

## PRODUCTIVITY COMMISSION DRAFT REPORT

### *A Better Way to Support Veterans*

#### Response by Peter Sutherland ANU School of Legal Practice

On 10 July 2018, I made a comprehensive Submission to the Commission expressing my views on how to improve military compensation arrangements in Australia, including my particular concern about:

- the need to harmonise and improve the existing legislative scheme, based on the MRCA, rather than enact a new military compensation Act; and
- whether the compensation provisions for incapacity in the MRCA are ‘fit for purpose’ because of their legislative complexity, possible detrimental effect on return to work after discharge, and failure to provide the superannuation guarantee for veterans who have a long-term, total incapacity for work.

In relation to reform of the legislation, I strongly commend the Commission’s analysis and proposals.

In relation to incapacity for work, the Commission appears to have asked a series of further questions. I urge the Commission to acquire and study the necessary data and come to firm conclusions. My original submissions remain apposite.

The Commission identified ‘Key points’ of its Draft Report. My response to these key points is:

***Scheme not fit for purpose:*** Agreed.

The current schemes and their interactions are not ‘fit for purpose’.

***Complexity:*** Agreed.

There is a serious failure of focus on lifetime wellbeing and the arrangements are too complex.

***Scheme effectiveness:*** Agreed.

While the level of expenditure is high, individual outcomes can often be inadequate.

***Focus on wellbeing:*** Agreed.

It is critical to improve rehabilitation, transition and focus on ‘wellbeing’ of veterans.

***Redesign:*** Qualified support.

While some best practice features of civilian schemes could be introduced into our military compensation arrangements, some of the solutions must be found in military-specific responses. Additionally, some elements of the VEA scheme need to be ring-fenced and maintained in the interests of existing, elderly clients, even though the scheme is out of step with the MRCA.

***Scheme governance and funding:*** Doubtful.

Undoubtedly reform of governance arrangements is necessary. However whether this should extend to a Veterans Services Commission model is a very live issue. I suspect this recommendation may prove to be

a 'bridge too far'. It is interesting to note that the proposed Commission model is a return to the role that the Repatriation Commission played, as administrator of repatriation benefits, between 1920 and 1947.

It is very important to enhance the policy attention given to this area by the Defence Department and the ADF as many of the necessary reforms must improve in-service practice, and not take effect only after discharge.

Introduction of premium funding could provide useful transparency in relation to the real cost of operational decisions such as a commitment to operations overseas and poor WHS practices. It would be inappropriate for premiums to be applied to the VEA cohort as the costs of this scheme cannot be reduced by active WHS involving current members. It may also be preferable to maintain DRCA as a 'pre-premium' scheme and commence premiums only in relation to MRCA claims and costs. Some lessons about the introduction of premiums and maintenance of 'pre-premium' arrangements can be learned from the introduction of premiums into the SRCA scheme.

**Transition:** Agreed

Improved transition services during a member's service life is of key importance to scheme outcomes.

**Veteran Centric Reform:** Agreed

This is proving a major success and needs to be reinforced and expanded in all possible ways.

**Scheme complexity:** Agreed

The Commission's proposed path to scheme harmonisation is practical and the far preferable approach to these issues.

The Commission pays no attention to the unnecessary and undesirable complexity of the MRCA incapacity provisions (see p 523). These should be substantially rewritten; as discussed in my original Submission.

**Treatments and supports:** Agreed

This is important, though it is a bit outside my areas of expertise.

**Non-liability cover:** Agreed

Non-liability cover is very important to early identification of problems and early intervention (with attendant long-term savings).

Improved support for mental health care is very important, particularly because of the legacy issues we face from the Afghanistan commitment.

In this Response, I will comment below on a few specific recommendations and information requests. I do not have the personal resources to respond in a comprehensive manner to the whole of the Draft Report.

#### **Draft Recommendation 4.1: Objective and principles**

Supported.

#### **Draft Finding 5.1: Work Health and Safety Act**

Agreed.

#### **Draft Recommendation 5.3: Annual actuarial report**

Supported.

#### **Draft Finding 6.1: Rehabilitation incentives**

Agreed.

#### **Draft Recommendation 6.3: Improved rehabilitation arrangements**

Supported.

#### **Draft Recommendations 7.1, 7.2: Transition**

Supported.

#### **Information Request 7.3: Transition needs of Reservists**

Overall, I consider little consideration is given to the specific (and sometimes very different) needs of Reservists. I urge the Commission to consider the special needs of Reservists in all of the key reforms areas.

### **Draft Recommendation 8.1: Initial liability**

Qualified support.

I think initial liability provisions in the MRCA could be rewritten to reduce complexity (which was imported from the VEA).

While I believe the SoPs should be used only as an 'accept' contention, I acknowledge that they have wide support in the veterans' community.

Initial liability for DRCA could be harmonised with the MRCA in some obvious ways (eg. the exclusions), however it should not be moved into complete alignment with MRCA until that scheme has less complex and more rational initial liability provisions.

SoPs could be used in DRCA as an 'accept' contention. This does not require legislative change.

### **Information Request 8.2: RMA and SRMC**

I support the proposal to abolish the SRMC and provide an enhanced review process in the RMA, including additional independent experts. The SRMC was added in the Senate at the last minute; the availability of review is the key element, not the current mechanism.

### **Draft Finding 9.5: DVA**

Agreed.

### **Draft Finding 9.6: ESOs**

Agreed.

### **Draft Finding 10.2: Feedback from Review**

Agreed.

In addition, the VRB needs to improve public transparency of its decisions, as an aid to jurisprudence.

### **Draft Recommendation 10.1: Reporting of review outcomes**

Supported

### **Draft Recommendation 10.2: Review of decisions**

While this is a complex set of issues, I support the review pathway proposed by the Commission.

### **Draft Recommendations 10.3, 10.4: VRB**

Supported. The suggested date of 2025 is appropriate as it gives the Department, the VRB and the AAT sufficient time to improve their processes and coordination, improving visibility of what would be a 'best practice' system of review.

### **Draft Recommendation 11.5: Fully-funded compensation system**

As discussed above, I suggest only the MRCA (and possibly DRCA) operate on a premium basis and the VEA be operated on a 'pre-premium' basis funded from Consolidated Revenue on an actuarially determined basis.

### **Draft Recommendation 12.1: Harmonising benefits**

Supported, including the recommendation not to reassess PI for DRCA clients.

### **Draft Finding 12.1: Offsetting**

Agreed.

### **Draft Recommendation 12.2: CSC**

Supported.

### **Draft Recommendation 13.1: MRCA PI**

Qualified support. The harmonisation of MRCA PI payments should only be undertaken in conjunction with the harmonisation with DRCA PI payments. This will be complex and should not be rushed, with an attendant very high price tag if the ground rule is no veteran will be worse off. The harmonisation should have a rational basis, taking account of complexity, cost, interim payments, improvements to the guide for assessment, etc.

### **Draft Recommendations 13.2 and 13.3: Interim PI Compensation**

Not supported. I consider the removal of a lump sum option is undesirable and is an unnecessary response to the current unsatisfactory arrangements for interim PI payments.

### **Draft Recommendation 13.2: Additional NEL for children.**

Supported. This change needs to be integrated with the other proposed changes to PI compensation (see 13.1 above).

### **Information Request 13.2: Remuneration loading and compulsory superannuation**

As discussed above, I think a re-evaluation of the remuneration loading should be undertaken. Introduction of compulsory superannuation of incapacity payments is highly desirable and may offer an opportunity for adjusting entitlements. Grandfathering, freezing and transitional arrangements will be very important to the redesign.

Unfortunately, both measures may have a regressive effect, benefiting a member with high incapacity payments much more than a member on incapacity payments at the level of the Minimum Wage. For this reason there may need to be a structured withdrawal of the remuneration loading and introduction of compulsory superannuation. Equity is also a strong reason for introducing a maximum rate of incapacity payments at 150%-200% of AWOTEFA.

I support aligning DRCA incapacity payments with MRCA payments as discussed at p 526 of the Draft Report.

### **Draft Recommendation 13.6, 13.7: SRDP**

Supported. The SDRP was a compromise required for the passage of the MRCA in 2004. It is inconsistent with the overall scheme design. Existing recipients, if any, must be grandfathered.

### **Draft Finding 13.3: Rate of special rate pension**

Agreed.

### **Draft Recommendation 13.8: Dependant payments**

Supported. The two payments should be combined.

### **Draft Recommendation 14.1: DFISA, etc**

Supported. The interaction of the military compensation scheme and the Social Security Act 1991 is unnecessarily complicated.

### **Draft Recommendation 14.3, 14.4: Supplements and allowances**

Supported.

### **Draft Recommendation 14.5: VEA Attendant allowances**

Supported.

### **Draft Recommendation 14.6: Motor vehicle assistance**

Supported.

### **Draft Finding 15.1: Treatment Cards**

Agreed.

### **Draft Recommendation 15.1: Gold Card**

Partly Supported. Some anomalies may be identified within existing categories and may require some limited future issue of a Gold Card.

### **Draft Finding 16.1: Research Data**

Agreed.

### **Draft Recommendation 17.1: Two schemes by 2025**

Supported. This is a sensible approach to the 5 Acts problem.