence for a hearing.³¹



- 3.73 Certain travelling expenses may also be paid to an attendant who travels for the purpose of accompanying an applicant to a hearing or to obtain medical evidence for a hearing.

- 3.74 Travelling expenses are payable for transport, accommodation and meals. Applicants are usually advised of their

²⁹ VE Regs, rr 9 – 9AN; MRC Regs, r 18

³⁰ VEA, s 132(5)

³¹ VEA, s 170B

entitlement to claim for expenses for their travel to and from their VRB hearing at the time the case is listed for hearing.

- 3.75 A claim for travelling expenses must be made *within 3 months* of the travel that was undertaken.
- 3.76 The VRB is not involved in the processing of these claims, although they may be lodged at a VRB Registry (unlike an application for review).
- 3.77 Should an applicant seek to have a hearing at a place distant from a place where the VRB normally hears applications, DVA will only pay the travelling expenses that would have applied had the hearing been at the closer locality.
- 3.78 If the applicant would suffer financial hardship, DVA may pay travelling expenses in advance.³² Contact should be made with the relevant office of DVA to negotiate such an arrangement well in advance of the proposed travel.
- 3.79 If an applicant is dissatisfied with a decision of the relevant Commission concerning travelling expenses, they can seek reconsideration by another delegate *within 3 months* of notice of the decision.³³
- 3.80 If still dissatisfied, the applicant may apply to the AAT for review. Application to the AAT must be made *within 3 months* of notice of the decision.³⁴

³² VEA, s 132A

³³ VE Regs, r 9AH, MRC Regs, r 18

³⁴ VE Regs, r 9AL, MRC Regs, r 18

Reimbursement of costs of obtaining medical evidence

- 3.81 Applicants can apply to DVA for reimbursement of the costs (including associated travel costs³⁵) of obtaining medical evidence in support of their applications to the VRB.³⁶
- 3.82 Certain general conditions apply:
- the medical evidence must have been obtained after the applicant received notice of the decision of the relevant Commission;
 - there is a maximum amount that may be reimbursed in respect of each medical condition involved in the application to the VRB;
 - the evidence obtained must be ‘relevant documentary medical evidence’ reasonably used in support of the application for review;
 - the application for reimbursement must be made to DVA in writing on an approved form *within 3 months after the evidence was submitted to the VRB*; and
 - a claim for travelling expenses to obtain a medical report must be made *within 3 months of the travel* that was undertaken, even if the medical report has not been received at that time (the application will not be processed until the medical report is received).
- 3.83 The VRB is not involved in the processing of these claims. All matters are determined by officers of DVA.

³⁵ VEA, s 170B

³⁶ VEA, s 170A

Chapter 4 — Role of representatives

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Role of representatives

- 4.1 The role of representatives before the VRB is to assist applicants to prepare and present their cases.
- 4.2 A number of ex-service organisations provide representatives free of charge, whether the applicant is a member of their organisation or not. A list of these organisations is available from the VRB.
- 4.3 Representation at the VRB is at the applicant's own expense though most representatives do not charge a fee.
- 4.4 Lawyers cannot appear as a representative at a VRB hearing,³⁷ but can help to prepare a case.
- 4.5 While legal aid is not available for cases at the VRB, the Legal Aid Commissions in some States and Territories provide what they describe as a 'minimal assistance' service for VRB applicants, which does not include representation at VRB hearings.

³⁷ VEA, s 147(2) defines lawyers to include anyone who has a law degree (whether or not admitted to practise law) or anyone else who is qualified to practise as a lawyer.

Responsibilities of representatives

Be diligent and objective

- 4.6 Representatives should present the applicant's case to the best of their ability, regardless of any personal feelings about the applicant or their own opinions about the merits of the case. Representatives should maintain their objectivity and not become personally involved in the outcome of a case.
- 4.7 A representative must promote the timely resolution of the matter consistent with the best interests of the applicant

Present all relevant supportive evidence

- 4.8 Representatives have a responsibility to the VRB to present whatever supportive evidence is available to them to enable the VRB to make an informed decision.
- 4.9 Representative must act impartially and in a manner unaffected by considerations other than the best interests of the applicant.

Do not act as a witness

4.10 It is inappropriate for a representative to act as a witness at the hearing by giving evidence in support of the applicant whom they represent. This is because a conflict might arise between their responsibility as a witness and that as a representative.

Do not mislead

4.11 Representatives have an obligation not to mislead the VRB. An effective relationship between the VRB and a representative must be based on integrity.

Act courteously

4.12 Although VRB hearings are informal, they are still hearings of a statutory tribunal. Representatives should be courteous at all times during hearings and should avoid using emotive or inflammatory language.

4.13 It is an offence to obstruct the VRB or a member in the performance of their functions or to disrupt a hearing.³⁸

Keep up-to-date and well-informed

4.14 Representatives need to be aware of the legislation and any relevant case precedents. It is also helpful if a representative has some knowledge of service conditions and a basic knowledge of general medical matters.

4.15 Representatives need to be aware of resources that are available to assist them in gathering material for presentation to the VRB (see Chapter 7).

Do not contact VRB members about cases

4.16 Any inquiries about a particular case must be directed to VRB staff and not to members who have heard or who may subsequently hear the case.

4.17 Representatives should not contact members about a particular case outside the VRB hearing room, as this might give the impression of improper influence. Similarly, DVA staff are not permitted to speak to VRB members about particular cases.

4.18 Any communication between a party to the review and the VRB must be done in a manner by which the other party to the review has an opportunity to hear or see that communication and to make submissions.³⁹

4.19 Informal communication concerning a case outside the hearing room between a party and a VRB member would be a breach of procedural fairness.

Advise on prospects of success

4.20 Representatives have a responsibility to advise applicants realistically of their prospects of success.

4.21 If the representative thinks an application has no chance of success, the representative should explain to the applicant the reasons why the case has no prospects of success, and give three options:

- proceed to a hearing, understanding that it is not likely to succeed;
- withdraw the application; or
- obtain a second opinion.

³⁸ VEA, s 170

³⁹ VEA, s 153

Chapter 5 — Case preparation

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Understanding the issues

- 5.1 The representative must have a clear understanding of the issues to be decided by the VRB and of the evidence about those matters. This requires a careful study of the s 137 report and detailed interviews with the applicant and anyone else who might be able to give relevant evidence.
- 5.2 The best way to begin examining the s 137 report is to locate the claim form to get an idea of the scope of the claim. Next, read the delegate's decision. This will provide a good idea of the issues involved.

- 5.3 The next step is to read carefully all the documents, from start to finish. It is the representative's task to consider whether any issues have been missed or misunderstood by the decision-maker, to reconsider the evidence and determine if there are other avenues by which the claim might succeed, or alternative ways of considering the evidence and the issues.

Construct a chronology

- 5.4 While reading the documents, the representative should note any matters that need to be clarified with the applicant concerning such things as service events or medical history, and construct a chronology of events relevant to the claim and the issues.

- 5.5 The chronology is a list of dates and events that the representative should continue to update as the evidence develops. It should include every date and every event relevant to the case and a reference to where in the s 137 report the evidence of that event is to be found.
- 5.6 The chronology should be immediately available every time any action is taken on the case and is a useful tool to have in the hearing. It effectively tells the applicant's story in a concise, logical fashion, and is a shortcut for the representative to refresh themselves on the facts of the case.

Getting organised

- 5.7 The representative must consider all the issues in the case, including dates of effect, eligibility, application of legislation, Statements of Principles and applicable case law.
- 5.8 The representative should make detailed notes on all these matters while reading and researching the case. Notes should be made under headings so that the representative can easily find the particular information when it is needed. These notes will later assist in preparing a written submission.
- 5.9 Getting organised at the start of a case makes it so much easier at the end of a case. Taking notes in a systematic manner will not only assist the representative and the applicant, but will enable someone else to pick up the case if for some reason the initial representative becomes unavailable.

Gathering evidence

- 5.10 The representative should carefully consider the evidence, not only to see whether it supports the contention of a link between service and the applicant's injury or disease, but also to consider objectively its value, consistency with other evidence, reliability, and credibility:
- Can it be supported by other material?
 - How easy or hard would it be to obtain such other supportive material?

Act on instructions in gathering evidence

- 5.11 The representative should always ensure that such decisions are made in consultation with the applicant.
- 5.12 Any decisions that might result in a delay, or expenditure of money (even if it will be reimbursed by DVA) must be made on instructions from the applicant.
- 5.13 The representative must always keep in mind that it is not their case: it is the applicant's case.
- 5.14 The representative has a responsibility to keep the applicant informed of what is happening, what is done on their behalf, and should ensure that they have clear instructions about what they will be doing on the applicant's behalf. That way, the applicant recognises that they have ownership, control, and confidence in what is happening with the running of their application.

- 5.15 It is usually in the applicant's interests that the case is finalised as quickly as possible. For example, in a VEA entitlement matter, it may help if the VRB has sufficient evidence to assess the rate of pension as well as decide whether the claim for the injury or disease can be granted.
- 5.16 This would require evidence not only about the claimed injury or disease, but also any other disabilities for which liability has already been accepted, so that a combined assessment can be made.

Preparing applicants and other witnesses

- 5.17 The VRB rarely hears oral evidence from witnesses other than the applicant and their family. Expert evidence is usually given to the VRB through written reports from specialists.
- 5.18 If there is a witness who can provide additional relevant evidence, the VRB should be advised at the earliest opportunity (preferably when providing the certificate or readiness for hearing) so that sufficient time can be allocated for the giving of that evidence.
- 5.19 It might be easier for a witness to give evidence by telephone rather than attend the hearing in person.
- 5.20 A statement should be prepared for every witness, which sets out the evidence the witness will give in the hearing. That statement should be forwarded to the VRB at least two weeks before the hearing, preferably at the time that the VRB is advised the applicant is ready to proceed to the hearing.
- 5.21 Preparing a witness does not mean telling the witness what to say. It means going over the facts of the case and the material and statements they have already given, with each witness, separately.
- 5.22 The representative should have the witness read their statement and get them to explain to the representative any aspects that might require some clarification.
- 5.23 The representative should indicate to the witness that VRB members are likely to ask them questions about their statement and may ask about inconsistencies with other evidence.
- 5.24 The representative should review the evidence to identify where there appear to be inconsistencies, then ask the witness to explain those inconsistencies.
- 5.25 The witness needs to understand the hearing procedure and what to expect, including the layout of the hearing room, who will be in attendance, whether they will be excluded from the hearing room before they give their evidence, where they can wait pending being called to give evidence.
- 5.26 The witness should be advised to address their answers to the VRB members and to speak clearly, always giving oral answers rather than nodding or shaking their head. They should not argue with the questioner but always answer politely.

Obtaining evidence under s 148(6A)

- 5.27 Subsection 148(6A) of VEA provides that the Principal Member may, at any time, ask the Secretary of DVA or the MRCC to obtain further documents or arrange for an investigation or medical examination and then to give the Principal Member a report of that investigation or examination.
- 5.28 The Principal Member has delegated these discretionary powers to Registrars.
- 5.29 A representative who experiences difficulties in obtaining particular evidence may ask a VRB Registrar to exercise their power under s 148(6A) to ask DVA to obtain the evidence at DVA's expense.
- 5.30 Whether the Registrar does so, and what the Registrar asks of DVA is entirely at the Registrar's discretion.
- 5.31 A Registrar will not assist a representative to go on a 'fishing expedition' for evidence.
- 5.32 There must be good grounds for seeking the particular evidence and it must be clear to the Registrar that the particular evidence would assist the VRB in determining a relevant issue.
- 5.33 It is much better to ask a Registrar to use s 148(6A) than proceed to a hearing with the intention of seeking an adjournment under s 152 for the same purpose.⁴⁰

⁴⁰ See page 25.

Discuss the case with the Registrar

- 5.34 The Registrar is able to discuss and provide useful information about case preparation. If a representative has had difficulties in obtaining material that is considered important to a case, this should be discussed with the Registrar who may be able to assist. It can often be useful just to discuss difficult issues raised in a case with the Registrar.

What records do DVA and MRCC hold?

- 5.35 DVA holds the following files:
- **Medical files** ('M' files) – relating to claims for VEA disability pensions and MRCA compensation;
 - **Pension files** ('C' files) – relating to service pension;
 - **Hospital files** ('H' files) – they have older clinical notes from appointments and admissions to the former Repatriation General Hospitals;
 - **Compensation files** – relating to claims under the SRCA;
 - **Rehabilitation files** – relating to rehabilitation assessments and programs under the SRCA;
 - **Transition management service (TMS) files** – relating to a member's preparation for discharge and civilian life.

Who holds service records?

- 5.36 DVA holds Army and RAAF service medical records for service from World War 2 until 1952. DVA also generally holds service medical records of persons who have made claims with DVA.
- 5.37 The Department of Defence holds all other service records.

Lodging further evidence

- 5.38 Any additional evidence obtained in support of the applicant's case should be sent to the VRB as soon as possible prior to the hearing.
- 5.39 Additional evidence is added to the s 137 report so that each party has access to all relevant information in the VRB's possession prior to the hearing.
- 5.40 Early lodgement of evidence may lead to a favourable s 31 review (VEA) or s 347 reconsideration (MRCA). Delays in lodgement of evidence may lead to an adjournment of the case.
- 5.41 If providing copies of articles or extracts from books, it is important to provide the entire article or chapter of a book together with the publication details (year, publisher, edition, title, author, editor, etc) so that the VRB can understand the passages on which the applicant relies in the proper context.
- 5.42 Such documents should not be marked or highlighted, but the relevant passages should be identified by stating the page, paragraph number, or place on the page in which the relevant passage appears.

Written submissions

- 5.43 It is often useful to provide a written submission to the VRB, which can then be supplemented by an oral presentation highlighting those aspects that need emphasis.
- 5.44 The submission should clearly outline the applicant's case. It should point to the relevant documentary evidence and show how the applicant's

circumstances fit within the legal requirements for the pension, compensation or other benefit the applicant seeks to obtain.

- 5.45 The submission should deal not only with the evidence and arguments that support the case, but also any evidence and arguments that would tend to detract from the case. The representative should be able to say why their arguments should prevail, and why the supporting evidence outweighs the contradictory evidence.
- 5.46 The submission should contain headings so that the VRB can quickly see where it is leading, and should make it clear from the outset what the applicant is seeking.
- 5.47 A short chronology of the important events particularly relevant to the case should be provided. This will usually be shorter than the chronology that was prepared during the case preparation.
- 5.48 The representative should indicate, but not recite, the particular provisions of the legislation and the particular SoPs that are applicable.
- 5.49 In making statements or allegations of fact, the representative should note the page reference or the particular medical report, which is evidence of, or points to, that fact.

Summoning witnesses

- 5.50 A summons is an order for a person to appear at the VRB and/or produce documents.
- 5.51 Summoning witnesses or documents should be a last resort and is rarely used at the VRB. It should be

- discussed first with the Registrar who may be able to advise of other simpler means by which particular evidence may be obtained.
- 5.52 The presiding member of the VRB panel assigned to hear the application can, at their discretion, issue a summons.⁴¹
- 5.53 An applicant or representative can request the issue of a summons if there are reasonable grounds to believe that a particular person can give relevant evidence or produce relevant documents but would not do so without being summoned.
- 5.54 If an applicant asks for a summons to be issued, the applicant is responsible for serving it and providing the person summoned with expenses to travel to the VRB. A summons must be delivered personally, with the person shown the summons when it is handed over.⁴²
- 5.55 If the applicant summons an expert witness, the applicant is responsible for paying the witness fees for that expert. The travelling expenses and witness fees are determined, usually at the time the summons is issued, by the presiding member of the VRB panel.⁴³
- 5.56 While the applicant is initially responsible for paying the allowances and fees for witnesses, the VRB may order the Commonwealth to pay part or all of it. A request for such an order should be made at the hearing at

which the witness appears or produces the required documents.

- 5.57 There must be substantial reasons for the VRB to depart from the presumption that the person calling the witness should pay that witness' costs.⁴⁴ Relevant considerations might include personal hardship, or that the witness would not have had to be summoned but for some action on the part of the VRB or the relevant Commission.⁴⁵

Freedom of Information requests

- 5.58 If after examining the s 137 report the representative or applicant thinks there might be other relevant documents on DVA or MRCC files, the applicant should make a Freedom of Information (FoI) request of DVA or MRCC to obtain access to the files.

Timing of FoI applications

- 5.59 If an FoI request is to be made, it should be before a certificate of readiness for hearing is lodged. The VRB gets the DVA files for the hearing, but the VRB has no authority to release those files for examination by the applicant or representative.

Cost of FoI applications

- 5.60 If the applicant makes the request and authorises the representative to access the documents on his or her behalf, no fee will be payable. If the representative makes the FoI request in their own name, an application fee is payable.

⁴¹ VEA, s 151(2)

⁴² VEA, s 171, VE Regs, r 10, r 12

⁴³ Fees are set in accordance with Schedule 2 to the *Administrative Appeals Tribunal Regulations 1976*: see VEA, s 171, VE Regs, r 12

⁴⁴ *Re Blyth and Repatriation Commission* (1982) 1 RPD 254 at 262

⁴⁵ *Re Pye and Director-General of Social Security*, 20 July 1983

Chapter 6 — Record keeping

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Good record-keeping

- 6.1 Good record-keeping is essential for every representative or pension officer.
- 6.2 It is important to maintain good records of relevant events, conversations, correspondence and other communications with the claimant and anyone else with whom you communicate about their case.
- 6.3 Proper documentation helps representatives and pension officers keep track of their activities and to demonstrate that they have followed proper procedures and have acted on the claimants' instructions.

What are records?

- 6.4 Records include letters, faxes, memos, e-mail messages, information kept in computers, any notes taken during or after phone calls, and any other related information you have acquired. You should keep a record of all information related to your efforts on behalf of the people whom you represent.

What records should be created?

- 6.5 Numerous documents are created in the process of assisting veterans and their dependants with their claims and appeals. These may include printed,



faxed and electronic letters (e-mail messages and attachments), and may serve several purposes. For example, they may be used to:

- contact people who are not available in person or by phone;
 - record and confirm important information received orally, in meetings or through phone calls;
 - record and confirm important understandings, undertakings, appointments, and deadlines.⁴⁶
- 6.6 If you work for an ex-service organisation, there may be additional record-keeping requirements covered by State or Commonwealth laws concerning legal, financial or management records. You should be aware of any such policies and legal requirements within your organisation. These rules may also concern the retention and disposal of records.

Create a file

- 6.7 A separate file should be created for each claimant. The records in the file should be full and accurate. They should correctly reflect what was done, and be complete, retrievable, and understandable to someone else.

⁴⁶ See *Re Hunt and Repatriation Commission* (2001) 17 *VeRBosity* 7. At para [41], the AAT said: 'Representatives hold particular responsibility for ensuring that amongst their many duties, there is compliance with statutory deadlines and requirements. ... [T]he Tribunal is aware that advocates and representatives have huge and complex caseloads with many competing priorities. Case management in these circumstances is often difficult but this should not excuse inattention to strict legislative requirements.'

Take notes

- 6.8 It is important to get into the habit of recording all relevant phone calls, meetings or other oral conversations. After any phone call, make a short note.
- 6.9 If it is likely that a phone call will be lengthy, ensure that you have adequate writing paper (or your computer) near the phone.
- 6.10 If possible, you should jot down key details, at least in point form, during the call.
- 6.11 In your more detailed notes written afterwards, be sure to include the time and date of the conversation, the names of participating persons, and a short outline of the discussion.

Follow-up letters

- 6.12 When appropriate, use the written information as the basis for follow-up letters to confirm meetings, calls, decisions, key facts, undertaking given, and so on.
- 6.13 By following up a meeting or conversation with a claimant with a letter confirming what was discussed and agreed, you ensure that any misunderstandings get cleared up early. It also ensures that the claimant has a written reminder of what he or she agreed to do, and what you agreed to do.
- 6.14 Always ask for, and note the name and contact details of, anyone you may need to communicate with later on.

Make and keep copies

- 6.15 Always make and keep copies of letters, other documents and electronic messages that you send, receive or share with others and put them on the file.
- 6.16 It is important to recognise that it is your (or your organisation's file) not the claimant's file. However, because the file contains personal information about the claimant, the claimant has a right to access it if he or she chooses to do so.
- 6.17 If the claimant chooses to end your relationship, while you should keep copies of all relevant documents,⁴⁷ you should provide the claimant with all original documents that the claimant has provided to you as well as copies of other relevant documents related to his or her case.

How should records be kept?

- 6.18 DVA, in consultation with a number of experienced veterans' representatives have developed a computerised case management system for the use of representatives and pension officers. This system is called VPAD. It facilitates best practice record-keeping and enables efficient tracking and maintenance of cases by representatives and their organisations.
- 6.19 If you do not have access to VPAD, you should maintain a system of some sort that records all your cases, both past and present.
- 6.20 For current cases, your system should enable you to quickly find out what is

currently happening, such as what the case is about, what the issues are, when the next appointment will be, what evidence is being sought and from whom, and any important dates.

- 6.21 If either the claimant or the VRB contacts you, you should quickly be able to give an update on the progress of any case.

How long should documents be kept?

- 6.22 For your own protection, you should keep documents for at least 7 years after the last action that was taken or last advice given in the case.
- 6.23 Under State and Territory statutes of limitation, the limitation periods for commencing civil litigation can vary from periods as short as 6 months to periods of up to 15 years. But the main causes of action likely to give rise to litigation against representatives and pensions officers is generally 6 years. Such actions include negligence (for example, negligent advice, or negligently failing to take a certain course of action), and breach of contract.
- 6.24 Keeping the documents for an extra year provides a margin of safety as the time begins to run from when the relevant damage occurred, which might be some time after the action occurred or the advice was given.
- 6.25 It should be noted that limitation periods are usually not absolute bars to commencing litigation. It is up to the defendant to invoke the limitation as a defence to the action.

⁴⁷ See page 38

What documents must be kept?

- 6.26 While working on a current case, a representative needs to keep a copy on file of all documents created in the course of that case. However, once the matter has been concluded it is unnecessary to keep everything.
- 6.27 All that must be kept are those records that indicate any advice given, instructions received, and records of any meetings and conversations in connection with the case. That is, evidence of the claimant's instructions, the representative's actions, the actions of others relating to the case, and any advice given.
- 6.28 If such information is kept on computers you need to ensure that must be capable of being retrieved in an appropriate format .
- 6.29 There must also be an adequate back-up system so that information is not lost. If you upgrade your computer the data must be transferred to a compatible system on the new computer.
- 6.30 Do not leave copies on claimants' data on the old computer if you are disposing of it.
- 6.31 Data on floppy discs will probably not last 7 years in that form of storage and should be transferred to a hard disc of a computer or to CDs, Zip drive, flash drive, or memory stick. But even CD storage might not last 7 years. CDs should be checked and copied every year to ensure that the data is still accessible. Old CDs and floppy discs should be physically broken up.

What documents can be destroyed?

- 6.32 There is no simple answer to this. If you work for an ex-service organisation you will need to follow their policies and legal requirements concerning retention and destruction of documents.
- 6.33 Like good housekeeping, destroying documents is part of good administrative practice and a common sense approach to organising your work. It should be an everyday practice to dispose of records, while being careful not to jeopardise important information.
- 6.34 Such everyday 'cleaning-up' occurs if the document is:
- a duplicate (such as a draft or 'information copy');
 - unimportant (such as a message slip); or
 - of short term value (such as a reminder note that has been actioned).
- 6.35 Generally, you do not need to keep duplicates of documents, such as a s 137 report, provided that the original is known to exist and the duplicate contains no meaningful annotations that would make it an original record in its own right.
- 6.36 If the original document exists in DVA or the VRB and litigation is commenced, you should be able to obtain it by summons or other litigation discovery processes.

How should documents be destroyed?

- 6.37 Documents relating to a claimant should never be placed in the ordinary garbage without first being shredded or otherwise made unreadable. Documents must be destroyed so that they cannot be recreated in any form.
- 6.38 The confidentiality of the records must be maintained throughout the destruction process. You should not let anyone destroy the documents who is not authorised to read the documents.
- 6.39 There is a real risk that unless documents are properly destroyed they may be discovered at the local rubbish tip, and might turn out to be very embarrassing not only for the claimant, but your own reputation if their source is traced back to you. The claimant might also be able to obtain damages against you for breach of privacy.

What records do the VRB keep?

- 6.40 The VRB keeps its file, which contains all correspondence between the VRB and the applicant, the representative, and other parties. It also has a computer database containing information about each application for review.
- 6.41 The VRB file and one copy of the s 137 report is kept by the VRB for 7 years from the date the matter was finalised and can be retrieved from archives in the event it is needed in litigation.
- 6.42 While the VRB keeps the tape of its hearings for only 2 years, it is unlikely that it would be required in litigation involving a representative. This is because anything said or done in the course of a hearing by a representative is

protected by s 167(2) of the VEA (provided it does not amount to contempt of the VRB). (See below.)

Privacy

- 6.43 It is essential that you maintain the privacy of everyone whose personal information you have obtained in the course of your activities. This involves ensuring that:
- at the time personal information is obtained, or when permission is being given to obtain personal information, the person to whom it relates is made aware of who else is likely to see or hear about their personal information;
 - personal information is always appropriately secured;
 - personal information is not released or made available to anyone without the permission of the person to whom it relates (unless a law requires its release).

Professional indemnity insurance

- 6.44 Subsection 167(2) of the VEA provides that a person representing a party at a hearing before the VRB has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.⁴⁸

⁴⁸ A barrister cannot be sued for negligence for the way in which he or she conducts a case in a Court hearing or in work outside Court if it is intimately connected with the work inside the Court: *D’Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12.

- 6.45 This does not mean that a representative will be immune from all legal actions that might be taken against them.
- 6.46 If you do not have professional indemnity insurance you run a substantial risk in the event of litigation being commenced against you by an unhappy former claimant.
- 6.47 The VRB will not include a representative on its lists of representatives that it provides to applicants unless the representative has professional indemnity insurance.
- 6.48 The Veterans' Indemnity and Training Association Inc (VITA) was established in 1995 as a result of concerns of ex-service organisations that they might be subject to litigation if the advice they gave in good faith was incorrect. VITA provides professional indemnity insurance for the practitioners (pension and welfare officers and representatives) of those organisations who are members of VITA.
- 6.49 In order to be covered by the VITA insurance policy, practitioners must abide by the TIP (Training & Information Program) Code of Ethics, and have an auditable trail of case work. This means that each case must be kept in a separate case file from each other case and must be initiated with a cover sheet stating, among other things:
- the name and address of the claimant;
 - the name of the practitioner;
 - the name of the ex-service organisation for whom the practitioner is acting.
- 6.50 VITA requires that all notes of action or other annotation relating to the case must be added to this case file, and that if, at any time, the claimant wishes to go to another organisation, copies of the documents provided by the claimant must be retained on the file (and originals given back to the claimant).
- 6.51 In addition, to be eligible for VITA coverage, the practitioner must be an authorised practitioner of an ex-service organisation that is a financial member of VITA. Such authorisation must be in writing from the organisation.
- 6.52 The practitioner must be TIP trained to the level at which he or she is authorised to operate by their organisation.
- 6.53 Being trained to a particular level carries with it an implied requirement to keep up to date and undertake regular refresher training at the relevant level.
- 6.54 VITA also requires that fees, including donations and gratuities, must not be charged nor solicited for services to claimants (other than an administrative fee that must not exceed \$50).
- 6.55 If these requirements are not met, the insurance cover may be void.
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Chapter 7 — Sources of advice and information

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- 7.1 Representatives should have ready access to relevant information and know where to go, or whom to speak to, for advice about particular matters or issues related to their cases.

Networking

- 7.2 It is important to talk with other representatives, Departmental officers, and VRB staff to keep in touch with recent developments, and to discuss ideas and issues related to practising as a representative.
- 7.3 While representatives must not relate personal details of their cases to others unless authorised by the applicant, it is often useful to discuss legal and evidentiary issues, approaches to presentation, and such matters with other practitioners.

TIP training and VRB information sessions

- 7.4 The Department, in partnership with the main ex-service organisations, has a Training and Information Program (TIP) that trains and provides continuing education for pension and welfare officers and representatives. This is a very useful structured program of learning that all representatives should be involved in. It is important to update training regularly to ensure familiarity with new changes to the law or practice and to reinforce best professional practice.
- 7.5 The VRB runs regular legal and information update sessions and workshops for representatives in each State at which recent court cases and legislative changes are discussed and at which questions can be asked about VRB practices and procedures.

Experts and researchers

- 7.6 It is useful to develop a list of experts and people with particular research skills who are willing to help out, or provide useful information or advice, at reasonable cost or for no charge.

VRB staff

- 7.7 The Registrar and other VRB staff are often able to discuss issues in cases with representatives, and can be a source of useful information and advice. However, VRB staff cannot say what the VRB members will or will not do in a particular case.
- 7.8 Nevertheless, if a representative is having particular difficulties in obtaining certain evidence or has concerns of a practical or procedural nature about a case, it is often useful to talk to the Registrar or Case Manager.

Internet



- 7.9 There are many useful sites on the Internet for legal, medical, historical and general information. A good starting point is the VRB's web site, which contains all the procedural information about the VRB as well as links to legislation, case law, and many other sites of interest.
- 7.10 There are many different ways to search for information. It is worthwhile taking the time to learn to use the web search tools on sites such as AustLII, Comlaw, and Google to locate relevant information in an efficient and effective way. See page 145.

Doing legal research

- 7.11 It is essential to prepare before any VRB appearance. This will involve finding the law that will apply to the case in which you are appearing, as well as any other materials that may help explain the law. However, finding the law is not always easy.
- 7.12 The answer you are looking for may not always be found after conducting just one search. Often many resources will need to be consulted and your search strategy and search terms may need to be reconsidered along the way.

Why is legal research important?

- 7.13 The law changes quickly either by new legislation being introduced by parliaments or through new judgments being handed down by the courts. The law does not stand still: concepts learned today can be obsolete tomorrow. To understand the law at a particular point in time and offer an accurate opinion one must be aware of these changes and their impact.
- 7.14 Conducting thorough legal research will mean you are conscious of these changes and can therefore respond appropriately in your VRB appearances. In fact, the quality of your case presentation is often directly related to the quality of your legal research.

Getting started – Sources of Law

7.15 When researching the law you are looking to find what law applies to a particular set of facts or circumstances. There is no single technique that is right for finding the law in all situations, but 3 approaches can be applied to help you find the law.

- Subject approach (secondary sources)
- Case law approach (primary sources)
- Statute approach (primary sources)

7.16 Proceeding from general information (secondary sources) to more specific, authoritative information (primary sources) is a good approach to use.

7.17 **Primary sources** of law are statute law and case law. These contain ‘the law’:

Primary Legislation	Acts or Statutes of Parliament
Subordinate Legislation	Rules, Regulations, Determinations, Instruments: these are made by individuals or bodies to which Parliament has delegated legislative authority.
Case law	Published reports of judgments of courts

7.18 In addition to primary sources, which contain the law itself, it is necessary to be familiar with the many secondary sources available and how to use them.

7.19 **Secondary sources** are books and journal articles about the law. They include journal articles, textbooks, conference papers, legal dictionaries and encyclopaedias

7.20 Secondary sources of legal information perform one of two functions:

- assist in locating relevant primary sources of law; and

- assist in the interpretation of relevant primary sources.

7.21 Commentaries found in secondary sources such as textbooks, journal articles and conference papers are an excellent starting point for your research as they often provide you with an overview of the topic as well as references to primary materials.

Understanding Legislation

7.22 Acts (also called statutes) and regulations can be difficult to read. Journal articles may discuss what an Act means, what the government was trying to do when it passed the legislation and what effect the legislation actually has or is expected to have.

7.23 Acts have a name and year, for example the *Veterans’ Entitlements Act 1986*. The name usually reflects the subject matter of the Act and the date indicates the year in which the Act passed through both Houses of Parliament and received Royal Assent.

7.24 Acts can be amended (changed) by Parliament at any time. Some commonly used Acts may be reprinted from time to time. Several reprints have been done on the VEA. When they are reprinted, the principal (original) Act and all subsequent amendments are put together to make an up-to-date ‘consolidated’ version of the Act.

7.25 Regulations are examples of delegated legislation (also called subordinate legislation), which is so named because Parliament has delegated legislative power to a person, a government agency or other body to make further laws under a particular Act.

- 7.26 Delegated legislation is often of a technical nature or deal with administrative details. It may include standard forms and fee information. Regulations (known as statutory rules in the Commonwealth jurisdiction) generally contain material that changes frequently, so it is important that you locate an up-to-date copy.
- 7.27 A Federal Register of Legislative Instruments contains all Commonwealth delegated legislation and is maintained by the Attorney-General's Department.
- 7.28 If you have access to the Internet, you can find Commonwealth legislation, including the Federal Register of Legislative Instruments, on the Australian Attorney General's Department site, ComLaw (www.comlaw.gov.au).
- 7.29 Legislation from the Commonwealth as well as other State and Territory jurisdictions can be found at the Australasian Legal Information Institute site (www.austlii.edu.au).
- 7.30 This information is free of charge, but make sure you take note of when the material for each jurisdiction was last updated, as the legislation may not be completely up-to-date.
- 7.31 Reading and understanding Acts is not easy, however most are now drafted (written) in simpler terms than they once were. Often an Act will have a Table of Contents, which lists all the sections in the Act, and each major Part or Division in an Act will have an Outline at the front of that Part or Division that describes how that Part or Division operates.

- 7.32 Usually there is a definition section near the beginning of the Act, which explains what is meant by some of the words and phrases used in the Act.
- 7.33 Some Acts have schedules at the end, which contain tables and detailed information that is referred to elsewhere in the Act.

Finding Cases on a Subject

- 7.34 When working on a legal problem you must focus on the legal principles involved. This means that you must research the legal issues, not the facts.

Using case law

- 7.35 It is all very well to have access to information, but it is the way in which it is used that really matters.
- 7.36 There are hundreds of court judgments and thousands of AAT decisions in veterans' law cases, but many of them are no longer relevant, accurate, or useful. Additionally, AAT decisions are not binding on the VRB, and only some aspects of court judgments are binding.
- 7.37 Therefore, one must be careful about using AAT and court cases in VRB hearings.

AAT cases

- 7.38 Generally, there is little need to refer to AAT cases in VRB hearings. While the AAT might have dealt with a case that involves similar factual issues, often the evidence before the AAT in one case is different from that in someone else's case. The facts are always just a little different, and the way in which one decision-maker sees the facts can well be different from how another person sees the facts.

- 7.39 Nevertheless, reading AAT cases that deal with issues similar to those in an applicant’s case can be useful in getting an idea of the kind of evidence that might be taken into account, the approach that has been taken (and which the VRB might also take), and any legal issues and arguments that might be involved.
- 7.40 While AAT cases often say things about the law, it is possible that other AAT members have expressed different views in other cases. Until a court rules on the relevant legal issue, neither the VRB nor AAT are bound by an AAT decision.
- Court cases**
- 7.41 As court cases are concerned only with questions of law, the evidence and factual issues in the case are not usually significant. Instead, what is important is how the law was applied to the facts as found by the AAT. The issues in court cases usually concern the meaning of words and phrases in the Act or in instruments made under the Act, and whether the AAT used a wrong legal test.
- 7.42 Thus, court cases are important for identifying the types of questions the legislation requires the decision-maker to ask when it decides particular types of cases.
- 7.43 When looking at court cases it is important to know when it was decided, whether the relevant legislation has been amended since, and whether a later court case has changed the effect or understanding of the legislation even if the Act has not been amended.
- 7.44 It is also important to recognise that not every statement on the law by a court is binding. Strictly, it is only those parts of the court’s judgment that are essential to the court’s order that are binding on courts and tribunals below that court in its jurisdictional hierarchy.⁴⁹ Those binding parts of the court’s reasons are called the *ratio decidendi*.
- 7.45 Other statements made in the course of delivering the judgment but which are not essential to the court’s order are not binding. Nevertheless they might be of some persuasive value for courts and tribunals below it. These statements are called *obiter dicta*.
- 7.46 If it is thought necessary to refer to a court case in a VRB hearing, there is no need to provide the VRB with a copy of the case. VRB members are usually familiar with most of the relevant court cases and they can easily access the judgments using VRB resources after the hearing.
- 7.47 When referring to a court case, it is useful to indicate the relevant page or paragraph numbers of the judgment that set out the legal principle on which the applicant relies.
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⁴⁹ See the chart at page 124. A court or tribunal is in the ‘jurisdictional hierarchy’ of a particular court if an appeal can be made, directly or indirectly, from the court or tribunal to that particular court.

Leading cases

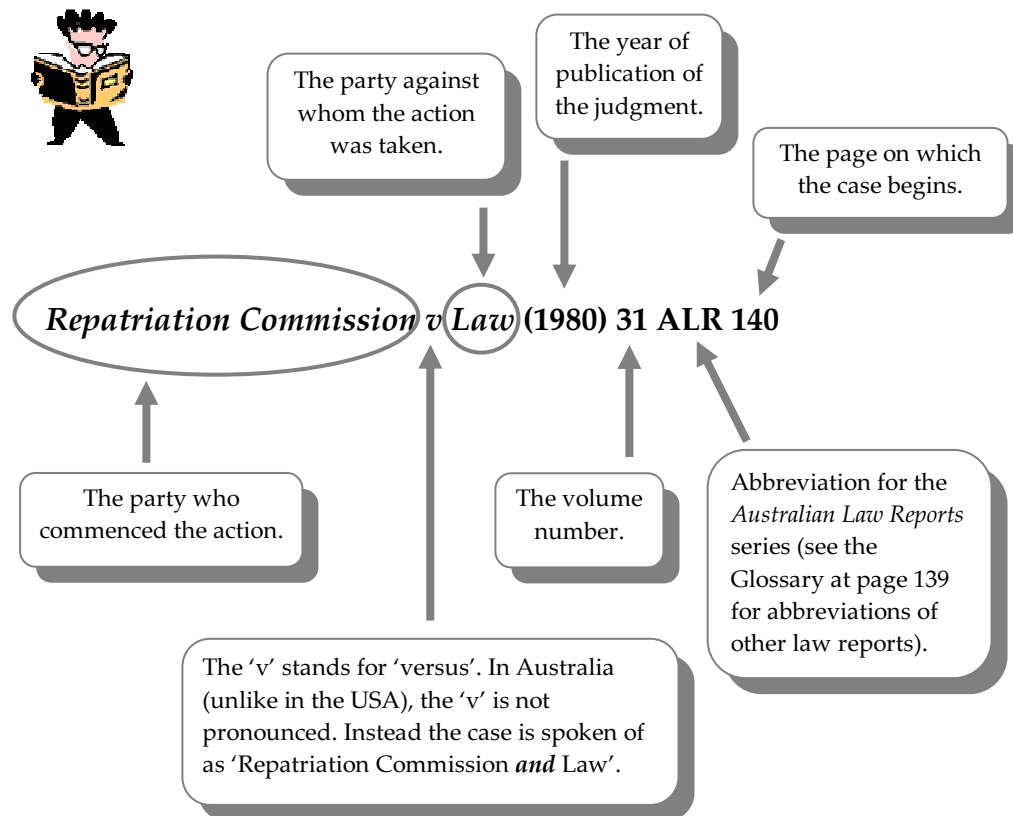
- 7.48 A leading case is a significant court decision that has determined and settled the principles in a particular area of law. A leading case is often cited by advocates in Board hearings as authority for their case.
- 7.49 The best sources of information on leading cases in veterans' law are *Veterans' Entitlements Law* by Creyke and Sutherland (The Federation Press www.federationpress.com.au), and articles in *VeRBosity*.

7.50 Once you have found the leading case that seems relevant to the case you are presenting, you can check that it is still good law by searching for the case name in Federal Court cases in AustLII to see how the case has been considered in later court cases.

Where can I get a printed copy of the VEA or MRCA?

7.51 A printed copy of Commonwealth legislation can be purchased from:
Canprint Information Services
PO Box 7456 Canberra MC ACT 2610
Phone: 1300 656 863
Fax: 02 6293 8333
Email: legislation@infoservices.com.au

Understanding a case citation



Chapter 8 — Service Eligibility

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PART OF VEA	PENSION	TYPE OF SERVICE
Part II	Disability pension, Dependant's pension (widow, widower, orphan)	ELIGIBLE WAR SERVICE <ul style="list-style-type: none"> • <i>operational service</i> is a category of eligible war service • <i>warlike service</i> and <i>non-warlike service</i> are categories of operational service
Part III	Service pension	QUALIFYING SERVICE <ul style="list-style-type: none"> • <i>warlike service</i> is a category of qualifying service
Part IV	Disability pension, Dependant's pension (widow, widower, orphan)	DEFENCE SERVICE <ul style="list-style-type: none"> • <i>hazardous service</i> is a category of defence service PEACEKEEPING SERVICE <ul style="list-style-type: none"> • both civilians (usually police) and members of the Defence Force can render peacekeeping service

Service and eligibility under the VEA

- 8.1 **Part II** of the VEA concerns pensions for incapacity from **war-caused** injury, war-caused disease, or for war-caused death. The relevant type of service for Part II is **'eligible war service'**, which may include **'operational service'**.
- 8.2 If a person has rendered 'operational service', they get certain advantages in how their claims are determined, including a more beneficial standard of proof and additional means by which the Commonwealth might be liable to pay pension.
- 8.3 **Part III** of the Act concerns service pensions (equivalent to the age pension) for persons who have rendered **'qualifying service'**. The VRB does not review decisions under Part III of the VEA. **Qualifying service for service pension** is different from **operational service** for a **disability pension**.
- 8.4 **Part IV** of the Act concerns pensions for incapacity from **defence-caused** injury, defence-caused disease, or for defence-caused death.
- 8.5 The relevant types of service for Part IV are **'defence service'** (which may include **'hazardous service'**) and **'peacekeeping service'**.
- 8.6 Like 'operational service' under Part II, if a person has rendered 'hazardous service' or 'peacekeeping service', they get similar advantages how their claims are determined.
- 8.7 A person is not taken to be rendering 'defence service' while they are rendering 'peacekeeping service'.

Who is a 'veteran' or 'member'?

- 8.8 Before a person can claim a disability pension under the VEA, he or she must be a 'veteran', a 'member of the Forces', or a 'member of a Peacekeeping Force'.
- 8.9 A **'veteran'** is a person who has rendered eligible war service.
- 8.10 A **'member of the Forces'** is a person who has rendered defence service.
- 8.11 A **'member of a Peacekeeping Force'** is a person who has rendered peacekeeping service.

Eligible war service

- 8.12 For service during World War 2 (WW2), a person has rendered eligible war service if he or she rendered continuous full-time service as a member of the Defence Force for any period between 3 September 1939 and either 2 January 1949 or 30 June 1951.
- 8.13 The end date of eligible war service depends on the terms of the person's enlistment. If a person served only after 30 June 1947 and did not serve outside Australia they are not eligible unless they rendered operational service, or enlisted in the Interim Forces for a period of two years.
- 8.14 A person (an **'Australian mariner'**) has rendered eligible war service if they served in the Australian merchant navy between 3 September 1939 and 29 October 1945. Their eligible service extends only to each period of employment during that time.

Operational service

- 8.15 A person is taken to have rendered operational service during WW2 if, during a period of eligible war service the person served ‘outside Australia’.
- 8.16 Whether a person has ‘rendered continuous full-time service outside Australia’ depends on the essential purpose of any trip outside Australia. If the person was merely a passenger on a ship that sailed from one port in Australia to another port in Australia, but which happened to sail outside the territorial waters in the course of the voyage, it does not mean that the person had rendered ‘continuous full-time service outside Australia’. The purpose of the voyage must be connected with rendering service outside Australia.⁵⁰
- 8.17 In characterising such service it is relevant to consider the length of the voyage, the purpose of the voyage, and the risk of contact with the enemy.⁵¹
- 8.18 Some service *within Australia* during WW2 qualifies as ‘operational service’. For example, service in the northern part of the Northern Territory (north of Katherine) for a continuous period of at least 3 months between 19 February 1942 and 12 November 1943 is regarded as constituting operational service.
- 8.19 Similarly, service by a person who enlisted on a Torres Strait island and who served there for at least 3 months between 14 March 1942 and 18 June 1943 is taken to have rendered operational service.
- 8.20 If a person has rendered operational service by any of these means, any eligible war service rendered immediately before and immediately after such operational service is also taken to be operational service.
- 8.21 Another means by which a person within Australia can be taken to have rendered operational service is if the Repatriation Commission considers that the person should be treated as having been involved in ‘actual combat against the enemy’.
- 8.22 ‘Actual combat against the enemy’ involves ‘integral participation in an activity directly intended for an encounter with the enemy, whether offensive or defensive in character’.⁵²
- 8.23 If a person is taken to have rendered ‘operational service’ under this provision, there is no extension of operational service to any eligible war service either before or after that ‘actual combat’ period of operational service.

Allotment for duty in an operational area

- 8.24 For most operational service after WW2, the person or their unit must have been be ‘allotted for duty in the operational area’.⁵³ Allotment must be demonstrated by a written instrument produced for the purposes of the VEA by relevant Defence authorities or the Minister for Defence.
- 8.25 Copies of these and other instruments relating to eligible service are available at the VRB’s web site.

⁵⁰ *Repatriation Commission v Kohn* (1989) 87 ALR 511

⁵¹ *Proctor v Repatriation Commission* [1999] FCA 32

⁵² *Repatriation Commission v Ahrenfeld* (1991) 101 ALR 86

⁵³ VEA, s 6C, Schedule 2 to the VEA

Warlike and non-warlike service

- 8.26 Amendments were made to the VEA in 1993 to permit the Minister for Defence to declare certain service to be either ‘warlike’ or ‘non-warlike’ service by written instruments.⁵⁴ This was consistent with provisions in the *Income Tax Assessment Act 1936* to give special benefits for service personnel engaged in certain overseas service roles.
- 8.27 This system has also been used to give eligibility for some earlier overseas involvements of Australian forces that had been denied benefits under the previous legislation. An example of such an extension is the service in Vietnam by embassy guards in Saigon from 1973 to 1975. Certain recent service in East Timor, Afghanistan and Iraq has been determined to be warlike service, while other service has been determined to be non-warlike service.
- 8.28 The only difference between warlike service and non-warlike service is that warlike service is taken to be ‘qualifying service’ for service pension eligibility as well as ‘operational service’ for disability and war widow/er’s pension eligibility, while non-warlike service is taken to be only ‘operational service’, and not ‘qualifying service’.

Defence service

- 8.29 In 1973, Repatriation legislation was amended, with effect from 7 December 1972, to extend coverage to all full-time service personnel during peacetime, subject to completion of 3 years service (unless a person was discharged before 3 years on medical grounds).
- 8.30 This meant that service personnel could claim benefits under both the Repatriation legislation and the Commonwealth employees’ compensation legislation for normal peacetime service. Offsetting provisions applied to ensure that double benefits were not paid.
- 8.31 On 7 April 1994, upon the introduction of the *Military Compensation Act 1994*, eligibility for ‘defence service’ under the VEA ceased to apply except for those persons whose period of enlistment or appointment in the Defence Force began before 22 May 1986 (the date of commencement of the VEA).

Hazardous service

- 8.32 Hazardous service is service of a kind determined in writing by the Minister for Defence. It was introduced into the legislation in 1986, with the introduction of the VEA. It covers defence service outside Australia that was specially hazardous.
- 8.33 Unlike other defence service, hazardous service does not involve a 3 year minimum of service in the Defence Force before a person becomes eligible.

⁵⁴ VEA, s 5C, s 6F

Peacekeeping service

- 8.34 Peacekeeping service can apply not only to ADF members but also to civilians.
- 8.35 One of the largest groups of peacekeepers is the civilian police who have served in Cyprus since 1964.
- 8.36 Civilian police have also rendered peacekeeping service in Cambodia and East Timor.

Service from 1 July 2004

- 8.37 Service eligibility under the VEA generally ends on 30 June 2004. Service in the ADF on or after 1 July 2004 is covered by the MRCA.
- 8.38 There are two types of service rendered **on or after 1 July 2004** that continue to give eligibility under the VEA. They are:
- peacekeeping service rendered by civilians; and
 - warlike service, which is regarded as ‘qualifying service’ for service pension and gold card purposes under the VEA.

Service not covered by the VEA

- 8.39 Generally, the VEA does not cover part-time service in the ADF.
- 8.40 The VEA also does not cover most service rendered from 3 January 1949 until 6 December 1972 except if a person has rendered periods of operational service (in Korea, Japan, Malaya, Singapore, Malaysia, Vietnam).

- 8.41 From 3 January 1949, eligibility for most members of the Forces under Repatriation legislation ceased and they became eligible to claim compensation under Commonwealth employees’ compensation legislation in respect of service on or after that date.
- 8.42 That eligibility is now covered by the *Safety, Rehabilitation and Compensation Act 1988 (SRCA)*.
- 8.43 Compensation coverage under the SRCA for service in the ADF continued for service up to 30 June 2004. While the MRCC administers SRCA in respect of members and former members of the ADF, the VRB cannot review determinations made under the SRCA.

Service eligibility under the MRCA

- 8.44 From 1 July 2004 compensation related to service rendered on or after that date is covered by the MRCA.
- 8.45 Service eligibility under the MRCA is dealt with at p 85.
- 8.46 The chart at p 53 outlines which Act applies to particular types of service between certain dates from WW2.

Where can you find more information?

- 8.47 This Chapter is only a brief overview of this complex part of the legislation. More information about eligible service can be found in the *Repatriation Handbook* published by DVA and TIP, CLIK, and the VRB web site.

Service eligibility under the VEA, SRCA and MRCA

TYPE OF SERVICE	3 Sep 1939 to 2 Jan 1949	3 Jan 1949 to 6 Dec 1972	7 Dec 1972 to 21 May 1986	22 May 1986 to 6 Apr 1994	7 Apr 1994 to 30 June 2004	On or after 1 July 2004
Continuous full-time service (CFTS) – (known as ‘defence service’ from 7 Dec 1972)						
• Service ended before 7 Apr 1994 (did 3 years CFTS or was discharged on medical grounds)	VEA (see eligible war service)	SRCA	SRCA & VEA	SRCA & VEA		
• Did not do 3 years CFTS nor was discharged on medical grounds	VEA (see eligible war service)	SRCA	SRCA	SRCA	SRCA	MRCA
• Enlisted before 22 May 1986 (served up to and after 7 Apr 1994)		SRCA	SRCA & VEA	SRCA & VEA	SRCA & VEA	MRCA
• Enlisted on or after 22 May 1986 (did 3 years CFTS or was discharged on medical grounds by 6 Apr 1994)				SRCA & VEA	SRCA	MRCA
• Enlisted on or after 7 Apr 1994					SRCA	MRCA
Eligible war service (non-operational) Enlisted before 1 July 1947 or enlisted for 2 years in Interim Forces on or after 1 July 1947	VEA	VEA (ended 30 June 1951)				
Operational service (Eligible war service)	VEA	VEA	VEA	VEA	SRCA & VEA	
Hazardous service (Defence service)				SRCA & VEA	SRCA & VEA	
Qualifying service	VEA	VEA	VEA	VEA	VEA	VEA
Peacekeeping service	VEA	SRCA* & VEA	SRCA* & VEA	SRCA* & VEA	SRCA* & VEA	SRCA* & VEA (civilians only)
Peacetime service						MRCA
Warlike service or Non-warlike service	VEA	VEA	VEA	VEA	SRCA & VEA	MRCA
Part-time service (Citizen Forces, Reservists, Cadets)	VEA	SRCA	SRCA	SRCA	SRCA	MRCA

* Claims under the SRCA by Australian Federal Police or other Commonwealth employee members of a Peacekeeping Force are administered by Comcare. Claims under the SRCA by ADF members are administered by the MRCC. The VRB cannot review any matters under the SRCA.

Chapter 9 — Liability

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Relationship to service

9.1 To be related to a person’s service, under both the VEA or MRCA, an injury, disease, or death must be related in one of the following ways:⁵⁵

occurrence	If it resulted from an occurrence that happened while the person was rendering VEA operational service or VEA peacekeeping service or MRCA service.
arose out of, or was attributable to	If it arose out of, or was attributable to VEA service or MRCA service.
but for	If it would not have been suffered or contracted but for having rendered VEA or MRCA service or but for a change of circumstances or environment due to rendering VEA or MRCA service.
accident	If it resulted from an accident that happened while travelling to or from duty.
aggravated or materially contributed to	If the injury or disease, or the injury or disease from which the person died, was aggravated or materially contributed to by VEA or MRCA service.

Additional relationships to service under the MRCA

9.2 The MRCA liability provisions are largely modelled on the VEA, but it has the following additional means by which a service relationship can be accepted:

unintended consequence of medical treatment	If the claimed injury or disease is an unintended consequence of medical treatment provided under the Defence Regulations or under the MRCA. ⁵⁶
died as the consequence of medical treatment	If a person died as the consequence of medical treatment provided under the Defence Regulations or under the MRCA, liability can be accepted for that death. ⁵⁷
aggravation or material contribution to a sign or symptom	If a sign or symptom of the claimed injury or disease has been aggravated, or materially contributed to, by MRCA service. ⁵⁸

⁵⁵ VEA, s 8, s 9, s 70; MRCA, s 27, s 28.

⁵⁶ MRCA, s 29

⁵⁷ MRCA, s 29

⁵⁸ MRCA, s 30

Scope of service

9.3 Whether an activity that occurred (whether off duty or on duty) is within the scope of service may depend on its nature and the degree of connection with the Defence Force, military discipline, and the performance of duties.⁵⁹

9.4 The scope of service rendered depends on the nature of the person’s service and the circumstances under which the person served. It involves not only what the person was required to do but includes those activities that the person was reasonably expected or authorised to undertake in order to carry out the person’s duties. It also includes activities that were reasonably incidental to the performance of duty.

9.5 An activity that was reasonably expected to have been undertaken is one that the person understood was expected of the person by a relevant authority or by the person’s colleagues in connection with the performance of the person’s duties.

9.6 An activity is authorised if it was approved for the purpose of, or in connection with, the performance of the person’s duties.

9.7 An activity is reasonably incidental to the performance of duties if the person understood it to be necessary or appropriate to be done in order to carry out or in connection with the person’s duties.

9.8 *Social events*: A social event that a person was expected to attend because of its connection to the military and an expectation of attendance by superiors, or because of regularity of practice, may give rise to a relevant association with the person’s duties.

9.9 *Sporting activities*: Merely because a person is expected to keep fit does not mean that every fitness promoting activity is authorised or expected to be performed or is incidental to the performance of the person’s duties.

9.10 *Personal matters*: service must be more than merely the setting in which things occur: service must contribute to the cause. Merely personal or domestic matters while occurring in the context of a service environment are not necessarily related to that service.

‘Scope of service’ case:
 Captain Holthouse received a new posting. In preparing to lease his house he moved a pot plant and injured his back. Moving the plant was not a part of the removal to the new post. Whether he let the house, and whether he moved the plant were matters of no concern to the Navy. As they were matters within Captain Holthouse’s private life, they were not within the scope of his defence service: *Holthouse* (1982) 1 RPD 287

⁵⁹ *Roncevich v Repatriation Commission* (2005) 21 *VeRBosity* 105

Occurrence

- 9.11 It is not necessary to show that service was the cause of the occurrence. The occurrence merely had to happen during the period of relevant service.
- 9.12 The occurrence must be the direct cause of the injury, disease or death.⁶⁰
- 9.13 An occurrence is something that occurs, happens, or takes place. It must be something different from ordinary day-to-day events. The development of a habit is not an occurrence.⁶¹
- 9.14 The occurrence connection applies only to operational and peacekeeping service under the VEA, but to all kinds of service under the MRCA.

‘Occurrence’ case: Mr Gundry died from asthma, which his widow attributed to a respiratory infection that he contracted during his service. It was alleged that the respiratory infection was an occurrence that happened while rendering service, and that his death resulted from that occurrence. The Federal Court found that the connection between the respiratory infection (the occurrence) and the disease causing death (asthma) had to be a direct causal connection (‘resulted from’) and it had to satisfy the SoP concerning death from asthma. As ‘suffering a respiratory infection’ was not a factor in the SoP, the claim could not succeed: *Gundry* [2003] FCAFC 160.

Arose out of or was attributable to

- 9.15 For the ‘arose out of, or attributable to’ connections to apply, the relevant circumstance of service must have contributed to the cause but need not be the sole, dominant, direct or proximate cause of the injury, disease or death.⁶²
- 9.16 Service must have caused the relevant circumstance and not merely be the setting in which the circumstance occurred.⁶³
- 9.17 If the causal factor is something that occurs in everyday life, as well as in a service context, such as solar exposure, the circumstances of service must have made a special contribution over and above that of the person’s everyday life.⁶⁴

‘Arose out of’ case: Mr Bendy suffered solar skin damage. He ordinarily lived in Sydney, but served for 2 years in Darwin. The Court held that ‘Exposure to sunlight is, in itself, a natural feature of life and, though all servicemen suffer some exposure to sunlight during their service, that exposure is not a matter which, in the ordinary case, is attributable to ... service. ... [It is] a factor which can be connected causally to war service only if the war service placed the veteran in a position of special risk as to its occurrence’. If it were shown that his service in Darwin created such a special risk the claim could succeed: *Bendy* (1989) 18 ALD 144.

⁶⁰ *Repatriation Commission v Law* (1980) 31 ALR 140; *Woodward & Gundry v Repatriation Commission* [2003] FCAFC 160

⁶¹ *Repatriation Commission v Law* (1980) 31 ALR 140

⁶² *Repatriation Commission v Law* (1980) 31 ALR 140

⁶³ *Repatriation Commission v Tuite* (1993) 29 ALD 609

⁶⁴ *Repatriation Commission v Bendy* (1989) 18 ALD 144

But for changes of environment or circumstances

9.18 The ‘but for’ test is a causal test, requiring a connection between the incident giving rise to the injury or disease and circumstances of service. It is not sufficient if service was merely the environment in which the incident occurred.⁶⁵

9.19 It is a more direct causal test than the ‘attributable to’ test, and the ‘changes in environment’ referred to in the provision could refer to social and other attributes of the situation in which the person was placed during service.⁶⁶

Travelling to or from duty

9.20 Whether a particular journey is covered depends on the purpose of the journey. It is not sufficient that the person was going to or from the place of duty. If the accident occurred while travelling to the place of duty, the question is whether or not the person was going there to commence duty or merely going there for some other reason or because that was where he or she was residing.⁶⁷

‘Travelling accident’ case:

Mr Fish had been out on private business, and was returning to his quarters on base. He had intended to prepare his uniform once he returned to his quarters. If he had not had the motor vehicle accident, he would have arrived there the day before he was due to commence duties. The Tribunal held that the fact that Mr Fish would have returned early and been there to *prepare* for undertaking duty, meant that he was *not* travelling to a place for the purpose of *performing duty*, so the travelling provision did not apply to him: *Re Fish* [2003] AATA 675.

9.21 An injury or disease cannot be accepted as war-caused or defence-caused if the person’s risk of injury was substantially increased because:

- the journey was delayed;
- the route was not reasonably direct; or
- there was a substantial interruption in the journey.

Death from an accepted disability

9.22 If a person dies from an injury or disease that has already been accepted under the VEA or MRCA, there is no need to link that death to service. The death will be deemed to be a service death.

9.23 The kind of connection between the accepted injury or disease and the death must be a reasonably proximate and direct cause.⁶⁸

9.24 Liability for the death cannot be accepted under this provision if the injury or disease had been accepted on the basis of it being aggravated by service, and immediately before the death, that injury or disease was no longer aggravated or contributed to in a material degree.

⁶⁵ *Holthouse v Repatriation Commission* (1982) 1 RPD 287

⁶⁶ *Repatriation Commission v Keenan* (1989) 5 *VeRBosity* 116

⁶⁷ *Wright v Commonwealth* (1956) 96 CLR 536

⁶⁸ *Re Shaw and Repatriation Commission* [2005] AATA 354

Aggravation or material contribution

9.25 In the VEA and MRCA, an aggravation of an injury or disease is not a separate injury or disease in its own right. Instead, if an injury or disease has been aggravated by service, that injury or disease is treated as ‘war-caused’,⁶⁹ ‘defence-caused’,⁷⁰ or a ‘service injury or disease’.⁷¹

9.26 If an injury or disease is accepted under the VEA on the basis of aggravation, the entire injury or disease becomes war-caused or defence-caused and the entire incapacity from that injury or disease is pensionable (not merely the effects of the aggravation).

9.27 This implies that the aggravation must be of a permanent nature and it must worsen the injury or disease itself rather than merely worsen its symptoms or have only a temporary worsening effect on the injury or disease.⁷²

9.28 The MRCA restricts some forms of compensation only to the impairment

resulting from the effects of the aggravation rather than to impairment from the injury or disease itself.⁷³

9.29 Some compensation and benefits under the MRCA are provided for an aggravated injury or disease without regard to the effects of the aggravation,⁷⁴ and in other cases, the persistence of the effects of the aggravation is merely a preliminary requirement before the effects of the entire injury or disease are compensated.⁷⁵

‘Aggravation’ case: Mr Yates had an ankle condition that became symptomatic when he did strenuous activity such as running. At the time he made his claim he was symptomatic, but by the time of his AAT hearing he was not. While service had temporarily aggravated his symptoms, the disease was, at the time of the hearing, no worse than it would have been without that aggravation. The Court held that an aggravation of the symptoms is not necessarily an aggravation of the underlying disease, which is required by for aggravation to give rise to liability under the Act: *Yates* (1995) 38 ALD 80.

Aggravation or material contribution to a sign or symptom

9.30 If a part-time member of the ADF twists their ankle, aggravating a pre-existing ankle condition, the effects of this might only last a few days or weeks, but the member might have been incapacitated for their civilian work and need compensation for lost earnings. This might be able to be provided under s 30 of the MRCA,

which concerns aggravation or material contribution to a sign or symptom of an injury or disease. There is no equivalent to this in the VEA.

9.31 Section 30 of the MRCA covers temporary aggravation, which is not covered by s 27(d).

⁶⁹ VEA, s 9(1)(e).

⁷⁰ VEA, s 70(5)(d) and s 70(5A)(d).

⁷¹ MRCA, s 27(d), s 29(2), and s 30.

⁷² *Repatriation Commission v Yates* (1995) 11 *VeRBosity* 45

⁷³ For example, MRCA, s 70 and s 72.

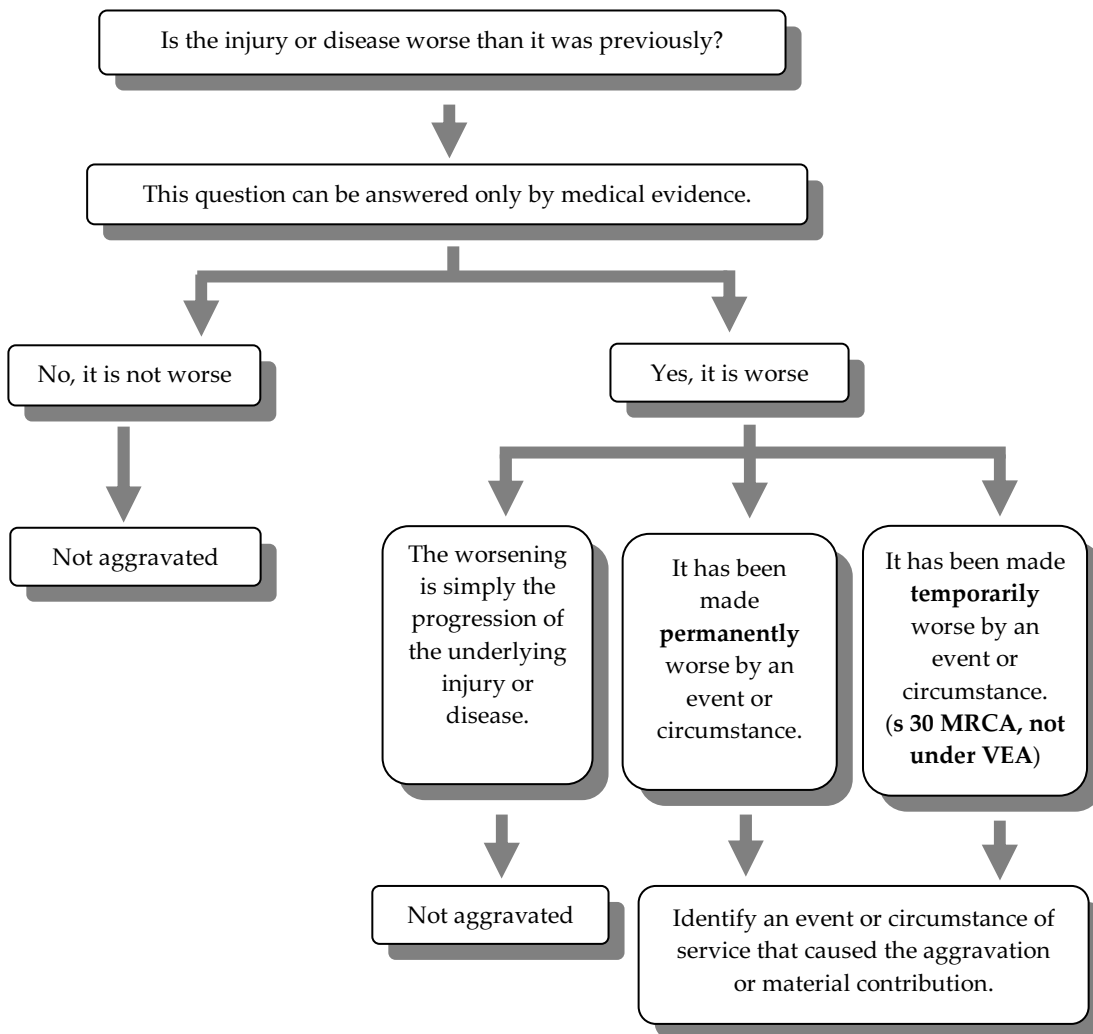
⁷⁴ For example, MRCA, s 43, s 61, and s 62.

⁷⁵ For example, MRCA, s 8, s 119 and s 283.

9.32 A symptom may be **aggravated** by service if it is worse than it previously was. A symptom may be **contributed to in a material degree** if the symptom is worse or if it develops due to service. Aggravation under s 27(d) of the MRCA will apply only if the underlying injury or disease is made worse, but s 30 will apply if it is merely a symptom that is affected by service.

9.33 An injury or disease that is accepted on the basis of an aggravation of a sign or symptom is just as much a ‘service injury or disease’ as one that is accepted under s 27(d) of the MRCA. The type and extent of compensation available will tend to be limited by the extent of the persistence of the effects of the aggravation.

Identifying ‘aggravation’ and whether an injury or disease is related by aggravation to service



Unintended consequence of treatment

9.34 Under s 29, liability can be accepted for an injury or disease that is the unintended consequence of medical treatment. Treatment covered is:

- treatment for a *service injury or disease* under the MRCA; or
- *any treatment* under the Defence Regulations.

9.35 Former members who have a Gold Card for treatment under the MRCA are entitled to be treated for any injury or disease, whether it is a service injury or disease or not. Section 29 does *not* apply to treatment for a *non* service injury or disease under the MRCA.

9.36 Certain members of the ADF are entitled to treatment for any injury or disease, whether a service injury or disease or not, under regulation 58F of the Defence Force Regulations 1952. Section 29 applies to treatment for *any* condition under these Regulations.

9.37 The leading case, *Comcare v Houghton* [2003] FCA 332, indicates that the process involves a number of steps:

STEP 1:

9.38 Identify the injury or disease that is said to have resulted from the treatment.

STEP 2:

9.39 Decide whether that injury or disease was caused by the treatment and was not merely associated with the treatment.

STEP 3:

9.40 Decide whether the injury or disease was 'unintended'.

9.41 An unintended consequence of medical treatment⁷⁶ is a consequence of the treatment that is *both*:⁷⁷

- not desired nor aimed for by the provider of the treatment; and
- not a likely consequence of the medical treatment.

9.42 It is not an unintended consequence if it was known to be an unavoidable outcome of the treatment even though not desired.

'Unintended consequences' case:

Mr Houghton underwent an operation that, he was told, would probably result in total hearing loss, but that there was a slim chance of preservation of his hearing. In the event, he had total loss of hearing. The Court said that an unintended consequence, 'does not encompass an injury which was, and was always known to be, an unavoidable direct consequence of the medical treatment, albeit one which those administering the treatment did not positively desire, seek or aim to produce.' *Houghton* [2003] FCA 332.

Death as a consequence of medical treatment

9.43 Liability for a death can be accepted if it is a consequence of medical treatment.

9.44 The death must have been caused by the treatment, and not just have occurred during the course of the treatment.

⁷⁶ See definition of 'treatment' at page 112.

⁷⁷ This explanation of an 'unintended consequence' is in the Explanatory Memorandum to the Military Rehabilitation and Compensation Bill 2003 at p 16. The Explanatory Memorandum can be downloaded from the Comlaw web site: see p 145.

Liability provisions

Relationship	Main case law	Service to which it applies	VEA	MRCA
Occurrence	<i>Law</i> (1980) 31 ALR 140 <i>Gundry</i> [2003] FCAFC 160	VEA – operational service, peacekeeping service MRCA – all service	s 8(1)(a), s 9(1)(a), s 70(4)	s 27(a), s 28(a)
Arose out of/ Attributable to	<i>Law</i> (1980) 31 ALR 140 <i>Roncevich</i> [2005] HCA 40 <i>Bendy</i> (1989) 18 ALD 144 <i>Tuite</i> (1993) 29 ALD 609	VEA – all service MRCA – all service	s 8(1)(b), s 9(1)(b), s 70(5)(a), s 70(5A)(a)	s 27(b), s 28(b)
Travelling to or from duty	<i>Wright</i> (1956) 96 CLR 536 <i>Smith</i> [1997] FCA 525 <i>Jamieson</i> (1984) 2 RPD 257 <i>Re Fish</i> [2003] AATA 675	VEA – all service MRCA – peacetime service	s 8(1)(c), s 9(1)(c), s 70(5)(b), s 70(5A)(b)	s 27(e), s 28(f)
But for	<i>Holthouse</i> (1982) 1 RPD 287 <i>Keenan</i> (1989) 5 <i>VeRBosity</i> 116	VEA – all service MRCA – all service	s 8(1)(d), s 9(1)(d), s 9(2), s 70(5)(c), s 70(7), s 70(5A)(c), s 70(7)	s 27(c), s 28(c)
Material contribution or aggravation	<i>Yates</i> (1995) 11 <i>VeRBosity</i> 45	VEA – all service, except must have rendered 6 months of eligible war service (if the person had not rendered operational service), peacekeeping or defence service MRCA – all service	s 8(1)(e), s 9(1)(e), s 70(5)(d), s 70(5A)(d)	s 27(d), s 28(d)
Material contribution or aggravation of sign or symptom	Not judicially considered	VEA – does not apply MRCA – all service		s 30
Died from accepted disability	<i>Hayes</i> (1982) 1 RPD 281 <i>Re Shaw</i> [2005] AATA 354	VEA – applies but does not require link to service MRCA – applies but does not require link to service	s 8(1)(f), s 70(5)(e), s 70(5A)(e)	s 28(1)(e) s 28(2)
Unintended consequences of treatment	<i>Houghton</i> [2003] FCA 332 <i>Re Eaton</i> (2002) 67 ALD 182	VEA – does not apply MRCA – all cases		s 29(1), (2) s 29(3)

Exclusion provisions

Under the VEA

9.45 Under the VEA an injury or disease cannot be accepted as war-caused or defence-caused if it:

- resulted from the veteran’s serious default or wilful act;⁷⁸
- arose out of a serious breach of discipline; or
- is related to the person’s service *only* because the person used tobacco products on or after 1 January 1998 or increased his or her use of tobacco products after that date.

Under the MRCA

9.46 Unlike under the VEA, if the injury or disease causes serious and permanent impairment or the exclusory circumstance causes the person’s death, not all of the exclusions apply.

9.47 The exclusions that *do not apply* to **serious and permanent impairment or death** include:

- serious default;
- wilful act;
- serious breach of discipline;
- self-inflicted injury;
- consuming alcohol or unauthorised drug;
- resulted from reasonable counselling in connection with performance as a member;

- resulted from failure to obtain a promotion, transfer, or benefit.

9.48 The exclusions that *do apply* to injury and disease including those resulting in serious and permanent impairment, and to death include:

- wilful and false representation in connection with the person’s defence service or proposed defence service that he or she did not suffer, or had previously not suffered, from the claimed injury or disease or that resulted in his or her death;⁷⁹
- in relation to journeys to or from undertaking duty:
 - substantial delay in commencing the journey;
 - indirect route;
 - substantial interruption to the journey,

which substantially increased the risk of injury, disease or death;⁸⁰

- if the only service-related cause of injury, disease or death is the use of tobacco products.⁸¹

9.49 The exclusions relating to travel apply not only to the specific travelling provisions in s 27(e) and s 28(1)(f), but also to any other provision in ss 27, 28, 29 or 30 that, in a particular case, raises a connection between a peacetime service-related journey and injury, disease or death.⁸²

⁷⁸ A ‘wilful act’ indicates conduct that is blameworthy and deserving of serious censure: *McPherson v Repatriation Commission* (1989) 5 *VeRBosity* 58

⁷⁹ MRCA, s 34

⁸⁰ MRCA, s 35

⁸¹ MRCA, s 36

⁸² MRCA, Note to s 35(1)

Exclusion of liability

Exclusions	Main case law	VEA	MRCA
Serious default, wilful act	<i>McPherson</i> (1989) 5 <i>VeRBosity</i> 58	Resulted from a serious default or wilful act: s 9(3), s 9(6), s 70(9)	Resulted from a serious default or wilful act while a member <i>unless</i> resulted in serious and permanent impairment or death: s 32
Wilful false representation	Not judicially considered	Not in VEA	Wilful false representation in connection with service that did not suffer from the injury or disease: s 34
Serious breach of discipline	<i>Levi</i> (1994) 10 <i>VeRBosity</i> 22	Arose from a serious breach of discipline, or from an occurrence that happened while committing a serious breach of discipline: s 9(3), s 9(6), s 70(9)	Arose from a serious breach of discipline, or from an occurrence that happened while committing a serious breach of discipline <i>unless</i> resulted in serious & permanent impairment or death: s 32
Counseling or discipline	<i>Chenhall</i> (1992) 109 ALR 361 <i>Warren</i> [1997] FCA 102 <i>Schmid</i> [2003] FCA 1057	Not in VEA	Resulted from reasonable and appropriate counselling in relation to performance as a member: s 33
Failure to obtain benefit	<i>Mooi</i> (1996) 137 ALR 690 <i>Golds</i> [1999] FCA 1481	Not in VEA	Resulted from failure to obtain promotion, transfer or benefit in relation to service as a member: s 33
Travel exclusions	<i>Smith</i> (1997) 13 <i>VeRBosity</i> 70	Nature of risk substantially increased by delay, indirect route, or interruption unconnected with performance of duties: s 9(5), s 70(8)	Nature of risk substantially increased by delay, indirect route, or interruption unconnected with performance of duties: s 35
Tobacco use	Not judicially considered	Related to service only by tobacco use on or after 1 January 1998: s 9(7), s 70(9A)	Related to defence service only by tobacco use: s 36
Alcohol / drugs	Not judicially considered	Not in VEA	Resulted from taking alcohol or drug (unless authorised and taken legally according to directions) <i>unless</i> resulted in serious & permanent impairment or death: s 32(2), s 32(5)
Self-inflicted injury	<i>Taylor v Stapley</i> (1954) 90 CLR 1 <i>Re Martin</i> (1993)	Not in VEA	If self-inflicted injury <i>unless</i> resulted in serious & permanent impairment or death: s 32
Related to service on or after 1 July 2004	Not judicially considered	Suffered or contracted since 1 July 2004 and related to service on or after 1 July 2004: s 9A(1), s 70A(1) . Aggravated by service on or after 1 July 2004 unless chose AFI instead of MRCA claim: s 9A(2), s 70A(2) . (See page 86)	Not in MRCA

Chapter 10 — VEA decision-making system

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Primary decision

- 10.1 Once a claim for pension or an application for increase in pension is lodged at an office of DVA, it is investigated on behalf of the Secretary of DVA by a Claims Assessor.
- 10.2 The Secretary of DVA has broad investigatory powers and can require information or documents to be provided by claimants and other persons or bodies.⁸³
- 10.3 After obtaining medical evidence, service records, and other relevant evidence, the Claims Assessor, as delegate of the Repatriation Commission, will determine the claim or application.
- 10.4 Upon being given notice of a decision of the delegate of the Repatriation Commission the claimant or applicant may apply for review to the VRB.

Section 31 review

- 10.5 Once an application for review by the VRB is received by DVA, it is considered by a senior delegate of the Repatriation Commission who has the power to review the primary decision under s 31 of the VEA.
- 10.6 If the delegate chooses to do so and the decision is varied, then the decision the VRB reviews is the primary decision as varied by the s 31 decision.
- 10.7 A claimant may seek review under s 31 without also seeking review by the VRB. However, the claimant runs the risk that the period in which to apply for a review by the VRB will expire before the s 31 review has been completed (see time limits at page 9).⁸⁴
- 10.8 A s 31 review can also be sought after a VRB application has been lodged.

⁸³ VEA, s 127, s 128

⁸⁴ VEA, s 31(10), s 31(11) provide that a s 31 decision is not reviewable if it does not vary the decision under review.

Administrative Appeals Tribunal

10.9 Both applicants and the Repatriation Commission are entitled to apply to the AAT for review of a VRB decision to affirm, vary or set aside a decision reviewed by the VRB. The VRB is not a party to the subsequent proceedings before the AAT.

10.10 There is no application fee for applying for a review by the AAT of matters under the VEA.

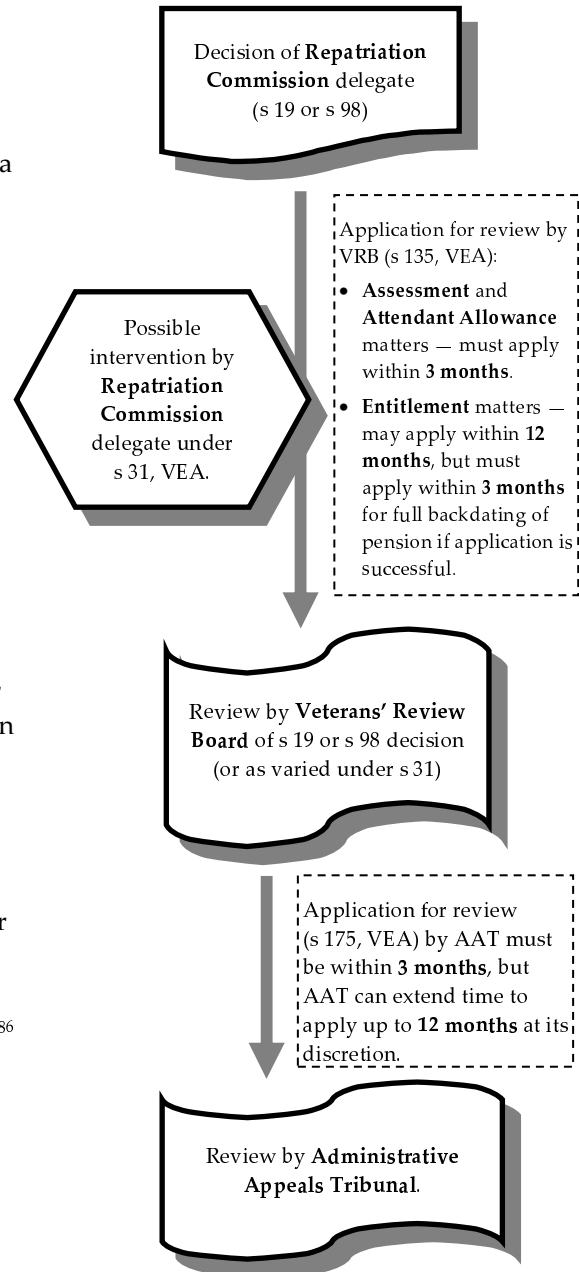
Time limit in which to apply

10.11 An appeal to the AAT must be in writing and should be lodged at an AAT Registry within **3 months** of receipt of the VRB's decision at the applicant's postal address as last notified to the VRB.⁸⁵

10.12 A person can apply by writing a letter to the AAT or filling out an application form available from an AAT Registry or from the AAT's web site (www.aat.gov.au).

10.13 The AAT may extend the time for lodging an appeal up to **12 months** after notice of the VRB decision, but the applicant must convince the AAT why an extension of time should be granted.⁸⁶

Outline of the VEA decision making system



⁸⁵ VEA, s 176(4)

⁸⁶ VEA, s 176(4) and AAT Act, s 29

Chapter 11 — VEA cases

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The disability pension system

- 11.1 If a person seeks to have a pension for incapacity from an injury or disease that is related to their eligible service, a claim for disability pension is lodged.
- 11.2 If it is determined that the injury or disease is war- or defence-caused (s 9 or s 70), the incapacity from that injury or disease is assessed to determine whether pension is payable.
- 11.3 Once a rate of pension is determined, it will usually continue at that rate unless the person makes an application for increase in pension or makes a claim for another injury or disease. If a new injury or disease is accepted as war- or defence-caused, the rate of pension is reassessed.

Standards of proof

- 11.4 'Standard of proof' means the level of evidence needed for a claim to succeed. The VEA has two standards of proof:
1. 'reasonable satisfaction'; and
 2. 'beyond reasonable doubt': a more generous standard than applies in other compensation schemes as it applies to disproving a claim.
- 11.5 The reasonable satisfaction standard applies to all matters except for deciding whether there is a connection between operational, peacekeeping or hazardous service and the claimed injury, disease or death. It applies to matters such as diagnosis of the claimed condition or kind of death, a person's eligibility to claim, and the nature of service rendered.

Reasonable satisfaction (BoP)⁸⁷

- 11.6 The ‘reasonable satisfaction’⁸⁸ standard is also called the civil standard of proof, or the ‘balance of probabilities’.
- 11.7 This standard of proof does not mean that the decision-maker must be absolutely certain that a particular thing happened, but merely that it is ‘more likely than not’ that it happened.

Beyond reasonable doubt (BRD/RH)⁸⁹

- 11.8 The beyond reasonable doubt standard of proof requires a degree of certainty such that the decision-maker has no ‘reasonable’ doubts.
- 11.9 This standard of proof applies in relation to operational, peacekeeping and hazardous service. This means that claims related to such service must be granted unless the decision-maker is satisfied beyond reasonable doubt that the connection with service does not exist.⁹⁰
- 11.10 If the material does not raise a *reasonable hypothesis* of a connection between the service rendered by the person and the injury, disease or death, then a connection with service will not exist.⁹¹

Statements of Principles

- 11.11 Statements of Principles (SoPs) are created by an independent body of experts known as the Repatriation Medical Authority (RMA).
- 11.12 SoPs are based on sound medical-scientific evidence and set out the minimum factors that must exist and be related to service before it can be said that a hypothesis or contention has been raised connecting an injury or disease with the circumstances of a person’s service.
- 11.13 If the RMA has made a SoP about a kind of injury or disease then all decision-makers, including the VRB, must apply it when considering a claim for such an injury or disease.
- 11.14 There is a right of appeal to a Specialist Medical Review Council (SMRC) against certain determinations of the RMA, but the SMRC cannot consider any new evidence and is restricted in its review to the material that was before the RMA.
- 11.15 The VRB will not postpone or adjourn a hearing pending the outcome of an investigation by the RMA or a review by the SMRC.⁹²
- 11.16 A representative should have a good medical dictionary to assist in understanding the terminology used in the SoPs and medical reports.

⁸⁷ Balance of probabilities

⁸⁸ VEA, s 120(4)

⁸⁹ Beyond reasonable doubt / reasonable hypothesis

⁹⁰ VEA, s 120(1), (2)

⁹¹ VEA, s 120(3)

⁹² *Beale v AAT* (1998) 14 *VeRBosity* 22; *McMillan v Repatriation Commission* (1998) 14 *VeRBosity* 28

Decision-making processes

Applying the reasonable hypothesis (RH) process

11.17 The Federal Court in *Deledio* set out a 4-step decision-making process (as modified by later Federal Court cases) for matters concerning operational, peacekeeping and hazardous service:⁹³

STEP 1:

- 11.18 The first step requires there to be material that points to a hypothesis connecting the claimed injury, disease or death with service.⁹⁴ This requires more than speculation or a mere allegation of a connection with service.
- 11.19 The material must raise ‘facts’ or inferences, which if they were true would raise a hypothesis relating the claimed injury, disease or death to the particular circumstances of the person’s service.
- 11.20 There is no fact-finding at this step. All the material must be considered, not only that supporting the claim.
- 11.21 The ‘raised facts’ (or inferences) must be pointed to by the material, but do not have to be proved.
- 11.22 If no hypothesis is raised, the claim fails. In other words, if the contentions put forward are not supported by the material, the claim cannot succeed. For example, if it is alleged that a veteran suffered trauma to the knee, there needs to be material pointing to that trauma occurring due to service.

⁹³ *Repatriation Commission v Deledio* (1998) 14 *VeRBosity* 45; *Bull v Repatriation Commission* (2001) 17 *VeRBosity* 118

⁹⁴ VEA, s 120(3)

STEP 2:

- 11.23 Identify whether there is a SoP for the kind of injury, disease or death, the subject of the claim.⁹⁵
- 11.24 If there is a SoP for the claimed injury, disease or kind of death, then SoPs must be applied to all the links in the chain of causation.⁹⁶
- 11.25 If there is no SoP for the claimed injury, disease or kind of death, no SoPs apply for any causal link.⁹⁷

STEP 3:

- 11.26 Consider whether any of the hypotheses raised are reasonable. This step will be met if a hypothesis:
- fits the requirements of a factor in the relevant SoP(s), if any;
 - is pointed to by the evidence;
 - is more than a mere possibility;
 - is consistent with known facts; and
 - is not too tenuous, remote, fanciful, impossible, or speculative.⁹⁸
- 11.27 There is no fact-finding at this step. The ‘known facts’ are facts that are indisputable. The decision-maker cannot draw conclusions from the evidence but may draw inferences.

⁹⁵ VEA, s 120A(3)

⁹⁶ *McKenna v Repatriation Commission* (1999) 15 *VeRBosity* 22

⁹⁷ *Spencer v Repatriation Commission* (2002) 18 *VeRBosity* 21

⁹⁸ *East v Repatriation Commission* (1987) 3 *VeRBosity* 167; *Bushell v Repatriation Commission* (1992) 8 *VeRBosity* 2

11.28 **If there is no relevant SoP**, the other tests in step 3 must still be met. The ‘raised facts’ must be supported by the material.

11.29 If the hypothesis meets these tests, it is ‘reasonable’, and step 4 must next be considered. If the hypothesis is not reasonable, the claim fails.⁹⁹

11.30 **If there is a relevant SoP**, in addition to meeting the other tests in step 3, the hypothesis must be ‘consistent with the template’ of a factor in the SoP. This involves consideration of the case law that has interpreted factors within SoPs. For example, a number of Court cases have examined the meaning of ‘experiencing a severe stressor’.

11.31 If a factor in a SoP prescribes a number of elements, they must all be pointed to by the material.¹⁰⁰

11.32 If the factor is not met, the claim fails.

STEP 4:

11.33 If the reasonable hypothesis is disproved beyond reasonable doubt the claim fails.¹⁰¹ This is the only step at which facts are found, and then only those facts that would disprove the claim. If not disproved beyond reasonable doubt, the claim succeeds unless an exclusion provision applies (see page 62).

11.34 Exclusions from liability are determined on the reasonable satisfaction standard.¹⁰²

Applying the reasonable satisfaction (BoP) standard

11.35 The following steps should be followed in applying SoPs in cases to which the reasonable satisfaction standard of proof applies:¹⁰³

STEP 1:

11.36 Determine, to the decision-maker’s reasonable satisfaction, whether the material before it raises a connection between the claimed disability and the person’s service.

STEP 2:

11.37 Identify whether there is a SoP for the kind of injury, disease or death, the subject of the claim.

STEP 3:

11.38 Determine whether the relevant SoP upholds the contention that the person’s disability is, on the balance of probabilities, connected with the person’s service.

11.39 If there is no relevant SoP, the matter is decided on the available medical and other evidence as to whether, on the balance of probabilities, there is a relevant connection between the claimed injury, disease or death and the person’s service.

11.40 If the connection with service is found to exist on the balance of probabilities, the claim will succeed unless an exclusion provision applies (see page 62).

⁹⁹ *Byrnes v Repatriation Commission* (1993) 9 *VeRBosity* 83

¹⁰⁰ *Connors v Repatriation Commission* (2000) 16 *VeRBosity* 47

¹⁰¹ VEA, s 120(1), (2)

¹⁰² *Ferriaday v Repatriation Commission* (1996) 12 *VeRBosity* 75

¹⁰³ *Somerset v Repatriation Commission* (2005) 21 *VeRBosity* 118

Developing an entitlement case

11.41 Most cases fall into one of two categories: entitlement or assessment.

‘Entitlement’

11.42 An ‘entitlement case’ concerns whether an injury, disease or death is war-caused or defence-caused.

11.43 The essential scheme of the VEA is that an eligible person is entitled to compensation by way of pension if the present injury or disease was caused by his or her service. The result of this simple statement is that there are always two preliminary questions to answer:

- What is the nature of the injury or disease from which the person currently suffers? and
- What was the service that is said to have caused the injury or disease?

11.44 In death cases, the questions are:

- What is the nature of the injury or disease from which the person died (the ‘kind of death’)?
- What was the service that is said to have caused the person’s death?

Injury or disease case

11.45 Developing an injury or disease case concerns obtaining evidence connecting the person’s eligible service with the claimed injury or disease.

11.46 The first step in an injury or disease case is to consider diagnosis:¹⁰⁴

- What was it that the veteran or member originally claimed in the claim form?
- What did the delegate determine was the diagnosis?
- What is the evidence for this?
- How reliable is it?
- Is there any doubt or ambiguity in the evidence on this issue?
- Does the diagnosis cover all the symptoms that were referred to in the original claim?

11.47 If the evidence does not clearly support the diagnosis in the decision under review or it appears not to be broad enough to cover all the things the applicant claimed, the representative will need to obtain evidence to clarify these diagnostic issues.

11.48 If it appears that the delegate has not dealt with a particular disability that was part of the claim, the representative might be able to negotiate with a review or reconsideration delegate to conduct an investigation into that disability.

11.49 If not, then the representative will need to get the evidence themselves. But the representative needs to keep in mind that in relation to a VRB application, there is a limited amount that can be reimbursed for medical reports by the Department in respect of each ‘medical condition’ the subject of the review.¹⁰⁵

11.50 Therefore, if seeking a medical report about a particular injury or disease, the report from the appropriate

¹⁰⁴ *Benjamin v. Repatriation Commission* (2001) 17 *VeRBosity* 119

¹⁰⁵ VEA, s 170A

medical expert should include all the information that the VRB will need about that injury or disease for the purposes of the review.

11.51 The medical report should cover:

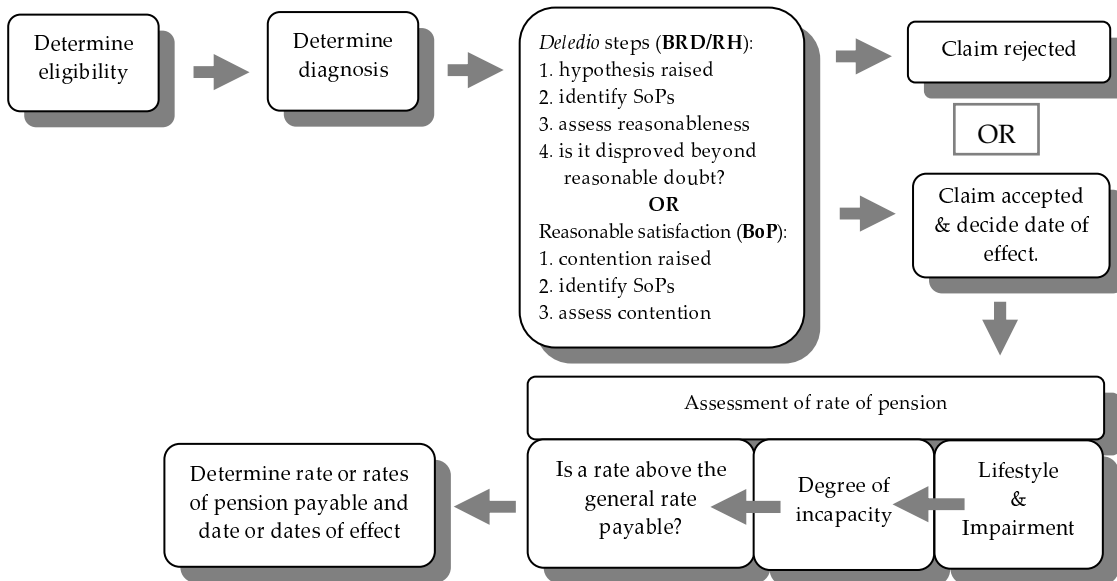
- the person’s area of expertise and basis for that expertise;
- diagnosis of the injury or disease;
- which SoP is relevant;
- date or time of onset;
- history of the progress of the injury or disease, including when and why any worsening occurred;
- the past and current treatment regime or rehabilitation program;
- prognosis for recovery;
- causation (referring to any relevant SoPs); and
- assessment under the Guide to Assessment of Rates of Veterans’ Pensions (GARP).

11.52 The report should not merely state the expert’s opinion on each of those matters, but give reasons for each of those opinions.

11.53 If the evidence clearly supports the existing diagnosis, the representative needs to know whether there are any SoPs about that kind of injury or disease. It is important to carefully consider the definition of the kind of injury or disease set out in the SoP to determine whether it really does cover the applicant’s particular diagnosis.

11.54 Once the relevant SoP has been identified, the representative needs to consider each of the factors in that SoP and consider whether any of the evidence tends to point to one or more of those factors existing in the applicant’s case, and whether there is any evidence pointing to a link between that factor and the person’s eligible service.

Disability pension decision-making process



Developing an assessment case

11.55 Under the VEA there are a number of different rates of disability pension:

general rate, in 10% increments from nil to 100%
extreme disablement adjustment (EDA)
intermediate rate
special rate (permanent or temporary)

11.56 A specific disability payment, is added to a disability pension if the person has certain disabilities (see page 80).

Assessment period

11.57 The rate of pension must be assessed throughout the ‘assessment period’.¹⁰⁶

11.58 The assessment period begins on the date the person made the claim for pension or applied for an increase in pension.

11.59 The assessment period ends on the date the decision-maker decides the matter.

11.60 The VRB must assess the rate or rates at which pension was payable throughout the assessment period.¹⁰⁷ The VRB might set one rate of pension from the ‘application day’ (the date on which the claim or application for increase was lodged) and another rate from a later date in the assessment period, being a date when there is evidence that the person’s impairment or lifestyle or employment circumstances substantially changed (for better or for worse). The rate might go up or down.

¹⁰⁶ VEA, s 19(9)

¹⁰⁷ VEA, s 19(5C)

Degree of incapacity

11.61 Generally, the greater the degree of incapacity, the higher will be the rate of disability pension.

11.62 The first step in assessment is determining the degree of incapacity. This is done using the Guide to the Assessment of Rates of Veterans’ Pensions (**GARP**). GARP assesses a person’s medical **impairment** from accepted disabilities and the effects of those disabilities on their **lifestyle**.

11.63 DVA will have obtained from a medical practitioner, generally the applicant’s local medical officer, a combined impairment assessment relating to each type of impairment arising from the applicant’s war- or defence-caused disabilities.

11.64 It is important to go through all the medical information with the applicant to be sure that it reflects the applicant’s understanding of his or her conditions. If there is any concern that the medical information is inaccurate or out of date, a further medical report should be obtained addressing the criteria in GARP.

11.65 GARP specifically requires that some types of medical information (such as, audiograms and spirometry tests) be no more than 6 months old at the time of the assessment. As the VRB must assess pension up to the date of its decision, it will require up-to-date medical information. The VRB Registrar can ask DVA to obtain these types of medical reports at DVA’s expense.

- 11.66 Any other medical reports, for example, from specialists, will usually have to be obtained at the applicant’s expense. However, a representative should contact the VRB Registrar if they have particular difficulties in obtaining further evidence.
- 11.67 When seeking medical evidence concerning assessment of impairment, the medical practitioner should be provided with the relevant extracts from GARP together with the relevant worksheets. These can be obtained from the VRB’s web site.

Using GARP

- 11.68 GARP assesses a degree of incapacity by reference to ‘impairment’ and ‘lifestyle’ effects of the war- or defence-caused disabilities.
- 11.69 The level of impairment is assessed using a ‘whole person’ system, expressed in ‘impairment points’, out of a maximum rating of 100. On this scale, zero points correspond to no or

negligible impairment and 100 points correspond to death. Effectively, impairment points are percentages of the impairment of the whole person.

- 11.70 GARP addresses medical impairment under 12 system-specific chapters.
- 11.71 The decision-maker must determine, based on medical evidence, what are the medical and functional effects of each war-caused or defence-caused injury or disease, and then go to each relevant system-specific chapter to determine the relevant medical impairment resulting from that injury or disease in the particular veteran’s case.
- 11.72 If a particular injury or disease results in impairment effects in more than one body system, then each relevant chapter must be consulted and separate impairment points determined for each functional effect or loss.
- 11.73 This is a typical impairment table:

Functional Loss Table 6.2.1

ABDOMINAL WALL HERNIAS

Impairment Ratings	Criteria
NIL	Inguinal or ventral hernia surgically repaired.
TWO	Inguinal or ventral hernia easily reducible.
FIVE	Inguinal or ventral hernia not easily reduced and resulting in mild symptoms.
TEN	Large inguinal or ventral hernia resulting in frequent symptoms.

An impairment rating is to be selected from this table for each accepted inguinal and ventral hernia.

No age adjustment permitted for this table

11.78 When assessing lifestyle effects only the effects of the war- or defence-caused injuries and diseases can be considered. The effects of other disabilities must be ignored.

11.79 The applicant must be compared with a hypothetical person of the same age but without the war-caused injuries and diseases.

11.80 Once an overall lifestyle rating has been determined and an overall combined impairment rating has been determined, these two ratings are combined using Scale 23.1 in Chapter 23 to obtain a degree of incapacity.

**SCALE
23.1**

CONVERSION TO DEGREE OF INCAPACITY



Impairment	Lifestyle Ratings								
	0	1	2	3	4	5	6	7	
0	0	10	10	20	N/A	N/A	N/A	N/A	
5	10	10	20	30	40	40	N/A	N/A	
10	10	20	30	30	40	50	60	N/A	
15	20	30	30	40	50	60	60	N/A	
20	20	30	40	50	50	60	70	80	
25	30	40	40	50	60	70	70	80	
30	40	40	50	60	70	70	80	80	
35	N/A	50	60	60	70	80	90	90	
40	N/A	50	60	70	80	80	90	100	
45	N/A	60	70	80	80	90	100	100	
50	N/A	70	70	80	90	100	100	100	
55	N/A	70	80	90	90	100	100	100	
60	N/A	80	90	90	100	100	100	100	
65	100	100	100	100	100	100	100	100	
70	100	100	100	100	100	100	100	100	
75	100	100	100	100	100	100	100	100	
80	100	100	100	100	100	100	100	100	
85	100	100	100	100	100	100	100	100	
90	100	100	100	100	100	100	100	100	

No age adjustment permitted for this table

Assessing a rate of pension

- 11.81 If the person's degree of incapacity is at least 70%, eligibility for the intermediate rate or special rate must be considered (see page 76).
- 11.82 If the person's degree of incapacity is 100% and the person is aged over 65, eligibility for the extreme disablement adjustment must be considered (see page 80).
- 11.83 If the person is not eligible for any of those rates, then whatever the percentage degree of incapacity is, will become the percentage of the general rate of pension that applies.

Special rate and intermediate rate

- 11.84 The following is a brief overview of the criteria for the special and intermediate rates of pension. More information can be found in the special issue of *VeRBosity* concerning the special rate of pension.¹⁰⁸ It can be found on the VRB's web site.¹⁰⁹
- 11.85 For either of these rates of pension, the person must have a degree of incapacity of at least 70%.
- 11.86 If the applicant is blind as a result of accepted disabilities, he or she is entitled to the special rate without having to meet any other of the tests outlined below relating to employment.

- 11.87 In all other cases, the employment tests are critical and it is important to obtain a full employment history. This should include an outline of the types of duties the applicant did in previous employment, and the level of education and training the applicant has had.
- 11.88 Information should be obtained about the reasons the applicant is no longer working in each of the relevant kinds of work in which the applicant has previously been engaged, and any steps taken to obtain other employment.
- 11.89 It is necessary to find out about the effects of accepted disabilities on the applicant's capacity to do the various types of work previously engaged in, and their impact on the applicant's ability to do other types of work for which the applicant has skills and expertise.
- 11.90 A medical opinion will need to be obtained that addresses the special rate issues.
- 11.91 Evidence of loss of earnings should be obtained if the person was self-employed, in a partnership, a joint business venture, or involved in a business run by a family company or trust to which the person has a connection.
- 11.92 Evidence concerning loss of earnings should be in the form of tax returns. A simple statement from an accountant that the person suffered a loss is unlikely to be persuasive of that fact.

¹⁰⁸ (2003) 19 *VeRBosity* Special Issue

¹⁰⁹ www.vrb.gov.au/publications.html

Under 65 special rate and intermediate rate

11.93 In a special rate or intermediate rate case in which the applicant was under 65 on the application day, the evidence needs to address the following questions:

Q 1. What are the applicant's trade and professional skills, qualifications and experience?

Q 2. What kinds of remunerative work might a person with the applicant's skills, qualifications and experience reasonably undertake?

Q 3. To what degree does the applicant's physical or mental incapacity from war- or defence-caused injury or disease reduce the applicant's capacity (in hours per week) to undertake the kinds of remunerative work referred to in question 2? (8 hours or less for special rate; less than 20 hours for intermediate rate.)

Q 4. What was the kind of remunerative work that the applicant was undertaking?

Q 5. Is the applicant, by reason of war- or defence-caused disabilities, prevented from continuing to undertake that kind of work?

Q 6. If the answer to previous question is 'yes', is the incapacity from war- or defence-caused disabilities the only factor preventing the applicant from continuing to undertake that kind of work?

Q 7. If the answers to the last two questions are, in each case, 'yes', is the applicant by reason of being prevented from continuing to undertake that work, suffering a loss of salary, wages or earnings on his own account that the applicant would not be suffering if he or she were free of that incapacity?

11.94 If the applicant has ceased to engage in remunerative work for reasons other than incapacity from war- or defence-caused injury or disease; or the applicant is incapacitated or prevented from engaging in remunerative work for some other reason, then the applicant is treated as if he or she has not had such a loss, and so will not be entitled to the special rate.

11.95 If the applicant is unemployed and has been genuinely seeking to engage in remunerative work that the applicant would, but for incapacity from war- or defence-caused injury or disease, be continuing to seek to engage in, is that incapacity 'the substantial cause' of the applicant's inability to obtain remunerative work? If so, the applicant is taken to meet Question 6.

11.96 To be 'the substantial cause', incapacity from war- or defence-caused disabilities must at least be the operative factor that, more than any other, explains why the applicant could not obtain remunerative work.

Over 65 special rate and intermediate rate

11.97 In a special rate or intermediate rate case in which the applicant was over 65 years on the application day, the evidence needs to address the following questions:

- Q 1.** What are the applicant’s trade and professional skills, qualifications and experience?
- Q 2.** What kinds of remunerative work might a person with the applicant’s skills, qualifications and experience reasonably undertake?
- Q 3.** To what degree does the applicant’s physical or mental incapacity from war- or defence-caused injury or disease reduce the applicant’s capacity (in hours per week) to undertake the kinds of remunerative work referred to in question 2? (8 hours or less for special rate; less than 20 hours for intermediate rate.)
- Q 4.** What was the last remunerative work that the applicant was undertaking?
- Q 5.** Was the applicant undertaking that work since before turning 65 as well as after turning 65?
- Q 6.** Was the applicant undertaking that work continuously for 10 years?
- Q 7.** In that last paid work was the applicant an employee or self-employed?
- Q 8.** If an employee, did the applicant work for the same employer (or predecessor of that employer) for

the continuous period of at least 10 years that began before turning 65?

Q 9. If self-employed, did the applicant work in the same profession, trade, employment, vocation or calling for the continuous period of at least 10 years that began before turning 65?

Q 10. Is the applicant, by reason of war- or defence-caused disabilities, prevented from continuing to undertake that kind of work?

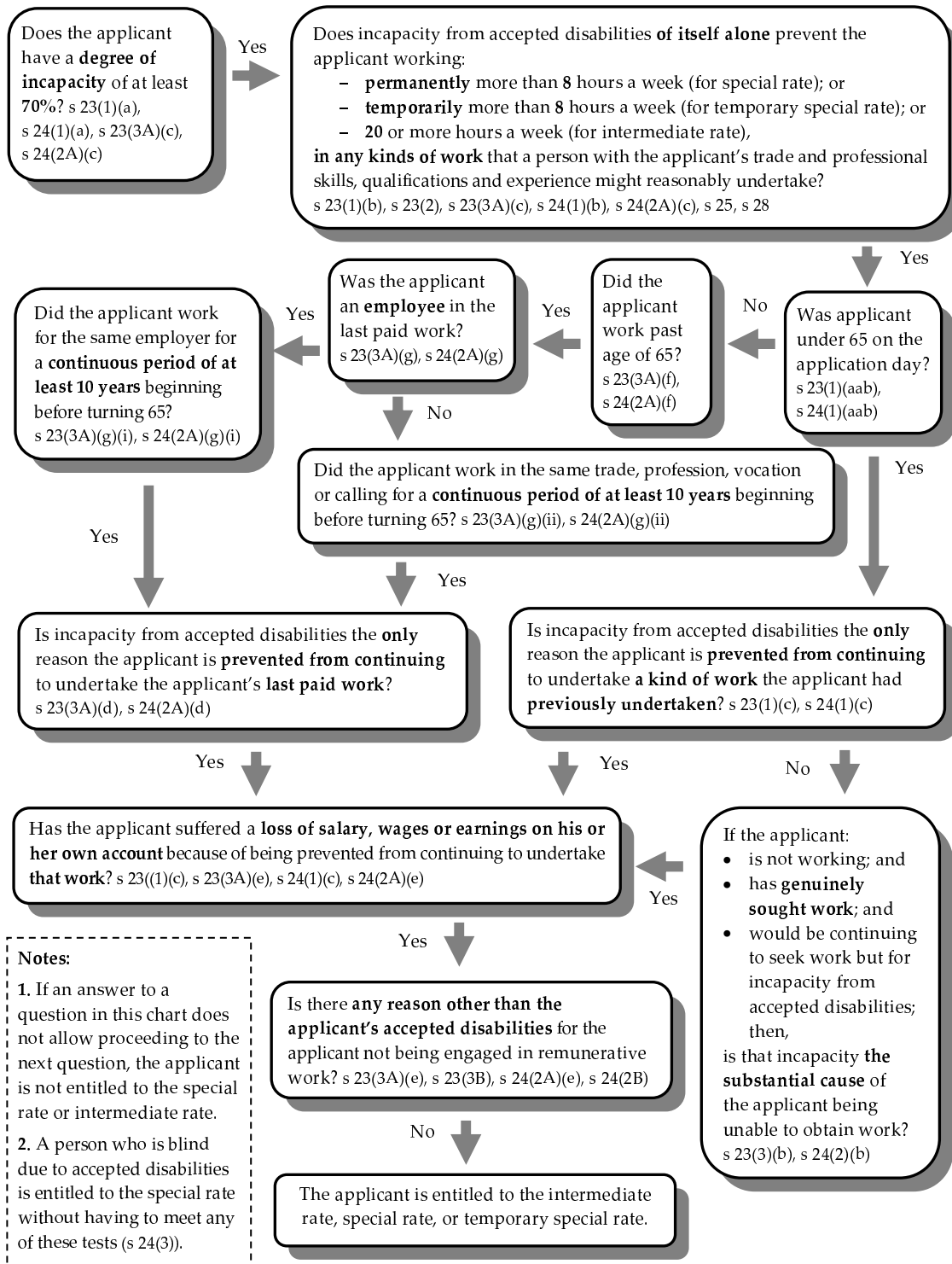
Q 11. If the answer to Question 10 is ‘yes’, is the incapacity from war- or defence-caused disabilities the only factor preventing the applicant from continuing to undertake that kind of work?

Q 12. If the answers to Questions 10 and 11 are, in each case, ‘yes’, is the applicant by reason of being prevented from continuing to undertake that work, suffering a loss of salary, wages or earnings on his own account that the applicant would not be suffering if he or she were free of that incapacity?

11.98 If the answers to any of Questions 5, 6, 8, 9, 10, or 11 is ‘no’, the special rate of pension is not payable.

11.99 In order to answer Question 12, the ‘loss’ test is qualified by deeming a person to fail it if the applicant has ceased to engage in remunerative work for reasons other than incapacity from war- or defence-caused injury or disease, or the applicant is incapacitated or prevented from engaging in remunerative work for some other reason.

Special rate and intermediate rate tests



Extreme disablement adjustment

11.100 The extreme disablement adjustment (EDA) rate of pension applies only if:

- the applicant is aged over 65;
- has at least 70 impairment points (by applying GARP) from war- or defence-caused injury or disease;
- and a lifestyle rating of 6 (by applying GARP) from war- or defence-caused injury or disease.

11.101 It should be noted that 68 impairment points rounds up to 70 and 5.5 lifestyle points rounds up to 6. Thus these ratings would qualify an applicant for the EDA rate.

11.102 The lifestyle rating is usually the most difficult aspect to be satisfied. It is important to obtain evidence from whoever lives with or cares for the applicant concerning the effects of the accepted disabilities on the applicant's:

- interpersonal relationships;
- mobility;
- recreational and community activities; and
- domestic activities.

11.103 It is important to identify what it is that the applicant has had to give up doing or requires assistance with because of the effects of accepted disabilities.

Specific disability payment

11.104 Section 27 of the VEA provides that a specific disability payment is payable for the following disabilities:

- Two arms amputated;
- Two legs and one arm amputated;
- Two legs amputated above the knee;
- Two legs amputated and blinded in one eye;
- One arm and one leg amputated and blinded in one eye;
- One leg and one arm amputated;
- One leg amputated above, and one leg amputated below, the knee;
- Two legs amputated below the knee;
- One arm amputated and blinded in one eye;
- One leg amputated and blinded in one eye;
- One leg amputated above the knee;
- One leg amputated below the knee;
- One arm amputated above the elbow;
- One arm amputated below the elbow;
- Blinded in one eye.

11.105 The permanent loss of use of a leg, foot, hand or arm equates to an amputation, and can entitle a person to a payment under this provision.

11.106 When preparing a case in which such an disability arises, it is important to refer to s 27 so that it is fully considered by the decision-maker.

Developing an attendant allowance case

11.107 An attendant allowance is paid to assist with the cost of an attendant to help a veteran with such things as feeding, bathing, dressing, moving around the house and other activities of daily living. It is paid fortnightly if a veteran's injuries or diseases involve:

- multiple amputations or blindness;
- conditions affecting the cerebro-spinal system; or
- conditions similar in effect or severity to a disease affecting the cerebro-spinal system

11.108 The permanent loss of use of a limb is treated as if the limb were amputated for the purpose of eligibility for an attendant allowance.

11.109 An attendant allowance is payable at a higher and a lower rate.

11.110 The lower rate is payable if the person:

- is blinded in both eyes;
- has both legs amputated and one arm amputated; or
- has both legs amputated at the hip;
- has one leg amputated at the hip and the other leg amputated in the upper third; or
- has an injury or disease affecting the cerebro-spinal system, or has a condition similar in effect or severity.

11.111 The higher rate is payable if the person:

- is blinded in both eyes together with total loss of speech or total deafness; or
- has both arms amputated.

11.112 However, an attendant allowance is not payable if:

- the person is cared for fully at public expense in a hospital or institution; or¹¹⁰
- Centrelink is paying a 'carer payment'¹¹¹ (formerly carer's pension) in relation to the person.

11.113 Medical evidence needs to be obtained concerning the person's accepted disabilities in relation to:

- whether a limb is permanently and wholly useless; or
- whether the disability is, or is similar in effect to, a disease of the cerebro-spinal system (which involves neural system including the brain and nerves of the spinal cord); and, if so,
- the impact on the person's capacity to undertake activities of daily living such as feeding, bathing, dressing, and moving around the house.

11.114 It is useful also to obtain evidence about these matters from the person who lives with or cares for the applicant.

¹¹⁰ *O'Donnell v Repatriation Commission* (1993) 117 ALR 680

¹¹¹ Carer payment is paid under Part 2.5 of the *Social Security Act 1991* (SSA). A 'carer payment' is not the same as a 'carer allowance' (paid under Part 2.19 of the SSA), which is for someone who has a disability, or is frail, aged or chronically ill. Payment of the 'carer allowance' does not prevent the payment of attendant allowance.

Developing a war widow's pension or orphan's pension case

Who may make a claim?

11.115 A **war widow(er)'s pension** can be claimed by a widow (or widower) who was the partner of the veteran or member immediately before the veteran or member's death.

11.116 A widow(er) means:

- the legal wife (or husband) of the veteran or member at the time of death; or
- a person who was of the opposite gender and in a marriage-like relationship with the veteran or member at the time of death.¹¹²

11.117 There may be more than one widow or widower of the veteran or member.

11.118 An **orphan's pension** can be claimed by a child who is under 16 years of age or a full-time student under 25 years of age, where the child:¹¹³

- is the natural or adopted child of the veteran or member; or
- was wholly or substantially dependant on the veteran or member at the time of death.

11.119 The widow or widower, or a natural or adopted child need not have been financially dependent on the veteran or member to be regarded as 'dependants' under the VEA.¹¹⁴

¹¹² The criteria for a 'marriage-like relationship' are set out in s 11A of the VEA.

¹¹³ VEA, s 10.

¹¹⁴ VEA, s 11.

Kind of death

11.120 The next step after deciding that the claimant is a widow(er) or child of the veteran or member is to consider the 'kind of death' suffered by the veteran or member.¹¹⁵

11.121 The 'kind of death' is the injury or disease from which the person died. A person might have had more than one condition contribute to their death.

11.122 It is necessary to consider all the disabilities suffered by the person and look for evidence about how any of those disabilities might have played a part in the person's death.

11.123 Most SoPs define 'death from' the relevant injury or disease as including death from a terminal event or condition that was contributed to by the relevant injury or disease.

11.124 This means that if an injury or disease is said to have contributed to a terminal event or condition that resulted in the person's death, then death from that injury or disease is a 'kind of death' for that person, and the SoP must be applied.

Relating a death to the person's service

11.125 Medical evidence should be obtained to support any contention that a particular disability played a part in the person's death.

11.126 Once a relevant connection between a disability and death has been identified, the relevant SoPs should be considered to see whether there is material that indicates that any of the

¹¹⁵ *Repatriation Commission v Hancock* (2003) 19 *VeRBosity* 82

factors in the SoP can be related to the person's service.

11.127 If an injury or disease from which the person died has already been accepted as war- or defence-caused, then death can be accepted without re-linking that injury or disease to service provided that the injury or disease was a reasonably direct cause of the person's death.¹¹⁶

11.128 If a previously accepted injury or disease that contributed to the person's death was *not* a *reasonably direct* cause, or if the injury or disease had not previously been accepted as war- or defence-caused, the evidence must link that injury or disease to the person's service. That evidence must indicate that a factor in the relevant SoP is met.

Other criteria for war widow's pension

11.129 A war widow's or widower's pension or orphan's pension is also payable even if the veteran' or member's death is not war- or defence-caused, if the veteran or member was in receipt of the special rate of pension, EDA, or certain of the specific disability payments in s 27, or had been a prisoner of war.

11.130 The VRB has no jurisdiction to consider these grounds for payment as they are not decisions of the Repatriation Commission,¹¹⁷ but are automatic payments under the VEA by DVA.

Operative dates (dates of effect)

11.131 The tables at page 129 provide information about the dates from which VRB decisions can operate (the dates of effect) for various types of matters.

Continuation of claims and applications after death of claimant

11.132 If a claimant dies the legal personal representative (**LPR**) is able to continue with the claim or application for review.

11.133 The LPR has the same rights as the claimant would have had if the claimant had not died.¹¹⁸

11.134 The LPR is the executor of the will or the administrator of a person's estate.

11.135 If the LPR chooses not to continue the claim or does not take any action in relation to it, the Repatriation Commission may approve someone else to continue the claim instead.

11.136 If the claimant or applicant dies, the representative should not take any further action without first getting instructions from the LPR.

¹¹⁶ See VEA, s 8(1)(f), s 70(5)(e), s 70(5A)(e).

¹¹⁷ VEA, s 13A.

¹¹⁸ VEA, s 126.

Chapter 12 — The transition from VEA to MRCA

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Background to the MRCA

- 12.1 When enacted in 1986, the VEA provided that eligibility for ‘defence service’ under the VEA would continue only until the establishment of a Military Compensation Scheme.
- 12.2 In 1994, ADF-specific amendments were made to the SRCA to establish a Military Compensation Scheme.
- 12.3 The Review of the Military Compensation Scheme (the Tanzer Review) was initiated after the Government had made interim adjustments to compensation benefits for ADF members as a result of the Black Hawk helicopter accident.
- 12.4 The Tanzer Review recommended the introduction of a self-contained safety, compensation and rehabilitation scheme for the ADF based on the distinct nature and needs of military service.
- 12.5 The new scheme is administered by the MRCC through DVA and is a military-specific compensation scheme.
- 12.6 The MRCA provides rehabilitation, treatment, compensation and a range of other entitlements for members and former members of the ADF in respect of injury, disease or death related to service rendered on or after 1 July 2004. It also provides for their dependants and other eligible persons.

Eligibility – who is covered?

- 12.7 Any member or former member of the ADF, whether on full-time or part-time service, including cadets, are eligible to claim compensation under the MRCA for an injury or a disease related to service rendered on or after 1 July 2004.
- 12.8 The VEA and SRCA remain in force and apply to members and former members who die or suffer injury or contract disease related to eligible service rendered before 1 July 2004.

Kinds of service covered

- 12.9 Service under the MRCA is categorised as (s 6, MRCA):
- *warlike service*;
 - *non-warlike service*; and
 - *peacetime service*.
- 12.10 All such service is called '*defence service*'.
- 12.11 The Minister for Defence determines warlike and non-warlike service by a determination in writing.¹¹⁹ All other service is peacetime service.

Purpose of the transitional provisions

- 12.12 At the same time as the MRCA was enacted, the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004 (CTPA)* was also enacted.
- 12.13 The purpose of the transitional provisions is to clarify which Act compensation can be paid under, and to provide for the smooth transition from eligibility under the VEA and SRCA to commencement of eligibility under the MRCA for injuries and diseases related to service on or after 1 July 2004.
- 12.14 The transitional provisions do not have any effect for those people who have eligible service only under the VEA or have eligible service only under the MRCA.
- 12.15 As part of the transitional provisions, s 9A and s 70A of the VEA (the 'closing-off' provisions) were enacted to stop liability being granted or continuing under the VEA if the injury, disease or death is related to service rendered on or after 1 July 2004.
- 12.16 Section 7 of the CTPA provides that the MRCA applies, instead, to such matters. As is explained below, there are some exceptions to this general rule.

¹¹⁹ The determinations are on the VRB's web site (www.vrb.gov.au).

New injury, disease or death on or after 1 July 2004

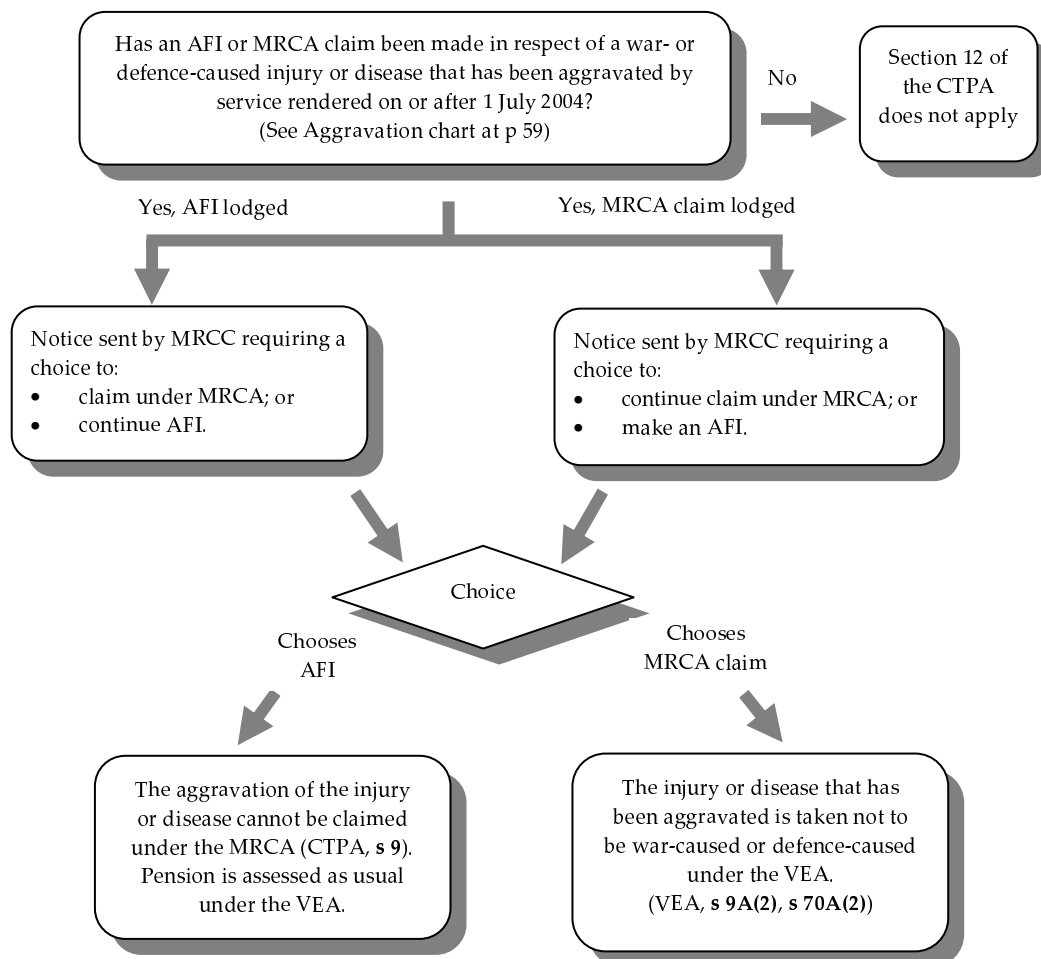
12.17 If an injury or disease arises or a death occurs on or after 1 July 2004, and it is related to service rendered on or after that date, s 9A(1) and s 70A(1) of the VEA provide that it cannot be accepted under the VEA even if it is *also* related to service rendered before 1 July 2004. Such an injury, disease or death must be claimed under the MRCA.¹²⁰

VEA injury or disease that has been aggravated by service on or after 1 July 2004

12.18 Section 9 of the CTPA provides that the MRCA does not apply to a person’s aggravation or material contribution if:

- the person is given a s 12 notice (see page 87) under the CTPA; and
- the person chooses to apply for an increase in the VEA disability pension instead of claiming under the MRCA.

Effect of s 12 of the CTPA – choice of VEA or MRCA



¹²⁰ VEA, s 9A(1), s 70A(1); CTPA, s 7.

s 12 CTPA notice

12.19 If the worsening of an injury or disease that has already been accepted under the VEA is related to service on or after 1 July 2004, the MRCC must send the person a notice ('s 12 CTPA notice') requiring the person to choose between:¹²¹

- making a claim under the MRCC in respect of the aggravation; or
- continuing with the application for increase on the basis of that worsening.

- to claim under the MRCA; or
- to continue with their AFI on the basis that incapacity from the entire injury or disease is pensionable under the VEA.

12.24 The VRB would have to await advice from DVA of the person's response before proceeding with its review.

12.25 If an injury or disease that has been accepted under the VEA is aggravated or materially contributed to by service rendered on or after 1 July 2004, it may be affected by s 9A(2) or s 70A(2).

12.20 If the person chooses *not* to claim under the MRCA, any incapacity from the worsening can be included in the VEA assessment.¹²²

12.26 Usually under the VEA, if an accepted disability worsens, any increase in incapacity from that disability is pensionable even if the worsening is caused by something unrelated to service covered by the VEA.

12.21 If the person chooses, instead, to claim under the MRCA, the aggravated injury or disease is taken not to be war-caused or defence-caused,¹²³ and the assessment of any VEA pension would proceed on that basis.

12.27 Since 1 July 2004, if a person who has served after that date makes an application for an increase in pension because an accepted disability has worsened, it must be determined whether that worsening is related to service rendered on or after that date.

Effect of s 9A(2) or s 70A(2)

12.22 If the VRB finds that an accepted injury or disease has been aggravated or materially contributed to by service on or after 1 July 2004, and the person has not been sent a s 12 CTPA notice, the VRB cannot proceed with its review.

12.28 If it has been made worse, or there is other evidence that it is worse, this must be investigated before proceeding.

12.23 In that situation, the VRB would ask the Secretary of DVA to invite the MRCC to send the applicant a s 12 CTPA notice requiring the applicant to choose either:

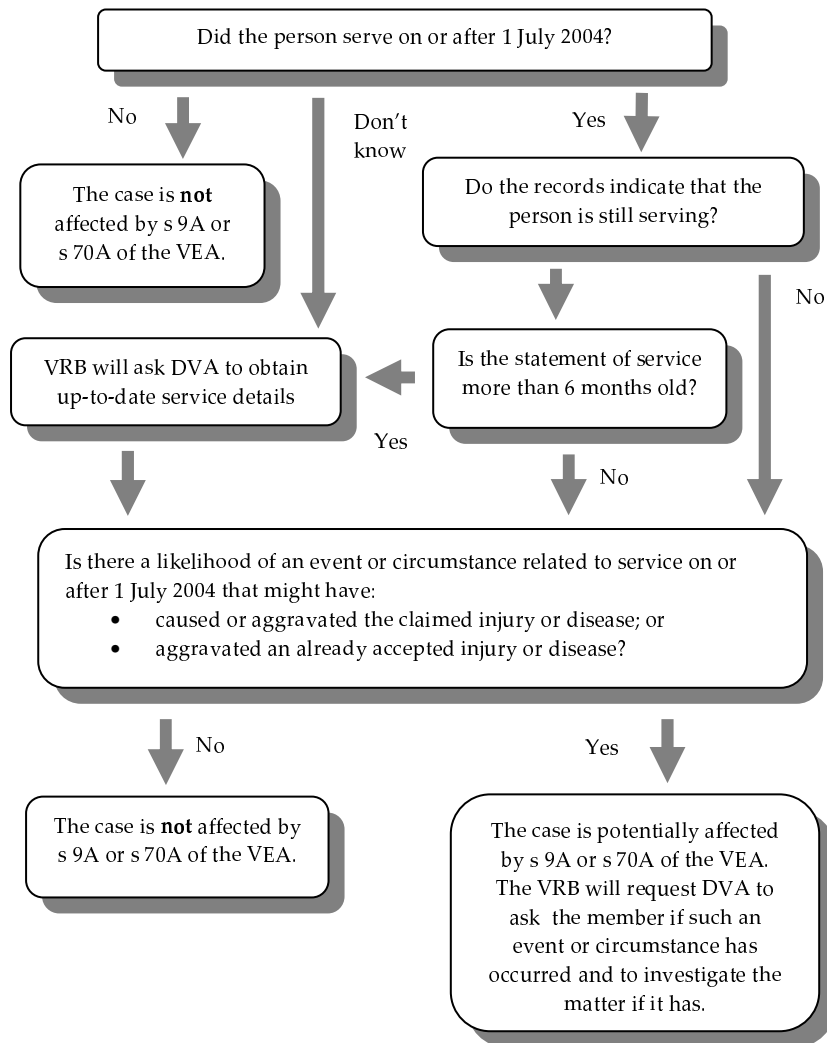
12.29 Medical evidence would need to be obtained to show whether the worsening is just the natural progression of the injury or disease, or if the underlying injury or disease has been made permanently worse by an event or circumstance related to service on or after 1 July 2004. See the discussion concerning aggravation at page 58.

¹²¹ CTPA, s 12

¹²² CTPA, s 9

¹²³ VEA, s 9A(2)

Identifying cases potentially affected by s 9A or s 70A of the VEA



MRCA Benefits

12.30 The primary benefits available under the MRCA include:

- incapacity payments for loss of salary or wages;
- permanent impairment compensation;
- Special Rate Disability Pension;
- rehabilitation;
- treatment;
- other compensation;
- death benefits.

Continued application of VEA for some benefits relating to service on or after 1 July 2004

12.31 The service pension remains available under the VEA to former members who have rendered warlike service on or after 1 July 2004.

12.32 The VEA also remains available for disability pensions and dependants pensions for peacekeeping service rendered by civilians on or after 1 July 2004.

New features of the MRCA

- Incapacity payments for loss of salary or wages;
- Permanent impairment payments available as a lump sum or as a periodic payment, or in some circumstances as a combination of both;
- Comprehensive rehabilitation arrangements;
- Treatment regimes involving either reimbursement for the cost of treatment; or use of DVA's health card system depending on the circumstances of the case.
- New service types – only 3 types:
 - warlike service;
 - non-warlike service;
 - peacetime service.They apply to part-time as well as full-time service.
- Choice of review path.
- New liability provisions apply to connect injury, disease or death with service:
 - unintended consequences of treatment (s 29); and
 - aggravation of a sign or symptom of an injury or disease (s 30).
- SoPs apply only to the liability connections in sections 27 and 28.
- SoPs do not apply to the other connections with service in sections 29 (consequences of treatment) and 30 (aggravation of a sign or symptom).
- GARP M applies to determine a 'compensation factor' (rather than a degree of incapacity) to determine the amount of compensation payable for permanent impairment.
- Copy of claims and determinations go to the person's service chief.

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Original determinations

- 13.1 Once a claim under the MRCA has been lodged (see page 94), it is investigated by the MRCC, which has broad powers of investigation and can require claimants and other persons or bodies to provide it with information or documents.¹²⁴
- 13.2 After the investigation of the claim has been completed, a decision called an **‘original determination’** is made by a delegate of the MRCC (or delegate of a service chief if the matter concerns rehabilitation of a serving member).

- 13.3 Any determination under the MRCA, except those listed in s 345(2), are ‘original determinations’. All original determinations are reviewable.¹²⁵
- 13.4 The MRCC must send the claimant a copy of the original determination, the reasons, and notice of appeal rights.¹²⁶
- 13.5 A determination made under, or in respect of, the CTPA is also an ‘original determination’ and is reviewable under the MRCA.¹²⁷

¹²⁴ MRCA, s 330, s 405, s 406

¹²⁵ See MRCA s 349, s 352, and the chart at p 5.

¹²⁶ MRCA, s 346

¹²⁷ CTPA, s 23. Determinations under sections 12 to 18 of the CTPA would be ‘original determinations’.

Review system

- 13.6 The review system under the MRCA is different from that under the VEA, and it is important to note the differences.
- 13.7 Under the MRCA, the claimant has a choice of first level merits review, either:
- to seek a 'reconsideration' under s 349 of the MRCA by a another delegate of the MRCC; or
 - to seek a 'review' by the VRB under s 352 of the Act.
- 13.8 If a person applies for reconsideration under s 349 the person cannot apply to the VRB. If a person applies to the VRB, the person cannot apply for reconsideration under s 349.

Section 349 reconsideration

- 13.9 An application for reconsideration by a delegate must be made within **30 days** of the 'original determination' being given to the person. However, the delegate may grant an extension of time to apply for review.
- 13.10 Once the original determination has been reconsidered, the reconsideration determination, reasons, and notice of appeal rights are sent to the claimant.

Application to AAT following s 349 reconsideration

- 13.11 If the person is dissatisfied with the reconsideration determination, an application for review must be made to the AAT by lodging a written application at a Registry of the AAT within **60 days** of receiving notice of

the reconsideration determination and reasons.

- 13.12 There is no application fee for applying for a review by the AAT of matters under the MRCA.
- 13.13 The AAT has the discretion to grant an extension of time to apply for review.
- 13.14 The MRCC must prepare the s 37 documents for the AAT review within **28 days** of notice from the AAT that the application for review has been lodged.

VRB review

- 13.15 Once an application is made to the VRB, an MRCC delegate examines the case to decide whether to do a 'reconsideration' under s 347 of the MRCA. If no reconsideration is done or the reconsideration does not change the original determination, the matter will proceed to the VRB.
- 13.16 If the determination is revoked or varied under s 347 to the extent that there is a completely different determination from the original determination, the VRB application lapses.
- 13.17 If the applicant is dissatisfied with a s 347 reconsideration determination that varied the original determination, a fresh application must be made to the VRB (or, instead, to a reconsideration delegate under section 349).
- 13.18 A reconsideration under s 347 is regarded as a new 'original determination' for which there is a new appeal right, and another choice of appeal path.

13.19 If the original determination is varied under s 347 but there is still an aspect of that determination that was unaltered, the VRB application may continue and the VRB will review that part of the determination that was not changed.

13.20 Once the VRB has reviewed the original determination, the VRB's determination, reasons and notice of appeal rights are sent to the applicant.

Application to AAT following VRB review

13.21 An application for review of the VRB determination may be made to the AAT by lodging a written application at a Registry of the AAT within **3 months** of receiving notice of the VRB's determination and reasons.

13.22 The AAT has the discretion to grant an extension of time to apply for review, but only up to **12 months**.

13.23 The MRCC must prepare the s 37 documents for the AAT review within **28 days** of notice from the AAT that the application for review has been lodged.

Effect of choosing reconsideration – costs may be awarded by AAT

13.24 If a claimant chooses the reconsideration path, then if the matter goes to the AAT and it is successful, the AAT may award legal costs to the applicant.¹²⁸ (The AAT cannot award costs against an applicant.)

13.25 If the claimant chooses the VRB review path, the AAT will not be able to award costs.¹²⁹

Effect of choosing VRB review – war veterans' legal aid may be available at AAT

13.26 If the claimant chooses the VRB review path and the application relates to warlike service or non-warlike service rendered since 1 July 2004, the claimant will be eligible for non-means tested legal aid at the AAT under the war veterans' legal aid scheme (see page 126) provided the case has some prospect of success (that is, a merits test applies).

13.27 Legal aid under the war veterans' matters guideline is not available if the claimant chooses the reconsideration path or the application relates only to peacetime service.

Other legal aid

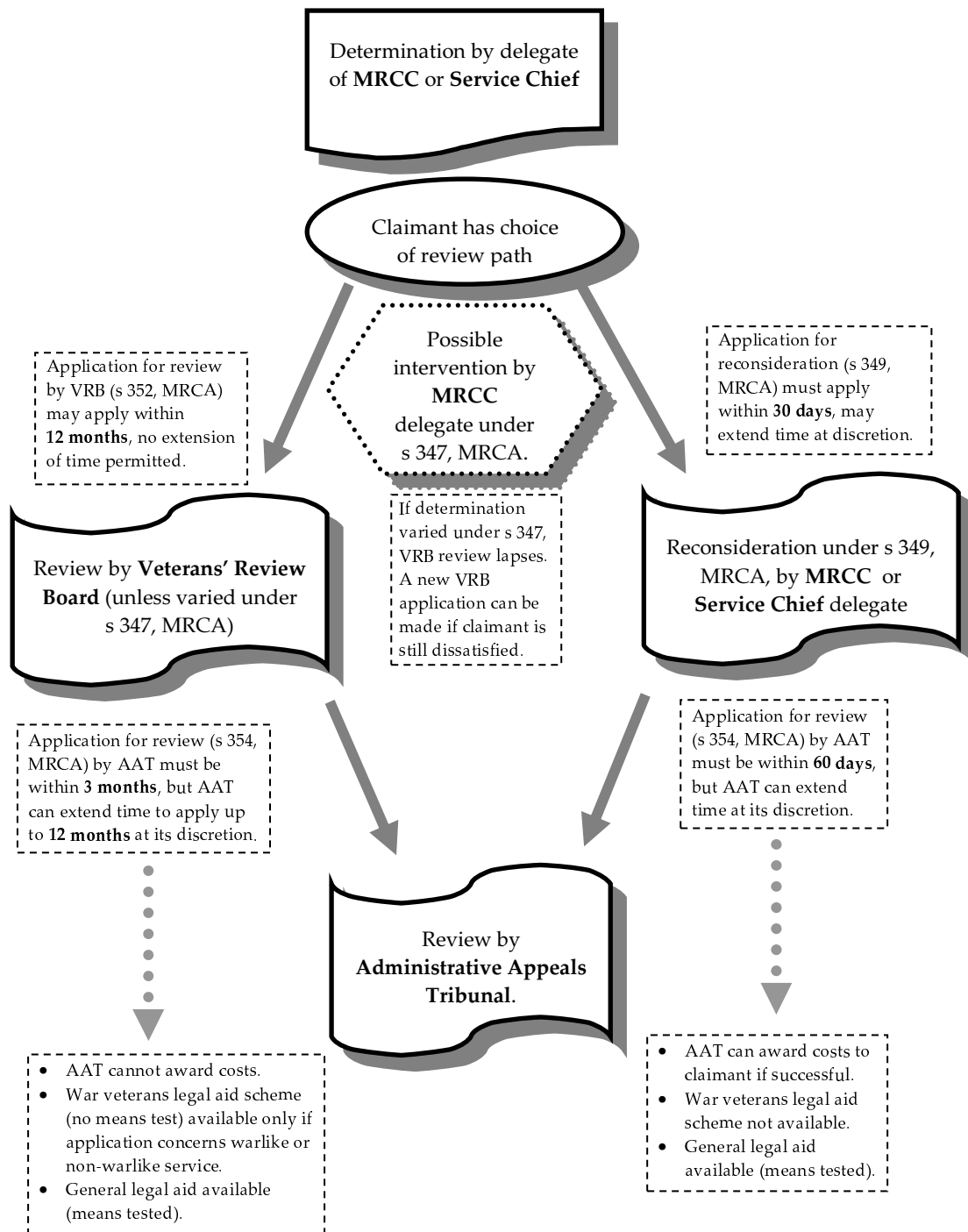
13.28 If the person is not eligible under the war veterans' matters guideline, legal aid might be available under the social security and other Commonwealth benefits guideline. This is subject to a means test as well as a merits test and applies to limited types of cases.

13.29 Legal aid under the social security and other Commonwealth benefits guideline might also be available, subject to a means test and a merits test, if the person chose the reconsideration review path instead of the VRB review path.

¹²⁸ MRCA, s 357, s 358

¹²⁹ MRCA, s 359

Outline of the MRCA determining system



Chapter 14 — MRCA cases: claims

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Claims for liability and/or compensation

- 14.1 Under the VEA, a person makes a single claim in respect of a particular injury or disease in order to receive pension for incapacity from that condition.
- 14.2 Under the MRCA, a person may make a claim merely to have liability accepted without having to claim compensation.
- 14.3 Before compensation can be determined or assessed, a person must have made **both**:
- a claim for ‘**acceptance of liability**’; and
 - a claim for ‘**compensation**’,¹³⁰
- 14.4 A claim must be made for most benefits under the MRCA. Forms can be found at the MRCS web site: www.mrcs.gov.au

Approved claim forms

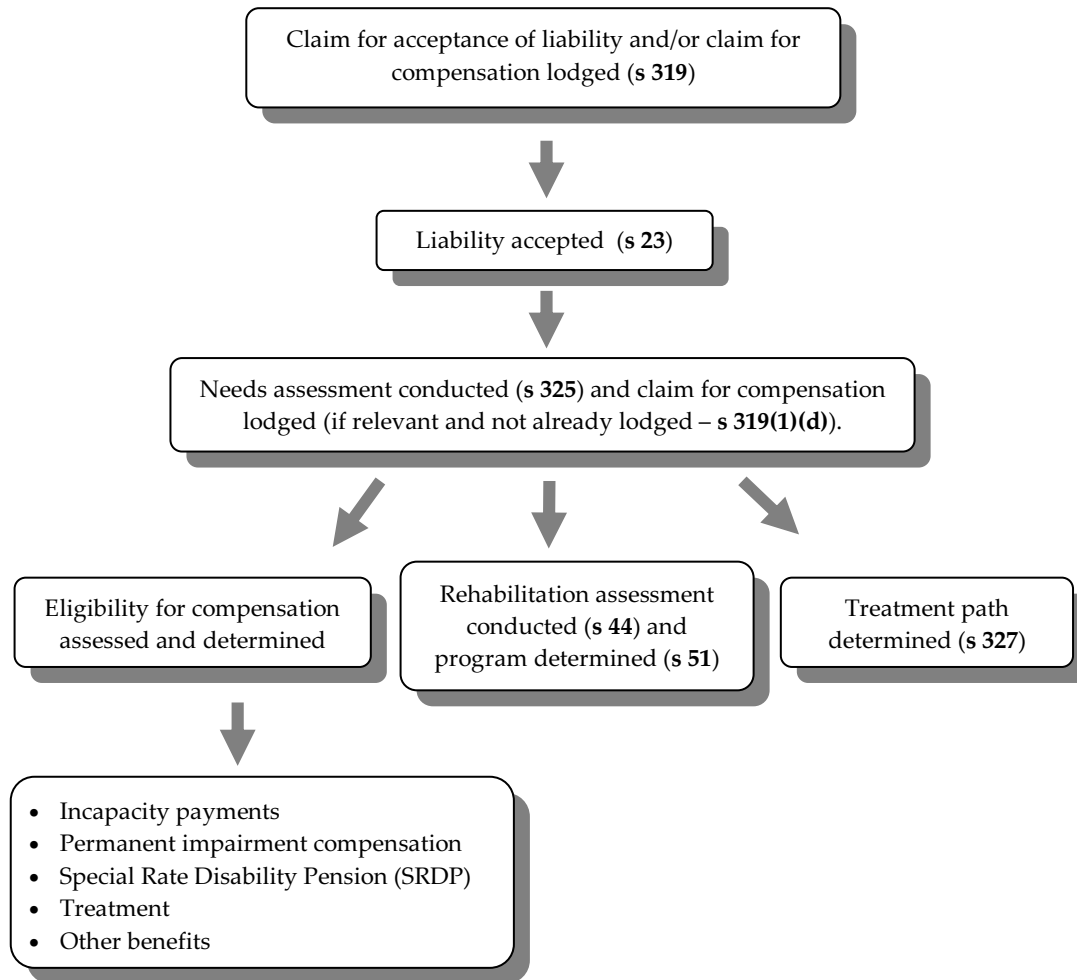
- 14.5 The MRCC has approved the following claim forms:
- claim for **liability** and/or **reassessment** of compensation (D2051)
 - **injury & disease** details sheet (must be attached to **liability** claim) (D2049);
 - **Special Rate Disability Pension** Payment Choices (D2052);
 - claim for compensation for **dependants** of deceased members and former members (D2053).

Lodgement of claims

- 14.6 Claims must be lodged at a place, or with an employee of DVA, approved by the MRCC. DVA offices in Australia are approved offices.
- 14.7 The MRCA permits electronic lodgement of claims if approved by the MRCC. Approval has been given for lodgement by fax to particular fax numbers only.

¹³⁰ MRCA, s 319(1)

MRCA claims process for injury or disease



Compensation claims

14.8 No particular claim form is required to claim for compensation, as this is usually identified in a needs assessment. The only requirement is that the claim be made in writing and be given to the MRCC.¹³¹ However, Part F of the liability claim form enables the claimant to choose to claim particular compensation.

14.9 If liability is accepted, the MRCC must consider a 'needs assessment' (see page 97). After assessing the claimant's needs, the claimant is asked to sign the needs assessment and return the signed copy to the MRCC.

14.10 If the assessment includes a need for particular compensation, the signed assessment can be regarded as a claim for that compensation.

¹³¹ MRCA, s 319(2)

What can be claimed?

14.11 The following can be claimed under the MRCA:¹³²

- liability for an injury, disease or death;
- liability for loss of or damage to medical aids;
- compensation – for example:
 - permanent impairment compensation;
 - compensation for incapacity for work or service;
 - compensation for the cost of household and attendant care;
 - treatment;
 - and death benefits.

14.12 A new liability claim cannot be made if an existing claim for the same service injury, disease, or death has not been finalised. A claim is ‘finalised’ if it has been determined, is not the subject of an appeal, and any appeal period has expired.¹³³

Who can make a claim?

14.13 A claim can be made by:¹³⁴

- the member or former member who suffered the injury or disease or the loss or damage to a medical aid;
- another person on behalf of that member with the member’s approval;

- the member’s legal personal representative; or
- a person appointed by the MRCC if the member is incapable of approving someone to lodge a claim on their behalf and has no legal personal representative or has a legal personal representative who will not make a claim.

14.14 A claim for acceptance of liability for a deceased member’s death or for compensation in respect of that death can be made by:¹³⁵

- a dependant of the deceased member;
- another person on behalf of that dependant with the dependant’s approval;
- the dependant’s legal personal representative; or
- a person appointed by the MRCC if the dependant is incapable of approving someone to lodge a claim on his or her behalf and has no legal personal representative or has a legal personal representative who will not make a claim.

Service chief notified of claim

14.15 The MRCC must give a copy of a liability claim or a claim for permanent impairment to a member’s service chief if the person was in the ADF at the time of the claim or the time of the member’s death.¹³⁶

¹³² MRCA, s 319

¹³³ MRCA, s 322

¹³⁴ MRCA, s 320

¹³⁵ MRCA, s 320

¹³⁶ MRCA, s 319(3), s 319(4)

Needs assessment

- 14.16 The MRCA does not require a claim for compensation to specify the type of compensation being sought. It is recognised that a person might not know all the types of compensation to which he or she might be entitled.
- 14.17 Delegates of the MRCC endeavour to assist claimants in identifying all the relevant features of their claim. For this reason, s 325 of MRCA enables the MRCC to carry out a needs assessment once a person has lodged a claim.
- 14.18 A ‘needs assessment’ is a general overview of what it is possible to provide for the claimant under the MRCA.
- 14.19 The MRCC *may* carry out an assessment of a person’s needs at any time after the acceptance of liability.¹³⁷
- 14.20 The MRCC *must* carry out an assessment of a person’s needs before determining a claim for compensation.¹³⁸
- 14.21 The aim of a needs assessment is to enable the person to be aware of their rights to access every type of compensation to which they are entitled at a particular time.
- 14.22 The needs assessment is an ongoing process and involves pro-active case management.
- 14.23 If a needs assessment identifies a need for a **rehabilitation assessment**, this is a separate matter and involves a suitably qualified rehabilitation specialist who provides a report and a

program plan. Such assessments are matters that can be appealed.

- 14.24 The MRCC requires claimants to sign a needs assessment before proceeding to determine a compensation claim. This is not a statutory requirement, but it enables the needs assessment to be treated as a compensation claim.

When a needs assessment is unnecessary

- 14.25 A needs assessment can be as brief or detailed as the case requires, and may be re-assessed at a later date if the person’s needs change.
- 14.26 An assessment would be unnecessary if the disability that has been accepted is relatively minor, has resolved, does not require any treatment and the person can carry out their usual military service or civilian work.
- 14.27 Needs assessments conducted under s 325 of the MRCA are not excluded from ‘original determinations’ by s 345(2) and so are reviewable determinations.¹³⁹

Standards of proof

- 14.28 The *beyond reasonable doubt standard* of proof (with the ‘*reasonable hypothesis*’ concept) applies to connections with *warlike* and *non-warlike* service.¹⁴⁰ The *reasonable satisfaction* standard applies to connections with *peacetime* service.¹⁴¹ See page 71.

¹³⁷ MRCA, s 325(1)

¹³⁸ MRCA, s 325(2)

¹³⁹ Subsection 345(2) of the MRCA defines what are *not* ‘original determinations’.

¹⁴⁰ MRCA, s 335(1), (2), s 338

¹⁴¹ MRCA, s 335(3), s 339

Chapter 15 — MRCA cases: compensation, rehabilitation, and treatment

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Compensation

15.1 Following the acceptance of liability for a service injury or disease, a needs assessment is conducted. If the person has already claimed compensation, or makes a claim for compensation after the needs assessment, compensation may be determined.¹⁴²

15.2 The compensation provisions in MRCA largely reflect those in the SRCA, especially in relation to incapacity for service and work payments.

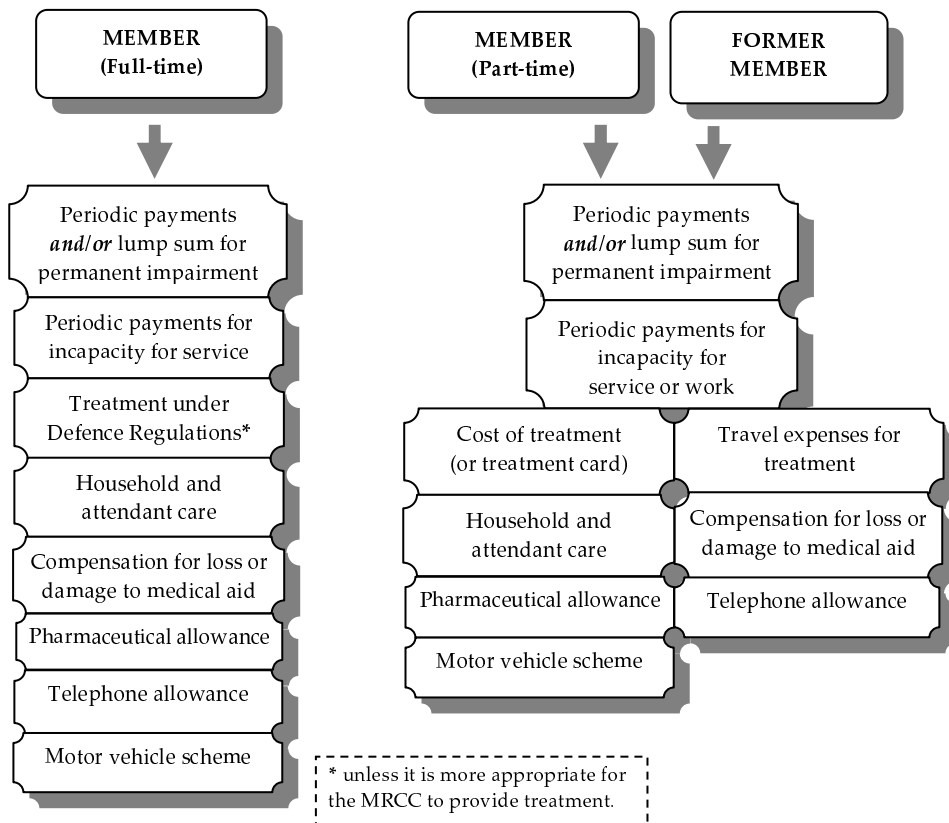
15.3 The types of compensation available are set out in the chart on page 99. This chapter only covers compensation for:

- permanent impairment;
- incapacity for service or work;
- Special Rate Disability Pension; and
- cost of treatment.

15.4 This chapter also deals with rehabilitation, which can be an important factor in determining whether compensation is payable.

¹⁴² MRCA, s 325(2)

Compensation potentially available to members and former members



Permanent impairment

What is a permanent incapacity payment?

15.5 Permanent impairment payments compensate for medical impairment and lifestyle restrictions that are permanent and result from service injury or disease. These payments are not related to loss of earnings.

How is it assessed?

15.6 Permanent impairment is assessed under the MRCA in a similar manner to degree of incapacity under the VEA.

15.7 A Guide based on the VEA's GARP is used under the MRCA, with changes to the way impairment and lifestyle are combined to determine the amount of compensation payable.

15.8 This Guide is called the 'Guide to Determining Impairment and Compensation' and was determined by the MRCC under s 67 of the MRCA. It is commonly known as 'GARP M', and is given this 'short title' in the Guide itself.

15.9 GARP M has much the same impairment and lifestyle chapters as GARP.

15.10 Impairment is assessed using chapters 1 to 21 of GARP M. Impairments points are combined using the Combined Values Chart in Chapter 18 of GARP M.

15.11 Impairment points are on a scale of 0 to 100. Unlike the VEA's GARP, impairment points are not rounded to the nearest 5 points.

15.12 The effects of lifestyle are determined using Chapter 22 of GARP M, and are on a scale of 0 to 7.

15.13 While evidence should be obtained similar to that used for GARP assessments,¹⁴³ medical evidence will also need to address the 'permanence' of each of the impairments flowing from the service injuries and diseases.

15.14 That evidence should refer to the prognosis having regard to both current and potential treatment or rehabilitation.

Determining Compensation

15.15 Compensation for permanent impairment is determined by reference to tables of compensation factors in GARP M, which combine the impairment and lifestyle ratings to give a 'compensation factor'.

15.16 Different tables are used depending on whether the injury or disease was accepted as being related to:

- warlike or non-warlike service; or
- peacetime service.¹⁴⁴

15.17 If there are service injuries related to warlike or non-warlike as well as peacetime service, GARP M combines the compensation factors from each table in a way that is proportionate to the impairment due to each type of service.¹⁴⁵

15.18 Once the 'compensation factor' has been determined, it is then multiplied by the maximum amount of weekly compensation that is possible to be paid under the Act to give a dollar value to the compensation as a weekly amount.

Who qualifies for permanent impairment compensation?

15.19 Permanent impairment compensation is paid only if:¹⁴⁶

1. the person has suffered an impairment as a result of a service injury or disease;
2. the impairment is likely to continue indefinitely; and
3. the injury or disease has stabilised.

Likely to continue indefinitely

15.20 To decide whether impairment is likely to continue indefinitely, the decision-maker must have regard to:¹⁴⁷

- the duration of the impairment; and
- the likelihood of improvement in the relevant service injuries or diseases; and
- whether the person has undertaken all reasonable rehabilitative treatment for the impairment; and
- any other relevant matters.

¹⁴³ See 'Degree of incapacity' at page 72.

¹⁴⁴ Tables 23.1 and 23.2 of GARP M.

¹⁴⁵ See 'Combined ratings' in Chapter 23 of GARP M.

¹⁴⁶ MRCA, s 68(1)

¹⁴⁷ MRCA, s 73

Minimum impairment threshold levels

15.21 Before compensation can be paid, minimum impairment threshold levels must be met:¹⁴⁸

- if the impairment results only from:
 - hearing loss;
 - loss, or loss of use of, a finger or toe; or
 - loss of the sense of taste or smell,the threshold is 5 impairment points;
- in all other cases the threshold is 10 impairment points.

Impairment threshold for aggravated injuries or diseases

15.22 The amount of compensation payable for an aggravated injury or disease is ‘the amount payable in respect of the impairment points of the person, and the effect on the person’s lifestyle, from the aggravation or material contribution’.¹⁴⁹

15.23 This means that only those impairment and lifestyle effects that resulted from the aggravation can be considered when determining the compensation payable.

15.24 The thresholds of 5 and 10 points also apply for aggravated injuries and diseases.¹⁵⁰ The impairment suffered as a result of the aggravation must meet the relevant threshold.

15.25 Compensation is payable only for the permanent impairment effects of the aggravation and not for the total permanent impairment effects of the injury or disease.

How is compensation paid?

15.26 Compensation for permanent impairment is paid primarily as a periodic payment, but this may be converted, in whole or in part, to a lump sum.

15.27 Payment choices are administered by the MRCC and are not dealt with by the VRB when reviewing permanent impairment determinations.

**What if the condition has not stabilised but will be permanent?
— interim compensation**

15.28 Interim compensation is payable for disabilities that have not yet stabilised,¹⁵¹ and so do not meet the criteria for permanent impairment compensation. Interim compensation is payable if:

- the person will meet the permanent impairment criteria; and
- the impairment currently suffered by the person constitutes at least 10 impairment points.

15.29 Additional interim compensation is payable for every increase of at least 5 additional impairment points assessed as likely to be permanent if the impairment permanently worsens.¹⁵²

¹⁴⁸ MRCA, s 69

¹⁴⁹ MRCA, s 70(2)

¹⁵⁰ MRCA, s 70(1)

¹⁵¹ MRCA, s 75

¹⁵² MRCA, s 71

Compensation for an ‘aggravated injury or disease’

15.30 If a disability has been accepted because of aggravation by service, permanent impairment compensation is payable only in respect of the impairment points and the effects on the person’s lifestyle that result from the aggravation.¹⁵³

15.31 Similarly, additional compensation for an aggravated injury or disease is payable only in respect of the impairment points and the effects on the person’s lifestyle that result from the aggravation.¹⁵⁴

What if liability is accepted for another injury or disease? — additional compensation

15.32 Additional compensation may be payable for additional injuries or diseases to members who have been paid, or are entitled to be paid, permanent impairment compensation or an interim payment if:¹⁵⁵

- the person makes a claim for additional compensation;
- liability is accepted for additional service injuries or diseases;
- the additional injury or disease results in the person suffering an additional impairment;
- the impairment is likely to continue indefinitely;
- the condition has stabilised; and
- the increase in the person’s overall impairment rating is at least 5 points.

What if the impairment from an accepted injury or disease gets worse? — additional compensation

15.33 Additional compensation may also be paid if:¹⁵⁶

- the person makes a claim for additional compensation;
- the person suffers additional impairment directly related to the deterioration of an injury or disease for which permanent impairment compensation or an interim payment has already been paid;
- the impairment is likely to continue indefinitely;
- the condition has stabilised; and
- the increase in the person’s overall impairment rating is at least 5 points.

How is additional compensation claimed?

15.34 Additional compensation must be claimed by completing and lodging the approved form: ‘claim for liability and/or reassessment of compensation’ (D2051).

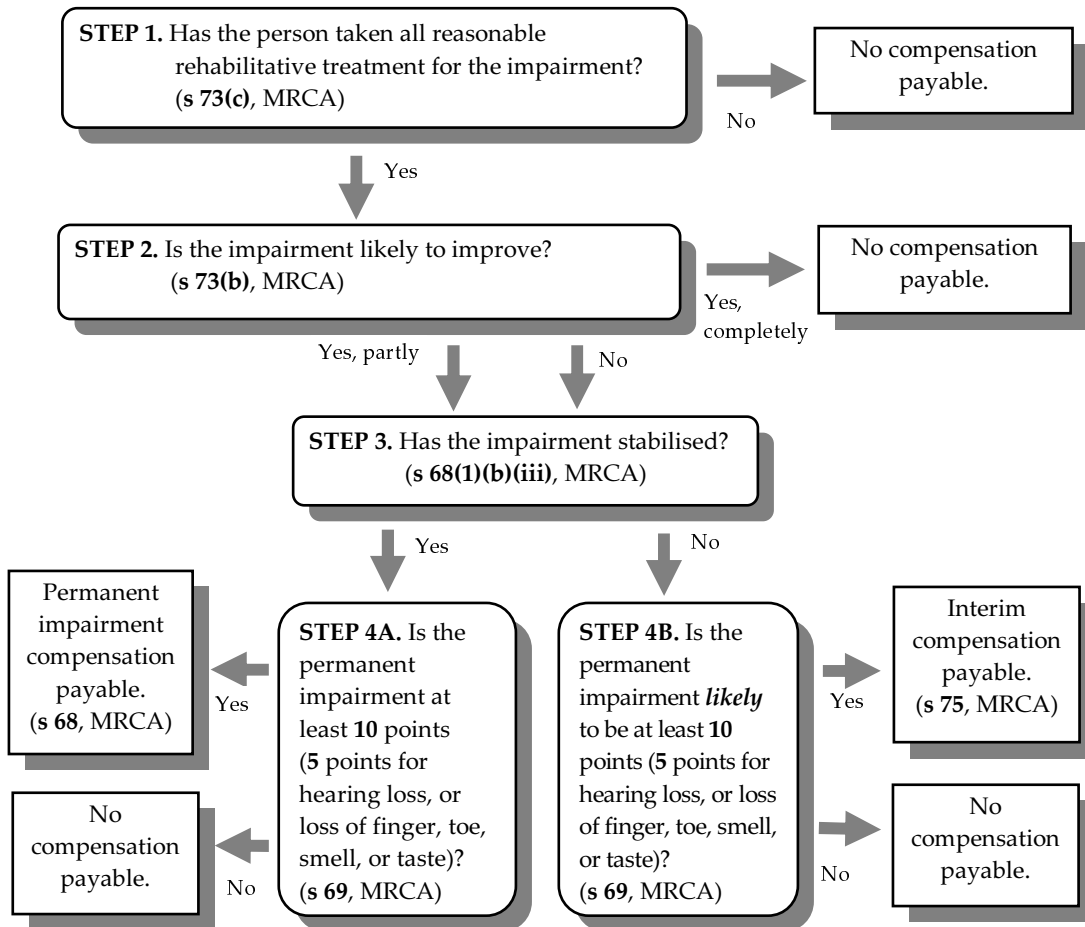
¹⁵³ MRCA, s 70(2)

¹⁵⁴ MRCA, s 72(2)

¹⁵⁵ MRCA, s 71(1)

¹⁵⁶ MRCA, s 71(2)

Deciding whether impairment compensation is payable



Bringing across impairment points from VEA and SRCA injuries and diseases

15.35 If a person who is entitled to a permanent impairment payment under the MRCA also has accepted disabilities under the VEA or SRCA, the combined impairment from all the disabilities (VEA, SRCA and MRCA) must be determined under the MRCA.¹⁵⁷

15.36 This process is called ‘bringing across’ the impairment points from the VEA and/or SRCA injuries or diseases.

15.37 It involves an assessment of the impairment points for these disabilities using GARP M (rather than the VEA GARP or the SRCA Guide).

15.38 Chapter 25 of GARP M sets out how the ‘bringing across’ process operates. It generally follows the following steps.

¹⁵⁷ CTPA, s 13

Bringing across VEA points

STEP 1:

15.39 The **combined impairment** from all the **VEA** disabilities is assessed using GARP M.

STEP 2:

15.40 The **combined impairment** from all the **MRCA** disabilities is assessed using GARP M.

STEP 3:

15.41 Combine the VEA and MRCA impairment points using the combined values chart in GARP M to get an overall impairment rating.

STEP 4:

15.42 Determine the overall **lifestyle rating** from all the VEA and MRCA disabilities using GARP M.

STEP 5:

15.43 Combine the overall impairment rating with the overall lifestyle rating to obtain the **compensation factor** using GARP M.

STEP 6:

15.44 Multiply the compensation factor by the maximum amount of compensation payable under the MRCA to obtain the **combined periodic payment amount**.

STEP 7:

15.45 Subtract the amount of disability pension paid per week under the VEA from the combined periodic payment amount. The result is the amount per week payable under the MRCA.

Bringing across SRCA points

STEP 1:

15.46 The **combined impairment** from all the **SRCA** disabilities is assessed using GARP M.

STEP 2:

15.47 The **combined impairment** from all the **MRCA** disabilities is assessed using GARP M.

STEP 3:

15.48 Combine the SRCA and MRCA impairment points using the combined values chart in GARP M to get an overall impairment rating.

STEP 4:

15.49 Determine the overall **lifestyle rating** from all the SRCA and MRCA disabilities using GARP M.

STEP 5:

15.50 Combine the overall impairment rating with the overall lifestyle rating to obtain the **compensation factor** using GARP M.

STEP 6:

15.51 Multiply the compensation factor by the maximum amount of compensation payable under the MRCA to obtain the **combined periodic payment amount**.

STEP 7:

15.52 Using actuarial tables calculate the weekly equivalent of all lump sums paid under the SRCA. Subtract this amount from the combined periodic payment amount. The result is the amount per week payable under the MRCA.

Incapacity for service or work

What are incapacity payments?

15.53 If a member or former member is ‘incapacitated for service’ or ‘incapacitated for work’ due to a service injury or disease, the person may be entitled to compensation for economic loss, that is loss of salary or wages due to a service injury or disease.

15.54 Incapacity payments are payable only until the person reaches 65 years of age. Payments are calculated by reference to the person’s normal weekly earnings immediately before the person was incapacitated for work.

15.55 The Act makes a distinction between ‘incapacity for service’ and ‘incapacity for work’. Different rules apply to the calculation of incapacity payments depending on the nature of service and work.

‘Incapacity for service’

15.56 Incapacity for service means an incapacity of a person to engage in the defence service that the person was engaged in before the onset of the incapacity at the same level at which he or she was previously engaged.¹⁵⁸

‘Incapacity for work’

15.57 Incapacity for work means:¹⁵⁹

- an incapacity of a person to engage in the work that he or she was engaged in before the onset of the incapacity, at the same level at which he or she was previously engaged; or

- if the person was not previously engaged in work (for example, a cadet, or an unemployed Reservist)—the person’s incapacity to engage in any work that it is reasonably likely he or she would otherwise be engaged in.

Link between service injury or disease and incapacity

15.58 The incapacity for service or work must ‘result’ from a service injury or disease.¹⁶⁰ This means that there must be a direct causal connection between the service injury or disease and the incapacity for service or work.

Incapacity from aggravated injury or disease

15.59 If a service injury or disease was accepted on the basis that it was aggravated by service, the person may be entitled to compensation only if the incapacity for service or work resulted from the aggravation.¹⁶¹

Assessing compensation

15.60 In general terms, compensation for incapacity for service or work is intended to make up for lost earnings caused by that incapacity. To assess the amount of compensation payable, a number of concepts are used, including:

- ‘normal earnings’;
- ‘actual earnings’;
- ‘able to earn’;
- ‘suitable work’;
- ‘normal weekly hours’.

¹⁵⁸ MRCA, s 5

¹⁵⁹ MRCA, s 5

¹⁶⁰ MRCA, s 85(1)(c), s 86(1)(c), s 87(1)(c)

¹⁶¹ MRCA, s 88

15.61 The legislation for **incapacity for service or work** is quite complex and covers over 100 pages of the Act and so the following is merely a general overview of the topic.

15.62 Different rules apply to each of these terms depending on whether the person is a:

- Permanent Forces member;
- Continuous full-time Reservist;
- Part-time Reservist;
- Part-time Reservist who was previously a Permanent Forces member;
- Part-time Reservist who was previously a continuous full-time Reservist; or
- Cadet or declared member.

Normal earnings

15.63 A person's 'normal earnings' depends on a number of factors, but in general terms, they are a notional amount per week that the person was earning before he or she was incapacitated by the service injury or disease.¹⁶²

15.64 For each type of member or former member, there are different rules for determining a person's normal earnings.

Actual earnings

15.65 In general terms, a person's 'actual earnings' are a notional amount per week based on what the person actually earns or earned in a particular week.¹⁶³

15.66 In relation to 'incapacity for work' but not 'incapacity for service', the actual earnings may be affected by how much the person is 'able to earn in suitable work'.¹⁶⁴

15.67 For each type of member or former member, there are different rules for determining a person's actual earnings.

Able to earn in suitable work

15.68 For members or former members who are incapacitated for work in civilian employment, their actual earnings for a week are the greater of:¹⁶⁵

- the weekly amount, if any, that the person is able to earn in suitable work; and
- the amount, if any, that the person earns for that week.

15.69 'Suitable work' is defined to mean work for which the person is suited having regard to:¹⁶⁶

- the person's age, experience, training, language and other skills;
- the person's suitability for rehabilitation or vocational retraining;
- if work is available in a place that would require the person to change his or her place of residence—whether it is reasonable to expect the person to change his or her place of residence;
- any other relevant matter.

¹⁶² MRCA, s 91(1), s 95(1), s 104(1), s 108(1), s 132(2), and MRC Regs 5-8

¹⁶³ MRCA, s 92, s 101, s 105, s 115, s 131(2), and MRC Regs 5-6

¹⁶⁴ MRCA, s 101, s 105, s 115, s 132

¹⁶⁵ MRCA, s 101(4)(a), s 105(4)(a), s 115(4)(a), s 132(1)

¹⁶⁶ MRCA, s 5

15.70 Whether the person is ‘able to earn in suitable work’ requires consideration of:¹⁶⁷

- if the person is working in suitable work—the amount the person is earning in that work;¹⁶⁸
- if the person fails to accept an offer of suitable work:¹⁶⁹
 - the amount the person would be earning in that work if the person had accepted the offer, and
 - whether the failure was reasonable;
- if the person accepted an offer of suitable work but fails to begin or continue that work:¹⁷⁰
 - the amount the person would be earning in that work if the person had begun and continued that work, and
 - whether the failure was reasonable;
- if the person was offered suitable work on condition that a rehabilitation or vocational training program is completed, but the person fails to complete the program:¹⁷¹
 - the amount the person would be earning in that work if the person had not failed to complete the rehabilitation or vocational training program; and

- whether the failure was reasonable;
- if the person failed to seek suitable work after becoming incapacitated:¹⁷²
 - the amount the person would reasonably be expected to earn in suitable work having regard to the state of the labour market at the relevant time; and
 - whether the failure was reasonable.

Normal weekly hours

15.71 A person’s ‘normal weekly hours’ are defined in s 132(2) of the MRCA.

15.72 Generally, for a person who, when the service injury was sustained or service disease was contracted, was:

- a Permanent Forces member; or
- a Full-time Reservist; or
- a part-time Reservist who was not engaged in civilian work,

the ‘normal weekly hours’ are 37.5 hours per week.¹⁷³

15.73 Generally, for a person who was in civilian work when the injury was sustained or disease contracted, the person’s ‘normal weekly hours’ are worked out by combining:

- the number of hours of civilian work usually performed in a week, with
- the number of hours of defence service usually performed in a week.

¹⁶⁷ MRCA, s 181

¹⁶⁸ MRCA, s 181(2)

¹⁶⁹ MRCA, s 181(3)(a), s 181(4)

¹⁷⁰ MRCA, s 181(3)(b), s 181(4)

¹⁷¹ MRCA, s 181(3)(c), s 181(4)

¹⁷² MRCA, s 181(5)

¹⁷³ MRCA, s 132(2)

What happens after the first 45 weeks of incapacity payments?

- 15.74 Payments of compensation for incapacity for service or work are reduced after 45 weeks (whether consecutive or not) of incapacity payments *after discharge* from the ADF.¹⁷⁴
- 15.75 The person’s incapacity payments are reduced by the ‘adjustment percentage’,¹⁷⁵ which depends on whether or not the person is working.
- 15.76 Compensation payable after the first 45 weeks of incapacity is calculated under s 131 of the MRCA as follows:

$$\left(\begin{array}{cc} \text{Person's} & \text{Person's} \\ \text{adjustment percentage} & \text{normal earnings} \\ \text{for the week} & \text{for the week} \end{array} \right) - \begin{array}{c} \text{Person's} \\ \text{actual earnings} \\ \text{for the week} \end{array}$$

- 15.77 The relevant ‘adjustment percentage’ is determined under s 131(2) as follows:

If the person is not working	75%
If the person is working 25% or less of the person’s normal working hours:	80%
If the person is working more than 25% but not more than 50% of the person’s normal working hours:	85%
If the person is working more than 50% but not more than 75% of the person’s normal working hours:	90%
If the person is working more than 75% but less than 100% of the person’s normal working hours:	95%
If the person is working 100% or more of the person’s normal working hours:	100%

Compensation reduced due to Commonwealth superannuation

- 15.78 If a person receives superannuation from a fund to which the Commonwealth has contributed on behalf of the member, the person’s incapacity payments are reduced by the weekly amount of superannuation relates to the Commonwealth’s contribution to the fund (not the person’s contributions).¹⁷⁶
- 15.79 If a person received a lump sum from such a superannuation fund, their compensation is reduced by a weekly amount relating to the Commonwealth’s contribution to that fund calculated by reference to the person’s age and the amount of the lump sum.¹⁷⁷

Cessation of payments at age 65

- 15.80 Payments of compensation for incapacity for service or work generally cease when the person turns 65 years of age.¹⁷⁸
- 15.81 The exception to this rule is if the person was over 63 years of age when the relevant injury or disease was sustained or contracted. In that case, compensation can be paid for up to 104 weeks (whether consecutive or not) during which the person is incapacitated for work.¹⁷⁹

How to make a claim

- 15.82 Incapacity payments may be claimed at the same time as liability is claimed or any time afterwards. There is no specific claim form for this purpose, but it is usually identified in the needs assessment process.

¹⁷⁴ The reduction after 45 weeks applies only to ‘former members’: see MRCA, s 118, s 125, s 128, s 129, s 131

¹⁷⁵ MRCA, s 131

¹⁷⁶ MRCA, s 134

¹⁷⁷ MRCA, s 135, s 136

¹⁷⁸ MRCA, s 120

¹⁷⁹ MRCA, s 121

Special Rate Disability Pension (SRDP)

What is the SRDP?

- 15.83 The Special Rate Disability Pension (SRDP), provided for in s 198 of the MRCA, is a payment that somewhat equates in value to the special rate of disability pension payable under the VEA.
- 15.84 The criteria for the SRDP are very different from those for the special rate of pension under the VEA.
- 15.85 SRDP can be chosen instead of receiving incapacity for work payments.
- 15.86 The choice may be a very difficult one to make. The SRDP is paid for life at the same rate of the VEA special rate pension and is non-taxable, whereas incapacity payments are paid only up to age 65 and are taxable.
- 15.87 The choice involves significant financial implications. The person must obtain independent financial advice before payment of SRDP can be granted.
- 15.88 SRDP eligibility attracts eligibility for the Gold Card, education assistance for dependent children and, in the event of death, death benefits for dependants and funeral assistance.
- 15.89 SRDP is reduced by Commonwealth superannuation in the same way as incapacity payments are reduced.

Eligibility

- 15.90 To be eligible to be offered the SRDP the person must:¹⁸⁰
- be receiving compensation for incapacity for work;
 - have a permanent impairment from service injuries or diseases;
 - have a permanent impairment determined under Chapter 6 of Part 2 of the MRCA at least **50** impairment points; and
 - be unable to work more than **10** hours a week, and rehabilitation is unlikely to increase the person's work capacity.
- 15.91 The 50 impairment points may include impairment from VEA and SRCA injuries and diseases. This is because impairments VEA and SRCA disabilities are included in the calculation of the combined impairment rating under s 13 of the CTPA and Chapter 25 of GARP M.

¹⁸⁰ MRCA, s 199

The offer of a choice

15.92 Once an offer is made, the person has 12 months to make their choice. That period can be extended by the MRCC if there was a delay in the person getting the offer or if the person did not receive it.¹⁸¹

15.93 If a person is made an offer, the person must seek advice from a suitably qualified financial adviser.¹⁸² The Commonwealth is liable to pay for such advice¹⁸³ not exceeding a statutory limit.¹⁸⁴

15.94 Once a person who is offered the SRDP makes a choice, they cannot change their choice.¹⁸⁵

Rate reduced by permanent impairment payments

15.95 The SRDP is reduced by the amount of any permanent impairment payments that have or are being paid.¹⁸⁶

15.96 It is also reduced if the person retired from their work and receives a pension or lumps sum under a Commonwealth superannuation scheme as a result of that retirement.¹⁸⁷

Return to incapacity payments if no longer eligible for SRDP

15.97 If the person no longer meets the eligibility criteria for SRDP (for example, if the person becomes capable of working more than 10 hours a week), he or she will return

to receiving incapacity payments (but only if the person is still eligible for those payments).

15.98 There is a Return to Work Scheme available to former members who become capable of working more than 10 hours a week. This Scheme contains financial incentives to assist in enabling returning to work and minimise financial disincentives.

15.99 The person may receive another offer of SRDP if the person later meets the SRDP eligibility criteria.

15.100 If the person no longer meets the eligibility criteria for the SRDP and is not eligible for incapacity payments (for example, because the person is over 65 years of age), then no incapacity payments can be made, but the person will continue to receive the permanent impairment payments to which he or she is entitled.

Payment continues after age 65

15.101 Unlike the incapacity for work payments, the SRDP continues to be payable after age 65.

Claiming SRDP

15.102 A person's eligibility for SRDP will usually be identified through the needs assessment process (see page 97). But a claim can be made at any time if the person considers that he or she meets the eligibility criteria. There is no specific claim form for this purpose.

¹⁸¹ MRCA, s 201

¹⁸² MRCA, s 202

¹⁸³ MRCA, s 205

¹⁸⁴ MRCA, s 206

¹⁸⁵ MRCA, s 200(2)

¹⁸⁶ MRCA, s 204

¹⁸⁷ MRCA, s 204(5)

Rehabilitation

15.103 Rehabilitation is a very important part of the legislative scheme in the MRCA. The **'aim of rehabilitation'** is to maximise the potential to restore a person ... to at least the same physical and psychological state, and at least the same social, vocational and educational status, as he or she had before the injury or disease.¹⁸⁸

15.104 For an injury or disease accepted on the basis of aggravation, the aim is to restore the person to the situation that existed immediately before the aggravation occurred. To better enable this to be achieved, rehabilitation is available 'even if the incapacity or impairment resulted from the original injury or disease and not from the aggravation or material contribution.'¹⁸⁹

15.105 For persons who are:

- Permanent Forces members; or
- continuous full-time Reservist members of the ADF,

their service chief is responsible for providing rehabilitation unless they have been identified for discharge. From then on, the MRCC is responsible for providing rehabilitation.

15.106 The MRCC is responsible for rehabilitation for all other members and former members of the ADF.¹⁹⁰

Rehabilitation assessment

15.107 The service chief or MRCC, at their own initiative, may carry out an initial assessment of the person's capacity for rehabilitation.¹⁹¹

15.108 An assessment must be conducted if a person asks for one.¹⁹²

15.109 The person may be required to undergo an examination as part of the assessment.¹⁹³

15.110 The rehabilitation assessment is separate from a 'needs assessment'. It is conducted by a rehabilitation professional.

15.111 The vocational assessment and rehabilitation consists of or includes any one or more of the following:

- assessment of transferable skills;
- functional capacity assessment;
- workplace assessment;
- vocational counselling and training;
- review of medical factors;
- training in resume preparation, job-seeker skills and job placement; and
- provision of workplace aids and equipment.¹⁹⁴

15.112 Once the assessment is done, the service chief or MRCC decides if the person should undertake a rehabilitation program provided by an approved program provider.

¹⁸⁸ MRCA, s 38

¹⁸⁹ MRCA, s 43(2)

¹⁹⁰ MRCA, s 39

¹⁹¹ MRCA, s 44

¹⁹² MRCA, s 44

¹⁹³ MRCA, s 45, s 46

¹⁹⁴ MRCA, s 41(1)

Varying a rehabilitation program

- 15.113 The service chief or MRCC can stop or vary a program once it has begun, but must first carry out another assessment and consult the person.¹⁹⁵
- 15.114 A person's right to compensation can be suspended if the person fails to undergo an examination or fails to undertake the program as required.
- 15.115 The suspension of compensation for this reason *cannot* be reviewed by the VRB or reconsidered by a delegate.
- 15.116 The MRCC has produced 'Rehabilitation Principles and Protocols' that specify how rehabilitation is provided and managed. This document can be obtained from the MRCA web site (see page 145).

Review of a rehabilitation program

- 15.117 If a person is dissatisfied with their rehabilitation program, he or she should seek a reassessment.
- 15.118 If the person is still unhappy he or she can seek review (by the VRB) or reconsideration (by a reconsideration delegate) of the rehabilitation assessment or of the rehabilitation program itself.
- 15.119 Seeking review or reconsideration of a rehabilitation program is a preferable course of action than ceasing the program and risking suspension of compensation.¹⁹⁶

Compensation for the cost of treatment

What is treatment?

- 15.120 'Treatment' is very broadly defined in s 13 of the MRCA to mean treatment provided, or action taken, with a view to:
- restoring a person to physical or mental health or maintaining a person in physical or mental health; or
 - alleviating a person's suffering; or
 - ensuring a person's well-being.
- 15.121 For these purposes, it is further defined to include:¹⁹⁷
- providing accommodation in a hospital or other institution;
 - providing medical procedures or nursing care;
 - providing social or domestic assistance or transport;
 - supplying, renewing, maintaining or repairing artificial replacements, medical aids and other aids and appliances; and
 - providing diagnostic and counselling services.

For whom is treatment provided?

- 15.122 Treatment can be provided under the MRCA for:
- members and former members who have an injury or disease for which liability has been accepted; and

¹⁹⁵ MRCA, s 53

¹⁹⁶ *Pascoe v Australian Postal Corporation* (2004) 77 ALD 464

¹⁹⁷ MRCA, s 13(2)

- partners and eligible young persons of deceased members who are entitled to compensation under the MRCA in respect of the member's death (see Chapter 16).
- 15.123 Not all members are entitled to treatment under the MRCA for their service injuries and diseases. Members of the Permanent Forces and Reservists who are on continuous full-time service must obtain their treatment under the Defence Force Regulations. However, in some instances, if the persons Service Chief recommends and the MRCC agrees that it would be more appropriate, treatment may be provided under the MRCA.¹⁹⁸
- 15.124 Treatment for other members and former members is obtained under one of two systems:
- reimbursement of cost of treatment;
 - health card system.
- 15.125 Following the determination of a needs assessment, the MRCC must specify which of these two treatment system applies in the person's case.¹⁹⁹ That determination is not reviewable.²⁰⁰
- Who comes under the health card system?**
- 15.126 If the person's service injury or disease has stabilised but needs periodic or regular treatment, or intermittent periods of acute care, the person is likely to be provided with a White Card. This enables the person to obtain treatment from an approved or contracted health services provider.
- 15.127 Member and former members who have at least 60 impairment points from service injuries and diseases, or are eligible for the SRDP, are entitled to a Gold Card.²⁰¹ This enables them to be treated for any injury or disease, whether liability has been accepted for it or not. Similarly, dependants who are entitled to treatment under the Act also receive a Gold Card.
- 15.128 Determinations made under the health card system are not reviewable by the VRB or a reconsideration delegate.²⁰²
- Who comes under the reimbursement system?**
- 15.129 If the person's service injury or disease only requires short-term, non-ongoing treatment, then the person will come under the reimbursement regime.
- 15.130 Under this system, the person can pay for the cost of treatment themselves, then seek reimbursement, or the person can ask the MRCC to arrange for the health services provider to bill the MRCC directly.
- 15.131 The MRCC will pay for the cost of treatment if it was reasonable for the person to have obtained the treatment in the circumstances.²⁰³
- 15.132 A determination concerning a claim for such compensation can be reviewed by the VRB or reconsideration delegate.

¹⁹⁸ MRCA, s 272

¹⁹⁹ MRCA, s 327

²⁰⁰ MRCA, s 345(2)(k)

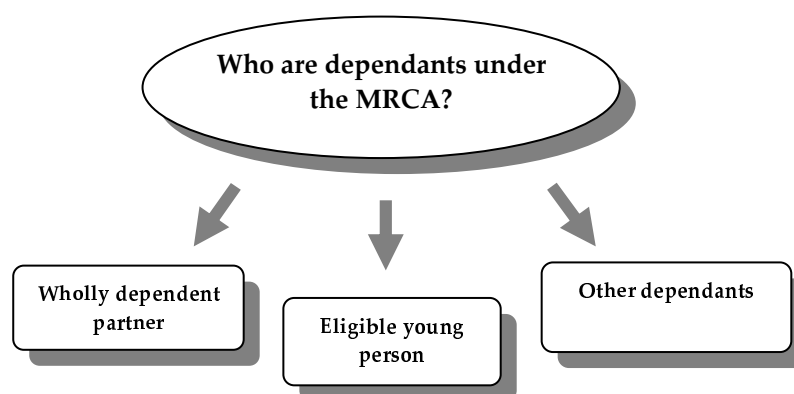
²⁰¹ MRCA, ss 281, 282

²⁰² MRCA, s 345(2)(h)

²⁰³ MRCA, s 271

Chapter 16 — MRCA cases: compensation for dependants

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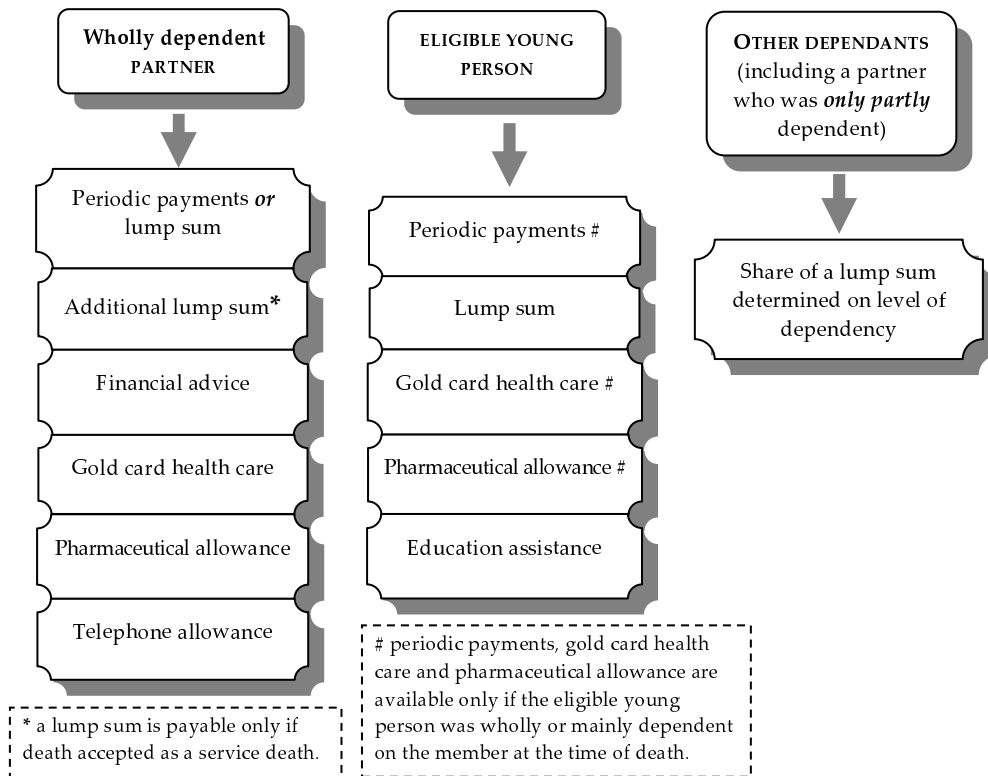
Compensation claim process

- 16.1 Compensation is available to certain dependants of deceased members and former members (see chart at p 116).
- 16.2 To claim compensation, the dependant must make a claim on the approved

claim form, 'claim for compensation for dependants of deceased members and former members' (D2053).

- 16.3 Once liability has been accepted, compensation can then be determined. Unlike claims for injury or disease, there is no needs assessment process when deciding dependants' claims.

Benefits potentially available to dependants



Eligibility

16.4 A person's dependants may be eligible for compensation and other benefits under the MRCA if:

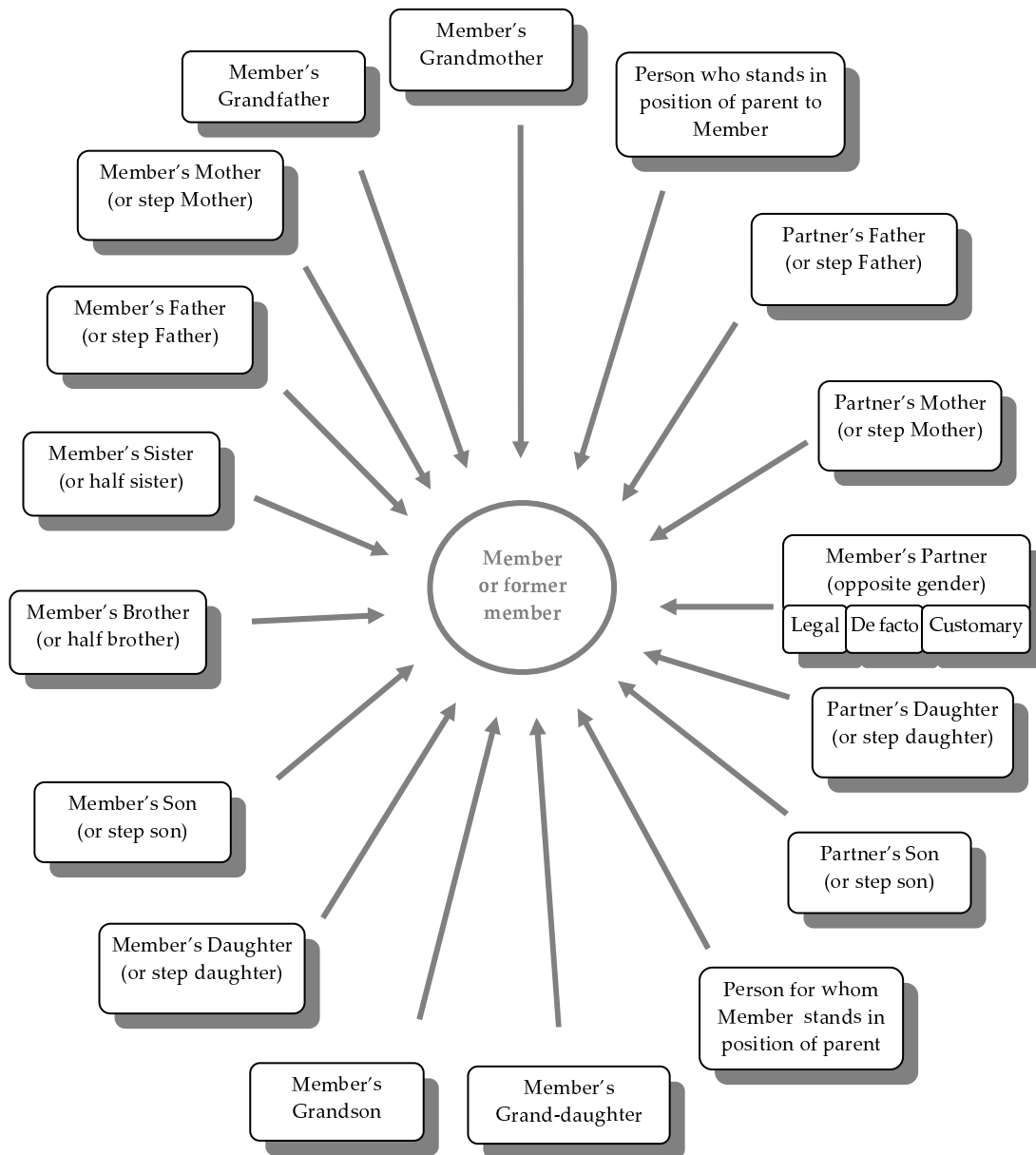
- the death of a member or former members of the ADF is determined to be a service death; or
- the member was eligible for the SRDP during his or her lifetime; or
- immediately before death the member had 80 impairment points from accepted disabilities.

16.5 Compensation is not provided to dependants while the member or former member is still alive except for dependent children of severely disabled former members.

16.6 Eligible young persons who are dependent on a former member who is or was eligible for the SRDP, or whose impairment from service injuries or diseases is at least 80 impairment points, are eligible for education assistance.²⁰⁴

²⁰⁴ MRCA, s 258

Persons who could be a ‘dependant’ of a member (s 15)



Who is a ‘dependant’?

16.7 Section 15 of the MRCA sets out who is a ‘dependant’ for the purposes of the Act. It sets out a number of family member relationships that can be regarded as a ‘dependant’ provided the person was wholly or partly dependent on the member or former member.

What is meant by being ‘dependent’?

16.8 The adjective, ‘dependent’, is defined in s 5 of the MRCA as meaning ‘dependent for economic support’.

Who can be regarded as being wholly dependent?

16.9 Some relationships are *taken to be ‘wholly dependent’* even if in fact the person is not dependent or only partly on the member or former member for economic support.

16.10 Section 16 of the MRCA provides that an ‘eligible young person’ or the ‘partner’ of the member is taken to be wholly dependent on the member or former member if:

- the young person or partner lives with the member; or
- would be living with the member but for a temporary absence or absence due to illness of the member, young person or partner (as the case requires).

16.11 Even if a partner or eligible young person is not wholly dependent they might still be eligible for some compensation or benefits.

Other categories of dependant

16.12 If the member or former member stood in the place of a parent for a person, then that person could be a dependant of the member or former member.²⁰⁵

16.13 Similarly, a person who stands in the place of a parent of a member or former member can be a dependant.²⁰⁶

Dependent for economic support

16.14 For a person other than an ‘eligible young person’, or the member’s or former member’s partner, that person is a ‘dependant’ only if the person was dependent on the member or former member for economic support.²⁰⁷

16.15 The state of dependency for economic support is determined at the date of the member’s or former member’s death.

16.16 The concept of ‘economic dependence’ is concerned with whether or not the person is financially self-supporting, or is dependent in whole or in part on the member for economic support.

16.17 If a person is able to maintain their usual lifestyle on his or her own income, that person is not dependent on someone else for economic support.²⁰⁸

²⁰⁵ MRCA, s 15(2)(b)

²⁰⁶ MRCA, s 15(2)(c)

²⁰⁷ MRCA, s 5

²⁰⁸ *Re Buck and Comcare* [1999] AATA 171; *Re Mason and Comcare* [2000] AAT 138.

Who is a 'Partner'?

16.18 A partner of a member or former member is a person of the **opposite sex** to the member or former member who is:²⁰⁹

- *legally married* to the member or former member; or
- in a *de facto relationship*, that is, a person who lives with the member or former member as his or her partner on a bona fide domestic basis although not legally married to the member or former member; or
- in a *customary marriage*, that is, if the member or former member is an Aborigine or Torres Strait Islander, the person is recognised as the member's or former member's husband or wife by custom prevailing in the tribe or group to which the member or former member belongs.

16.19 Unlike under s 11A of the VEA, the MRCA does not set out any indicators for establishing that a person is in a marriage-like relationship. The following factors have been accepted as important in a number of cases:²¹⁰

- all aspects of the relationship must be considered;
- the relationship should have a quality of permanence;
- the living arrangements and sexual activity of the parties having a quality of exclusiveness;

- pooling of resources;
- sharing of expenses;
- the parties hold themselves out as being married or life partners;
- the parties have a subjective belief that their relationship is like that of husband and wife;
- the parties being joint parents of a child;
- the parties have a joint social life;
- one party has a legal right to enforce obligations on the other.

16.20 Current social standards and the cultural background of the persons involved must be considered in determining whether two people were in a marriage-like relationship at the time of the member's death.

16.21 The weight to be given to each of the relevant indicators of a marriage-like relationship may vary over time and between different cases.

16.22 It is important not to rely on any one indicator as being definitive of a relationship. The whole of the circumstances of each case must be considered and each of the applicable indicators must be given weight appropriate to those circumstances.

²⁰⁹ MRCA, s 5

²¹⁰ *Re Tang and DGSS* (1981) 3 ALN N83; and *Re Roberts and SDSS* (1987) 12 ALD 723.

Determining eligibility as a partner of a deceased member

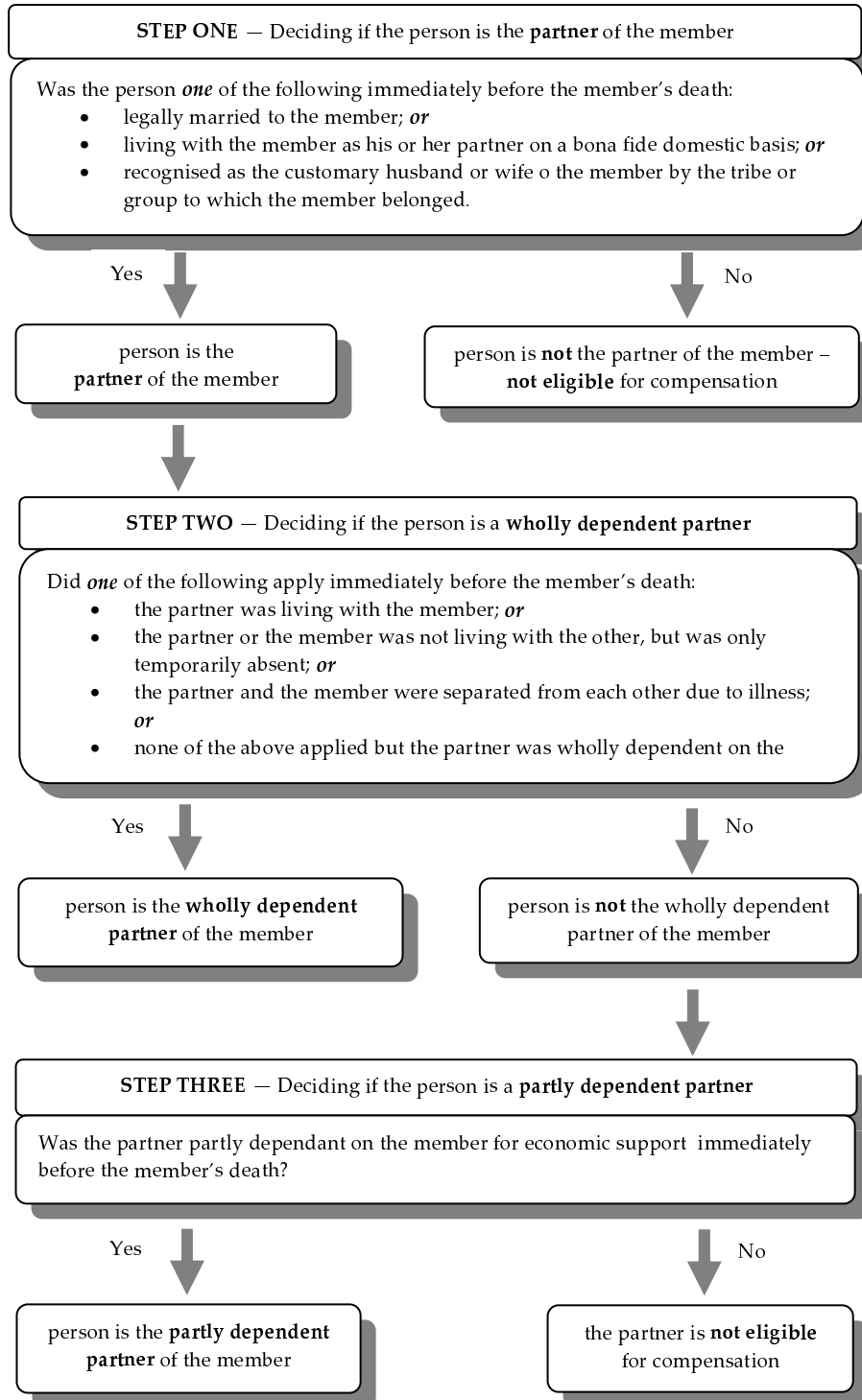


Table for calculating the additional lump sum death benefit for wholly dependent partners

Partner's age-based number under s 234(2) of the MRCA			
Partner's age next birthday on the date of the member's death	Partner's age based number	Partner's age next birthday on the date of the member's death	Partner's age based number
Up to 41	1.0000	66	0.6231
42	0.9884	67	0.6044
43	0.9765	68	0.5855
44	0.9643	69	0.5665
45	0.9518	70	0.5473
46	0.9391	71	0.5280
47	0.9260	72	0.5086
48	0.9126	73	0.4892
49	0.8989	74	0.4699
50	0.8850	75	0.4507
51	0.8707	76	0.4314
52	0.8562	77	0.4122
53	0.8413	78	0.3929
54	0.8262	79	0.3738
55	0.8108	80	0.3550
56	0.7951	81	0.3366
57	0.7791	82	0.3189
58	0.7629	83	0.3017
59	0.7463	84	0.2853
60	0.7295	85	0.2697
61	0.7125	86	0.2548
62	0.6951	87	0.2408
63	0.6775	88	0.2276
64	0.6596	89	0.2152
65	0.6415	90	0.2036

The number obtained from this table is multiplied by the maximum additional lump sum that is available under s 234(2) to determine the additional lump sum payable to the partner.

Compensation for wholly dependent partners

16.23 A wholly dependent partner (see page 117) of a member or former member whose death has been accepted as a service death²¹¹ is entitled either to:²¹²

- a tax-free periodic payment equivalent to the rate of the VEA war widow's pension; or
- a lump sum equivalent to that pension (determined by reference to the claimant's age and gender).

16.24 These benefits are also available to a wholly dependent partner if the member or former member:

- satisfied the eligibility requirements for the Special Rate Disability Pension at some time during his or her life;²¹³ or
- had been assessed at 80 or more impairment points immediately before his or her death.²¹⁴

Manner of payment

16.25 Compensation can be paid as a periodic payment or a lump sum. Until the person chooses one or the other, it is paid as a pension. The person has 6 months to advise of their choice.²¹⁵

16.26 A partner is entitled to compensation towards the cost of financial advice in making a choice between a periodic payment and a lump sum.²¹⁶

²¹¹ MRCA, s 12(1), s 28, s 29

²¹² MRCA, s 233, s 234(1)(b), s 234(5)

²¹³ MRCA, s 12(2)

²¹⁴ MRCA, s 12(3)

²¹⁵ MRCA, s 234, s 235, s 236

²¹⁶ MRCA, s 239, s 240

Additional lump sum death benefit for wholly dependent partners

16.27 A wholly dependent partner of a member or former member whose death has been accepted as a service death²¹⁷ is entitled to a lump sum in addition to the periodic compensation (which can be converted to a lump sum).²¹⁸

16.28 While the periodic compensation is available if the member or former member had been assessed at 80 impairment points or had been entitled to the Special Rate Disability Pension, the additional lump sum is not available unless the death has been determined to be a service death.

16.29 The amount of the lump sum depends on the partner's age. The maximum lump sum provided in s 234(2) (as indexed by s 404) is multiplied by the 'partner's age-based number'.

Other benefits for wholly dependent partners

16.30 A wholly dependent partner who is eligible for death benefits is also entitled to:

- a gold card for medical treatment;²¹⁹
- a pharmaceutical allowance;²²⁰
- a telephone allowance;²²¹ and
- an income and assets tested income support supplement under the VEA.

16.31 **Partly dependent partners** may also be entitled to compensation. See page 123.

²¹⁷ MRCA, s 12(1), s 28, s 29

²¹⁸ MRCA, s 234(1)(a), s 234(2)

²¹⁹ MRCA, s 284

²²⁰ MRCA, s 300

²²¹ MRCA, s 245

Compensation for eligible young persons

16.32 An eligible young person is a person who is:

- under 16 years of age; or
- aged between 16 and 25 and receiving full-time education and not in full-time work.

16.33 An eligible young person need not have been a child of the member (or former member), but in order to be a 'dependant', the eligible young person must have been at least partly dependent on the member at the time of the member's death.

Wholly or mainly dependent eligible young person

16.34 An eligible young person who was wholly dependent on a member to whom s 12 of the MRCA applies because:

- the member's death has been accepted as a service death;²²² or
- permanent impairment had been assessed at 80 impairment points immediately before the member's death; or
- at some time the member had been entitled to the Special Rate Disability Pension,

may be entitled to:

- lump sum compensation;²²³ and
- weekly compensation;²²⁴ and

- gold card health care; and
- pharmaceutical allowance; and
- education assistance.

16.35 To be entitled to all these benefits, the eligible young person must have been wholly or mainly dependent on the member immediately before the member's death.²²⁵

Partly dependent eligible young person

16.36 The **lump sum compensation** is payable and **education assistance** is available if the eligible young person was at least partly dependent on the member at the time of the member's death.²²⁶

Education assistance to eligible young person if member is severely disabled

16.37 Education assistance is also available if the eligible young person is at least partly dependent on a member of former member who:

- satisfies the eligibility criteria for the Special Rate Disability Pension (see page 109) or who has satisfied it at sometime in his or her life; or
- has impairment from service injury or disease of at least 80 impairment points.²²⁷

²²² MRCA, s 28, s 29

²²³ MRCA, s 251, s 252

²²⁴ MRCA, s 253, s 254

²²⁵ MRCA, s 253(1)(c)

²²⁶ MRCA, s 251(a)(ii)

²²⁷ MRCA, s 258

Compensation for other dependants

Who qualifies as an ‘other dependant’?

16.38 Section 15 lists a variety of classes of persons who may qualify as an ‘other dependant’ of a member or former member. The chart at page 116 shows the range of potential ‘other dependants’.

Partly dependent partner

16.39 A partner who does not qualify as being wholly dependant, but who was *partly dependent* on the member or former member, might be entitled to compensation under s 262 of the MRCA as an ‘other dependant’.

What compensation is available to ‘other dependants’?

16.40 The compensation available to such dependants is whatever amount is considered ‘reasonable’ up to the current statutory maximum of \$64,928.56 per person and a statutory maximum of \$205,607.12 in total for all dependants.²²⁸ Those maximum amounts are indexed annually.²²⁹

How is the amount of compensation determined?

16.41 In deciding what is a reasonable amount to be paid to any particular dependant, regard must be had to:²³⁰

- any financial loss suffered by the dependant as a result of the death of the member or former member; and

- the degree to which the person was dependent on the member or former member; and
- the length of time the person would have been dependent on the member or former member.

16.42 No other matters can be taken into account in making that decision. In particular, regard cannot be had to any amount paid or payable under the MRCA before the member or former member died.²³¹

Example: David is 28 years old and a full-time university student. He has a part-time job. His income is about \$250 per week. At the time of his father’s death, he was regularly paying him \$80 a week. His father had agreed to assist him return to university so that he could compete his Doctorate. He will be finished that degree in 18 months time.

David spends his income of \$330 a week as follows:

Rent	\$180
Transport	\$20
Food	\$60
Clothing	\$20
Social events	\$30

David is over 25 and so is not an eligible young person. As he was **partly dependent** on his father for economic support, he is entitled to a **lump sum** of up to \$64,928.56.

However, he cannot be paid any amount greater than the level of his dependency on his father. His father would have continued paying him \$100 a week for the next 18 months. This amounts to \$7,800. That is the amount of compensation to which he is entitled.

²²⁸ MRCA, s 263. These were the amounts as at May 2006.

²²⁹ MRCA, s 404

²³⁰ MRCA, s 263(1)

²³¹ MRCA, s 263(2)

Appeals from the AAT

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Federal Court appeal

- 17.1 Parties to proceedings before the AAT may appeal to the Federal Court on ‘a question of law’.²³²
- 17.2 The Court’s review is limited to deciding whether the AAT made a legal error when it decided the matter. In general, the Court cannot review the evidence or the facts of the case as found by the AAT, but must accept the facts that the AAT found.
- 17.3 The appeal must comply with the Federal Court Rules and set out the grounds of the appeal by stating the legal errors said to have made by the AAT. A lawyer should prepare this.

Transfer to Federal Magistrates Court

- 17.4 At its discretion, the Federal Court may transfer the case to the Federal Magistrates Court. This is likely to happen in less complex matters.²³³

Time limit in which to apply

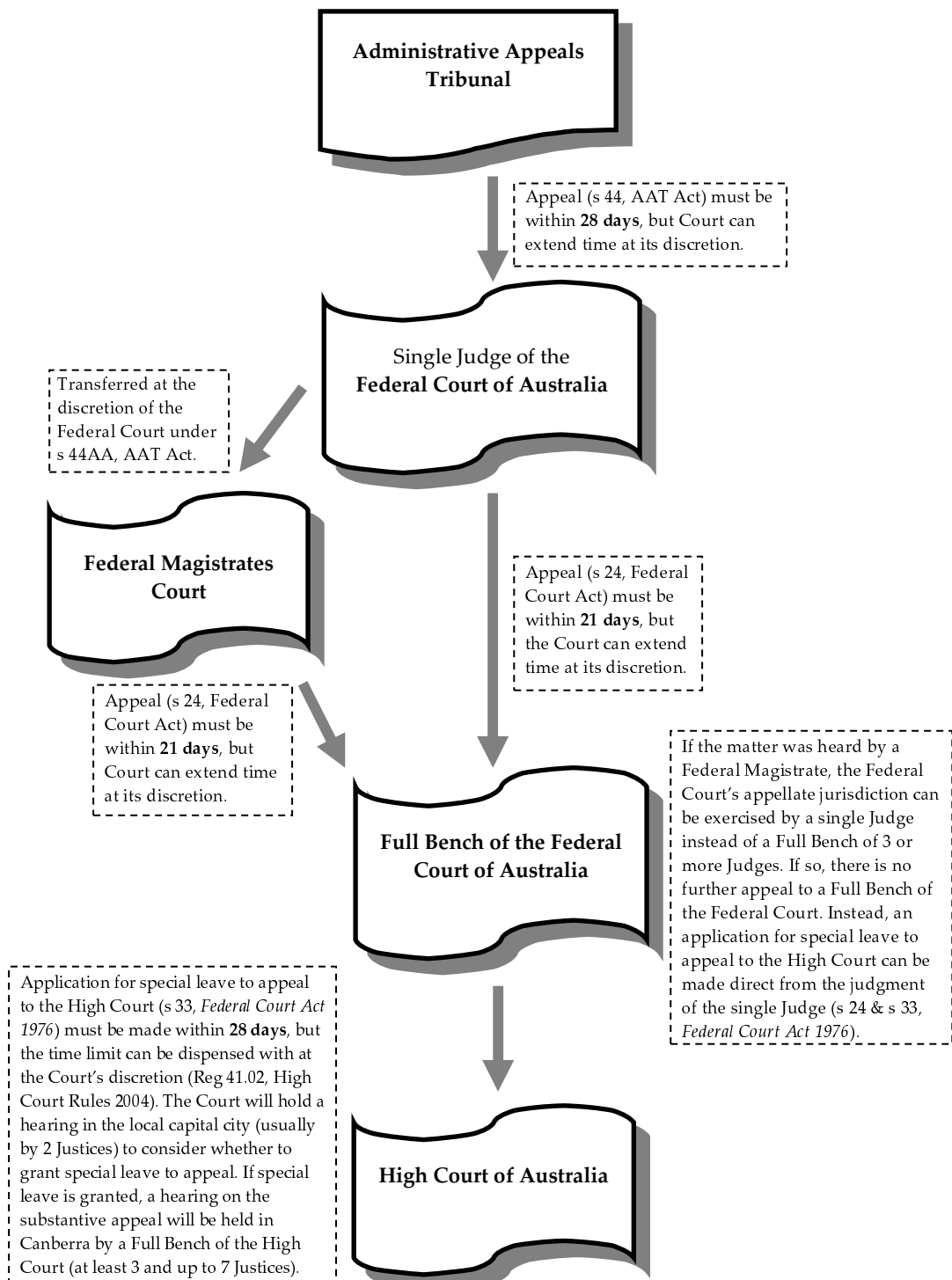
- 17.5 An application to the Federal Court must be lodged within **28 days** of written notification of the AAT decision.²³⁴
- 17.6 If the AAT gives oral reasons for decision it will post a written notice of the decision, but not its reasons, to the applicant and the Commission. Either party may request written reasons from the AAT. However, the 28 days in which to apply to the Court begins to run from when the written notice of the *decision* is received, not from when the written reasons are received.
- 17.7 A substantial application fee applies for appeals to the Court, but an application may be made to have the fee waived.
- 17.8 The Court may grant an extension of time in which an appeal can be made, but like applications for extension of time to the AAT, the onus is on the applicant to convince the court why it should do so.

²³² AAT Act, s 44

²³³ AAT Act, s 44AA

²³⁴ AAT Act, s 44(2A)

Appeals from the AAT



Legal assistance guidelines

The following are the main guidelines concerning the availability of legal aid for matters before the AAT. See page 92 for a brief discussion about the availability of legal aid. Legal aid under Guideline 2 is subject to a means test. Legal aid under Guideline 5 is not subject to a means test.

Guideline 2 – Social security and other Commonwealth benefits

2.1 Representation at Administrative Appeals Tribunal

Subject to guideline 2.2, the Commission may make a Grant of Legal Assistance to an applicant for assistance for representation at the Administrative Appeals Tribunal if:

- (a) it is considered that the applicant may incriminate himself or herself;
- (b) the case is complicated;
- (c) it would be unreasonable to expect the applicant for assistance to adequately represent himself or herself due to special circumstances of a kind listed in the Commonwealth Legal Aid Priorities; or

Note Special circumstances are set out in subclause paragraph 6.7.2 of the Agreement.

- (d) the Commission determines that the appeal involves an important or complex question of law.

2.2 Appeals to Administrative Appeals Tribunal

The Commission may make a Grant of Legal Assistance to an applicant for assistance to obtain instructions and necessary reports and prepare submissions

for an appeal to the Administrative Appeals Tribunal, if:

- (a) the appeal may result in the applicant being charged with a criminal offence;
 - (b) the applicant cannot afford to pay for medical reports, and the appeal is about the health of the applicant or someone for whom the applicant has parental or legal responsibility;
 - (c) it would be unreasonable to expect the applicant for assistance to adequately represent himself or herself due to special circumstances of a kind listed in the Commonwealth Legal Aid Priorities; or
- Note Special circumstances are set out in subclause paragraph 6.7.2 of the Agreement.
- (d) the Commission determines that the appeal involves important or complex questions of law.

Guideline 5 – War veterans' matters

5.1 Purpose

(1) To acknowledge the special contribution made by war veterans to protecting Australian society in time of war, the Commission may make a Grant of Legal Assistance to an applicant for assistance who is a war veteran or a dependent of a war veteran in relation to:

- (a) appeals from decisions of the Veterans' Review Board about war-caused disability pension entitlement or assessment claims under Part II of the *Veterans' Entitlements Act 1986*, and
- (b) appeals from decisions of the Veterans' Review Board about claims under the *Military Rehabilitation and Compensation*

Act 2004 that relate to warlike or non-warlike service, in regard to:

- (i) acceptance of liability (Chapter 2),
- (ii) rehabilitation programs (Chapter 3, Part 2),
- (iii) permanent impairment (Chapter 4, Part 2),
- (iv) incapacity payments for former members (Chapter 4, Part 4),
- (v) special rate disability pension (Chapter 4, Part 6), and/or
- (vi) dependants' benefits (Chapter 5).

(2) An application for a Grant of Legal Assistance under this guideline 5.1 is not subject to:

- (a) the means test, or
- (b) the applicant for assistance making any contribution to the cost of his or her legal assistance provided by the Commission in relation to the matter, other than to the extent of any costs recovered from the respondent in the matter.

5.2 Assistance for complex matters

(1) The Commission may determine the most appropriate Grant of Legal Assistance to make in a war veterans' matter that it determines to be a complex matter.

(2) The Commission may determine that a matter is complex at any time.

(3) In determining whether a matter is complex, the Commission may have regard to:

- (a) whether several conditions are being claimed, and reports are required from 3 or more areas of medical expertise
- (b) whether there is a complex link between statements of principle and the condition claimed, and
- (c) whether the matter involves unresolved questions of law.

(4) In making its determination, the Commission may consult:

- (a) the applicant for assistance
- (b) the national office of the Department of Veterans' Affairs, and
- (c) the Administrative Appeals Tribunal.

5.3 Assistance for non-complex matters

(1) The Commission may make a Grant of Legal Assistance in a war veterans' matter that it determines to be a non-complex matter only in the following stages:

- (a) stage 1 — funding for costs and disbursements in relation to:
 - (i) a maximum of 10 hours work up to and including the second preliminary conference (including all attempts to settle the matter), and
 - (ii) up to 2 medical reports, if necessary, and

(b) stage 2 — funding for costs and disbursements in relation to:

- (i) a maximum of 12 hours work for the hearing (including all preparation and either the costs of a solicitor or the fees of a barrister for appearing at the hearing), and
- (ii) witness expenses, if applicable.

(2) The total amount of funding that may be made available for disbursements for a non-complex matter is \$2,500.

(3) Funding at each stage is subject to compliance with the Commonwealth's Checklist for Administration of War Veterans' Matters and the Administrative Appeals Tribunal's General Practice Direction.

Time limits

Veterans' Entitlements Act 1986

Matter	Issue	Time limit	Extension of time
Application to VRB	Assessment of pension	3 months	No
	Entitlement matter	12 months, but 3 months for maximum benefits	No
	Attendant allowance	3 months	No
s 137 Report	Preparation by Secretary of DVA and provision to applicant	6 weeks	No
VRB s 148(1) notice	Request to applicant to advise how VRB case to be heard	28 days	Upon request
VRB s 155AA(4) or s 155AB(4) notice	Response to notice	28 days	No
Application to AAT	Assessment, entitlement, or attendant allowance	3 months	Up to 12 months at discretion of AAT
	Dismissal of VRB application under s 155AA or s 155AB	28 days	At discretion of AAT

Military Rehabilitation and Compensation Act 2004

Matter	Issue	Time limit	Extension of time
Application to VRB	All matters	12 months	No
s 137 Report	Preparation by MRCC and provision to applicant	6 weeks	No
VRB s 148(1) notice	Request to applicant to advise how VRB case to be heard	28 days	Upon request
VRB s 155AA(4) or s 155AB(4) notice	Response to notice	28 days	No
Application for s 349 reconsideration	All matters	30 days	At discretion of MRCC or service chief
Application to AAT	From VRB determination	3 months	Up to 12 months at discretion of AAT
	From s 349 reconsideration	60 days	At discretion of AAT
	Dismissal of VRB application under s 155AA or s 155AB	28 days	At discretion of AAT

Dates of effect

Veterans' Entitlements Act 1986

Matter	Circumstance	Date of effect	Section
Claim for pension (disability, war widow's, or orphan's pension)	If applied to VRB within 3 months of notice of the Commission's decision.	3 months before the claim was lodged ('earliest date').	§ 157(2)(a)(i) § 20(1)
	If applied to VRB more than 3 months after notice of the Commission's decision.	6 months before the application for review was lodged ('earliest date').	§ 157(2)(a)(ii) § 20(1)
Disability pension	If incapacity arose after the earliest date.	The date the person had pensionable incapacity from the injury or disease.	§ 20(3) § 21(3)
War widow's or orphan's pension	If veteran or member died after the earliest date.	The day after the date of death.	§ 20(3)
Application for increase		The date the application for increase was lodged.	§ 157(2)(a)(i) § 21(1)
Assessment of pension	If the degree of incapacity changes or the person becomes eligible for another rate in the assessment period.	The rate of pension changes from the date of the change in degree of incapacity or eligibility unless it would result in a reduction in the rate of pension.	§ 157(2)(a)(i) § 19(5C)
Temporary special rate		Must set date when temporary rate will cease as well as the rate of pension to which pension will be reduced.	§ 157(2)(a)(i) § 25(3)
'Informal' claim or application	If a person makes a claim or application for increase other than in accordance with the approved form, and within 3 months of being notified that a formal claim or application must be made makes a formal claim or application.	The date of lodgement of the informal claim or application is taken to be the date of the claim or application for the purpose only of setting a date of effect. A document is an informal claim only if it was intended to be a claim and not merely an inquiry, or an expression of intention to make a claim in the future, or an application for a review. ²³⁵ If a person's eligibility is dependent on the date of making the claim (eg, if the person's age at the date of claim is important for eligibility), it is the date of the <i>formal</i> claim that counts, not the date of the <i>informal</i> claim. ²³⁶	§ 20(2) § 21(2)
Attendant allowance	Application for the allowance made within 3 months of grant of pension.	The date of the grant of the claim for pension.	§ 157(2)(a)(i) § 114(2)(a)
	Application not made within 3 months of grant of pension.	The date the application for the allowance was lodged.	§ 157(2)(a)(i) § 114(2)(b)

²³⁵ *Morrow v Repatriation Commission* [1997] FCA 64, *Re Clough and Repatriation Commission* (1997) 44 ALD 457, *Re Feben and Repatriation Commission* (1988) 50 ALD 600

²³⁶ *Re Feben and Repatriation Commission* (1988) 50 ALD 600, *Re Clough and Repatriation Commission* (1997) 44 ALD 457

Dates of effect

When no date of effect can be set			
Affirmation	of decision under review	As there is no change, no date can be set.	§ 156(1)(a)
Reduction	in rate of pension	VRB must remit setting the date to the Repatriation Commission.	§ 157(2)(b) § 157(3)
Suspension	of pension	VRB must remit setting the date to the Repatriation Commission.	§ 157(2)(b) § 157(3)
Cancellation	of pension	VRB must remit setting the date to the Repatriation Commission.	§ 157(2)(b) § 157(3)
Revocation	of cancellation or suspension of pension	The decision that has been set aside is deemed not to have had any legal effect.	§ 156(1)(b)

Military Rehabilitation and Compensation Act 2004

Matter	Circumstance	Date of effect	Section
Permanent impairment payment – new disability	If the person had impairment of at least the minimum threshold impairment level that was likely to continue indefinitely and had stabilised <i>when the claim was made</i> .	The date of the claim for liability for that injury or disease.	§ 77(1)(a)
	If the person has impairment of at least the minimum threshold impairment level that is likely to continue indefinitely and has stabilised but only <i>after the claim was made</i> .	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	§ 77(1)(b) § 68 § 69
Additional permanent impairment payment – new disability	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised <i>when the latest claim was made</i> .	The date of the most recent claim for liability for an injury or disease that gave rise to the increased combined impairment.	§ 77(2)(a) § 71
	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised but only <i>after the claim was made</i> .	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	§ 77(2)(b) § 71
Additional permanent impairment payment – deterioration	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised <i>when the deterioration was notified to the MRCC</i> .	The date of the notification to the MRCC	§ 77(3)(a)

Dates of effect

Matter	Circumstance	Date of effect	Section
Additional permanent impairment payment – deterioration	If the person had an increased combined impairment of at least 5 impairment points that was likely to continue indefinitely and had stabilised but only <i>after the claim for additional compensation was made</i> .	The date that the impairment had stabilised at the relevant impairment level and was likely to continue indefinitely.	s 77(3)(b) s 71(2)
Interim compensation for impairment	If the person had impairment of at least 10 impairment points <i>when the claim was made</i> .	The date of the claim for liability for that injury or disease.	s 77(4)(a)
	If the person had impairment of at least 10 impairment points <i>only after the claim was made</i> .	The date on which the impairment was at least 10 impairment points.	s 77(4)(b) s 75(3)
Additional compensation	If impairment has stabilised from an injury or disease for which interim compensation has been paid	The date on which all the person's service injuries or diseases stabilised.	s 77(5) s 75(5)
Permanent impairment compensation	Decision made to choose lump sum	30 days after the day the MRCC became aware of the choice made by the person to take a lump sum.	s 79
Incapacity for service or work	If incapacity for service or work resulted from a service injury or disease not accepted on the basis of aggravation.	The date of onset of incapacity for service or work resulting from the service injury or disease.	s 89 s 342
	If incapacity for service or work resulted from an aggravated injury or disease.	The date of onset of incapacity for service or work resulting from the aggravation of the injury or disease.	s 88 s 89 s 342
Special Rate Disability Pension	Decision made to choose SRDP	The day on which the MRCC became aware of the person's choice to accept that pension.	s 203(2)(b)
Household services		The date the person obtained household services that he or she reasonably required because of the service injury or disease (or the aggravation of the injury or disease if liability was accepted on that basis).	s 214
Attendant care services		The date the person obtained attendant care services that he or she reasonably required because of the service injury or disease (or the aggravation of the injury or disease if liability was accepted on that basis).	s 217
Telephone allowance	If person who does, or has at some time, satisfied the special rate disability pension (SRDP) criteria	The date on which the person first satisfied the eligibility criteria for the SRDP, was an Australian resident, and had a telephone connected in their own name or jointly with someone else.	s 221(1)

Dates of effect

Matter	Circumstance	Date of effect	Section
Telephone allowance	If person who has 80 or more impairment points	The date on which the person had 80 or more impairment points from service injuries or diseases, was an Australian resident, and had a telephone connected in their own name or jointly with someone else.	s 221(2)
Compensation for wholly dependant partner	Commencement of payment of weekly amount	The date of death.	s 234(5)
Compensation for eligible young person	Commencement of payment of weekly amount	The Act does not specify a date of effect other than, if the person was born after the member died, compensation is payable from the week in which the person was born. As this is not specified as an earliest date, but as <i>the</i> date of effect, and it might be before the date a claim was made, it implies that the same date of effect would apply as that applicable to the wholly dependant partner – the date of death.	s 253
Compensation for cost of treatment	If service injury or disease not accepted on the basis of aggravation.	The date from which treatment was first provided for the service injury or disease.	s 271 s 272 s 273
	For injury or disease from which the person died, and whose death from that cause is accepted as a service death.	The date from which treatment was first provided for that injury or disease.	s 271 s 272
	For service injury or disease accepted on the basis of aggravation.	The date from which treatment was first provided after the aggravation of the injury or disease was sustained (and ending when the effects of the aggravation cease).	s 271 s 272 s 273 s 275
Pharmaceutical allowance		The date from which the person was entitled to treatment under the MRCA.	s 300
When no date of effect can be set			
Affirmation	of decision under review	As there is no change, no date can be set.	VEA s 156(1)(a) as applied by MRCA s 353(1), (2) item 19
Acceptance of liability		No date from which liability is accepted is necessary. Instead, a date of effect is determined later as part of the process of determining the level or amount, if any, of compensation that is payable.	
Compensation for other dependants		As it is a lump sum, no date of effect is required.	s 262 s 263
Compensation for travel	accommodation or travel costs relating to treatment	No date of effect is necessary.	s 290 s 291 s 297

Glossary

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VEA concepts or abbreviations

AFI.....	Application for an increase in disability pension.
Application day.....	The day the claim or AFI was lodged. This is the start of the assessment period.
Assessment matter.....	A case concerning the assessment of the rate of disability pension.
Assessment period.....	Period over which the decision-maker must assess the rate or rates of pension that were payable. It begins on the day the claim or AFI was lodged (the 'application day') and ends on the day the decision-maker determines the claim or AFI, or determines the review.
Attendant allowance.....	A fortnightly allowance paid towards the cost of an attendant for a person needing such assistance and who has accepted disabilities involving one of a number of types of amputations or severe types of disability, or an injury or disease similar in effect or severity to a disease of the cerebro-spinal system.
Australian mariner.....	A person who was employed in the merchant navy during WW2. An Australian mariner is a 'veteran'.
Decision.....	A determination or assessment.
Defence service.....	Continuous full-time service in the ADF on or after 7 December 1972 and until 6 April 1994 (or until 30 June 2004 if enlisted before 22 May 1986). Must have served at least 3 continuous years unless discharged on medical grounds. Defence service includes hazardous service.
Defence-caused death.....	A death for which liability has been accepted under Part IV of the VEA as related to defence service or peacekeeping service.
Defence-caused disease.....	A disease for which liability has been accepted under Part IV of the VEA as related to defence service or peacekeeping service.
Defence-caused injury.....	An injury for which liability has been accepted under Part IV of the VEA as related to defence service or peacekeeping service.

Glossary

Degree of incapacity.....	A measurement of the effects of war- or defence-caused injuries and diseases assessed using GARP. This is a preliminary step in pension assessment.
Disability pension.....	A fortnightly pension paid as compensation for incapacity from war- or defence-caused injuries or diseases.
EDA	Extreme disablement adjustment rate of disability pension.
Eligible war service.....	Service in the ADF during WW1 or WW2; or employment as an Australian mariner in WW2; or service in the Interim Forces on or after 1 July 1947; or any operational service.
Entitlement matter.....	A case concerning whether an injury, disease, or death is war- or defence-caused.
FESR	Far East Strategic Reserve: a military force contributing to the defence of Malaya and Singapore and deterrence of communist insurgence in the 1950s and 60s.
GARP	Guide to the Assessment of the Rates of Veterans' Pensions. GARP is used to assess a person's 'degree of incapacity'.
General rate.....	A rate of disability pension paid as a percentage (in increments of 10%, up to 100%) of the general rate. The percentage of the general rate is the same as the percentage degree of incapacity the person suffers from war- or defence-caused injuries and diseases (assessed under GARP).
Hazardous service.....	Service declared by instrument in writing by Defence Minister to be hazardous service. The reasonable hypothesis and beyond reasonable doubt evidentiary provisions apply to the connection between hazardous service and injury, disease or death. Hazardous service is a category of defence service.
Intermediate rate.....	A rate of disability pension higher than the general rate. It is paid if the person meets certain tests concerning incapacity for work. One of these tests involves being unable to do 20 or more hours remunerative work a week due to accepted disabilities.
Member.....	A person who has rendered defence service or peacekeeping service under Part IV of the VEA.
Non-warlike service.....	Service declared by instrument in writing by the Defence Minister to be non-warlike service. It is a category of operational service and eligible war service.
Operational service.....	Service outside Australia during WW1 or WW2, or in actual combat against the enemy during WW1 or WW2, or 3 months continuous service between 19 Feb 1942 and 12 Nov 1943 in Northern Territory north of 14°30'S, or after WW2 being allotted for duty in an operational area (and serving in that area), or rendering warlike service or non-warlike service. The reasonable hypothesis and beyond reasonable doubt evidentiary provisions apply to the connection between operational service and injury, disease or death.

Glossary

Orphan's pension.....	A fortnightly pension paid as compensation to a child of a person whose death has been accepted as war-caused or defence-caused.
Peacekeeping service.....	Service as a member of a Peacekeeping Force set out in Schedule 3 to the VEA or in an instrument by the Veterans' Affairs Minister declaring a particular Force to be a Peacekeeping Force.
s 31 review.....	Review by a delegate of the Repatriation Commission.
s 137 report.....	Documents prepared by DVA for the purpose of a VRB review.
Special rate.....	The highest rate of disability pension (also called the 'TPI' rate). It is paid if the person is blind due to accepted disabilities, or if the person meets certain tests concerning incapacity for work. One of these tests involves being unable to do more than 8 hours remunerative work a week due to accepted disabilities.
Temporary special rate.....	Temporary payment of the special rate of pension (also called the 'TPI' rate). It is paid if the person meets all the tests for the special rate except that the person's incapacity for work is temporary rather than permanent.
TPI.....	Totally and permanently incapacitated: a recipient of the special rate of disability pension.
VEA.....	<i>Veterans' Entitlements Act 1986.</i>
Veteran.....	A person who has rendered eligible war service under Part II of the VEA.
War-caused death.....	A death for which liability has been accepted under Part II of the VEA as related to eligible war service.
War-caused disease.....	A disease for which liability has been accepted under Part II of the VEA as related to eligible war service.
War-caused injury.....	An injury for which liability has been accepted under Part II of the VEA as related to eligible war service.
Warlike service.....	Service declared by instrument in writing by the Defence Minister to be warlike service. It is a category of operational service and eligible war service.
War widow's pension.....	A fortnightly pension paid as compensation to the widow of a male person whose death has been accepted as war-caused or defence-caused (whether they had been legally married to the person or not).
War widower's pension.....	A fortnightly pension paid as compensation to the widower of a female person whose death has been accepted as war-caused or defence-caused (whether they had been legally married to the person or not).
WW1.....	World War 1: 4 August 1914 to 1 September 1921 (hostilities ended 11 November 1918).
WW2.....	World War 2: 3 September 1939 to 28 April 1952 (hostilities ended 29 October 1945, formal Japanese surrender 2 September 1945).

MRCA concepts or abbreviations

Applied provisions.....	Provisions of the VEA that set out the VRB's powers and functions, which are applied by s 353 of the MRCA for the purpose of the VRB's review of an original determination under Part 4 of Chapter 8 of the MRCA.
CTPA	<i>Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004</i>
Declared member.....	A person who is, or is in a class of persons that is, the subject of an instrument by the Defence Minister under s 8 of the MRCA, who has engaged in activities or performed acts at the request or direction of the ADF, or for the benefit of the ADF, or in relation to the ADF under a Commonwealth law.
Defence service.....	Any service in the ADF (or as a cadet or a declared member) on or after 1 July 2004. It includes warlike service, non-warlike service and peacetime service.
Dependant.....	A person who was dependent on the member or former member for economic support or who was deemed to be wholly dependent because the person was the partner or an eligible young person who was living with (or was temporarily separated or illness separated from) the member or former member at the time of his or her death.
Dependent.....	Being dependent on the member or former member for economic support.
Determination.....	A decision or assessment.
Eligible young person.....	A person who is under 16 years; or a person who is between 16 and 25 and in full-time education and not in full-time employment.
Former member.....	A person who is not currently serving as a member of the ADF, but who did serve as a member on or after 1 July 2004.
GARP M.....	Guide to Determining Impairment and Compensation (under the MRCA).
Incapacity payments.....	Periodic payments of compensation for incapacity for service or work related to the person's normal earnings immediately before the incapacity arose and which is reduced by the person's actual earnings and, in some cases, their ability to earn.
Liability matter.....	A case concerning whether an injury, disease, or death is service-related.
Member.....	A person who is currently serving as a member of the ADF or is a declared member.
MRCA	<i>Military Rehabilitation and Compensation Act 2004.</i>
MRCC.....	Military Rehabilitation and Compensation Commission.

Glossary

Needs assessment.....	An assessment carried out by a delegate of the MRCC, after liability has been accepted and before compensation is determined, to assess the benefits to which the person is eligible under the MRCA.
Non-warlike service.....	Service on or after 1 July 2004 determined by instrument in writing by the Defence Minister to be non-warlike service. It is also defence service.
Original determination.....	A determination of the MRCC or a service chief under the MRCA that is capable of being reviewed by the VRB or being reconsidered by another delegate of the MRCC or a service chief.
Other dependants.....	Dependants other than a wholly dependant partner or an eligible young person.
Partner.....	Person of the opposite sex who is legally married, in a de facto relationship, or in a customary or tribal marriage to the member or former member.
Peacetime service.....	Service in the ADF (or as a cadet or a declared member) on or after 1 July 2004 that is neither warlike service nor non-warlike service. It is also defence service.
Permanent impairment payments...	Compensation for permanent impairment from service injury or disease. It is payable as a weekly amount or as a lump sum (or both in some cases).
Rehabilitation.....	A course of action or treatment aimed at maximising the potential and restoring a person who has an impairment, or an incapacity for service or work, as a result of a service injury or disease to at least the same physical and psychological state, and at least the same social, vocational and educational status, as he or she had before the injury or disease.
Reviewable determination.....	A determination of the VRB or a reconsideration delegate of the MRCC or a service chief under s 349 of the MRCA that is capable of being reviewed by the AAT.
s 137 report.....	Documents prepared by MRCC for the purpose of a VRB review.
s 347 reconsideration.....	Reconsideration of an original determination by a delegate of the MRCC or a service chief at their own discretion.
s 349 reconsideration.....	Reconsideration of an original determination by a delegate of the MRCC or a service chief at the request of a claimant. If such a request is made, the person cannot also seek review of the same determination by the VRB.
Service chief.....	The Chief of the Army, the Chief of the Air Force, or the Chief of the Navy.
Service death.....	A death for which liability has been accepted as related to defence service.
Service disease.....	A disease for which liability has been accepted as related to defence service.

Glossary

Service injury.....	An injury for which liability has been accepted as related to defence service.
Special Rate Disability Pension.....	Periodic compensation payment payable in place of incapacity for service or work payments and permanent impairment payments under the MRCA. It is paid at the same rate as the special rate of pension is paid under the VEA.
SRDP.....	Special Rate Disability Pension.
TMS.....	Transition Management Service: a service provided by the member's service chief who appoints a case manager, under s 64 of the MRCA, to assist a member in the transition to civilian life.
Warlike service.....	Service on or after 1 July 2004 determined by instrument in writing by the Defence Minister to be warlike service. It is also defence service.
Wholly dependent partner.....	A partner of a member or former member who was either: (1) wholly dependent on the member or former member for economic support at the time of that person's death; or (2) was living with the member or former member at the time of his or her death; or (3) would have been living with the member or former member at the time of his or her death but for a temporary absence or an absence due to illness or infirmity.

General concepts or abbreviations

AAR.....	<i>Administrative Appeal Reports.</i>
AAT.....	Administrative Appeals Tribunal.
AAT Act.....	<i>Administrative Appeals Tribunal Act 1975.</i>
ADF.....	Australian Defence Force.
Adjournment.....	Suspension of a hearing.
AFR.....	Application for a review by the VRB.
ALD.....	<i>Administrative Law Decisions.</i>
ALJR.....	<i>Australian Law Journal Reports.</i>
ALR.....	<i>Australian Law Reports.</i>
Applicant.....	A person or body that has applied for a review (to the VRB or AAT), or applied for an allowance or increase in pension (to DVA).
AustLII.....	Australasian Legal Information Institute: a joint facility of University of Technology Sydney and University of NSW that runs a website containing Commonwealth and State legislation and decisions of Australian and New Zealand courts and tribunals (www.austlii.edu.au).
BEST.....	Building Excellence in Support and Training: a grant scheme to assist ESO pension officers and representatives.
BoP.....	Balance of probabilities: standard of proof equivalent to 'reasonable satisfaction'.
BRD/RH.....	Beyond reasonable doubt / reasonable hypothesis: standard of proof applicable to the connection between injury, disease or death and operational service, peacekeeping service or hazardous service under the VEA, or warlike and non-warlike service under the MRCA.
Case law.....	The legal principles that have general application as stated by courts when giving their judgment in individual cases.
Case Manager.....	VRB staff member who looks after the administrative matters concerning an application for review.
Case appraisal.....	Examination of applications by VRB staff with a view to clarifying the issues, checking that the VRB has jurisdiction and that the applicant has standing, checking sufficiency of information, and readiness for hearing.
Certificate of readiness for hearing.....	A notice to the VRB that all the material on which the applicant wishes to rely has been lodged and the applicant is ready to proceed to a hearing.
Claimant.....	A person who has made a claim for a pension (to DVA) or claim for acceptance of liability and/or compensation (to the MRCC).

Glossary

CLIK.....	Consolidated Library of Information & Knowledge: a computer research tool for decision-makers and pension officers and representatives produced by DVA.
CLR.....	<i>Commonwealth Law Reports</i> .
Confidential information.....	Information that has been provided to someone on an understanding that it would be kept confidential (see VEA, s 153).
CoR.....	Certificate of readiness for hearing (see above).
Date of effect.....	The date from which a pension or compensation is payable.
Delegate.....	A delegate is a person who has been given the power to make decisions by, and in place of, a body or person that has been given that power by legislation.
Delegated legislation.....	Legislation made under an Act of Parliament by a specified person or body (the RMA's SoPs are delegated legislation). Since 2004, delegated legislation must be registered on FRLI and tabled in both houses of Parliament.
DSM-IV.....	Diagnostic and Statistical Manual of Mental Disorders, 4th Edition.
DVA.....	Department of Veterans' Affairs.
ESO.....	Ex-service organisation.
Extension notice.....	A notice under s 155AB of the VEA from a Registrar stating that a reason given by the applicant for not being ready for hearing is reasonable, and that a notice under s 155AB will be sent in 3 months time unless the case is then ready for hearing.
Extension of time.....	A direction of a court or tribunal enabling a person to make an application outside the standard time for making such an application.
FCR.....	<i>Federal Court Reports</i> .
FLR.....	<i>Federal Law Reports</i> .
FOI.....	Freedom of Information: the right to obtain documents from a Commonwealth Department or agency under the <i>Freedom of Information Act 1982</i> .
FRLI.....	Federal Register of Legislative Instruments – an on-line database (at www.comlaw.gov.au) established under the <i>Legislative Instruments Act 2003</i> containing all Commonwealth delegated legislation.
Gold Card.....	A health card that enables the holder to obtain medical treatment at Commonwealth expense for any condition whether related to service or not.
ICD.....	International Classification of Diseases.
Jurisdiction.....	1. Having the power to decide a particular matter. 2. The geographical area in which a court or tribunal operates.

Glossary

Legislation.....	Laws made by Parliament (a 'statute' or 'Act' of Parliament) or laws made under an Act ('legislative instruments' or 'regulations').
Legal aid.....	A scheme funded by the Commonwealth Government by which persons meeting certain criteria may obtain financial assistance to help pay for legal assistance or legal representation at a court or tribunal.
LMO.....	Local medical officer: a medical practitioner contracted to provide general medical services to holders of Repatriation health cards.
MCRS.....	Military Compensation and Rehabilitation Scheme: compensation scheme for members of the ADF under the <i>Safety, Rehabilitation and Compensation Act 1988</i> .
Member.....	A member of the VRB appointed by the Governor-General.
MIA.....	Medical impairment assessment.
MRCS.....	Military Compensation and Rehabilitation Scheme: compensation scheme for members of the ADF under the <i>Military Rehabilitation and Compensation Act 2004</i> .
NIF.....	No incapacity found.
Obiter dicta.....	Those parts of a court's reasons for judgment that are not binding because they were not essential to the outcome of the case. (See ratio decidendi.)
Precedent case.....	A court judgment that states a legal principle that applies to other cases. The legal principle on which a court case was decided will be binding on all courts and decision-makers lower in the hierarchy of courts (this is called the 'doctrine of precedent'). Tribunal cases are not precedent cases: only court cases can state binding legal principles.
Prejudicial information.....	Information that, if it were provided to a person, may be harmful to that person's health or well being (see VEA, s 153).
Principal Member.....	The member of the VRB appointed by the Governor-General who is responsible for the national management of the VRB, and who must have legal qualifications.
PTSD.....	Post traumatic stress disorder.
Ratio decidendi.....	The binding parts of a court's reasons for judgment. (See obiter dicta.)
Reconsideration.....	A new consideration or review of an original determination under s 347 or s 349 of the MRCA.
Registrar.....	VRB staff member who manages a State Registry of the VRB.
Registry.....	An office of a court, tribunal, or the VRB.
Respondent.....	A person or body against whom a claim, application, or appeal is brought; the party that responds to an application brought by an applicant.

Glossary

RMA.....	Repatriation Medical Authority.
RPD.....	<i>Repatriation Pension Decisions</i> (published by the VRB).
s 12 CTPA notice.....	Notice sent to a person by the MRCC requiring the person to choose between (a) making or continuing a claim under the MRCA; and (b) making or continuing an AFI under the VEA in respect of an injury or disease aggravated by service rendered on or after 1 July 2004.
s 37 documents.....	Documents prepared by the decision-maker for the purpose of an AAT review (also called 'T-documents').
s 148(1) letter.....	Letter sent to an applicant by the VRB seeking advice concerning how or if the applicant will appear or be represented at the VRB hearing.
s 148(6A) request.....	Request sent by VRB Registrar as delegate of Principal Member to the Secretary of DVA or MRCC seeking further investigation or documents.
s 151 adjournment.....	Adjournment of a hearing by VRB usually at the applicant's request, but can be for any reason.
s 152 adjournment.....	Adjournment of a VRB hearing in order that the presiding member can ask the Secretary of DVA or the MRCC for further investigation or further documents.
s 152 request.....	The request made to the Secretary of DVA or the MRCC by the presiding member of the VRB panel for further investigation or documents.
s 155AA notice.....	Notice sent to an applicant asking whether the case is ready for a hearing, and if not, why not. Failure to respond or failure to provide adequate reasons will result in dismissal of the VRB application.
s 155AB notice.....	Notice sent to an applicant following on from a 'reasonable explanation' response to an earlier s 155AA notice or a previous s 155AB notice asking whether the case is yet ready for a hearing, and if not, why not. Failure to respond or failure to provide adequate reasons will result in dismissal of the VRB application.
s 155AC authorisation.....	Authority to allow someone to represent an applicant for the purpose of responding to a particular s 155AA or s 155AB notice. A fresh authorisation to represent must be given after each such notice.
Senior Member.....	A member of the VRB appointed by the Governor-General who usually presides at VRB hearings, and who usually has legal qualifications.
Services Member.....	A member of the VRB appointed by the Governor-General who was nominated by an organisation representing veterans throughout Australia, and who usually has broad and extensive military experience.

Glossary

SMRC	Specialist Medical Review Council, which reviews determinations of the RMA.
SoP.....	Statement of Principles determined by the RMA.
SRCA.....	<i>Safety, Rehabilitation and Compensation Act 1988.</i>
Standing.....	A person has 'standing' if that person has a sufficient interest, recognised by law, in a matter such that it enables the person to apply to the court or tribunal about that matter.
Summons.....	An order made by a court or tribunal requiring a person to attend or produce documents to that court or tribunal. Failure to comply with a summons may be a criminal offence.
T-documents.....	Documents prepared by the decision-maker for the purpose of an AAT review (also called 's 37 documents').
Telephone hearing.....	A VRB hearing conducted by telephone between a VRB hearing room and another location.
TIP	Training and Information Program funded by DVA for training pension and welfare officers and representatives, conducted by ESO, DVA and VRB trainers.
VAN.....	Veterans' Affairs Network: a network of client service offices of the Department of Veterans' Affairs.
Video hearing.....	A VRB hearing conducted by video-link between a VRB hearing room and another location.
VITA	Veterans' Indemnity and Training Association Inc (see p 41).
VRB.....	Veterans' Review Board.
White Card.....	A health card that enables the holder to obtain medical treatment at Commonwealth expense for particular conditions for which the person has an entitlement to treatment under the VEA or MRCA.

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