Chapter summary

With the introduction of the Military Rehabilitation and Compensation Act 2004 (MRCA) in 2004, the decision was made to provide parallel appeal pathways: review by the Veterans’ Review Board (VRB), or reconsideration by the Military Rehabilitation and Compensation Commission (MRCC) delegate. This provides a choice between consideration by a non-judicial body (the VRB) and a path that provides reconsideration by another delegate, which may lead more quickly to the Administrative Appeals Tribunal (AAT). Both paths lead to review by the Veterans’ Appeals Division of the AAT.

The Committee examined the issues around the parallel appeal pathways raised by several submissions to the Review. The VRB path can be seen as a lengthy and daunting process and, therefore, some claimants seek MRCC reconsideration, only then realising the irrevocability of the decision and the fact that legal aid will not be available at the MRCC or at the AAT, other than for claims relating to operational service. Confusion also arises from the different time limits applying for lodgement of applications and for subsequent actions in the two paths. For example, applications for MRCC reconsideration must be lodged within 30 days and subsequent review by the AAT must be within 60 days, and applications for VRB review must be lodged within 12 months and subsequent review by the AAT must be within 3 months.

The main suggestions from the submissions were that the appeals process be simplified by removing the MRCC pathway and directing all appeals to the VRB; and that legal aid be available for all appeals. The Committee recommends a single appeal path should be established that includes internal reconsideration, the VRB and then the AAT. The Committee believes that this will achieve more timely reviews at a lower cost. However, the Committee also believes that significant alterations to the current VRB process are required, including the introduction of active case management and improvements to timeliness for MRCA reviews by the VRB.

Case management and case conferences will help to ensure that the process is fully understood by the applicant, the issues are well defined, and all relevant evidence is identified and sought as early as possible so that the hearings can proceed without any unnecessary delay. In advance of the adoption of a single path, a formal service-level agreement between the MRCC and the VRB should be negotiated to define a comprehensive case conference process within current legislation.

The Committee believes that reconsideration by the MRCC should be the first step in the review process. This would help ensure the quality of decisions that are considered by the VRB and reduce VRB workloads and costs.

Given the significance of the changes involved in moving to one pathway, alterations will need to be introduced incrementally. The Committee recognises that there are many significant issues that would need to be worked through in consultation with all stakeholders. A model for reform, business case and change management plan for implementation of incremental and legislative change would need to be developed. Incremental change could begin with negotiated changes between the Department of Veterans’ Affairs and the VRB. There will be up-front costs in recruitment, training and systems needs. Implementation of a single path would also require the current position in relation to costs and legal aid to be rethought. For legal aid coverage to be extended to a broader group, the federal Attorney-General would need to take up this matter with his state counterparts.

(continued)
Where liability has been rejected by the MRCC but is subsequently accepted by the VRB, there is rarely sufficient material on file to enable the VRB to determine compensation, as the matters would not have been investigated by the MRCC. As the VRB currently has no power to remit a matter to the MRCC to determine compensation, it must, upon accepting liability, adjourn the hearing. The Committee believes the VRB should be provided with explicit powers to remit a matter to the MRCC for needs assessment and compensation.

Introduction

17.1 This chapter addresses issues relating to reconsideration and review of determinations under the *Military Rehabilitation and Compensation Act 2004* (MRCA). Submissions to the Review raised concerns about claimants having a choice between two MRCA review paths, and related legal aid and cost issues. The terms of reference for the Review exclude the functions and powers of the Veterans’ Review Board (VRB). However, as the Committee has considered submissions about all matters relevant to the operation of the MRCA, including the reconsideration and review process, it has inevitably considered the role of the VRB.

Background

History of military compensation and administrative review

17.2 The right of appeal in veterans’ legislation has existed since 1915 through amendments to the *War Pensions Act 1914*. This provided for appeal of entitlement and assessment matters determined by Deputy Commissioners in each state. Initially, a Commissioner for Pensions filled this role (later the Repatriation Commission), with the first external appeal tribunals established in 1929. From the mid-1930s, a three-tier system existed for some 40 years: (i) Repatriation Boards; (ii) the Repatriation Commission; and (iii) appeal tribunals for entitlement and assessment. There was no general right of appeal to the court system.¹

17.3 In 1975, the Independent Enquiry into the Repatriation System by the Hon Justice Toose recommended that Repatriation Commission delegates take the primary decision-making role, replacing the Repatriation Boards, and that a single tribunal replace the two appeal tribunals, preferably a division of the Administrative Appeals Tribunal (AAT). On questions of law, appeals would be made available to the proposed new Federal Court. In 1979, a first-tier review body, the Repatriation Review Tribunal, was established, instead of referring these appeals to the AAT. A second level of external review to the AAT was made available on merits grounds and, for the first time, claimants could seek a judicial review by the Federal Court on appeal from the AAT on a question of law.

17.4 The system came under severe strain in the early 1980s with the volume of claims and appeals being lodged by Second World War and Vietnam War veterans. Following reviews by the Administrative Review Council (ARC) and an independent advisory committee appointed by the Minister for Veterans’ Affairs in 1983, the Repatriation

Review Tribunal was replaced by the VRB, a specialist, high-volume tribunal providing independent merits review, from 1 January 1985.

17.5 In contrast, appeals under the Safety, Rehabilitation and Compensation Act 1988 (SRCA) were dealt with under the state courts. A Commonwealth Employees Compensation Tribunal operated for five years in the late 1970s and was replaced by the AAT in 1981. The system providing for reconsideration of an original determination and then an appeal to the AAT is common to many other aspects of Commonwealth administration, including matters under Part III of the Veterans' Entitlements Act 1986 (VEA) that provide age and invalidity service pensions for those with qualifying service.

17.6 Certain references are made in this chapter to the operations of the Social Security Appeals Tribunal (SSAT) established under the Social Security (Administration) Act 1999. Access to the SSAT is available for any person dissatisfied with a decision that has been reviewed and affirmed, varied or set aside by the Secretary of the relevant department, Centrelink, or the Child Support Agency. The SSAT has a legislative objective to operate informally with a mechanism that is ‘fair, just, economical and quick’.

17.7 The SSAT is similar to the VRB in that it is not bound by technicalities or rules of evidence, there is no onus of proof, and it is independent of the portfolio department. The SSAT and VRB are the only first-tier, specialist tribunals whose decisions can be appealed to the AAT. Both provide low-cost, less formal review mechanisms, where the relevant department is not present at the hearing. However, all decisions reviewed by the SSAT are made by the equivalent of a VEA section 31 Review Officer, so there has already been at least one internal review of the original decision. While a similar process is applied to VEA matters, internal reviews are currently not routinely carried out for MRCA matters going before the VRB.

Recent developments

17.8 The ARC was established in 1976 to oversee the system of Commonwealth administrative law. The ARC’s 1995 report, Better decisions, recommended structural changes to the tribunal system within the Commonwealth. It recommended the amalgamation of the AAT and a number of other tribunals, including the VRB and the SSAT, with specialist divisions to hear first-tier review cases.2

17.9 In March 1997, the then Attorney-General announced the government’s intention to amalgamate the various specialist tribunals. This was amended in February 1998 to exclude the VRB from the amalgamation proposal, after extensive lobbying by the ex-service community.

17.10 The Administrative Review Tribunal Bill 2000 was introduced into the House of Representatives on 28 June 2000.3 Features of interest included the merger of most tribunals (excluding the VRB) into a two-tiered Administrative Review Tribunal, with leave to appeal from the first to second tier; simplification and streamlining of tribunal procedures, with an emphasis on flexibility in the first tier; less emphasis on legal

---

3 House of Representatives, Official Hansard, 28 June 2000, p. 18,404 per the Attorney-General, the Honourable Daryl Williams MP.
qualifications for tribunal members; and an appeal or review role for the Federal Magistrates Court. This Bill was defeated in the Senate in February 2001.

17.11 Change at the AAT level was enabled through the *Administrative Appeals Tribunal Amendment Act 2005*. The aim of the Act was to improve operations without fundamental change to the purpose, structure or function of the Tribunal. This includes the use of registrars to issue directions as to the procedure to be followed at a proceeding before a hearing has commenced, and imposing an obligation on agency decision makers to assist the Tribunal to reach its decision.

### The Military Rehabilitation and Compensation Act determining system

#### Development of the system

17.12 Several options for the review of primary decisions were considered during the development of the Military Rehabilitation and Compensation Bill 2003 (MRCB) including:

- the paths for SRCA reconsideration and AAT appeal;
- the VRB, including a conciliation role; and
- access to the AAT on merit only.

17.13 The MRCB went forward with parallel appeal paths. These reflect the reconsideration and appeal rights available under the SRCA for all service[^4] and for claims arising from warlike and non-warlike service.[^5]

17.14 In September 2003, the Senate Finance and Public Administration (F&PA) References Committee initiated an inquiry into the administrative review of veteran and military compensation and income support.[^6] The exposure draft of the MRCB had been made available to stakeholders in June 2003.

17.15 In explaining the development of the review model in the exposure draft of the MRCB, the then Secretary of the Department of Veterans’ Affairs (DVA), Dr Neil Johnston AO, advised the inquiry that:

> …we advised the government, in the light of the discussions in the working party where there was no consensus on a single preferred model, that the best option was to continue with two parallel tracks in a sense travelling more closely together now and providing more obvious points of comparison. We expect that over a period of some years now that there will be a better opportunity to compare the two and if possible meld them or learn from each other. At this point, we certainly have not been able to put forward a rationale or an analysis that has been persuasive to the veteran community on a preferred melding of the two.[^7]

[^4]: Section 349 of the MRCA.
[^5]: Section 352 of the MRCA.
17.16 The F&PA References Committee, in its report tabled on 4 December 2003, recommended that the MRCA provide the same appeal path for all claimants, and made other recommendations aimed at improving the capacity of ex-service organisations (ESOs) to run advocacy services. The Committee found that worthy reforms could be implemented with priority given to incentives to assist early provision and completeness of information, and hence the earliest possible settlement of appeal cases. It recommended incremental reforms starting with a two-year trial in one state to test the effectiveness of a number of ‘modest changes’, particularly to the VRB stage of the review process.

17.17 The F&PA References Committee report was not responded to by the Australian Government until 16 June 2005, and the changes recommended for the VRB were not generally agreed. Similar issues are discussed later in this chapter.

17.18 The Senate Foreign Affairs, Defence and Trade Legislation Committee conducted an inquiry into the MRCB and reported in March 2004. ESOs objected to the parallel process of appeal and review. For example, the view of the Returned & Services League of Australia (RSL) and the Injured Service Persons Association was that there should be a single path and that all applicants should have access to the VRB, regardless of the type of service.8 The outcome of the inquiry’s recommendations was that all appellants were given the choice to use the VRB path in the MRCA, regardless of the type of service.

### The current system

17.19 A schematic of the current MRCA determining system is shown in Figure 17.1, demonstrating the two pathways that resulted in response to the Senate Inquiry. Alternatively, the MRCC can reconsider any original determination under section 347 under its ‘own motion’. This becomes an original determination in itself and is, therefore, appealable under either path.

17.20 Under section 352 of the MRCA, the claimant may choose to appeal to the VRB. This path leads to the AAT with legal aid, subject to a ‘merits test’, to applicants with warlike or non-warlike service. No costs can be awarded under this path. The MRCC must provide a written report to the VRB within six weeks of an application for review by the Board being received,9 as required under section 137 of the VEA.

17.21 Legal representation is not permitted at the VRB, although the claimant may be accompanied by a nominated representative. While people with legal qualifications are prohibited from representing applicants at VRB hearings, applicants are permitted to consult lawyers prior to their hearing, and a paralegal employed by a law firm can appear. Written submissions prepared by a legal practitioner will be accepted by the VRB for consideration as evidence. However, legal aid funding is not available for legal work on VRB applications.

17.22 Requests for appeal to the VRB under the VEA are ‘screened’ by the section 31 reviewing officer prior to the materials being collated for the VRB, under section 137 of the VEA. Consistent with the practice under the VEA, the MRCC, as a rule, had all VRB

---


9 Section 353 of the MRCA, which adopts section 137 of the VEA.
appeals firstly reconsidered by another delegate under section 347. This practice was discontinued in late 2009, in response to ESO requests at the Operational Working Party\(^{10}\) for prompt referral to the VRB.

17.23 Under section 349 of the MRCA, the claimant may seek reconsideration by another delegate of the MRCC. This path leads to further review by the AAT, with possible awarding of costs where the applicant is successful (no costs award can be made against the applicant). The section 349 path offers internal reconsideration, as well as review by application to the Compensation Division of the AAT. Once a request for reconsideration is lodged under section 349 of the MRCA, a person cannot then proceed to the VRB.

17.24 Under both paths, general means-tested legal aid is, in theory (see later discussion), available in accord with community-wide standards assessed at the state level.

Note: Shaded boxes show the same path as available under the VEA.

---

\(^{10}\) The Operational Working Party is a high-level forum of the Department and ESO representatives, established to focus on the Department’s service delivery performance and operational issues.
17.25 Under the MRCA, a more expansive range of issues is appealable to the VRB. In addition to the death, liability, assessment and attendant allowance cases handled previously, VRB coverage in the MRCA extends to rehabilitation, incapacity payments, treatment and other allowances. It also includes transitional matters arising from the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004*.

**Statistics**

17.26 From the commencement of the MRCA in 2004, the level of reconsiderations and reviews grew slowly from a zero base. Table 17.1 summarises activity at each level of review of MRCA decisions over the past four years.

### Table 17.1  MRCA review activity

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>VRB — cases received</td>
<td>36</td>
<td>68</td>
<td>137</td>
<td>210</td>
</tr>
<tr>
<td>VRB — cases withdrawn after section 347 and other action</td>
<td>6</td>
<td>16</td>
<td>21</td>
<td>38</td>
</tr>
<tr>
<td>VRB — cases finalised</td>
<td>12</td>
<td>36</td>
<td>58</td>
<td>111</td>
</tr>
<tr>
<td>VRB — cases heard</td>
<td>10</td>
<td>34</td>
<td>50</td>
<td>95</td>
</tr>
<tr>
<td>Cases affirmed</td>
<td>43.7%</td>
<td>76.0%</td>
<td>76.7%</td>
<td>43.0%</td>
</tr>
<tr>
<td>Cases set aside</td>
<td>56.3%</td>
<td>24.0%</td>
<td>23.3%</td>
<td>57.0%</td>
</tr>
<tr>
<td>AAT appeals from the VRB</td>
<td>NA</td>
<td>4</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>VRB decisions affirmed</td>
<td>NA</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Settled prior to hearing</td>
<td>NA</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>NA</td>
<td>2</td>
<td>2</td>
<td>6</td>
</tr>
</tbody>
</table>

**Section 349 path**

| Requests for reconsideration received                 | 185     | 370     | 295     | 372     |
| Requests for reconsideration decided                 | 155     | 307     | 374     | 445     |
| Decisions affirmed                                    | 113 (73%) | 205 (67%) | 218 (58%) | 300 (67%) |
| AAT applications received                            | 2       | 34      | 46      | 31      |
| AAT applications decided                             | 2       | 24      | 10      | 21      |
| Settled prior to hearing                              | NA      | 6       | 3       | 5       |
| Withdrawn                                             | NA      | 14      | 3       | 10      |

MRCA = *Military Rehabilitation and Compensation Act 2004*, VRB = Veterans’ Review Board, AAT = Administrative Appeals Tribunal, NA = not applicable

Note: Statistics confirmed by the Veterans’ Review Board but may differ from Department of Veterans’ Affairs annual reports.

17.27 As shown, 210 applications for review were made to the VRB in 2009–10. These MRCA applications formed only 5.4 per cent of the VRB’s total intake and only 3 per cent of its output of finalised applications. While this indicates that current MRCA activity at the VRB and AAT is minor, it will grow as the proportion of claims under the MRCA grows over time and VEA applications continue to decline.

17.28 The table shows that 372 claimants (64 per cent of all claimants) seeking review of an MRCC determination chose the section 349 reconsideration path in 2009–10. For
this path, 67 per cent of delegate decisions were affirmed in 2009–10 on reconsideration by a new delegate. For the section 352 path, the VRB affirmed 43 per cent of MRCA matters. The VRB affirmation rate has reduced in the past year as the MRCC no longer conducts a section 347 review prior to the VRB consideration.

17.29 Statistics are not available on determinations under section 347 for MRCC-initiated reconsiderations. Section 347 determinations are appealable in the same way as primary decisions and some parties may choose to apply to the VRB following a decision under that section.

17.30 The average expenditure in 2009–10 on each finalised VEA and MRCA application to the VRB was $1,450.\textsuperscript{11}

17.31 The SSAT reported similar average costs to the VRB of $1,858 per decision reviewed in 2009–10.\textsuperscript{12}

17.32 Data from the SSAT’s 2009–10 annual report is included in the following table for comparative purposes.\textsuperscript{13}

| Table 17.2 Social Security Appeals Tribunal Centrelink application statistics |
|---------------------------------|---------|---------|---------|
| Lodged                          |        |        |        |
| Finalised                       |        |        |        |
| Decisions reviewed\textsuperscript{a} |        |        |        |
| Decisions affirmed\textsuperscript{b} |        |        |        |
| Decisions set aside or varied\textsuperscript{b} |        |        |        |
| No jurisdiction/withdrawn/dismissed | 9.3% / 8.2% / 6.8% | 7.0% / 8.2% / 7.7% | 7.9% / 7.8% / 3.4% |

\textsuperscript{a} Centrelink applications may include appeals against multiple decisions.
\textsuperscript{b} Figures are given as a percentage of all decisions reviewed.

17.33 The AAT 2009–10 annual report states that 63 per cent of all Veterans’ Affairs cases were dealt with within 12 months and 83 per cent within 18 months, against a target of 80 per cent within 12 months.\textsuperscript{14} Of all SRCA cases, 57 per cent were dealt with within 12 months and 78 per cent within 18 months, against a target of 75 per cent within 12 months. The average cost of a review at the AAT to the Tribunal itself ranges from $2,600 per case without hearing (82 per cent) to $14,620 per case with hearing.\textsuperscript{15} In the two years from 2007–08 to 2008–09, only 8 of the 34 MRCA cases that were decided went to hearings, supporting the value of mandatory conciliation and effective case management processes prior to hearings at this level. The AAT received 23 MRCA applications last year, and 32 MRCA matters were finalised.\textsuperscript{16}

\textsuperscript{11} As advised by the VRB.
\textsuperscript{13} ibid., p. 15.
\textsuperscript{15} ibid., p.24.
\textsuperscript{16} ibid., p. 127.
Processing times

17.34 In 2009–10, reconsiderations of MRCA claims took an average of 127 days (130 in 2008–09), similar to the times taken for the SRCA. Submissions to the Review from legal firms seek time standards and one recommendation is for a required time of 30 days.\(^\text{17}\)

17.35 The VRB provides a comprehensive analysis of TTTP in its annual reports, including times for stages of the MRCA appeal process and attribution of the times taken that are primarily within the control of the VRB, DVA and the applicant. The total time to resolve a VRB application on a MRCA claim for the past three years has been 327 days (2007–08), 398 days (2008–09) and 418 days (2009–10) — an upward trend. The time reported for all claims (VEA and MRCA) for the past three years has been 406 days (2007–08), 356 days (2008–09) and 335 days (2009–10) — a downward trend.

17.36 The following table shows the three categories where the application was held for the last two fiscal years. These VRB data indicate that, of the time taken to complete an appeal, more than half the time can be taken where the case is in the hands of the applicant. The table shows that DVA is a greater contributor to the elapsed time for applications under the MRCA than the VEA, although numbers under the MRCA are much lower.

<table>
<thead>
<tr>
<th>Table 17.3 Number of Veterans’ Review Board applications at each stage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>MRCA cases</strong></td>
</tr>
<tr>
<td>With the VRB</td>
</tr>
<tr>
<td>With the applicant</td>
</tr>
<tr>
<td>With DVA</td>
</tr>
<tr>
<td>Total</td>
</tr>
<tr>
<td><strong>VEA cases</strong></td>
</tr>
<tr>
<td>With the VRB</td>
</tr>
<tr>
<td>With the applicant</td>
</tr>
<tr>
<td>With DVA</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

MRCA = Military Rehabilitation and Compensation Act 2004, VRB = Veterans’ Review Board, VEA = Veterans’ Entitlements Act 1986, DVA = Department of Veterans’ Affairs

Advocacy

Representation

17.37 Legal representation at the VRB is prohibited under VEA section 147; however, the applicant may be accompanied or represented at the hearing by anyone who is not a lawyer. This provision also applies to the MRCA. It is less common for MRCA applicants to be accompanied or represented at the VRB.

\(^{17}\) Vietnam Veterans Federation of Australia and KCI Lawyers.  
\(^{18}\) Slater & Gordon Lawyers.
17.38 In 2009–10, 70 per cent of MRCA applicants had an advocate attend the VRB, compared to 85 per cent for VEA applicants. This may reflect higher education and confidence levels among the younger people eligible under the MRCA. It may also reflect a shortfall in the number of ESO pension officers and advocates with the required level of understanding of the MRCA in some locations. The VEA is generally better understood by pension officers and advocates; it represents most of their experience to date.

17.39 In contrast, legal representation is allowed at the SSAT. Interestingly, this occurs in 2.5 per cent of SSAT hearings that are not related to child support, but rises to 7.5 per cent in the SSAT’s Child Support Agency jurisdiction. The Commonwealth priorities for legal aid assistance apply to child support and maintenance. Legal costs are not payable in the SSAT.

**Department of Veterans’ Affairs advocacy**

17.40 The Repatriation Commission and the MRCC are generally not represented at the VRB, and this allows the applicant to put their cases without being subject to Departmental challenge such as cross-examination. The Repatriation Commission did appear in more VRB cases in the early years of the VRB, but it was decided there was a better return through redirecting resources at the AAT, where case law was more of an issue. DVA advises that in exceptional cases, the Commissions are represented at the VRB.

17.41 DVA advocates representing the Repatriation Commission on VEA cases at the AAT are generally DVA employees at the Executive Level 1 or above. They are not required to be legally qualified, but most are. Most SRCA and MRCA advocacy conducted by DVA at the AAT is contracted out to a panel of legal service providers at a cost of $4.5 million per year. The AAT requires agencies to be in attendance (or participate by telephone) at conferences and hearings to facilitate settlements.

**Veterans’ Review Board**

17.42 Rates of cases that are set aside or affirmed may vary for a number of reasons, as stated in the VRB annual report each year. Some of the factors that may influence this include:

- the approach taken by applicants and representatives as to the matters on which review will be sought;
- the extent of MRCC intervention under section 347 of the MRCA;
- the adequacy of information presented to primary decision makers;
- the nature and extent of new material presented on review (oral evidence at a hearing or new evidence obtained during pre-hearing appraisal);
- a different interpretation of original evidence (so a new diagnosis and new SoP are applicable);

---

19 Percentages supplied by the VRB.
• a shift in focus to a different factor in the applicable SoP; and
• a change in an applicant’s degree of incapacity or impairment between the date of the
decision under review and the date of the final hearing at the VRB in an assessment or
compensation matter.

17.43 In an examination conducted in 2007–08, about 85 per cent of all VEA claims
that were overturned at the VRB were overturned due to new evidence. The VRB has
advised DVA that surveys of VRB decisions conducted in May 2008 and May 2010
showed that, in 76 per cent and 75 per cent of cases, respectively, where matters were set
aside by the VRB, this was due to additional evidence that allowed a decision in favour of
the applicant. In the May 2010 survey, the second most common reason for setting aside a
decision was the consideration of a different SoP factor (around 19 per cent of set aside
decisions). In 84 per cent of these cases, new evidence was provided in relation to the
new SoP factor.

17.44 In comparison, the SSAT reports the following breakdown of reasons for changes
in Centrelink decisions:
• 44 per cent new evidence;
• 33 per cent errors in fact;
• 15 per cent errors in law; and
• 8 per cent special circumstances.

17.45 An analysis undertaken by the VRB in New South Wales in 2008 indicated that,
of the cases set aside as a result of new evidence, the kinds of new evidence were:
• other kinds of information: 40 per cent;
• specialist reports: 39 per cent;
• general practitioner reports: 25 per cent;
• applicant questionnaires: 20 per cent;
• new medical impairment assessment: 16 per cent; and
• new audiogram: 16 per cent.

17.46 That such a high percentage is a result of ‘other kinds of information’ is rather
unusual, considering the evidence that a decision is based on should be reasonably clear.
This ‘other kind of information’ may be a result of oral evidence given before the VRB
hearing by the applicant or their advocate. Some applicants have no phone contact with
DVA and therefore do not have an opportunity to voice their contentions regarding their
claim.

17.47 A review of a sample of cases has shown clearly that ‘other information’ is often
a written statement from the applicant’s spouse or children, attesting to the applicant’s
alcohol consumption or general state of mind in certain cases. This new information,
often combined with oral evidence by the applicant or spouse, appears to have been
considered very favourably by the VRB. The ability of the VRB to generally hear oral
evidence is obviously different to DVA’s decision-making process, which may explain
the higher weighting of claimants’ statements at the VRB.
Administrative Appeals Tribunal

17.48 In August 2004, the AAT President issued a direction that all defence-related claims under the SRCA, and all applications under the MRCA, should be dealt with in the Veterans’ Appeals Division of the AAT. This is expected to be renamed the Veterans’ and Military Compensation Division, to reflect the fact that all applications relating to veterans’ entitlements and military compensation are to be dealt with in this division.

17.49 During 2009–10, there were 13 matters finalised in the AAT concerning appeals from the VRB under the MRCA. Ten were withdrawn, one was affirmed following a hearing and two were dismissed. The VRB commented in its annual report that, in the majority of varied or set aside cases at AAT level, there appeared to be evidence before the AAT that was not before the VRB. 21

Legal aid

17.50 The Australian Government, through the Attorney-General’s Department, funds legal aid commissions in each state and territory to provide legal aid for matters arising under Commonwealth law.

17.51 The service is delivered through legal aid commissions in each state and territory to people who meet means and merits tests and relevant guidelines. The means test assesses income and assets, including disability pensions, and the likely cost of the proceeding. The merits test assesses whether there is a reasonable prospect of success, whether a prudent self-funded litigant would risk his or her own money on the case and whether it would be appropriate to spend public money on it.

War Veterans’ Legal Aid Scheme

17.52 Part 6 of the Commonwealth Legal Aid Priorities and Guidelines sets out the Commonwealth legal aid priorities, including specific aspects of family, criminal and civil law. These include Commonwealth employees’ compensation; war veterans’ pensions, benefits or allowances; and actions by the Commonwealth that have a real prospect of affecting the person’s capacity to continue his or her usual occupation.

17.53 The War Veterans’ Legal Aid Scheme is subject only to a merits test; no means test is applied. This is only available for those whose appeal relates to warlike or non-warlike service, and where they have chosen the review path through the VRB under section 352. The level of funding available for veterans is not separately identified and allocation is decided by the legal aid commission in each state or territory, taking the Commonwealth Legal Aid Guidelines into account.

17.54 While legal aid is, in principle, available to all appellants, ADF members and former members rarely, if ever, qualify under the means test. These appellants would receive legal aid for litigation only if they met the merits test as applied under the War Veterans’ Legal Aid Scheme.

Complex and non-complex matters

17.55 Until recently (1 July 2010) matters on appeal were further categorised in Commonwealth Legal Aid Guideline 5 as complex and non-complex. Complex matters were those with several conditions being claimed, requiring medical reports from three or more medical specialities, and with complex links between the SoP and the condition claimed involving questions of law. There were no guidelines specifying the amount of legal aid funding available in complex matters.

17.56 Funding for non-complex matters was limited to 10 hours of legal work leading up to the hearing stage at the AAT, including two medical reports, and a maximum of 12 hours of work for a hearing plus witness expenses, with a total amount not exceeding $2,500.

17.57 DVA cannot pay a supplement to individuals for legal aid provided by legal aid commissions.

Review of legal aid funding

17.58 Commonwealth legal aid programs are delivered by state and territory legal aid commissions under the National Partnership Agreement on Legal Assistance Services, which commenced on 1 July 2010. Funding for veterans’ legal aid is included within the total funding allocation made by the Commonwealth to the states and territories. The Attorney-General has assured the previous Minister for Veterans’ Affairs that veterans’ matters will continue to be a Commonwealth legal aid priority.

17.59 Melbourne Legacy raised the adequacy of the legal aid guidelines, including the criteria for defining complex cases, with the previous Minister for Veterans’ Affairs. Since the National Partnership Agreement commenced, the guidelines have been revised to remove the distinction between complex and non-complex cases. While this may help to address some perceived inadequacies in veterans’ legal aid, individual state and territory legal aid commissions may impose their own funding limits on individual matters. In addition, the overall value of the funding for veterans’ legal aid matters has not increased under the new partnership arrangements.

Submissions

17.60 Several submissions to the Review focus on the two paths for reconsideration and review, and the related legal aid and cost issues. These submissions, including those commented upon below, have been taken into account where appropriate in making the recommendations in this chapter. The views relevant to the parallel review paths are summarised as follows:

- One ESO\(^{22}\) argued that the choice between reconsideration and the VRB should be removed and the VEA process installed for all MRCA appeals. The representatives from the ESO Round Table expressed the same view to the Steering Committee, as did the RSL in its submission to the MRCB Senate Inquiry in February 2004.

- An ESO\(^{23}\) submitted that legal aid should be provided to everyone appealing MRCA decisions at the AAT, regardless of the type of service giving rise to the claim. Two

\(^{22}\) Australian Peacekeeper & Peacemaker Veterans’ Association.

\(^{23}\) Australian Veterans and Defence Services Council.
other ESOs\textsuperscript{24} support legal aid regardless of the choice of the reconsideration or appeal path. This is consistent with the position put by the Injured Service Persons Association to the MRCB Senate Inquiry in 2004.

- One submission\textsuperscript{25} observed that there is no mediation at the VRB and that the Commission is not exposed to cost awards at subsequent AAT hearings for war veterans’ cases. It noted that cases that go to the VRB with no provision for costs (particularly medical costs) are often later resolved at the AAT where further evidence is available, and a significant number are resolved prior to hearing with this additional evidence.

- An ESO\textsuperscript{26} observed that some claimants see the VRB as a lengthy and daunting process and therefore seek reconsideration, only then realising the irrevocability of the decision and the fact that legal aid will not be available at the AAT (other than for war service).

- Another ESO\textsuperscript{27} is critical of the fact that legal aid is not available under the section 349 reconsideration path and comments that its experience with this path is more adversarial than the more open VRB path. It proposes an alternative whereby section 349 reconsideration is treated the same as section 31 of the VEA, so that appeal is then possible to the VRB. (This is already in place. The MRCC can reconsider any original determination under section 347; this is known as an ‘own motion’ review. Where the MRCC becomes aware that a person is dissatisfied with a decision, it may undertake such a review. Once a decision is made, this becomes an original determination in itself and is therefore appealable under either path.)

- The ESO Round Table representatives advised that they consider it to be an anomaly that, since introduction of the MRCA, claimants with peacetime service injuries are no longer eligible for legal aid. They claimed that a person with operational service claiming for a peacetime injury after 1 July 2004 is now disadvantaged, as they would have been entitled to legal aid for a peacetime injury before that date. (Entitlement to assistance under the War Veterans’ Legal Aid Scheme only applies to claims under Part II of the VEA [operational service]. This excludes members claiming under Part IV for injuries arising from other defence service from 1972. On the evidence of the ESO representations, it appears that such a strict dividing line may not have been drawn by some state legal aid commissions in the past, but this has not ever been Commonwealth policy.)

**Complexities of retaining the two paths**

17.61 The benefit of having the two paths is that choice is available between consideration by a non-judicial body (the VRB) and reconsideration by another delegate that may lead more quickly to the AAT. However, the two paths were arrived at by default, as no single preferred model could be established at the time of development of the MRCA.

\textsuperscript{24} Legacy and Vietnam Veterans Federation of Australia.
\textsuperscript{25} Vietnam Veterans Federation of Australia and KCl Lawyers.
\textsuperscript{26} Vietnam Veterans Federation of Australia.
\textsuperscript{27} Legacy.
17.62 The differences in approach to legal aid and the award of costs are significant and one of the main reasons why ESOs seek revision to a single path. Other complexities in retaining the two paths are outlined below.

**Both paths can involve reconsideration**

17.63 Under the VEA, a section 31 reconsideration by another delegate does not affect subsequent appeal rights. However, claimants seeking a formal reconsideration under MRCA section 349 become ineligible for the VRB path. Where they ask the MRCC to consider an own motion reconsideration under section 347, this restriction does not apply.

17.64 The legal profession is generally in favour of the section 349 reconsideration route, which is more expensive once it reaches the AAT level. It is regarded by some ESOs as a less open and more adversarial process.

**Claiming under multiple Acts**

17.65 Where a person claims a condition under the SRCA as well as the MRCA, appeals must be carried out separately under both Acts. Where a second condition under the VEA is also involved, there are further complexities when different appeal paths are pursued. The mix of legal aid and cost applicability can become more complex again.

**Time limits**

17.66 Further confusion arises from the different time limits applying for lodgement of applications at the first tier, and for subsequent actions within each path. For example:

(i) application to the VRB is limited to 12 months, while an application for a section 349 reconsideration is to be made within 30 days; and

(ii) application to the AAT from a VRB determination is limited to 3 months (with up to 12 months available at the discretion of the AAT), while a section 349 reconsideration is limited to 60 days (with an unspecified extension at the discretion of the AAT).

17.67 The 30-day limit for a MRCA section 349 reconsideration can be extended either before or after that period.

**Options for change**

17.68 The Committee believes that arrangements in this area should be simplified and that, given the history of achieving change in administrative law, the changes should be incremental. The Committee believes that, in time, there should be one pathway for reconsideration and review applying to all claimants, regardless of the type of service from which the claim arises. The single path must include active case management at all stages.

**Option 1: section 349 becomes the single path**

17.69 One option would be to adopt the SRCA path alone (MRCA section 349, reconsideration, then the AAT) and to not use the VRB in the MRCA appeal process.
This path is chosen by the greater number of applicants (see Table 17.1 and paragraph 17.28) and is consistent with practice in most other Commonwealth jurisdictions. In most cases, legal firms are engaged to represent clients at the AAT, often on a ‘no win, no fee’ basis.

17.70 However, this option would be inconsistent with the practice of nearly a century of veterans’ administration with a specialised tribunal for veterans’ matters. It is also difficult to argue that the review path through the VRB should be abolished while civilian disability applicants have access to a low-cost and accessible review mechanism in the SSAT before review by the AAT. Additionally, the cost of an average AAT case, whether it proceeds to a hearing or not, is significantly greater than the VRB ($1,450 for the VRB compared to $2,600–$14,620 for the AAT).

**Option 2: section 352 becomes the single path**

17.71 Retention of the VRB will ensure only suitable cases go forward to the AAT, and should reduce costs. Furthermore, the VRB is a less formal review mechanism where panel members have experience and knowledge of service matters. The Committee considers that simplification is more likely to be achieved by reforming the appeal path through the VRB and, in time, this should be adopted as the single path. However, significant alterations are necessary, including the introduction of active case management and improvements to timeliness for MRCA reviews by the VRB.

17.72 The F&PA References Committee report recommended a trial of pre-hearing mediation and conciliation processes at the VRB. This included the presence of the claimant, the advocate and DVA, and greater use of VRB registrars to ensure that applications were not deficient in evidence. This recommendation should be revisited. In the context of veterans’ law, however, conciliation and mediation are probably not the most applicable terms. The concept of active case management better describes this step.

17.73 Case management should ensure that the applicant fully understands the process, the issues are well defined and all relevant evidence is identified and sought.

17.74 A major issue with a pre-hearing process at the VRB is the need to avoid adding another tier of review to the system. Additional skilling and revised recruitment practices may be necessary at the VRB to successfully implement this change. The AAT is successful in this regard, but has over 25 years experience in reaching its current stage. However, if a stronger degree of evidence review and clarification can be assured, this could reduce the need for a three-member VRB panel to sit for all applications.

17.75 A detailed financial model may need to be developed to scope the cost of additional skilling and revised recruitment practices at the VRB. In terms of recruitment, the Board may need to have more senior members who are not only lawyers, but also have service experience. This will assist in the transition to more regular, single-member panels, and anticipate any concerns that ESOs may have regarding panel members’ service experience or panels of fewer than three members.

17.76 The VRB does have current procedures for ‘on-the-papers’ or preliminary reviews that involve a final decision without the need for a full hearing of three members. These procedures are explained in the Federal Court case of *Joan Annie Anderson v.*
This procedure has been used infrequently in recent years and it has not been used on any MRCA case to date.

The VRB has sought amendment to both the VEA and the MRCA to provide it with express powers for a single member to examine papers and set aside a decision in certain defined circumstances.

In some cases, a person may simply require more clarification of the reasons for the decision provided by DVA, and this could be resolved through a case conference between relevant parties. Attention to explanatory and conciliatory action at this point is consistent with the overall direction for legal assistance from government, with a greater focus on the role that legal assistance services can play in targeted intervention to resolve issues as early as possible, without the need for protracted and expensive litigation.

There is no formal service-level agreement (SLA) between the VRB and DVA or the Commissions to define the objectives and obligations of all the parties involved in considering an application for review. A mandatory process of case conferencing should be worked out by DVA and the VRB within the current terms of the MRCA. A SLA should define the cases that should be screened and resolved in conference with the client and the MRCC prior to a full hearing. For each phase of the review process, the roles and obligations of all participants should be specified, including time standards for the MRCC, client, advocates and the VRB.

Before any legislative amendments for alternative dispute resolution, the conferencing process can be undertaken with the agreement of both parties. The MRCC may wish to make a blanket agreement in the SLA for conferencing, where the applicant also consents. The VRB and MRCC have already started work on developing a policy for ‘remittal’ of all set aside liability matters, without the need for adjournments to deal with this issue in the interim, before legislative amendment.

The objective of significantly reducing the elapsed time of 418 days for MRCA claims at the VRB must also be addressed as part of the development of the MRCC and VRB SLA.

The Committee notes that the VRB’s revised staff procedures manual sets internal time frames for action by the Board. Further, the VRB’s newly developed MRCA training program will assist in improving timeliness for review at the VRB by having members trained to understand the MRCA.

It is a matter for consideration, but not relevant for the purposes of this Review, as to whether these practices should also extend to VEA applications to the VRB.

Issues to be considered in moves towards a single path

There are some significant issues that need to be resolved before legislation can be drafted to introduce a single path.

---

29 Press release by the Attorney-General, 6 November 2009.
Compulsory reconsideration by the Military Rehabilitation and Compensation Commission

17.85 The Committee believes that reconsideration by the MRCC should be the first step in the review process, in the same way as section 31 reviews are carried out for all appeals under the VEA. This would help ensure the quality of decisions that are considered by the VRB and reduce VRB workloads and costs.

Time targets

17.86 The VRB aims for all matters to be finalised within 12 months. The Committee considered whether a shorter time frame of 12 to 16 weeks could be mandated; however, the difficulty is that applicants often need considerable time to arrange additional medical reports, as the VRB is often the first opportunity the applicant has to arrange for independent medical reports. This is outside the VRB’s control, and the Committee notes that the AAT has the same problem and it affects their time frames in all compensation matters, not just the MRCA.

17.87 Where the time frame set by the VRB is exceeded, such cases could default to the AAT upon application by a party, or wider dismissal powers could be given to VRB members and registrars for failure of applicants to comply with directions.

17.88 The approach of setting a date for the VRB hearing upon receipt of the application should be considered as an incentive to all parties to identify and seek the evidence needed early and to prepare for hearing. Hearing dates may have the ability to be extended, but some rigour may need to be applied to decisions to prevent extensions becoming the norm. However, it is important to note that applications are lodged at the Department not the VRB. The possibility of application being lodged at the VRB should be explored.

17.89 Alternatively, time frames could be set for the lodgement of certificates of readiness, with default resulting in an in absentia hearing. The Committee notes that this approach has already been adopted by the VRB, and may prove to be a better alternative to setting a time frame for a hearing before taking account of availability, which may result in increased adjournments and postponements.

17.90 The ESOs’ capability of representing applicants before the VRB in an environment of tight time frames would have to be considered. A number of other improvements to education, process and claim forms recommended in other parts of this review may assist a more streamlined appeal process.

Award of costs to successful applicants and legal aid

17.91 If no cost awards are available under the single path, members pursuing claims for peacetime service (who do not have access to merits-based legal aid) are put at a disadvantage. Currently, the availability of the second path allows this to be taken into account.

17.92 Implementation of a single path would therefore require rethinking the current position in relation to costs and legal aid.
17.93 For legal aid coverage to be extended to a broader group, the federal Attorney-General would need to take up this matter with his state counterparts. There is an argument that the reducing volume of Second World War and Vietnam War veteran claims should provide a significant offset to any costs of expanding the eligibility for peacetime claimants, as this may not yet be fully reflected in the forward estimates.

17.94 However, the Committee’s preference is to have a full costs jurisdiction for all MRCA applicants at AAT level. This would allow legal and other representatives to assess the merits of cases and pursue them on a ‘no win, no fee’ basis.

Case conference costs

17.95 Introducing an earlier case conference stage may expose DVA to greater and earlier costs for advocacy and medical expert reports that are currently not met until cases reach the AAT stage. This may simply bring forward costs, but would need to be assessed.

Evidence

17.96 Improvements in the quality and extent of evidence provided with the claim form, as discussed in the previous chapter, should also help reduce time taken through the appeal process.

Pre-hearing action and competencies

17.97 The VRB introduced pre-hearing appraisals in 2009–10. However, initiating case conferencing and other alternative dispute resolution measures, such as the power for registrars to issue directions and impose obligations, would require legislative change.

Transition issues

17.98 Where a member has an appeal relating to a pre-1 July 2004 (SRCA) condition, and claims for a post-1 July 2004 condition, they will continue to have appeal rights under two Acts. Some consideration might be given to absorbing SRCA appeals in such cases under the MRCA.

Other considerations

17.99 There should also be scope to take test cases to the AAT with the leave of the VRB, without needing to have the matter considered by the VRB.

Summary of issues

17.100 In summary, the Committee recognises the many significant issues that would need to be worked through in consultation with all stakeholders to move to a single pathway based on the VRB. The Committee was not able to explore these issues in depth with the relevant stakeholders. A model for reform and business case for changes to the legislation would be needed. Part of this model should include incremental changes, such
as those outlined in Figure 17.2 below, which are achievable through administrative change. The VRB can introduce alternative dispute resolution measures, before legislative change, with the parties’ consent. This should be a focus for the SLA with the MRCC. A change management plan would also be required to enable incremental transition to the single pathway.

**A streamlined Military Rehabilitation and Compensation Act determining system**

17.101 The following figure shows the streamlined MRCA determining system that the Committee believes the Australian Government should move towards. In recognition of the issues identified above, the figure indicates procedural changes that may be made incrementally. The changes that are possible within the existing legislation are outlined in column two. In column three, the figure shows the more substantial changes that would need legislative amendment.
Veterans’ Review Board general practice direction

17.102 The VRB introduced a General Practice Direction (GPD) on 1 January 2011, which sets out revised procedures for applications for review before the Board. The Board has confirmed its aim to undertake its role in a manner that is fair, just, informal, economical and quick. The GPD supplements the material in the VRB Handbook, issued in 2006, and has many features that should improve the process for consideration of MRCA and VEA applications by the VRB. The recommendations in this Review for the introduction of a case conference or alternative dispute mechanism are consistent with the GPD. However, VEA and MRCA cases can be fundamentally different.

<table>
<thead>
<tr>
<th>Determination by delegate of MRCC or Service Chief (for ADF rehabilitation matters)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reconsideration by MRCC or Service Chief (for ADF rehabilitation matters)</td>
</tr>
<tr>
<td>Review by Veterans’ Review Board</td>
</tr>
<tr>
<td>Review by Administrative Appeals Tribunal</td>
</tr>
</tbody>
</table>

**Figure 17.2 Streamlining the MRCA determining system**

<table>
<thead>
<tr>
<th>Incremental</th>
<th>Substantial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural change</td>
<td>Amending legislation</td>
</tr>
<tr>
<td>MRCC reconsiders all applications to the VRB.</td>
<td>Amend legislation to remove dual pathways.</td>
</tr>
<tr>
<td>Negotiate VRB/DVA:</td>
<td>Single member powers to set aside</td>
</tr>
<tr>
<td>• define place and types of alternative dispute resolution available</td>
<td>Registrar power to issue directions and set aside</td>
</tr>
<tr>
<td>• streamline administration</td>
<td>Absorb SRCA/MRCA cases where both Acts apply</td>
</tr>
<tr>
<td>• set 30-day target for s 347 action or single member action</td>
<td></td>
</tr>
<tr>
<td>• define reconsideration and VRB registrar action.</td>
<td></td>
</tr>
<tr>
<td>Apply preliminary review procedures</td>
<td></td>
</tr>
<tr>
<td>Referral of cases directly to AAT in certain circumstances</td>
<td></td>
</tr>
<tr>
<td>MRCC representation at (defined) MRCA hearings</td>
<td></td>
</tr>
<tr>
<td>Improve training of DVA/VRB/ESCs on MRCA</td>
<td></td>
</tr>
</tbody>
</table>

Chapter 17: Reconsideration and review 241
17.103 The GPD provides for improvements to the management of applications to the VRB. The Committee supports any initiative undertaken by the VRB that aims to improve the Board’s case management, provided that the essential characteristics of the VRB are maintained; that is, it should remain a non-adversarial review process in which an applicant has the opportunity to be heard by the Board, including a services member.

17.104 Furthermore, the introduction of a GPD may highlight the need for more veteran advocates with MRCA experience. While DVA supports Training and Information Program training for the MRCA, at present it is unlikely there is good coverage of advocates with MRCA expertise in all locations.

Other Veterans’ Review Board matters

17.105 The VRB has advised DVA of the need to amend its powers to allow it to remit a greater number of cases back to the MRCC, to avoid adjournment and consideration in a formal VRB hearing. The current remittal powers are based on the subject matter coverage under the VEA and they omit the wider issues covered by the VRB for MRCA clients (for example, treatment and rehabilitation issues). Such a remittal power already exists at the AAT level.30

17.106 The VRB has also brought to notice a number of minor technical amendments to correct apparent drafting oversights, modifying the application of the VEA for the purposes of the MRCA.

Other issues from the submissions

28 days’ notice

17.107 One submission31 states:

There is concern with respect to section 35632 that in general it limits the AAT’s discretion regarding admissibility of evidence. Currently the AAT is not bound by the rule of evidence under its own Act. However, Section 356 of the MRCA now directly conflicts with this discretion when the MRCC issues a “Notice” for information.

17.108 Section 356 of the MRCA discourages the production of new evidence without at least 28 days’ notice to the AAT. This is a reasonable requirement, given the AAT hearing may be the fourth time the case has been considered.

17.109 The AAT is empowered under subsection 356(1) of the MRCA to give leave for evidence to be introduced within the 28-day time frame. To move away from the rule in this section does not seem appropriate, as it may encourage the introduction of new evidence at any time before or at an AAT hearing. If circumstances warrant the introduction of new evidence, the AAT has discretion to accept it. Therefore, the Committee does not see any need to alter the legislation.

30 Section 43 of the Administrative Appeals Tribunal Act 1975.
31 Vietnam Veterans Federation of Australia/KCI Lawyers
32 Section 356 applies only to reviews by the AAT of reconsiderations under section 349, not to reviews of decisions by the VRB.
Location of reconsideration or hearing

17.110 The RSL seeks reconsiderations under section 352 of the MRCA to be conducted in the same location as the VRB hearing. DVA has advised that there is currently an insufficient volume of MRCA appeals to staff review officers at each location. Presently, MRCA review officers operate from Brisbane, Canberra and Melbourne. It is expected that appeal work will continue to be managed nationally and undertaken in locations where expertise can be sustained.

17.111 The RSL also submits that the Commonwealth should pay the legal costs in any court where the appeal of an AAT decision is to establish a legal precedent. DVA advises that MRCC and Repatriation Commission policy is to consider applications from respondents to bear the reasonable costs of a hearing and it is not uncommon for this to occur in test cases.

Legal and medical costs

17.112 In its submission to the Review, the Defence Force Welfare Association (DFWA) points out that appellants to the AAT who have had a reconsideration under section 349 of the MRCA have only had one level of review, as opposed to two levels under section 352. These appellants are facing considerable personal cost to engage legal representation against counsel engaged by the Commonwealth. The DFWA seeks counsel to be engaged at Commonwealth expense.

17.113 The RSL supports this contention in its submission to the Review, believing it would avoid members being disadvantaged by disproportionate representation.

17.114 Costs can be awarded against the Commonwealth in these cases, but cannot be awarded against the applicant. Further, legal representation is commonly available on a ‘no win, no fee’ basis. The AAT has conciliation procedures in place prior to the expensive hearing stage. The Committee believes there are compensating factors to the DFWA and RSL view.

Reasons for decision

17.115 A participant in a public consultation session in Hobart criticised the lack of information provided with reasons for decision on how to apply for a reconsideration. This matter is being taken up in a DVA review of advice letter templates.

Veterans' Review Board remittals

17.116 Section 353 of the MRCA modifies and directs the VRB review process to section 135 of the VEA. The applied provisions do not give the VRB the specific powers to remit a matter to the MRCC for needs assessment and determination of compensation. The effect of the legislation is that persons whose liability claim is initially rejected by the MRCC, but then accepted at the VRB, lose an avenue of appeal otherwise available in respect of the compensation determination.

17.117 In reviewing an MRCA claim for liability or compensation, the VRB’s jurisdiction extends to making whatever determination the MRCC could have made. This means it is also necessary, under section 325 of the MRCA, for a needs assessment to be
undertaken before determining compensation. In circumstances where the MRCC has accepted liability, most of the required information will also be available to the VRB; however, where liability has been rejected by the MRCC, but is subsequently accepted by the VRB, there is rarely sufficient material on file to enable the VRB to determine compensation, as these matters would not normally have been investigated by the MRCC.

17.118 One submission to the Review pointed out that the recent Federal Court case of *Irwin v. Military Rehabilitation and Compensation Commission* (discussed in Chapter 16), has highlighted the need for the MRCC to determine compensation where it is claimed, even where liability is rejected. Nonetheless, as the VRB currently has no power to remit a matter to the MRCC to determine compensation, it must adjourn the hearing upon accepting liability. Such adjournment allows the VRB to request the MRCC to conduct an investigation and provide a report to the VRB in respect of the matters held in abeyance, such as needs assessment, rehabilitation and compensation. This request to the MRCC is made under section 152 of the VEA as modified by section 353 of the MRCA.

17.119 Procedural fairness would require the VRB to invite DVA to make further submissions and attend a VRB hearing, if the VRB decided to consider an issue of compensation that was not fully dealt with in the written brief originally submitted by DVA to the VRB.

17.120 The Committee believes it makes sense to provide the VRB with explicit powers to remit a matter to the MRCC for needs assessment and compensation. The subsequent MRCC decision then becomes an original determination and is subject to further VRB review or MRCC reconsideration, should the claimant be dissatisfied with the outcome.

17.121 In relation to AAT appeals from adverse liability decisions by the VRB, the Committee believes that different considerations may arise from the *Irwin* case. Given the substantial time lines for an AAT appeal, it would be possible for the MRCC to conduct a needs assessment and make a determination on compensation in cases where an applicant has appealed to the AAT against an adverse liability decision by the VRB. This subsequent compensation determination could then be reviewed by the AAT in the same hearing as the liability decision.

**Conclusions**

17.122 The MRCA determining system should be refined to provide a single appeal path. This recommendation is aimed at more timely results and a less complex process with lower costs. There will be up-front costs in recruitment, training and systems needs, and a change management plan and comprehensive finance model should be developed for the whole process.

17.123 The option of a single path that excludes the VRB would be inconsistent with the provision of a specialist tribunal at the first level, as is available to Centrelink beneficiaries, and may also be a higher-cost option. It would also be strongly opposed by ESOs.

17.124 The preferred single path should provide access to case conferences. If the applicant still seeks adjudication, there should be access to the VRB, with a more

---

33 Slater & Gordon Lawyers.
streamlined method so that key questions and relevant evidence are established prior to, or at, the VRB hearing. A further review by AAT would then be available by application by the claimant or by the Commission.

17.125 Legislative amendments will be required to resolve the complexities to achieve a single path, particularly legal aid and costs award issues. In advance of the development of revised legislation, early action should be taken to clarify, refine and hasten the early phases of section 352 (VRB) reviews by negotiation and agreement between the VRB and MRCC. Some costs would be incurred in staffing this function and some support would also be needed for the ESO advocates involved at the case conference stage.

Recommendations

The Committee recommends that:

17.1 the determining system under the Military Rehabilitation and Compensation Act 2004 (MRCA) be refined to a single appeal path to the Veterans’ Review Board (VRB) and then the Administrative Appeals Tribunal (AAT), as a means of a more timely review that is less complex and less costly;

17.2 internal reconsideration by the Military Rehabilitation and Compensation Commission (MRCC) be the first step in the review process, and the process for section 31 reviews under the Veterans’ Entitlements Act 1986 be adopted, to help ensure the quality of decisions that are considered by the VRB and reduce VRB workloads and costs;

17.3 there be access to a case conference process by the VRB so that, wherever possible, the key questions and relevant evidence are established as early as possible and the hearings can proceed without any unnecessary delay;

17.4 in advance of the adoption of a single path, a formal service level agreement between the MRCC and the VRB be negotiated to define a comprehensive case conference process within current legislation; and

17.5 the MRCA be amended to provide the VRB with explicit powers to remit a matter to the MRCC for needs assessment and compensation.