Chapter summary

The Military Rehabilitation and Compensation Act 2004 (MRCA) was enacted in 2004 to overcome the complexities and confusion created by the parallel and combined operation of two separate compensation Acts for military service, the Veterans’ Entitlements Act 1986 (VEA) and the Safety, Rehabilitation and Compensation Act 1988 (SRCA). There continues to be complexity and confusion arising from the interaction of the three Acts (actually five Acts, if the 1930 Act and the 1971 Act subsumed into the SRCA are also considered). Most liability claims under the MRCA are determined quickly and dealt with simply. Claims that give rise to concerns are often complicated by previous conditions accepted under one or two other Acts. The effect of continuing to accept claims under the SRCA and the VEA for service before 1 July 2004 means that claims under those Acts will not be exhausted for possibly 60 years or even longer.

The Committee examined the possibility of reducing legislative complexity by ceasing future claims under the SRCA and treating them as claims under the MRCA. While the Committee’s discussion focused on the movement of SRCA claims to be treated as MRCA claims, the Committee noted similar considerations might also be made for future VEA claims. Transitioning future SRCA claims to the MRCA would reduce complexity, confusion among stakeholders and some administration. Exact benefits under the MRCA and SRCA depend on individual circumstances; however, most would receive a higher benefit under the MRCA. The Australian Government’s future military compensation liability could therefore be expected to increase substantially over time as a consequence of transitioning the SRCA into the MRCA. There may also be a perceived inequity where late claimants come under the MRCA, which is, in certain respects, more beneficial than the SRCA, so these claimants would be at an advantage by not lodging their claims sooner. There is potential for this to lead to demands that all old SRCA claims should be reassessed under the MRCA.

However, not all future SRCA recipients would be better off if assessed under the MRCA. The application of the MRCA’s whole person impairment assessment, and the use of the Statements of Principles and the Guide to determining impairment and compensation assessment tool, can lessen the amount of compensation for some claimants or deny eligibility altogether to some others. This may reduce, to some degree, the costs associated with transitioning new claims under the SRCA to the MRCA. However, it could lead to arguments by claimants for a choice as to which legislation they wish to be covered by, or litigation by claimants arguing they have been denied their rights.

Therefore, the Committee recommends that the current transition approach be maintained and that no action be taken to cease future claims under the SRCA by treating them as claims under the MRCA.

Introduction

20.1 The Military Rehabilitation and Compensation Act 2004 (MRCA) was enacted in 2004 as a direct response to the complexities and confusion surrounding military compensation legislation, which had been created by the parallel and combined operation of two separate and quite different compensation Acts: the Veterans’ Entitlements Act 1986 (VEA) and the Safety, Rehabilitation and Compensation Act 1988 (SRCA). It was decided that the only way to overcome the problem was to
legislate for a new scheme which would, over time, replace the two pre-existing schemes.

20.2 There continues to be complexity and confusion arising from the ongoing interaction of the three Acts. The effect of continuing to accept claims under the SRCA and the VEA for service before 1 July 2004 means that claims under those Acts will not be exhausted for possibly 60 years, or even longer.

20.3 The terms of reference for the Review included the following for examination and consideration:

Consider legislative and policy issues identified by stakeholders relating to transitional arrangements between the VEA or the SRCA and the MRCA.

20.4 In accordance with the terms of reference, this chapter examines one of the most complex issues within the Review’s ambit — the possibility of reducing legislative complexity around the transitional provisions by ceasing future claims under the SRCA and treating them as claims under the MRCA.

Background

20.5 The MRCA’s transitional provisions are premised on ensuring that the following were unaffected (unless the Act or the transitional provisions indicate otherwise): any right, privilege, duty, obligation, penalty, or liability acquired, incurred or accrued under Commonwealth compensation legislation or veterans’ legislation immediately before 1 July 2004. This was the policy position recommended by the Tanzer Review in 1999¹ and agreed to by the then government.

Alternative transitional options considered by the Tanzer Review

20.6 The Tanzer Review looked at two other options when considering the most appropriate transitional arrangements.

20.7 One option was to apply the new legislation to those members who enlisted in the Australian Defence Force (ADF) on or after the date of commencement of the legislation. Those covered by the old legislation could be given the right to elect to transfer to the new scheme.

20.8 The election to choose the old or new legislation would mean this option would extend dual eligibility for the longest period. It would also mean there was the potential for three ADF members injured in the same accident to each have different compensation cover and different levels of benefits.

20.9 Another option was to allow all new claims to be determined under the new legislation, regardless of date of injury. This would have included a period of grace for those who had been injured in the past, but not lodged a claim, to choose whether to submit a claim under the old or the new legislation.

Current transitional arrangements

20.10 The above options were rejected and the legislation was put in place on the basis of the ‘date of injury’ approach. This means the Commonwealth’s liability arises with the date of service relating to the condition, and liability is accepted in accordance with the legislation applying at that time. As the Tanzer Review stated: 2

Changes to compensation arrangements in other jurisdictions have generally been based on date of injury. This recognises that a person’s right to compensation crystallises at the time of injury even though the person may not exercise that right. Option 3 [the date of injury approach] does not affect those rights.

Reducing complexity into the future

20.11 In an effort to reduce the current complexities of MRCA administration, the Committee has examined the possibility of ceasing new claims under the SRCA and treating them as claims under the MRCA. That is, the Committee has examined whether the Australian Government should consider ceasing future defence-related claims under the SRCA by legislating that, from a specified future date, all new claims that would have been covered by the SRCA will be treated as if they were MRCA claims and administered accordingly.

20.12 This date of claim approach differs significantly from the current date of injury approach. It would not cease the future operation of the SRCA for military personnel, it would merely cease new claims. Benefits paid for claims previously made under the SRCA would continue to be paid.

Comparing the Safety, Rehabilitation and Compensation Act and the Military Rehabilitation and Compensation Act

20.13 Exact benefits under the MRCA and SRCA depend on individual circumstances; however, it is estimated that more than 90 per cent of claimants will receive a higher benefit under the MRCA that they would otherwise have received.

20.14 The two Acts differ in many respects, including their liability provisions, death benefits, incapacity payments and permanent impairment rates. The difference in cost, and therefore in the Australian Government’s future military compensation liability, could be expected to increase substantially over time as a consequence of transitioning the SRCA into the MRCA, as more of these additional payments are made.

20.15 The Committee notes that, in its submission, Slater & Gordon Lawyers have argued that the MRCA is inferior legislation to the SRCA. The submission implies that changes should be made to the MRCA to make it more like the SRCA, rather than more like the VEA, as many stakeholders typically argue.

20.16 While the Committee does not agree with the analysis by Slater & Gordon Lawyers of the MRCA in comparison with the previous legislation, it does note that, in some cases, claimants may be granted less compensation under the MRCA than might have been paid in similar circumstances under the SRCA (although this occurs infrequently and only in particular circumstances). The application of the MRCA’s whole person impairment assessment, the use of the Statements of Principles and the

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2 N Tanzer, ibid., p. 79.
Guide to determining impairment and compensation assessment tool significantly distinguish the MRCA from the SRCA.

20.17 While this may reduce, to some degree, the costs associated with transitioning new claims under the SRCA to the MRCA, it could lead to arguments by claimants for a choice of which legislation they wish to be covered by, or litigation by claimants arguing they have been denied their rights. Accordingly, the Committee feels that caution should be exercised in adopting a policy that unilaterally moves members and former members from coverage under the SRCA to the MRCA.

Benefit structures

20.18 The existence of different types and levels of benefits in the MRCA, the SRCA and the VEA inevitably leads to claims by stakeholders in specific, individual circumstances that a lower benefit or less generous provision in one scheme should be adjusted to reflect the higher benefit or more beneficial provision in another.

20.19 The SRCA and the MRCA have similar benefit structures. Indeed, the MRCA’s benefit structure is modelled to a fair degree on the SRCA. The SRCA is essentially contemporary workers’ compensation legislation, designed specifically for civilian employees of the Australian Government. It was extended in an earlier form to ADF personnel rendering peacetime service in the late 1940s, and then extended in 1994 to those with operational service.

20.20 There are differences in the level and application of benefits between the SRCA and the MRCA, as well as some important differences in the manner in which liability is accepted. These differences are historic and stem from the fact that the SRCA is a civilian and peacetime ADF scheme, whereas the MRCA incorporates the liability provisions of the VEA that developed over time as part of the repatriation system. (VEA issues are discussed later in this chapter.)

20.21 These differences present complications in taking an injury that previously would have been covered by one Act and determining it under another. This is where the likelihood of unfavourable comparisons increases.

History and structure of the Safety, Rehabilitation and Compensation Act

20.22 Currently, many SRCA claimants would otherwise have been covered by the Commonwealth Employees’ Compensation Act 1930 (the 1930 Act) and the Compensation (Commonwealth Government Employees) Act 1971 (the 1971 Act) as provided for in Part X of the SRCA, ‘Transitional provisions, consequential amendments and repeals’.

20.23 Although the 1930 and the 1971 Acts have been repealed, Part X of the SRCA gives current and former employees of the Commonwealth covered by the earlier Acts — which, for the purposes of the legislation, includes ADF members and former members — the right to claim compensation under the SRCA as if the 1930 and 1971 Acts continued to operate. The outcome of Part X is that the SRCA is effectively three pieces of legislation, a fact that is not widely or well understood.

20.24 The 1930 and 1971 Acts provided death benefits for dependent partners of only $12,000 for the 1930 Act and $60,000 for the 1971 Act. There were effectively only permanent impairment payments for conditions covered by the table of maims.
methodology. Diseases and psychiatric conditions did not attract permanent impairment payments.

20.25 A number of claimants from the 1930 and 1971 Acts have complained because they see themselves as disadvantaged due to the generally inferior provisions of the two earlier Acts. Some of those complaining are former Australian Regular Army personnel or national servicemen who were injured while undergoing training in the Army, in some cases while preparing to serve in Vietnam.

20.26 It is estimated that approximately 20 per cent of the Department of Veterans’ Affairs’ (DVA’s) current SRCA claims are considered under these earlier Acts. A decision to cease new claims under the SRCA and consider them under the MRCA would result in future claims covered by the 1930 and the 1971 Act being considered under the MRCA, again substantially increasing the Australian Government’s future military compensation liability.

20.27 This class of claimants could be excluded from any proposal to transfer future claims under the SRCA to the MRCA. However, to specifically exclude a class of claimants (such as those covered by the SRCA’s antecedents) in order to deny them the same rights as others, would inevitably draw criticism from some stakeholders and possibly from the wider community, and potentially raise a number of legal issues.

**Potential demands for retrospective reassessment**

20.28 Former and current SRCA claimants can be expected to argue that they have been disadvantaged because they have already claimed and received compensation, or been denied compensation, under the SRCA. There may be a perceived inequity wherein late claimants come under the MRCA, which may be more beneficial than the SRCA.

20.29 Accepting new claims under the MRCA for service before 1 July 2004 would effectively place claimants in a comparatively better position as a result of not lodging their claims in a more timely manner. This is particularly so for claimants compensated under the rules of the 1930 and 1971 Acts. The liability provisions of the 1930 and 1971 Acts that are contained within the SRCA are very strict and the comparisons will mostly be unfavourable. Cases of compensation denied will be particularly relevant to that consideration.

20.30 Therefore, by abandoning the date of injury approach for all future claims, there is potential for demands that all previously determined claims under the SRCA (including the 1930 and 1971 Acts) should also be reassessed in accordance with the MRCA. Conceivably, thousands of claimants may seek a reassessment of permanent impairment claims, in order to see whether a higher amount of compensation would be payable. It could include claims by wholly dependent partners for the MRCA’s death benefits, which are considerably higher than provided in earlier legislation. Such reassessments would be costly, inefficient, impractical and unfeasible.

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3 See, for example, submissions to the Review by E Saul, J McLean and G Eastlake.
Processing future Safety, Rehabilitation and Compensation Act claims as Military Rehabilitation and Compensation Act claims

Arguments in favour

20.31 Transitioning future SRCA claims to the MRCA would reduce the existing amount of compensation legislation, and reduce the complexity that results from the interaction of three separate compensation Acts covering essentially the same subject matter.

20.32 Reducing the number of different scenarios or schemes that presently exist would reduce confusion among stakeholders and administrators. It would also reduce some degree of administration by DVA (in the long term).

Arguments against

20.33 Transitioning new SRCA claims to the MRCA would require that consideration be given to accrued rights, with the potential for litigation by claimants arguing they have been denied their rights.

20.34 It would give rise to additional (possibly substantial) benefit costs over time, as the MRCA tends to be more beneficial than the SRCA and significantly more beneficial than the 1930 and 1971 Acts, which are effectively part of the SRCA.

20.35 Because benefits are determined according to individual circumstances, it will also render some claimants worse off than if they had remained under the SRCA. This could lead to demands for future claimants to have a choice between the two Acts — effectively, a reintroduced form of dual eligibility where claimants would get the best of both schemes.

20.36 The proposed change may lead to former claimants seeking to have their old claims reassessed because of perceptions of inequity and the possibility of receiving a higher benefit. This would have enormous cost and resource implications.

20.37 It would also create dual eligibility between the MRCA and the VEA — a category of dual eligibility (and level of complexity) that presently does not exist, and which the MRCA was designed to overcome.

Veterans’ Entitlements Act considerations

20.38 Discussion so far has centred on transitioning SRCA claims to be treated as MRCA claims. A further complication is the potential for requests for similar arrangements for VEA claimants in certain situations.

20.39 The VEA has a significantly different nature and benefit structure from the SRCA and the MRCA. The VEA is a veterans’ entitlements scheme, rather than workers’ compensation legislation adapted for military personnel.

20.40 Moreover, there are political sensitivities surrounding the VEA’s history as the successor to the Repatriation Act 1920. Its primary benefit structure is flat-rate, lifetime pensions. All of this leads the Committee to conclude that it may not be appropriate to cease future claims under the VEA, at least not in the near future.
20.41 There may be some VEA recipients who seek reassessment or election to be included in the proposed changes, due to the perception that a higher benefit may be available under the MRCA. An example may be those ADF members who served in the first Gulf War and did not have access to the SRCA (and, therefore, lump sum payments) at that time. Some VEA recipients may believe that incapacity payments plus a permanent impairment payment under the MRCA may be worth more than their disability pension.

20.42 Therefore, the scope for potential complications is not limited to the SRCA with all its complexities. There is potential for it to also expand to some VEA recipients.

Addressing existing complexities

20.43 Having described the potential difficulties associated with moving away from the date of injury approach on which the MRCA is based, the outcome remains unsatisfactory. The problems and complexities of having to maintain three pieces of compensation legislation to cover defence service for many years into the future still exist.

20.44 Despite the problems likely to be encountered, simplifying the existing military compensation arrangements could be achieved by deciding that, at some future date, all SRCA claims by ADF members and former members simply come under the MRCA. The fundamental question is whether the benefits of such an exercise will outweigh the costs (financial or otherwise). In doing this, it would be necessary to stipulate a transition date that gives potential claimants sufficient notice — perhaps anywhere between six months and three years.

20.45 The argument has tended to focus on the SRCA because its provisions more closely reflect those of the MRCA, while the VEA is a very different Act in the way it delivers benefits. However, if we are serious about simplifying military compensation arrangements, that means eventually coming down to only one Act. On this basis, a case could be made for the VEA to be included in the transition to the MRCA at some future time, without necessarily coming within the same time frame as the SRCA.

20.46 Another important policy question is whether to simply transition the SRCA under the MRCA in its entirety, or to exclude claimants from the 1930 and 1971 Acts. A judgment has to be made as to whether the additional costs associated with including the two earlier Acts (effectively making the MRCA three Acts) is likely to be outweighed by the negative reaction that could be expected from stakeholders following a decision to exclude a class of claimants.

Conclusions

20.47 This discussion has outlined the likely implications of abandoning the date of injury approach by ceasing claims under the SRCA and treating them as claims under the MRCA — effectively, a date of claim approach. It is difficult to estimate the tangible savings involved. There are likely to be savings in terms of reduced administration but, having regard to the overall cost of administration compared with the cost of scheme benefits, such savings are unlikely to be substantial. They may to be exceeded, perhaps substantially, by the increased cost of benefits resulting from the more widespread application of the MRCA.
20.48 At a broader policy level, changing the transition arrangements from date of injury to date of claim would give rise to a number of complex, sensitive and potentially controversial issues that would have to be resolved. The relative generosity of the MRCA compared to SRCA in some aspects, and the inherent differences between the VEA and the MRCA, need to be factored in. There may be several options to achieve a fair migration to a single Act, but it may not be possible to please all stakeholders. An important consideration is that there should be no detriment to individuals in the transition from the VEA and the SRCA to the MRCA.

20.49 That said, reducing the amount of military compensation legislation, and therefore the existing complexity and confusion, remains a highly desirable policy and administrative objective. The existing arrangements remain complex and cause confusion for claimants and ex-service organisation representatives. The arrangements are also costly and difficult for DVA to administer. Over time, it may become feasible to address this complexity. In the meantime, DVA and the Australian Defence Organisation should continue efforts to educate claimants on the present system and to simplify claimants’ entry to the system.

**Recommendations**

The Committee recommends that:

- **20.1** the date of injury approach be maintained and no action be taken to cease future claims under the *Safety, Rehabilitation, and Compensation Act 1988* by treating them as claims under the *Military Rehabilitation and Compensation Act 2004*; and

- **20.2** the Department of Veterans’ Affairs and the Australian Defence Organisation undertake more education of claimants and ex-service organisation representatives on the three pieces of legislation that govern military compensation and continue to simplify the front-end claims process for potential claimants.