21 Aggravations of conditions accepted under the Veterans’ Entitlements Act related to service rendered after 1 July 2004

Chapter summary

When the Military Rehabilitation and Compensation Act 2004 (MRCA) was enacted, the intention was not to interfere with compensation entitlements of Veterans’ Entitlements Act 1986 (VEA) beneficiaries. Transitional provisions contained in the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004 (CTPA) clarify the interaction between the MRCA, the VEA and the Safety, Rehabilitation and Compensation Act 1988 (SRCA).

Claims for aggravation of a condition compensated under the VEA (where the aggravation occurred as a result of service rendered on or after 1 July 2004) require the claimant to make a choice under section 12 of the CTPA (known as a section 12 election). Claimants can either:

- make an application for increase (AFI) under the VEA for the aggravation. This means that both the underlying condition and the aggravated component will be pensionable under the VEA; or
- claim under the MRCA for acceptance of liability for the aggravation. This means that the underlying condition will remain pensionable under the VEA, while the aggravated component may be compensated under the MRCA.

The election process is an exception to the general date of injury approach adopted under the MRCA transitional provisions, but it ensures that the MRCA does not interfere with the entitlements of VEA beneficiaries. The election process is complex and can cause confusion and anxiety for claimants, and administrative burden for the Department of Veterans’ Affairs (DVA). Most claimants elect to proceed with an AFI under the VEA rather than claim under the MRCA. The Committee also identified a number of issues, in addition to those raised in submissions, relating to the difficulties in the administration of section 12 elections.

One approach to address these issues is that all aggravations of VEA conditions caused by service on or after 1 July 2004 could be compensated under the MRCA. This would be in line with the date of injury approach and the approach to aggravations of conditions previously accepted under the SRCA. However, the Committee does not prefer this option, as it may prevent some claimants from being eligible for an above General Rate of Pension or Repatriation Health Card – For All Conditions (Gold Card) under the VEA, and some claimants may have liability for the aggravation rejected under the MRCA.

An alternative approach is to remove the election process and stipulate that all aggravations of a VEA condition that relate to service can only be compensated under the VEA, regardless of when that service occurred. This option is an exception to the date of injury approach, but is more in line with the principle that enactment of the MRCA would not interfere with VEA entitlements. The Committee therefore recommends that the election provisions be removed and replaced with provisions stipulating that all aggravations of VEA conditions relating to service on or after 1 July 2004 must be the subject of an AFI under the VEA, and cannot be claimed under the MRCA.
Introduction

21.1 This chapter addresses aggravations of accepted conditions under the *Veterans’ Entitlements Act 1986* (VEA) related to service rendered on or after 1 July 2004 — the commencement date of the *Military Rehabilitation and Compensation Act 2004* (MRCA).

21.2 The terms of reference for the Review include:

Consider legislative and policy issues identified by stakeholders relating to transitional arrangements between the VEA or the SRCA [Safety, Rehabilitation and Compensation Act 1988] and the MRCA.

Background

Transitional provisions

21.3 The *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* (CTPA) contains transitional provisions that clarify the interaction between the MRCA, the VEA and the SRCA. The transitional provisions do not apply to a person whose eligibility for compensation or other benefits arises solely under the MRCA. The CTPA also contains a number of consequential amendments to the VEA and the SRCA, which state that most conditions are no longer covered for the purposes of compensation under those Acts for service rendered on or after 1 July 2004.¹

21.4 The transitional provisions operate with different rules, depending on whether they are being applied to a claim for onset of a condition or a claim for aggravation.²

Claims for onset

21.5 The MRCA applies to a claim for onset if two criteria are met:

- the condition occurred on or after 1 July 2004; and
- the condition relates to defence service rendered by the person on or after 1 July 2004.³

21.6 The MRCA does not apply to a claim for onset if the condition occurred after 1 July 2004 and the condition only relates to defence service rendered before 1 July 2004. The VEA or the SRCA may apply, depending on the member’s eligible service.

21.7 Claims for onset of a condition cannot be accepted under both the MRCA and the SRCA, or the MRCA and the VEA, unless the accepted condition has been aggravated by post-1 July 2004 defence service. In such cases, liability for onset may be accepted under the VEA or the SRCA, and liability for the aggravation may be accepted under the MRCA. Different rules apply to post-1 July 2004 aggravation, depending on whether the condition was previously accepted under the SRCA or the VEA.

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¹ Sections 9A and 70A of the VEA and section 4AA of the SRCA.
² For simplicity, the term ‘aggravation’ will be taken to include a material contribution to an injury or disease.
³ Sections 7 and 8 of the CTPA.
Claims for aggravation of a condition accepted under the Safety, Rehabilitation and Compensation Act

21.8 Claims for aggravation of a SRCA condition are relatively straightforward. The MRCA applies to a person’s claim for aggravation of an accepted SRCA condition if two criteria are met:

• the aggravation or material contribution occurred on or after 1 July 2004; and
• the aggravation or material contribution relates to service rendered by the person on or after 1 July 2004.\(^4\)

21.9 Liability for onset of the original condition continues to exist under the SRCA, even if the MRCA applies to an aggravation of that condition.

Claims for aggravation of a condition accepted under the Veterans’ Entitlements Act

21.10 Claims for aggravation of a VEA condition by service after 1 July 2004 is markedly different, in that it requires a choice to be made (Figure 21.1).

21.11 If a person with a VEA condition lodges a MRCA claim for aggravation of that VEA condition then, as required by section 12 of the CTPA, the person must be given an election between:

• making an application for increase (AFI) under the VEA in respect to the aggravation; or
• continuing with a claim under the MRCA for acceptance of liability for the aggravation.\(^5\)

21.12 The MRCA will only apply to a claim for an aggravation of a VEA condition if:

• the aggravation occurred on or after 1 July 2004; and
• the aggravation relates to service rendered by the person on or after 1 July 2004.

However, if the claimant makes a section 12 election to pursue compensation for that aggravation under the VEA, the MRCA does not apply.\(^6\)

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\(^4\) Ibid.
\(^5\) Section 12 of the CTPA.
\(^6\) Sections 7, 8 and 9 of the CTPA.
21.13 Only one election notice is sent for each aggravation of a VEA-accepted disability. Once an election is made, the person is locked in by that choice for that aggravation of the accepted disability.7

21.14 Liability for clinical onset of the original condition continues to exist under the VEA, even if the claimant elects to pursue compensation for the aggravation of that condition under the MRCA, as demonstrated in Figure 21.2.

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7 Sections 9 and 12 of the CTPA and subsection 15(1) of the VEA.

VEA = Veterans’ Entitlements Act 1986, AFI = application for increase, MRCA = Military Rehabilitation and Compensation Act 2004

**Figure 21.1** Election under section 12 of the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act
Policy rationale for the election process

21.15 When the MRCA was enacted, the intention was not to interfere with the compensation entitlements of VEA beneficiaries.8

21.16 By allowing a claimant a choice about which Act they wish to be compensated under for any post-1 July 2004 aggravation of a VEA condition, flexibility is maximised for the claimant. If the claimant would prefer to continue to receive compensation under the VEA for the post-1 July 2004 aggravation, that choice is open to them. On the other hand, the election process also ensures that a claimant is informed of their eligibility under the MRCA, of which they may previously have been unaware. The MRCA may provide an attractive suite of benefits to a claimant; for example, incapacity compensation and whole-of-person rehabilitation services.

21.17 There are many reasons a claimant may wish to pursue an AFI under the VEA for the aggravation, rather than make a claim under the MRCA. One common reason would be that the claimant is close to being eligible for an above General Rate of Pension under the VEA. Another reason may be to avoid the necessity to again establish liability, if a claim is lodged for an aggravation under the MRCA.

21.18 The Committee believes that a similar election process was not offered in relation to SRCA conditions, because of the similarities of compensation outcomes under the SRCA and the MRCA.

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Submissions to the Review and other issues identified

21.19 The section 12 election process is an area of particular concern raised in stakeholder submissions to the Review. One submission to the Review recommends ‘[t]hat a member be given the pros and cons of making the choice between the MRCA and the VEA for an aggravation of a VEA injury or disease’ and states: 9

Section 12 of the MRC (Consequential and Transitional Provisions) Act 2004 requires the applicant to make a decision in regard to the aggravation of an existing condition accepted under the VEA when the applicant makes a claim under section 319 of the MRCA for the acceptance of liability for the aggravated injury or disease, or applying under section 15 of the VEA for an increase in a rate of pension in respect of the aggravated injury or disease. The MRCC [Military Rehabilitation and Compensation Commission] letter to the member should contain a table from the VEA delegate and the MRC [sic] delegate detailing the entitlements under the two Acts.

21.20 A number of other issues not raised in submissions have been identified by the Committee:

• claiming for a new condition under the VEA (‘cleanskin’ claims), where onset of the condition related to service before 1 July 2004, and aggravation is related to service after 1 July 2004;
• ensuring the claimant receives the most beneficial outcome;
• investigating whether an AFI has been made in respect to an aggravation; and
• issuing an election notice for each aggravation.

‘Cleanskin’ claims under the Veterans’ Entitlements Act

21.21 The operation of section 12 of the CTPA has created some administrative difficulties in relation to ‘cleanskin’ claims under the VEA for conditions where clinical onset relates to service before 1 July 2004, but has been aggravated by service after 1 July 2004.

21.22 The CTPA ceases coverage under the VEA for any aggravation of an accepted condition where that aggravation is related to service after 1 July 2004, unless the person has made a section 12 election and chooses to lodge an AFI under the VEA. The person can only make a section 12 election after he or she has lodged either an AFI under the VEA or a claim for aggravation under the MRCA.

21.23 Therefore, in the circumstances outlined above, DVA is required to:

• determine the claim for causation of the condition due to service rendered before 1 July 2004 under the VEA;
• invite the veteran to lodge an AFI under the VEA or a claim for aggravation under the MRCA; and then
• offer the veteran a section 12 election.

21.24 Unless this process is followed, the aggravated portion of the claimant’s condition cannot be compensated under the VEA. Thus, DVA has to invite an AFI under the VEA or a claim under the MRCA, then issue an election notice. Section 12 of the CTPA appears to have been drafted on the assumption that those with potential dual

9 Returned & Services League of Australia.
eligibility would have already lodged their VEA claims before the commencement of the MRCA. This has not been the case for all claimants, so DVA is finding itself having to administer the election provisions in reverse.

21.25 For example, a claimant lodges a ‘cleanskin’ claim for lumbar spondylosis under the VEA. Causation of the condition relates to service rendered before 1 July 2004 (the ‘original component’). Service after 1 July 2004 has also aggravated the condition (the ‘aggravated component’). The legislation prevents the aggravated component from being compensated under the VEA until the claimant makes a section 12 election. Therefore, the requirements of section 12 must be met before the aggravated component can be compensated under the VEA. The original component must initially be accepted under the VEA. Then the claimant must lodge an AFI under the VEA or claim under the MRCA in respect to the aggravated component. The claimant can then be issued with a section 12 election notice.

21.26 This process is not easily understood and appears to the claimant to be unnecessarily bureaucratic. Furthermore, it places an unnecessary administrative burden on DVA.

**Ensuring the claimant receives the most beneficial outcome**

21.27 It is important that a claimant makes a fully informed and careful election under section 12 of the CTPA. Under the legislative provisions, if a section 12 election results in a negative outcome — for example, liability for the aggravation being rejected under the MRCA — the claimant cannot change his or her choice at a later date.

21.28 Decision makers are unable to provide financial advice or advise a veteran on what choice to make, but they can provide information to the veteran to help inform that choice. However, as could be expected, this information may be complex and difficult to understand for some claimants. In such circumstances, it is difficult to ensure that a claimant receives the most beneficial outcome.

**Investigating whether an application for increase has been made in respect to an aggravation**

21.29 When an AFI is made under the VEA, generally the only issue to be addressed is whether the claimant’s incapacity has increased; there is no investigation into what caused that increase in incapacity.

21.30 However, after the introduction of the MRCA, in any case where a claimant lodging an AFI has continued serving in the ADF after 1 July 2004, further investigation is necessary to determine whether the AFI relates to an aggravation by defence service rendered after 1 July 2004. In other words, for members who serve after 1 July 2004, an AFI is no longer a simple matter of reassessing the claimant’s incapacity under the VEA; an investigation into the cause of any increased incapacity is also required to establish whether an aggravation has occurred.

21.31 This has meant abandoning well-established claims processing practices, and has the potential to increase processing times. It also inconveniences those claimants who, after providing additional evidence relating to the existence of an aggravation, turn out not to be required to make a section 12 election after all.
Issuing an election notice for each aggravation

21.32 Section 12 of the CTPA applies each time a veteran with a VEA-accepted disability lodges an AFI under the VEA or a claim under the MRCA in relation to aggravation.

21.33 If a veteran elects to be compensated under the MRCA for an initial aggravation of their VEA knee condition, and then a year later aggravates the knee in a separate service-related incident, they must be offered another section 12 election in respect to the new aggravation. Therefore, a claimant’s compensation for the same condition can go back and forth between the two Acts.

21.34 Not only does this mean a claimant must make multiple section 12 elections, it also makes assessing the rate of compensation under both the VEA and MRCA problematic and administratively complex. This is particularly an issue where different impairments have been ‘sandwiched’ together because the person elects to be compensated under different Acts for different aggravations, as demonstrated in Figure 21.3.

Figure 21.3 Multiple section 12 elections for the same condition

Section 12 election patterns to date

21.35 DVA’s information technology systems have no way of recording when an election has been offered or the outcome of an election. This information is only available by accessing a claimant’s hard copy file. However, it is understood that very few claimants elect to claim under the MRCA once they are offered an election; the vast majority choose to continue to be compensated under the VEA.
All aggravations to be compensated under the Military Rehabilitation and Compensation Act

21.36 The Committee believes that removing the section 12 election process would significantly simplify the process, both for claimants and in administration. This could be achieved by stipulating that all aggravations of VEA conditions caused by service after 1 July 2004 must be claimed under the MRCA, and cannot be claimed under the VEA. This accords with the date of injury approach that was advocated in the previous chapter, and is consistent with the approach to aggravations of conditions previously accepted under the SRCA. It is also consistent with the approach to onset of unrelated conditions (as opposed to aggravations).

21.37 As stated earlier in this chapter, when the MRCA was introduced in 2004, it was the government’s intention that its introduction would not disturb existing rights to compensation for beneficiaries under the VEA or the SRCA. Removing the election process and compensating all claims under the MRCA for an aggravation of a VEA condition related to service after 1 July 2004 would have two potential detrimental effects.

21.38 First, under the VEA, a claimant must have a certain level of incapacity to be eligible for some benefits, such as the above General Rate of Pension or the Gold Card. If a claimant has an accepted condition under the VEA that is aggravated after 1 July 2004, and the impairment from that aggravation must be compensated under the MRCA and cannot be compensated under the VEA, the claimant may not be eligible for benefits under the VEA that they otherwise would have had access to following the aggravation of their accepted condition.

21.39 Second, any aggravation of a VEA condition would have to satisfy the liability provisions under the MRCA before compensation is payable. This would not be the case if the aggravation was simply treated under the AFI provisions of the VEA. This is because the level of incapacity, and not liability, is the only factor that needs to be considered in relation to AFIs under the VEA. Therefore, it is possible that liability may be rejected for an aggravation of an accepted condition under the VEA, and no compensation will be payable, even where an increase in incapacity assessment has resulted from the aggravation and an AFI would have been successful under the VEA.

21.40 Besides being detrimental, this option would not resolve some of the administrative issues of the current arrangements. In particular, all AFIs lodged under the VEA by a claimant with service after 1 July 2004 would still need to be investigated to determine whether the AFI had been lodged in relation to an aggravation caused by that service. Where an aggravation has occurred, the matter would have to be dealt with under the MRCA. However, where no aggravation has occurred, the matter could be processed normally as an AFI, but only after the delay associated with investigating whether an aggravation has occurred.

21.41 For these reasons, the Committee does not prefer this option, despite the fact that it would result in simplicity and consistency with the date of injury approach.

All aggravations continue to be compensated under the Veterans’ Entitlements Act

21.42 An alternative option is to remove the election process and stipulate that all aggravations of a VEA condition that relate to service can only be compensated under
the VEA, regardless of when that service occurred. This option would streamline administration by removing the election process and the need to determine when the aggravation occurred. This option would also reduce confusion and apprehension among claimants.

21.43 This approach does not accord with the date of injury approach advocated in the previous chapter and would draw out the VEA ‘tail’ (the length of time that the VEA will continue to operate) for a longer time. It also removes a ‘choice’ and potentially creates ‘losers’ — those who would be better off being compensated under the MRCA than under the VEA for an aggravation.

21.44 However, it would ensure that claimants under the VEA would be able to contribute incapacity resulting from aggravations of their accepted conditions after 1 July 2004 towards eligibility requirements for benefits under the VEA, such as above General Rate of Pension and the Gold Card. In these circumstances, the Committee believes that this consideration should take precedence and that this exception to the date of injury rule should be adopted.

21.45 One drawback of this approach is that it would prevent a claimant from accessing the provisions of the MRCA, which may be more beneficial in some circumstances than the provisions of the VEA. Of particular concern is the reduced access to whole-of-person rehabilitation under the VEA. However, this concern would be alleviated if the recommendations in Chapter 29 of this report were accepted by the government; that is, that the Repatriation Commission review the Veterans’ Vocational Rehabilitation Scheme with the aim of improving rehabilitation options for those who have VEA eligibility and are under 50 years of age.

21.46 Therefore, the Committee recommends that the election option be removed, and that the VEA (not the MRCA) should apply to any aggravation of an accepted condition under the VEA, even where that aggravation is related to service rendered after 1 July 2004.

Conclusions

21.47 The section 12 election process that applies to aggravation of a VEA condition after 1 July 2004 is an exception to the general date of injury approach adopted under the MRCA transitional provisions. This exception ensures that the enactment of the MRCA does not interfere with compensation entitlements of VEA beneficiaries with previously accepted conditions.

21.48 There is merit in providing increased flexibility for the claimant, but the election process is complex and has caused confusion and anxiety for claimants. It is also an unnecessary administrative burden for DVA. The Committee is, therefore, of the view that the provisions should be simplified and the section 12 election process removed.

21.49 There are strong policy grounds for aggravations of a VEA condition after 1 July 2004 to be compensated under the MRCA. However, these are overridden by the need to ensure that the MRCA does not interfere with a claimant’s existing rights to compensation under the VEA for that aggravated condition.

21.50 The Committee has formed the view that the section 12 election process should be removed and aggravations of a VEA condition after 1 July 2004 should continue to be compensated under the VEA.
Recommendations

The Committee recommends that:

21.1 the section 12 election provisions be removed. The election provisions should be replaced with provisions that stipulate that all aggravations of a condition accepted under the Veterans’ Entitlements Act 1986 (VEA) that relate to service after 1 July 2004 be the subject of an application for increase under the VEA, and cannot be claimed under the Military Rehabilitation and Compensation Act 1986.