Permanent impairment compensation

Chapter summary

Impairment is defined in section 5 of the *Military Rehabilitation and Compensation Act 2004* (MRCA) as ‘... the loss, the loss of the use, or the damage or malfunction, of any part of the person’s body, of any bodily system or function, or of any part of such a system or function’. Where liability for an injury or disease that results in permanent impairment has been accepted, the MRCA enables compensation to be paid as a periodic payment (generally, paid for life). Permanent impairment compensation payments are non-economic loss payments; that is, they are paid to compensate for pain, suffering, functional loss or dysfunction and the effects of the injury or disease on lifestyle. Functional loss and lifestyle effects are assessed using the *Guide to Determining Impairment and Compensation* (known as GARP M).

The Committee discussed the arguments for and against the retention of different compensation levels for different types of service in the MRCA. Under the MRCA, different permanent impairment compensation amounts result for the same impairment rating depending on whether the service at the time is operational or peacetime. Generally, a higher permanent impairment compensation payment is made for operational service.

Many ex-service organisations (ESOs) argue that compensation under the MRCA should be the same, regardless of the type of service rendered. Submissions on the issue centred on the argument that impairment has the same impact, regardless of what the service was at the time of injury. The principle of ‘like compensation for like injury’ is recognised in the development of all modern workers’ compensation schemes. In addition, it can be argued that operational service is already financially recognised through the Australian Defence Force (ADF) deployment allowances. Conversely, the unique and high-risk nature of operational service compared to peacetime service can be seen to require a higher level of compensation. The Committee recommends that the existing permanent impairment compensation differential for warlike and non-warlike service (or operational service) as opposed to peacetime service be maintained.

The current compensation differential is payable for low levels of impairment but not severe impairment or death, and the Committee examined whether this should be revised so that the differential also applies to severe impairment and death.

The Committee had divided views on the application of the differential across differing levels of impairment. Committee members representing the Department of Finance and Deregulation, the Treasury, and the Department of Education, Employment and Workplace Relations support maintaining the status quo; Committee members representing the Department of Veterans’ Affairs (DVA) and Defence, as well as Mr Sutherland, supported the recommendation that higher rates of compensation for operational service should continue and be extended to the severely impaired and for death. It is estimated that 15-20 per cent of annual permanent impairment compensation expenditure is relates to injuries from operational service and that the proposed extension would have a cost of $1.15 million over four years.

The Committee discussed and confirmed the rationale for age-based lump sums under the MRCA. An eligible claimant may choose to convert all or part of a periodic permanent impairment payment into an age-based lump sum. Several submissions to the Review raised the disadvantage caused to older recipients in not being eligible for the maximum lump sum. The Committee supports the retention of the current system because the lump sum is based on the periodic payments and is calculated on the total payments remaining to the member. If the member is unhappy with the lump sum calculation, they can choose to remain on the periodic payment.

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The assessment of permanent impairment under the MRCA is based on whole person impairment methodology. That is, where multiple service-related conditions exist, the impairment resulting from all service-related conditions is not simply added but must be combined by applying a combined values formula, which ensures compensation cannot exceed 100 per cent of the whole person. The Committee recommends that the whole person impairment methodology continue under the MRCA.

The Committee examined the date of effect provisions for permanent impairment compensation. Weekly permanent impairment compensation under the MRCA becomes payable from either the date the claim for liability was lodged or the date that the claimant’s condition(s) are found to have become permanent and stable, whichever is the later. The Committee has found inequities for claimants with multiple conditions where the conditions become stable at different points in time. The Committee recommends that permanent impairment compensation become payable on the basis of each individual accepted condition, rather than on the basis of all accepted conditions. The Committee confirms the stability requirement in the MRCA, but recommends that the increased use of interim compensation payments would alleviate concerns about delays created by the requirement.

Several submissions raised concerns relating to the limitations imposed by the MRCA on the pursuit and level of common law damages. If permanent impairment compensation is payable to a claimant under the MRCA, but the compensation has not yet been paid, the member may irrevocably choose to institute common law action against the Commonwealth or a potentially liable member for damages for non-economic loss. Under the MRCA, if a member institutes an action at common law, the court must not award damages of more than $110,000 for non-economic loss. In addition, the choice to pursue common law damages is only offered where permanent impairment compensation is payable. The Committee does not support any changes to these provisions and confirms that one of the objectives of the MRCA should be for statutory compensation to take precedence over the common law as the system for seeking non-economic loss compensation in respect of most, if not all, conditions related to defence service.

**Introduction**

8.1 In this chapter the Committee considers several submissions regarding permanent impairment compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA), as well as issues raised in relation to common law action for non-economic loss. The following issues are considered:

- the permanent impairment compensation differential between warlike and non-warlike service and peacetime service;
- age-based lump sums;
- multiple conditions and the whole person impairment methodology;
- the date of effect of permanent impairment compensation payments;
- the requirement that an injury or disease be stable before a member or former member is eligible for permanent impairment compensation;
- the limit on damages against the Commonwealth or other liable parties for non-economic loss; and
- the choice to institute action for damages against the Commonwealth or other liable parties for non-economic loss.
Background

8.2 As a result of sustaining a service injury or service disease, a member or former member of the Australian Defence Force (ADF) may suffer permanent impairment. Impairment is defined in the MRCA as ‘… the loss, the loss of the use, or the damage or malfunction, of any part of the person’s body, of any bodily system or function, or of any part of such a system or function’.1

8.3 Where liability for a service injury or service disease has been accepted and the member or former member suffers a permanent impairment from that service injury or service disease, the MRCA enables compensation to be paid as a periodic payment (generally, paid for life). Permanent impairment compensation, as a result of a service injury or service disease, will be payable if the impairment has stabilised and is considered permanent.2

8.4 Permanent impairment compensation payments are non-economic loss payments; that is, they are paid to compensate for pain, suffering, functional loss or dysfunction and the effects of the injury or disease on lifestyle.3 Functional loss and lifestyle effects are assessed using the Guide to determining impairment and compensation. This guide is known as GARP M, because it is a modified version of the Guide to the Assessment of Rates of Veterans’ Pensions, fifth edition, (GARP V), used to assess the extent of incapacity under the Veterans’ Entitlement Act 1986 (VEA). GARP M is a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act 1901 and the Military Rehabilitation and Compensation Commission (MRCC) is bound by its provisions.4

8.5 Under GARP M, the degree of impairment is expressed in impairment points, on a scale from 0 to 100. Impairment points are combined with a lifestyle rating to determine a percentage of the maximum permanent impairment payment payable.

8.6 A member or former member must suffer an impairment that constitutes at least 10 impairment points before he or she can be paid permanent impairment compensation.5 An exception to this is in cases of hearing loss, loss of the sense of taste or smell, or impairment of the fingers or toes, where a minimum of five impairment points is required.

8.7 All permanent impairment payments are tax free.

Permanent impairment compensation differential

8.8 Under the MRCA, different permanent impairment compensation amounts result from the same impairment rating and lifestyle effects, depending on whether the service injury is suffered or the service disease is contracted on warlike or non-warlike service (operational service) or peacetime service. A higher permanent impairment compensation payment is made for operational service. The difference at the low end of the scale is consistent at about 80 per cent (i.e. the rate for operational service is 180 percent of the rate for peacetime service). For more severely impaired claimants (50 or more impairment points), the difference in percentage terms between the compensation

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1 See section 5 of the MRCA.
2 See section 68 of the MRCA. ‘Permanent’ is defined as ‘likely to continue indefinitely’.
3 See section 67 of the MRCA.
4 Ibid.
5 See section 69 of the MRCA.
amounts diminishes. For claimants with severe impairment (80 or more impairment points), compensation amounts are the same for both operational and peacetime service.

8.9 Figure 8.1 shows the weekly permanent impairment compensation rates (as at 1 July 2010) for the different degrees of impairment. Figure 8.2 shows the differential as a percentage of the rates for peacetime service.

Figure 8.1  Permanent impairment compensation rates under the MRCA (as at 1 July 2010)

Figure 8.2  Permanent impairment compensation differential under the MRCA (as at 1 July 2010)

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6 For the purposes of this comparison and others within this chapter, a lifestyle rating at the top of the shaded area of Table 23.1 and 23.2 of GARP M has been used. In most cases, a lifestyle rating that falls within the shaded area of Table 23.1 or 23.2 of GARP M will be broadly consistent with the corresponding degree of impairment.

70 Review of Military Compensation Arrangements
The case against a compensation differential

8.10 Many ex-service organisations (ESOs) argue that compensation under the MRCA should be the same, regardless of the type of service rendered. These submissions were premised on the service-related death or impairment of a member having the same functional, social and emotional impact, irrespective of the type of service rendered.

8.11 One submission states:

An example of this is if a veteran suffers a fractured pelvis on service within Australia, there is no difference of a veteran suffering the same medical condition on WS or NWLS. There is no difference to the impairment of the individual, regardless of where they serve. The impairment and/or incapacity are the same.

6.2 Therefore, considering the Impairment and/or Incapacity of a veteran, no matter where he or she serves, there is no difference in terms of physiological or psychological damage. The Tiered Service bias within the GARP M is therefore discriminative toward those who serve on PTS. This service discrimination has never been used previously to veterans eligible under the VEA or the SRCA, toward NEL payments/pensions.

8.12 Likewise, another submission argues along the following lines:

One of the most stand out anomalies of this system occurs at the 50 IP level for peacetime service which is approx $7.00 less than 30 IP under the warlike scale. The other aspect is where the difference between warlike and peacetime at 50 IP is currently $129.66 a fortnight.

Does a person suffer less because it occurred in Australia?

Many ADF personnel have served with distinction on operations only to succumb to injury or death months or years later whilst training or peacetime service. Trooper Lawrence served with the 2nd Cavalry Regiment in Iraq but tragically died in Australia during a course in the NT.

It is important to highlight that under the VEA, peacetime service members with VEA accepted conditions do not get reduced payments when compared to veterans. Regardless of where the condition was acquired, the compensation payments are all equal. In other words, the impairment level is the focus, not the location it occurred.

To continue with the current discriminative system will only cause the financial gap to widen as the indexation is applied each year.

8.13 Some serving members on ADF bases argued that the distinction is somewhat blurred between the level of exposure to risk when training for operational service and when actually engaging in such service.

8.14 The Committee also considered arguments that the unique nature of operational service is currently being financially recognised by the Australian Government twice: first, in the ADF remuneration system, which provides for the payment of a deployment allowance or similar pay-related allowances while a member is deployed on operational service; and second, in military compensation arrangements. It could also be argued that the unique nature of operational service, as opposed to peacetime service, is recognised

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7 One exception is the Vietnam Veterans Federation of Australia.
9 Australian Peacekeeper and Peacemaker Veterans’ Association.
10 Injured Service Persons Association.
though the different standards of proof applicable to the determination of liability for any claimed condition.

The case for a compensation differential

8.15 As discussed in Chapter 2, since the First World War, Australian governments have afforded higher compensation and related support for veterans serving in overseas conflicts and their families, compared with peacetime service in Australia. This historical distinction continues to be recognised in continuation of certain benefits under the VEA after 1 July 2004, such as eligibility for the service pension and the Repatriation Health Card — For All Conditions (Gold Card) at age 70 for veterans who have rendered qualifying service.

8.16 The argument that an injury is an injury and a death is a death, irrespective of the kind of service rendered, can also lead to the conclusion that there is no difference between a military injury or death, and a civilian injury or death. Just as the nature of military service requires a separate piece of compensation legislation specifically designed to meet the needs of ADF members and their families, the unique nature of operational service compared with peacetime service requires a higher level of compensation.

8.17 The differences between operational service and peacetime service were well described as follows at one public meeting held during the course of the Review:

I very strongly believe that service on the battlefield, in the ship and in the air is the highest form of military service and that it contains an element which is not present in peacetime service and that ought to be recognised. In peacetime service the balance between the achievement of the mission and the safety of the members of the Defence Force is very solidly in favour of the safety of the members of the Defence Force …

When we get onto the battlefield, the conditions are precisely reversed. The achievement of the mission becomes the primary purpose for which we are engaged in the mission. And often the achievement of the mission requires exposure of members of the Defence Force to very high degrees of risk, almost up to and including certain wounding or death.11

8.18 An ESO submission to the Review believed that the recognition of injuries, diseases or death related to operational service under the MRCA does not go far enough:

It is interesting to note that veterans/members are now immune from being wounded in battle. Such mishaps are instead described as ‘injuries’ for the purposes of the MRCA. I seem to recall one critic suggesting that there is now little difference between being hit by a bullet while attacking an enemy position and falling over while returning from the Mess. Both are simply ‘injuries’ as far as the new Act is concerned …12

8.19 Uniform compensation benefits could be seen as inconsistent with the nature of military service, and would imply, or could be interpreted to mean, that all military service is the same. If the compensation differential in the MRCA was removed, it may only be a matter of time before demands for a restoration of a differential begin again.

8.20 It is arguable that ADF’s remuneration arrangements should not be regarded as a complete response to the unique nature of operational service. The additional

11 Brigadier (retired) Kerry Mellor at the public meeting held in Canberra on 12 March 2010.
12 Vietnam Veterans Federation of Australia.
remuneration rewards members of an all-volunteer force for serving on operations and ‘compensates’ them for the broad variety of stresses, hazards and arduous conditions they are likely to experience. In the event of a severe injury or death, deployment allowance — which is received by all members rendering service on a particular operation, whether injured or not — will count for little with the member and his or her family.

8.21 Notwithstanding that the MRCA includes a number of contemporary workers’ compensation features, the existence of a differential maintains a traditional direct link to the repatriation system. Under the repatriation system, ADF members who engaged in operational service were deemed to warrant higher compensation than military personnel whose service was restricted to peacetime. The essence of this viewpoint is well captured by the following statement:

The Australian Soldiers Repatriation Act 1920-43 is not based upon any well-known type of legislation. Though it may have something in common with Workers’ Compensation … It represents a desire of the Australian people, through their National Parliament, to ensure that members of Australia’s gallant fighting forces who have become wounded or sick as a result of their service shall be properly cared for, and that they and their dependants, and the dependants of deceased members, shall be provided for by a war pension and otherwise assisted in the economic struggle for life. The bearing of these forces in the field commands the admiration of the world, and too much cannot be done in the way of reparation to recompense them for the sacrifices they have made in the sacred cause of liberty.13

8.22 The retention of higher compensation payments for operational service is in recognition of those who are intentionally exposed to harm from belligerent enemy or dissident elements. This policy objective is as relevant today as it was following the Second World War.

Extension of the compensation differential

8.23 If the current compensation differential is retained, then the form of that compensation differential needs consideration. Policy questions to consider in this context include:

• should the status quo be maintained; that is, should higher compensation continue to be payable for a low level of impairment but not severe impairment or death; or,
• should the current compensation differential be revised so that it applies to severe impairment and death?

8.24 The arguments for and against a differential in relation to death benefits will be addressed in Chapter 9 of this Review.

Argument for status quo

8.25 Committee members representing the Department of Finance and Deregulation (Finance), the Treasury, and the Department of Education, Employment and Workplace Relations (DEEWR) support maintaining the status quo with regard to the compensation differential. They believe the rationale for extending the current differential to the more serious level of impairment is not clear. It was noted that the

DEEWR representative expressed an in-principle opposition to the existing differential as not being consistent with the principle of like compensation for like injury.

8.26 In support of this position, it should be noted that the Review received no submissions arguing for an extension of the permanent impairment compensation differential to higher levels of impairment. These Committee members also note that the unique nature of operational service is recognised in other ways, including through remuneration and other means, such as application of the beneficial standard of proof for liability.

8.27 Committee members with this view also gave weight to the principle of like compensation for like injury, and believe this principle is recognised in the development of all modern workers’ compensation schemes. In modern schemes, risk is recognised, where appropriate, through remuneration and relevant allowances.

**Argument for broader application of the differential**

8.28 The policy rationale for the current model is thought by some to be tenuous; that is, having the differential apply to low levels of permanent impairment only, and not severe impairment or death. If this view is accepted, then the MRCA’s current differential should be revised so that the higher compensation payments for operational service are extended to all levels of compensation. If we accept that the differential comprehends gratitude and recognition by the government of the day, it would follow that the differential should apply in respect of all levels of impairment.

8.29 A balance would need to be struck in setting a proposed new differential to apply to the higher impairment levels. The loading determined should not be mere tokenism. On the other hand, it should not be so much that it would be likely to engender resentment and criticism by those receiving the lesser benefit. A new differential for higher impairment of around 10 per cent would seem to meet this balance.

8.30 Under such a proposition, the compensation differential would no longer be the same at any point on the scale. Payments for operational service would be a standard 10 per cent greater than compensation payments for peacetime service for claimants, with 71 or more impairment points (the point at which the current differential diminishes to approximately 10 per cent). Figures 8.3 and 8.4 show this revised model.
8.31 DVA’s financial reporting systems do not attribute claims expenditure by category of service. However, an examination of case reports indicates that approximately 15–20 per cent or less of permanent impairment compensation expenditure per year under the MRCA is attributed to operational service.

8.32 The proposition would increase operational service payments for impairment ratings at 71 or more impairment points by an average of 10 per cent. The number of operational service payments made for impairment ratings at these high levels is so
infrequent that the overall financial impact would be minimal. Most claimants suffer an impairment of between 10 and 30 impairment points. Initial estimates are that the proposition would cost approximately $1.15 million over four years, assuming prospective implementation.

8.33 Committee members representing DVA and the Australian Defence Organisation, as well as Mr Peter Sutherland, have formed the view that the higher rates of compensation for operational service should be extended in this way. Given the differential recognises service against enemy forces or dissident elements, it should exist for all impairment levels. For a relatively small cost, a differential can be achieved across all impairment levels by the proposition put above.

**Age-based lump sums**

8.34 An eligible claimant may choose to convert all or part of a periodic permanent impairment payment into an age-based lump sum.\(^\text{14}\) The choice must be made in writing and must be given to the MRCC within six months.

8.35 Lump sum payments are age based starting at age 31 for males and age 35 for females. In other words, for a given level of permanent impairment, lump sum amounts are constant up to age 31 for males and age 35 for females and will then reduce according to a formula provided by the Australian Government Actuary.\(^\text{15}\)

8.36 The age used for making the adjustment is the age of the claimant on the date at which the MRCC advises him or her that permanent impairment compensation is payable.

8.37 Figure 8.5 shows male peacetime permanent impairment lump sum compensation amounts (as at 1 July 2010) for different ages and degrees of impairment.

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\(^\text{14}\) See section 78 of the MRCA.

\(^\text{15}\) See section 78 of the MRCA.

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76 Review of Military Compensation Arrangements
8.38 Lump sum amounts for women are higher, because the Australian Life Tables reflect a longer life expectancy for females compared with males.

8.39 As at December 2010, only 94 claimants were receiving periodic permanent impairment payments, compared with 1,453 lump sums paid since 2004. It should be noted that of the 94, some were still within the timeframe to convert to a lump sum.

**Submissions to the review regarding age-based lump sums**

8.40 Several submissions to the Review referred to the disadvantage caused to older recipients in not being eligible for the maximum lump sum. One submission to the Review stated:

Lump sum payments under the SRCA are not gender or age based. This means a 24 y o [year old] male who satisfies the criteria will get the same amount as a 40+ y o [year old] male or female.

This means that in reality a person who receives a lump sum payment under the SRCA can in affect [sic] receive more than his/her equivalent under the MRCA.

Again this goes against the concept of no one being worse off.

Although we understand the rationale, we disagree with the application as it discriminates based on age and gender. Whether this is legal or not, it is immoral and goes against the concept of being a model litigant.\(^\text{16}\)

\(^{16}\) Injured Service Persons Association.
8.41 Another submission to the Review stated:

> It is strongly put to the Government that the age and gender bias is removed in terms of Government Actuary referencing, as this is a Military Compensation Act, not Superannuation. This is the only known Compensation system to be bias toward service type, age and gender in the world. This is distinctly disadvantageous to those who have served or serve in the ADF.\(^\text{17}\)

8.42 Some submissions also pointed to problems encountered in seeking extension of the legislated six-month time limit for choosing a lump sum.\(^\text{18}\) They sought a 12-month period for election of the lump sum.

### Age-based calculation should remain in place

8.43 The Committee supports the retention of the current system of age-based lump sums for the following reasons.

8.44 The MRCA approach is distinct from other compensation jurisdiction, such as the SRCA, in which lump sum benefits are paid at the same rate regardless of age and sex. However, the MRCA approach effectively parallels fortnightly disability pensions under the VEA, with the additional choice of being able to convert these to a lump sum.

8.45 The MRCA approach is derived from the VEA, but improved by offering the choice to take a lump sum in lieu of the periodic payment, or a combination of both. If a person is unhappy with the lump sum calculation, they can choose to remain on the periodic payment. ESOs sought this approach in the development of the MRCA and a number of submissions have been made to the Review requesting the same choice in respect of a pension payable under the VEA.

8.46 The criticism in some submissions is that lump sums should be the same regardless of age and sex, not that the choice between a pension and a lump sum be removed. However, the element of choice makes it essential for lump sums to continue to be calculated on the basis of actuarial assumptions.

8.47 Furthermore, an extension of time to 12 months is not favoured by the Committee, because this may delay the process more than is necessary. The MRCC may extend the six-month period within which the choice must be made if it considers there are ‘special circumstances’ for doing so. A decision regarding an extension of time is reviewable. However, the MRCC should provide clear policy and guidelines in regard to what constitutes ‘special circumstances’.

\(^{17}\) Australian Peacekeeper and Peacemaker Veterans’ Association.
\(^{18}\) Vietnam Veterans Federation of Australian & KCI Lawyers.
Multiple conditions and the whole person impairment methodology

8.48 The assessment of permanent impairment under the MRCA is based on whole person impairment methodology.\(^\text{19}\) That is, where multiple service-related conditions exist, the impairment resulting from all service-related conditions is not simply added but must be combined by applying the following formula, where A and B are separate conditions:

\[
\text{Combined value of } A \text{ and } B = A + B(1 - \frac{A}{100})
\]

rounded to the nearest integer.\(^\text{20}\)

8.49 This formula ensures compensation cannot exceed 100 per cent of whole person.

8.50 For example, a member suffers a condition that constitutes 60 impairment points; that is, 60 per cent of whole person. The same member suffers a subsequent condition that constitutes 50 impairment points. This subsequent injury will be worth an additional 20 impairment points — 50 per cent of the person’s remaining 40 per cent of whole person. The member’s impairment rating will be 80 impairment points as a result of the two conditions.

Submissions to the review regarding the whole person impairment methodology

8.51 One submission to the Review argued that the MRCA’s whole person impairment methodology disadvantages claimants with multiple conditions in comparison to schemes that do not use a whole person impairment methodology, or do so in limited circumstances.\(^\text{21}\)

8.52 The SRCA is the primary example used to support this argument. When the MRCA came into operation on 1 July 2004, the permanent impairment claims under the guide used to assess the degree of permanent impairment under the SRCA employed a whole person impairment approach where multiple conditions resulted from a single workplace incident.

8.53 The guide used to assess the degree of permanent impairment under the SRCA (under both Part 1 and Part 2) can no longer apply a whole person impairment concept of assessment, because the High Court\(^\text{22}\) has found that each condition resulting in impairment must be assessed separately and that injury is not incident based. Multiple conditions can result from the one workplace incident, and the impairment resulting from each injury must be assessed separately and not combined. Therefore, the gap between the SRCA and the MRCA has widened since 1 July 2004.

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\(^{19}\) The concept of ‘whole person impairment’ is reflected in various provisions of the primary legislation, such as the definition of impairment in section 5 of the MRCA; the definition of ‘impairment points of a person’ in section 5 of the MRCA; sections 67, 68, 69, 70 and 71 of the MRCA — noting especially the meaning of ‘compensable condition’; and section 13 of the CTPA.

\(^{20}\) See Chapter 18 of GARP M.

\(^{21}\) Slater & Gordon Lawyers.

Retention of the whole person impairment methodology

8.54 The Comcare options paper makes the following observations in relation to the change in whole person impairment methodology of the SRCA brought about by the High Court:

A consequence of the Canute decision is that it disadvantages an employee who might, for example, have nine per cent impairment to their foot, seven per cent impairment to their ankle and seven per cent impairment to their wrist. Each value falls below the 10 per cent threshold. However, if these separate impairments were combined to achieve a combined impairment value, (in this example, nine per cent, seven per cent and seven per cent) they would achieve a combined value of 21 per cent using the combination tables in the Guide.

The application of the law in accordance with Canute advantages a small group of employees, being those with multiple ‘above threshold’ impairments. These individual impairments are able to be added — e.g. 15 per cent, 12 per cent and 10 per cent impairment added to achieve a 37 per cent impairment as opposed to being combined, via the Guide’s combination tables, to achieve a 33 per cent impairment.23

8.55 The Committee notes and agrees with Comcare’s observation that there can be both detriment and benefit under a whole person impairment methodology compared with the single-condition methodology required by the High Court.

8.56 Consistent with the whole person impairment approach, Comcare’s preferred position is that, for each employee under the SRCA, all impairments resulting from a single workplace incident be combined. If Comcare’s preferred option is accepted, the SRCA will once again be more closely aligned with the MRCA. This would go some way to addressing the concerns expressed in submissions to the Review, although not in the direction sought, but at least resolving the different approaches between the SRCA and the MRCA.

8.57 Regardless of the current or future position adopted under the SRCA, the Committee believes the whole person impairment methodology under the MRCA is a preferable policy position. The Committee supports the retention of a compensation system that ensures a claimant cannot receive a series of payments that accumulate to more than 100 per cent whole person.

8.58 The Committee recommends that the whole person impairment methodology continue under the MRCA.

Date of effect of permanent impairment compensation payments

8.59 Weekly permanent impairment compensation under the MRCA becomes payable from the later of: 24

- the date the claim for liability was lodged; or
- the date that the claimant’s condition(s) are found to have become permanent, stable, and constituting the required threshold of impairment points, as determined by the MRCC.

24 See section 77 of the MRCA.
8.60 In the case of multiple conditions, all must be found to be permanent, stable, and constituting the required threshold of impairment points. Where a final assessment cannot be made because one or more of the conditions have not stabilised, an interim payment of permanent compensation can be made under the MRCA. This may occur where the impairment suffered by the person as a result of the accepted conditions constitutes the minimum impairment threshold and is likely to continue indefinitely.\footnote{See section 75 of the MRCA.}

8.61 The interim compensation is the amount determined to be reasonable, based on a conservative estimate of the expected final impairment rating once all conditions have stabilised. Importantly, lifestyle effects are not included in the calculation of the interim permanent impairment, whereas lifestyle effects are a component of the final permanent impairment calculation.\footnote{See subsection 75(2) of the MRCA.}

**Submissions to the review regarding the date of effect for permanent impairment payments**

8.62 Concerns have been raised with the Committee in relation to situations where liability has been accepted for two or more conditions and one condition becomes eligible for payment, but other condition(s) are awaiting stabilisation. In this situation, only an interim payment will be payable in relation to the first condition, until all conditions have stabilised.

8.63 Under these circumstances, a claimant may be disadvantaged because the lifestyle effects of the stable condition will not be compensated until a final permanent impairment compensation payment becomes payable.

8.64 Take for example, a former member who has liability for condition X and condition Y accepted under the MRCA as related to peacetime service (example A, in Figure 8.6, below). Neither condition was considered stable at the date the claim for liability was lodged in July 2010. Condition X is determined to be stable and permanent in August 2010. Because condition Y is not stable, only interim compensation can be paid.

8.65 Condition X constitutes 20 impairment points and a lifestyle effect of 2 points. The lifestyle effects of the condition cannot be included in the calculation of the interim payment. The interim payments for condition X will be $28.92 per week, payable from August 2010. Condition Y becomes stable in January 2011. Including lifestyle effects, the final payment for condition X is $36.22 per week, payable from January 2011. The former member has suffered a loss of $7.30 per week ($36.22–$28.92) between August 2010 and January 2011.
8.66 The former member in the example above would not have suffered any loss if he or she had waited to lodge a claim for liability for condition Y until after permanent impairment compensation became payable for condition X (example B, in Figure 8.7).

8.67 The current date of effect provisions may have the unintended consequence of inconsistent outcomes for comparable situations, depending on the order in which claims for liability are lodged. It may encourage a member or former member with multiple conditions to hold back a claim for liability for some condition(s). This could occur where the lodgement will prevent an early permanent impairment payment, including compensation for lifestyle effects, for other condition(s) likely to stabilise earlier.

8.68 This goes against one of the objectives that should underpin military compensation arrangements — that members and former members be encouraged to lodge a claim for liability as early as possible.

8.69 The Committee believes the MRCA should be amended so that permanent impairment compensation (including compensation for lifestyle effects) is payable from the date each accepted condition becomes permanent, stable and results in the threshold level of impairment.
Stabilisation

8.70 More generally, there appears to some concern in the community about the requirement for a condition to be stable under the MRCA before payment of permanent impairment compensation. The Commonwealth and Defence Force Ombudsman’s submission stated that ‘they receive complaints from clients who have been required to wait until their condition has stabilised before receiving compensation for permanent impairment’. The Ombudsman goes on to say:

While DVA is correct in requiring the condition to be stable, we note that this is an area where process and the reasoning is not well understood. To clients, it can seem that the requirement to wait means that DVA expects them to either recover, or become much worse.

8.71 It is not clear in which respect the Ombudsman believes DVA is ‘correct’; whether it believes DVA is correct in its application of the law or whether the legislation correctly requires a member or former member’s condition to be stable before payment — presumably both.

8.72 The Committee does not consider it reasonable to pay compensation at a level that does not reflect a claimant’s final degree of permanent impairment and confirms that the stability requirement is sound policy under the MRCA.

8.73 However, the Ombudsman categorises the problem as one of procedure and communication, as opposed to a concern with broader policy. The Committee observes that the reasons for the MRCA’s requirement for stabilisation are not well understood, particularly among the veteran cohort more familiar with the VEA, which does not contain the same requirements. Under the VEA, impairment is assessed at a point in time regardless of stability.

8.74 Only 153 interim permanent impairment compensation payments have been made under the MRCA from 1 July 2004 to 30 June 2010. The Committee believes that greater use of interim permanent impairment compensation payments would alleviate concerns around delays created by the requirement for impairment to be stable.

Limit on damages against the Commonwealth or other liable parties for non-economic loss

8.75 If permanent impairment compensation is payable to a claimant under the MRCA, but the compensation has not yet been paid, the member may irrevocably choose to institute common law action against the Commonwealth or a potentially liable member for damages for non-economic loss.

8.76 Under subsection 389(5) of the MRCA, if a member institutes an action at common law, the court must not award damages of more than $110,000 for non-economic loss. The amount of $110,000 is not subject to annual indexation and corresponds with the maximum lump sum payment under the SRCA when that Act came into operation in 1988. The amount under the SRCA is also not subject to annual indexation and has remained the same since 1988.

8.77 Several ESO and legal profession submissions to the Review advocate an increase to the cap of $110,000 under the MRCA. One submission wrote that ‘the cap on the damages available at common law has remained the same since 1988 while the maximum payable [for permanent impairment] has gradually increased … thereby
eroding potential common law benefit to members’. The submission argued that if there must be a cap for common law damages, it should be in line with the maximum benefit payable for permanent impairment, or at the very least indexed in accordance with the Consumer Price Index (CPI).

8.78 Like the SRCA, one of the aims of the MRCA is to take precedent over awards of damages at common law for losses of a non-economic nature. Increasing the cap on common law damages would undermine this purpose. While recourse to common law damages might be necessary in some limited circumstances, the Committee agreed that the MRCA should adequately cover the field in most cases. The Committee does not favour any increase to the cap on common law damages under the MRCA.

Choice to institute action for damages against the Commonwealth or other liable parties for non-economic loss

8.79 One submission argued that the MRCA has limited a member’s choice to institute an action for common law damages in two ways compared with the situation that previously existed under the SRCA.

8.80 Firstly, where the methodology used in calculating transitional permanent impairment compensation claims (discussed in more detail in Chapter 22) leaves a nil amount of permanent impairment compensation payable, the member has lost the choice to institute an action at common law. This is because the choice to pursue common law damages is only offered where permanent impairment compensation is payable. The submission recommends that the choice be offered where a member is eligible to receive permanent impairment compensation, whether or not permanent impairment compensation may actually be payable to that member.

8.81 The Committee believes that the choice to institute an action at common law should continue to be available only where permanent impairment compensation is payable. Again, it must be emphasised that one of the aims of the MRCA is to take precedent over awards of damages at common law for losses of a non-economic nature. Increasing the scope to pursue common law damages would undermine this purpose. However, it should be noted that an alternative method for calculating transitional permanent impairment amounts is presented, which would ameliorate the effect of the methodology and increase the circumstances in which permanent impairment compensation would be payable. This would go some way to addressing the concerns raised in submissions.

8.82 Secondly, the submission made the following argument:

A further unintended erosion of Common Law rights has occurred with respect to injuries ‘arising out of employment’ (as distinct from ‘in the course of employment’), in respect of which actions for damages are not barred by s 44 of the SRCA but are effectively barred by s 388 of the MRCA (which provision excludes actions in relation to all service injuries and diseases) and will in future prevent Common Law actions in respect of insidious diseases resulting from, for example, exposure to asbestos, radiation or chemicals.

8.83 Section 44 of the SRCA refers to an injury sustained by an employee ‘in the course of his or her employment’. On the other hand, section 6(1) of the Act (and other

27 Wyatt Attorneys.
28 Slater & Gordon Lawyers.
29 Slater & Gordon Lawyers, pp. 24–25.
30 Slater and Gordon Lawyers, p. 25.
sections) refers to an injury having ‘arisen out of, or in the course of, his or her employment’.

8.84 When the SRCA was drafted in 1988, section 6 (and other sections) adopted the wider definition of a compensable injury as having ‘arisen out of, or in the course of, his or her employment’, because of the emergence around that time of more cases of injuries of long latency (e.g. mental health conditions or asbestos-related diseases). It could be argued that, because of these long latency periods, these injuries did not arise ‘in the course of employment’ but instead ‘arose out of employment’. Section 6 was worded to ensure that long-latency diseases would be covered under the SRCA for workers’ compensation purposes.

8.85 Section 44, on the other hand, seeks to prevent employees from pursuing common law action for damages when they have access to workers’ compensation. DEEWR had advised the Committee that the drafters in 1988, when considering what damages action a person could take, believed that the courts would only ask, ‘did the injury arise in the course of the employment?’ and that the common law did not recognise the concept of ‘arising out of employment’. It was believed that section 44 would be wide enough to bar all common law actions when there was access to workers’ compensation.

8.86 This understanding of how a damages action would be interpreted by a court was, in the end, wrong, and in 1991 the NSW Court of Appeal31 ruled that there was a common law distinction between an injury ‘arising in the course of employment’ and an injury ‘arising out of employment’. Even though the courts have overturned the full intent of section 44, successive governments have not amended this section.

8.87 The Committee acknowledges that the MRCA’s access to common law damages for non-economic loss for diseases with potentially long latency, such as mental health conditions, is more limited than it is under the SRCA in respect of injuries and diseases ‘arising out of employment’. However, the Committee does not believe that an unintended outcome under the SRCA should be replicated under the MRCA. Again, the Committee confirms that one of the aims of the MRCA is to take precedent over awards of damages at common law for non-economic loss. It is the Committee’s view that the MRCA should not be amended to replicate the unintended outcome under the SRCA in respect of injuries or diseases ‘arising out of employment’, as this would undermine that intention.

Conclusions

8.88 Submissions to the Review raised a broad range of issues relating to permanent impairment compensation under the MRCA.

8.89 This chapter has discussed the arguments for and against the retention of higher compensation levels for operational service in the MRCA. The Committee had divided views on the application of the differential across all levels of impairment.

8.90 The chapter has also discussed and confirmed the rationale for age-based lump sums under the MRCA.

8.91 Furthermore, in this chapter, the Committee has considered the whole person impairment methodology. The Committee confirms its view that this approach to assessing claimants with multiple conditions under the MRCA should be retained.

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This chapter also examines the date of effect provisions for permanent impairment compensation and the stability requirement in the MRCA. The Committee has found inequities for claimants for multiple conditions where those conditions become stable at different points in time. The Committee confirms the stability requirement in the MRCA, but suggests that the increased use of interim compensation payments and reconsideration and review rights would alleviate concerns around delays created by the requirement for impairment to be stable before payment.

Finally, this chapter has dealt with concerns relating to both the limitation on, and the choice to pursue, common law damages for non-economic loss imposed by the MRCA. The Committee does not support any changes to these provisions and confirms that one of the objectives of the MRCA should be to replace the common law as the system for seeking non-economic loss compensation in respect of most, if not all, conditions related to defence service.

**Recommendations**

The Committee recommends that:

8.1 the existing permanent impairment compensation differential for warlike and non-warlike service, as opposed to peacetime service, be maintained; and

8.2 the Government considers:

(a) a model that revises the current differential, by having a standard 10 per cent permanent impairment differential for 71 or more impairment points (and for death benefits, see Chapter 9) — favoured by the Department of Veterans’ Affairs and Australian Department Organisation representatives and Mr Peter Sutherland; or

(b) not altering the current arrangements, noting the issues associated with removing the existing differential and the range of views in the broader veteran community — favoured by the Department of Finance and Deregulation, the Treasury and the Department of Education, Employment and Workplace Relations representatives;

8.3 permanent impairment compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA) continues to be paid either by way of periodic payments or an age-based lump sum payment, or a combination of the two;

8.4 claimants continue to be allowed six months to make an election to receive an age-based lump sum in lieu of periodic payments, and the Military Rehabilitation and Compensation Commission should provide clear policy and guidelines regarding what constitutes ‘special circumstances’ for the purposes of an extension;

8.5 the whole person impairment methodology continues to be applied under the MRCA;

8.6 the date of effect for commencement of periodic permanent impairment compensation payments under the MRCA be on the basis of each accepted condition rather than all accepted conditions;

8.7 decision makers make greater use of the interim permanent impairment compensation provisions of the MRCA;

8.8 no changes be made to existing provisions relating to the limit on damages against the Commonwealth or other liable parties for non-economic loss; and

8.9 no changes be made to existing provisions relating to the choice to institute action for damages against the Commonwealth or other liable parties for non-economic loss.