THE ROYAL AUSTRALIAN ARMOURED CORPS CORPORATION SUBMISSION TO THE DEPARTMENT OF VETERANS' AFFAIRS PROPOSED LEGISLATIVE REFORM PATHWAY 2023

…We say the care of the returned soldier is one of the functions of the Commonwealth Government.
Our soldiers do not fight for Queensland, New South Wales or Tasmania, but for Australia. They enlisted under the Commonwealth banner. They go out to fight our battles. We say to them: 'When you come back we will look after you'…
The soldiers will say to the Commonwealth Government: 'You made us a promise. We will look to you to carry it out.
PM Billy Hughes, 1917 Premiers' Conference.

I tell the senate quite candidly that I am not at this juncture concerned about finance. I have put before the honourable senators a proposition representing the duty we owe to these returned soldiers, and whether it is going to cost more or less for the discharge of that duty, we have to shoulder it.
Senator Millen, Second Reading Speech Australian Soldiers' Repatriation Bill 1917

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Chairman
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17 March, 2023

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The Responsible Officer
Legislation and Amendments
Department of Veterans' Affairs

SUBJECT: VETERANS' LEGISLATIVE REFORM 2023

PURPOSE

To brief DVA on matters related to the proposed harmonising exercise involving the VEA 1986 and MRCA 2004, taken as a result of the Government complying with **Recommendation 1** of the Interim Report of the Royal Commission into Defence and Veteran Suicide (the RC); viz

> *The Australian Government should develop and implement legislation to simplify and harmonise the framework for veterans' compensation, rehabilitation and other entitlements.*

The issues which the RAAC Corporation[1] discusses on behalf of its constituent Member Associations and on behalf of the senior leadership of the Alliance of Defence Service Organisations (ADSO)[2], of which the Corporation is a Member, are in the RAAC Corporation's view, of such significance that a need exists to have them addressed in the upcoming legislative reform exercise.

[1] The RAAC Corporation is a Tier1 ASIC and ACNC-listed entity formed in 2012, for a charitable purpose.
It represents the interests of 3000 former RAAC veterans in 12 Unit and Regimental Associations and the interests of approximately 2000 serving members of the RAAC.

[2] **The Alliance of Defence Service Organisations (ADSO) - incorporated in the ACT**, comprises:
The Defence Force Welfare Association (DFWA), Naval Association of Australia (NAA), RAAF Association (RAAFA), Royal Australian Regiment Corporation (RARC), Australian Special Air Service Association (ASASA), Vietnam Veterans Association of Australia (VVAA), the Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women, the Fleet Air Arm Association of Australia, Partners of Veterans Association of Australia, the Royal Australian Armoured Corps Corporation (RAACC), the National Malaya & Borneo Veterans Association Australia (NMBVAA), Defence Reserves Association (DRA), Australian Gulf War Veterans Association, Australian Commando Association, the War Widows Guild of Australia, Military Police Association Australia (MPAA), and the Australian Army Apprentices Association.

Notwithstanding the welcome news of the forthcoming legislative reform exercise, it remains the RAAC Corporation's position that only a brand new Omnibus Act will eliminate the damage done under the current, unwieldy and problematic multi-Act environment.

The RAAC Corporation also acknowledges that the importance of the subject matter involved in this exercise will result in ADSO preparing a joint and several submissions on behalf of its members even though individual ADSO entities will have the discretion to tender their own submissions which may differ from this.

BACKGROUND

The matters discussed in this submission were previously drafted and submitted to DVA Legislation and Amendments Branch in two submissions to be discussed at two legislative workshops held by the Department on 9/11/2017 and 6/3/2018. The matters addressed herein will in the RAAC Corporation's view, be again canvassed and discussed at length with other related issues throughout the reform project timeline.

The matters put to DVA by the RAAC Corporation in 2017-18 are again set out in this submission.

In addition, matters not addressed previously but which are relevant, will also form part of this submission.

This document is tendered in good faith and with sincere intent. It is hoped it is accepted in the spirit in which it was tendered.

PREAMBLE

Veterans are the conscience of the Nation.

The Government and the nation owes and will continue to owe, an enormous debt of gratitude to those whom Government sends in harm's way in the service of the nation overseas on operations and domestically, battling natural disasters, never forgetting what veterans gave up to do their duty, as lawfully directed by the elected government of the day.

The Government as represented by DVA's commitment to veterans is; ***"For what they have done, this we will do."***

Veterans have a well-founded and reasonable expectation that in return for their service and sacrifice, they will be treated fairly by their Government.

Veterans are entitled to feel they have not been so treated.

KEEPING AN OMNIBUS ACT ON THE TABLE

The planned legislative reform process has been met with a mixture of relief, suspicion and cynicism, all of which are reasonable reactions. Significant repair to the relevant legislation will need to be undertaken to hopefully bring a degree of sanity to veterans negotiating this confusing and hostile legislative landscape.

Veterans who access the military compensation schemes face a bewildering, complex and burdensome system where they are confronted with obtaining statutory relief not under one Act but up to three Acts, related to what period of time their military service covered.

When veterans encounter the multi-Act system they are also required to endure the SoP regime, itself another bewildering path which places a heavy evidentiary burden on claimants to meet the relevant SoP. It is not unreasonable to contend with the combination of two forces - legislative and SoP, veterans are faced with a toxic compensation trail they must use.

This is no better illustrated than by Mr Gerard Mc Aleese, one of three Senior Solicitors from the Veterans' Advocacy Service of the NSW Legal Aid Commission appearing before in his evidence to Counsel Assisting the Royal Commission, viz[3]

> *PETER SINGLETON: From your observation, what is the effect on veterans who are having to prepare claims that are perhaps difficult to prepare and then they have to wait while the determination is pending?*
>
> *GERARD McALEESE: I liken it to a tax return -- well, I don't liken it to a tax return. I think a claims process by DVA is far more complex than a tax return. For someone like me who is of reasonable mental health, a tax return is tedious, there is a lot of data entry, you have to look through receipts and we don't like to do it. In my view, a DVA claims process is far more complex, it's more legalistic, it's more bureaucratic, it involves collaboration with a range of stakeholders -- DVA, Defence, doctors, with the allied health professionals -- trying to obtain evidence in many cases from many years ago to support the case.*
>
> *Then you have the veteran at the centre of it all, many of whom who have severe mental health conditions. And we know that veterans with PTSD have a hyperactive fear response because their amygdala, the fear sensor responsible for the fear response of fight, flight and freeze is more pronounced, it's hyperactive. And their pre-frontal cortex, which is responsible for executive decision making, high-order thinking and doing the harder thing like trudging through a claims process, is impaired, it is hypoactive.*
>
> *So all these ingredients are such that it is a very difficult process and experience for veterans, particularly those with severe mental health conditions.* (This writer's highlighted emphasis).

The shock effect such a burdensome and cumbersome system has on claimants, in particular vulnerable veteran claimants, requires no further elaboration other than to recall the remarks of a client of this writer who stated, *"no wonder people kill themselves."*

[3] ***Royal Commission into Defence and Veteran Suicide***, Block 4 Canberra 7/9/20202, Transcript of Evidence at p. 27-2496 to 27-2497.

It is the RAAC Corporation's position that the drafting of what appears to be a partial Omnibus Bill to be undertaken must as a minimum, include **retention of every single beneficial provision** which currently exists in **all three** Acts and not just the two Acts mooted. That is considered to be on every level, the minimum acceptable standard to be applied in any drafting exercise.

Additionally, the plain English approach to the law should applied in any Omnibus drafting or harmonising exercise.

The primary fact in issue here relates to the very distinct possibility that in re-engineering the current legislation framework, matters adverse to veterans may be missed in the re-drafting and end up remining within the framework of the proposed single ongoing Act into what VEA and DRCA will be folded. The Government owes a duty to ensure this does not occur.

It is entirely reasonable to postulate that in order to ensure all legislative sins are excised from the veterans' legislative continuum, the drafting of an Omnibus Bill and rebuild from the ground up must remain a priority.

The current proposal while welcome, creates a perception of being nothing more than a patch-up job.
That is a well-founded perception within the veteran community.

In the comment expressed to this writer by a long-serving senior soldier*; "I am a bit sceptical of this but I suppose we are heading in the right direction to simplify a confusing, complex and time consuming system*."

The RAAC Corporation's position remains unchanged, namely that an Omnibus Act must not disappear from the discourse that this legislative reform process will generate. It must remain front of mind and firmly in the public square.

An Omnibus Act is considered to be the ultimate alternative to eliminating any and all remaining bad legislative practices.

ROOT AND BRANCH REVIEW

The RAAC Corporation is conscious of the timeline recommended by the RC to have **Recommendation 1** completed, *"by no later than 23 December 2022."*

In that regard, it is critical to maintaining good faith with the veteran community (serving and ex-serving) and families and other stakeholders, that any and all steps are reasonably taken by DVA to ensure sufficient legislative staff (either Departmental or Parliamentary Counsel), are allocated to undertake the re-drafting this exercise will involve.

Mere cosmetic tinkering around the edges will not on any level, suffice.
This must be on every level, level **a root and branch reform exercise**. Nothing less will serve the interests of the veteran community.

It also pertinent to give notice to DVA that any reduction in drafting proposed changes based on insufficient time and space, will not be an acceptable reason for not honouring via the Minister, the commitment to reform and create a new legislative model.

COMPOSITION OF THIS BRIEF

This brief addresses what the RAAC Corporation believes are the major facts in issue in two parts:

Part A: General issues discussed which the RAAC Corporation contends are necessary for consideration in any legislative reform exercise.

Part B: This part addresses issues which Recommentatrion1 contends should be included in the reformed legislative package, namely **RC Recommendations 8.1, 8.4, 13.1, 14.1 and 19.1** respectively (at p.2). The RAAC Corporation has elected to include in this brief its responses to the relevant Recommendations by the RAAC Corporation(136pp) to the 2018 Productivity Commission's (PC) Draft (non-substantive) Review and the RAAC Corporation's later response (53pp) to the PC's 2019 final formal (substantive) report.

Part B is directly and materially relevant to the provisions of RC Recommendation 1. They are relevant considerations and have been amended/updated to reflect where necessary, any changes between 2018-19 and the present.

Matters not addressed previously will be discussed in **Part A**.

GRANDFATHERING

The RAAC Corporation notes in the DVA Legislation Reform Booklet the Government's intention to grandfather *"all existing arrangements to ensure there is no reduction in entitlements currently being or previously received by veterans. Current payment rates are maintained and indexed normally."* (At p.3).

The RAAC Corporation notes and welcomes this commitment from the Commonwealth and contends very strongly that significant interaction between DVA and interested parties will need to be undertaken in order to go through the minutiae of detail such a grandfathering exercise will entail.

LAYING THE FOUNDATIONS FOR LEGISLATIVE REFORM

Th RAAC Corporation welcomes the Government's long overdue attempts to reform what is on any analysis, a confusing and treacherous legislative minefield.

The Full Federal Court decision in *Smith*[4] (cited in 44 cases)[5], discussed the extraordinary difficulty in navigating this minefield, in emphatic remarks made by Rares J in his concluding remarks albeit for a VEA matter, are considered by this writer to be directly analogous to and emblematic of the entire multi-Act legislative system currently in place; viz

[4] ***Smith v Repatriation Commission*** [2014] FCAFC 53; 2014 FCR 452; 142 ALD 410, Rares, Buchanan and Foster JJ, per Rares, J. http://classic.austlii.edu.au/au/cases/cth/FCAFC/2014/53.html [Accessed 12/3/2023].
[5] Online at https://jade.io/j/?a=outline&id=330727 [Accessed 12/3/2023].

The conditions specified in each of ss 23 and 24 are bedevilled with bewildering complexity. Regrettably the fog of the drafting style of this, like many Commonwealth Acts, has created a nearly impenetrable shroud over the meaning that the Court is expected to attribute to the intention of the Parliament. The cost to the community of this obscurity must be enormous.

Two days of hearing by this Court were largely devoted to an attempt to make sense of key entitlements provided in the Act to persons who have been injured in war conditions in service of this nation.[6] At [26].

The facts as brutally enunciated by His Honour, make it unambiguously clear that the legislative process currently in place is failing the veteran community badly. In the nine years since that decision, nothing has detracted from the Court's analysis. The onus now falls to the Commonwealth to redress this failure of statutory repair.

PART A

ISSUE 1 DRCA – A LEGISLATIVE THIRD WHEEL

The RAAC Corporation notes in the DVA Legislation Reform Booklet the Government's intention of *"Closing out VEA and DRCA to new compensation related claims."* (At p.3)

The recent addition of DRCA to the suite of veterans' compensation and support legislation has now added a third layer of what can best be described as a procedural minefield for veterans and their families to negotiate. The action by the Government in committing to legislative reform, is timely.

Given the small eligibility template of DRCA, it is not unreasonable to contend that the closing out of DRCA with **no detriment** to the rights and entitlements to DRCA-eligible veterans, is considered to be reasonable in all the circumstances.

In examining the introductory documentation issued by DVA there is still an amount of traffic in the veterans' sphere that DVA will focus on harmonising the VEA 1986 and MRCA 2004 leaving DRCA untouched and basically an orphan of the three Acts.

The inference from this traffic is that by focusing on two Acts only and folding them into one Act, the veteran community will be left with an unwanted and unwelcome Unholy Trinity of Three Acts, two of which are hopefully fixed and one still broken (DRCA).

This leads to the not unreasonable albeit incorrect perception that doing so is akin to buying a V8 car with only six cylinders operating. This is a matter of some concern and is at odds with the statement of intent in the DVA Booklet regarding the *"proposed new system"* at p.3.

DVA will need to communicate the intent of the reform process vigorously and with greater clarity, to ensure all stakeholders are unambiguously clear on what is to occur including with DRCA.
By not acting to rebut any incorrect assumptions that this involves only two Acts, DVA will damage the credibility of the reform process.

[6] Cited in the Royal Commission's Interim Report 2011 Part 4 Veteran compensation and rehabilitation legislation, at [39] at p.180. Transcript Nikki Jamieson, Hearing Block1, 1 December 2021, p. 1-66 [34-35].

1.1 Contention

It is the RAAC Corporation's contention that, closing out DRCA is a welcome move and that more effective communication by DVA to the veteran community on the DRCA closing out process is needed to keep faith with the veteran community.

ISSUE 2 BENEFICIAL LEGISLATION

1 Beneficial Provisions

It is noted that DRCA is silent on the matter of beneficial provisions.
That deficiency in a material particular is considered on its face, to be a fundamental flaw in ensuring equality of the application of beneficial provisions across all three Acts. As such, it is a deficiency that needs to be addressed in any amendment or Bill drafting exercise.

A need exists in any harmonising or drafting exercise to ensure the beneficial provisions enshrined in s.119 of the VEA 1986 and s.334 MRCA 2004, are carried over to DRCA undiluted, in the first instance. It is unfair that legislation based on a benevolent platform that is the original SRC Act 1988 does not contain the beneficial provisions or an adaptation of them in DRCA.

These provisions are considered to be the fundamental bedrock of any remedial legislation, as it must be remembered that all three Acts are considered due to beneficial provisions, to be remedial in nature in their application and operation for veterans and their families. Cross-vesting of all beneficial provisions in this exercise must be considered and actioned.

2 The Beneficial Nature Of The Legislation

Both the VEA 1986 and MRCA 2004 are considered to contain provisions that are beneficial in nature, applying a remedy to claimants who suffer insults to their systems as a direct consequence of their service to the nation. The nature of such legislation is in my view, quite plain. It is remedial in nature and its application and should be construed beneficially in favour of the veteran as held in *Whiteman*[7].

In *Whiteman*, the Federal Court citing from *Starcevich* and *Hawkins* held:

> *"the legislation should…be given a reasonably liberal interpretation; it has often been pointed out that it is a matter of great public importance to provide adequately for incapacitated ex-servicemen."*

It is contended that, consistent with the relevant persuasive authority cited in (*Whiteman et al*, the provisions of all three Acts should be so construed and *"should be given a liberal interpretation"* as held in the Common Law decision in *Starcevich*[8].

[7] *Whiteman* v *Secretary Dept of Veterans' Affairs* (1996) per Madgwick J, 43 ALD 225 at 232-233. *Starcevich v Repatriation Commission* (1987) 76 ALR at 454; 18 FCR 221 at 225 followed; *Repatriation Commission v Hawkins* (1993) 117 ALR 225 at 231;30 ALD 51 at 56 followed)
[8] *Starcevich v Repatriation Commission* (1987) 14 ALD 162, per Fox J

In *Tracy*[9], the Federal Court held that:

"…the Act is to be construed "to give the fullest relief which the fair meaning of its language will allow"

In the second appeal in *Tracy*[10], the Full Federal Court followed the decision in *Hawkins* and other authorities, that a legislative provision *"and in particular this legislation, should be construed generously."*

The legislation currently in force is seen by many veterans and their families as not being so construed. It is common ground that the manifest failure to correctly construe and apply the legislation beneficially by Departmental Determining Officers (Delegates), is a major driver of stress and anger amongst all veterans, regardless of the nature of service.

There is a binding duty reinforced by Common Law precedent on the Commonwealth as represented by its agent DVA and its Delegates, not to put too narrow a construction on the beneficial provisions, so as to deprive the veteran to an entitlement under the Act (*Tracy*).

The Primary Decision-makers are still being perceived as applying too narrow a construction in respect of veterans' circumstances and denying them procedural fairness.

A prime example of this is the continued failure by Delegates to look at a Factor in a SoP that is supportive of and meets, a veteran's claim and instead force veterans to try and meet a different SoP Factor completely unrelated to the documented injury claimed. That is an egregious and unconscionable breach of a duty to act as an honest broker by the Commonwealth, as represented by the Repatriation Commission and the MRCC.

A failure by Delegates as Primary Decision-makers, to have regard to the beneficial applications of all three Acts and considerable persuasive authority, connotes at best dangerously lazy decision-making leading and at worst incompetent decision-making. This leads to an abuse of process and a denial of natural justice.

2.1 Contention

It is the RAAC Corporation's contention that, any harmonsing exercise must, in all the circumstances, have regard to the judicial approach to beneficial legislation, its remedial effect and equitable application by Delegates of these statutory and Common Law principles.

[9] *Tracy v Repatriation Commission (1999) 57 ALD 403 per Lee J. (Bull v Attorney-General (NSW)* (1917) 17 CLR 370 per Isaacs J at 384 followed; *Holmes v Permanent Trustee Co of NSW Ltd* (1932) 47 CLR 113 per Rich J at 119 followed).
[10] *Tracy v Repatriation Commission* [2000] FCA 779 (9 June 2000) per Burchett, Sundberg and Hely JJ.

ISSUE 3 – CROSS-VESTING DRCA BENEFICIAL PROVISIONS

The recent enactment of ADF-specific compensation legislation in the form of DRCA contained a welcome and very significant statutory inclusion, namely the Henry VIII Clause[11] enshrined in s.121(B); viz

> ***121B Regulations modifying the operation of this Act***
>
> *(1) The regulations may modify the operation of this Act.*
>
> *(2) Before the Governor-General makes regulations under subsection (1), the Minister must be satisfied that it is necessary or desirable to make the regulations to ensure that no person (except the Commonwealth) is disadvantaged by the enactment of this Act.*

The inclusion of this section is significant as it provides ultimate protection to members covered by this Act.

It imposes what can only be described as a reverse disadvantage on the Commonwealth. In essence the provisions of this section make it possible for the Minister to make regulations modifying the Act, reversing by modification, the primary legislation (DRCA) having supremacy over the Regulations.

The section will enable the Minister to make a Regulation in circumstances such as a Federal Court decision which reads down an appeal or part of the Act that would act to the detriment of all ADF members covered by this Act.

A deficiency exists therefore, in a material particular through the absence of the same ameliorating DRCA provisions in the VEA and MRCA being available to veterans. It should, in the interests of equity and natural justice, apply to all veterans across the entire legislative landscape governing veterans' matters and not just one Act.

The statutory first-aid that is able to be performed under this section by the Minister in exercising a power and function vide s.121(B), is being denied to claimants under the other two Acts.

I consider that to be a grievous injustice that operates to create an imbalance in the application of natural justice. It does in many ways, deny procedural fairness and statutory relief to persons subject to processes not under DRCA.

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[11] A Henry VIII clause is the term given to a provision in a primary Act which gives the power for secondary legislation (regulations) to include provisions which amend, repeal or are inconsistent with the primary legislation. The effect of a Henry VIII clause is that whoever who makes the regulations has been delegated legislative power by the Parliament. In other words, the executive arm of government would have the power to make regulations which can modify the application of the primary statute. The original Henry VIII clause was contained in the *Statute of Sewers* in 1531, which gave the Commissioner of Sewers powers to make rules which had the force of legislation (legislative power), powers to impose taxation rates and powers to impose penalties for non-compliance. A later *Statute of Proclamations* (1539) allowed the King to issue proclamations which had the force of an Act of Parliament. Both these were passed during the time of Henry VIII. Online at http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Reports-and-Pres-4-11-Henry-VIII-Clauses-the-rule-of-law1.pdf [Accessed 20/10/17, 10/3/2023].

3.1 Contention

It is the RAAC Corporation's contention that, cross-vesting and harmonsing this generous provision across all VEA 1986 and MRCA 2004 Acts should be undertaken as a matter of priority and should also be incorporated into any future Omnibus draft.

ISSUE 4 MRCA PROVISONS

The MRCA is an amalgam of a number of Acts and has since its commencement, failed the veteran community and their families. The RC noted this in its Interim Report.

It is an Act that deems veterans receiving the Special Rate Disability Pension (SRDP) to be double-dipping and offsets a SRDP by 60% in circumstances where a SRDP veteran is in receipt of superannuation. The unconscionability of this action speaks for itself. This was made abundantly clear to the Senate Inquiry into veterans' suicides; viz

> *It is a bad act. It is bad law. It is a cheap and nasty cut and paste of the VEA, the SRC and some working men's compensation thrown in. The act needs repealing. It needs a complete rebuild or a total repeal. It is operating to defeat the claim and to create unnecessary and unwarranted tension and distress amongst claimants themselves. It is bad law, pure and simple.*[12]

It is common ground that veterans are deeply suspicions as to the forthcoming legislative reform process with good reason.

The general perception among veterans is that the reforms will lead to a new Frankenstein version of MRCA Mk1, still containing a plethora of administrative landmines similar, if not identical to, those processes currently in place with the capacity to defeat veterans' claims, creating unwanted stress and grief.

To that end, it is completely reasonable to argue that consideration must be given to drafting a brand new Omnibus Bill free of any legislative sins that presently exist in the three Acts.

Under MRCA, families of deceased veterans are better off financially under MRCA than they are under VEA. Funeral benefits under MRCA are superior to those under VEA, namely $12603.88 under MRCA and DRCA and a mere $2000 under VEA. The dichotomy is inexplicable and needs to be reviewed and harmonised to reflect the higher amount. (This writer's highlighted emphasis).

The Act as it currently operates, has caused untold stress anger and worse during its statutory life which is well-documented by the RC. Any harmonising activity will pose significant challenges and will not undo the intent of that Act, namely to save the Commonwealth money at the expense of veterans and their families, with sometimes tragic results for veterans.

This Act and its catastrophic effect on veterans has been the subject of intense examination in no less than three Senate Inquiries alone. It is welcome news that the Government is undertaking this reform process and not before time.

[12] Mc Laughlin/Jamison, per Noel Mc Laughlin, transcript of evidence at p. 25.

It is contended that the application of legislation which acts in a financially parsimonious and crushingly cold and bureaucratic manner, is an abrogation by the Commonwealth of its duty to not put a cash value on the service and sacrifice of those who serve the nation.

As long as there are offsets affecting veterans' entitlements and in some cases their lives, veterans and their families will continue to suffer disadvantage.

This cannot be allowed to continue.

4.1 Contention
It is the RAAC Corporation's contention that, the offsetting provisions as they currently exist with MRCA as discussed above are punitive and should be rescinded as part of this reform process.

ISSUE 5 ACCRUED RIGHTS DENIED

In *Petersen* (2008)[13] the AAT noted that the Full Court of the Federal Court in *Gordon* (2001)[14] *"recognised rights which may have accrued under repealed SoPs."*[15]
The Full Court in *Gordon* followed the reasoning of the Full Federal Court in *Keeley* (2000)[16]; viz

> *The majority in Esber (Mason CJ, Deane, Toohey, Gaudron JJ at 440) determined that a right to have a decision reconsidered and determined by the Tribunal was not merely a power to take advantage of an enactment nor a mere matter of procedure;* ***it was a substantive right*** *that may be said to have accrued under that enactment.* ***It was implicit in the reasoning of their Honours that it was not necessary for such a right to accrue, that it be a right enforceable by reason of prior adjudication or determination.*** At [38]. (This writer's bold highlighted emphasis).

However under s.341 MRCA 2004, no substantive rights are accrued.
The exclusionary provisions of s.341 deliberately exclude any entitlement to statutory relief in applying accrued rights to MRCA veterans.

It is pertinent to note the Federal Court decision in *Keeley* and *Gorton* occurred four and three years respectively, **prior to** the enactment of MRCA. The inference to be reasonably gained here, lies in the fact that a sufficiently long time frame was there for ESOs, Government and DVA right through the drafting process of the MRCA Bill, to examine the decisions in *Keeley* and *Gorton* and the successful High Court decision *Esber*[17] in and ensure equal rights of access were granted in law, to MRCA veterans.

That relevant persuasive authority was properly and materially before the Commonwealth and DVA at all times and who both failed to have due regard to in its direct relevance to the drafting process. This failure has led to a grievous injustice being committed on MRCA veterans.

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[13] ***Petersen and Military Rehabilitation and Compensation Commission*** [2008] AATA 1145 (19 December 2008),at [16].
[14] ***Repatriation Commission v Gorton*** (includes corrigendum dated 18 September 2001) [2001] FCA 1194 (29 August 2001) at [22]. ***Esber v Commonwealth*** [1992] HCA 20; (1992) 174 CLR 430 (3 June 1992) distinguished.
[15] Creyke, R., and Sutherland, P., ***Veterans' Entitlements and Military Compensation Law*** 3rd edn, 2016, Federation Press, Leichhardt NSW, 870pp, at p,434.
[16] ***Repatriation Commission v Keeley*** [2000] FCA 532 (28 April 2000) at[22]. ***Esber v Commonwealth*** [1992] HCA 20; (1992) 174 CLR 430 (3 June 1992) followed.
[17] ***Esber v Commonwealth*** [1992] HCA 20; (1992) 174 CLR 430 (3 June 1992).

I also consider the statute-barred right to access accrued rights available to other veterans to be a deliberate attempt by Government to save money by disenfranchising, denying statutory relief and therefore discriminating against on the basis of class, a cohort of veterans namely MRCA veterans, by denying them access to a right available to another class of veterans, namely VEA veterans.

The fact both classes of veterans served their nation is clearly missing in this matter.

Along with a statutory exclusion to beneficial accrued rights provisions of superseded SoPs (s.341), MRCA includes a self-executing provision automatically offsetting 60% of a SRDP pension where a veteran is in receipt of a Comsuper pension (s.204). These exclusions are not included in the VEA 1986 enabling veterans under that act to access accrued rights.

The entitlement to accrued rights exist for veterans under VEA 1986.
They do not exist in respect of MRCA veterans who are statute-barred from claiming accrued rights in respect of access to a superseded SoP which contains a beneficial Factor which would enable them to obtain natural justice though the claims or appeals (VRB) process.

The intent of such an exclusion is unambiguously clear. It is designed to save the Commonwealth money by denying MRCA veterans to access these rights. No other conclusion can reasonably be made. It is on any analysis, a terrible and damning indictment on the Commonwealth in its clear attempts to deny those who served and suffered from enjoying access to a benefit to which they should be entitled to.

It is callous in the extreme. It is deliberately discriminatory and completely fails any test of reasonableness.

The perversity of the application of a policy deliberately excluding one veteran cohort (post-July 2004), from accessing a benefit to which MRCA veterans should be entitled, is incomprehensible on every level and on any analysis.

The application of this exclusionary provision is so unreasonable it offends the 1947 landmark decision known as the *Wednesbury Principles*[18] in that the policy *"so unreasonable that no reasonable authority could ever have come to it"*. The later (1948) House of Lords decision per
Lord Greene Master of the Rolls[19], held that:

> *"It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere."*

The Wednesbury decision is considered to be of major significance in examining principles of reasonableness and the reading down by the Courts of unreasonable application of policy. *Wednesbury* has been referred to 3563 times[20] by various Courts including Australian Courts.

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[18] ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 KB 223 at 234.
[19] ***Associate Provincial Picture Houses Ltd v Wednesbury****Corporation*[1947] EWCA Civ 1, per Greene L, M.R., Somervell L.J. and Singleton, J.
[20] Law Cite http://classic.austlii.edu.au/cgi-bin/LawCite?cit=%5b1948%5d%201%20KB%20223?stem=0&synonyms=0&query=Wednesbury [10/3/2023].

The Full Federal Court in *Cockcroft* (1986)[21], (referred to 607 times)[22] held *inter alia:*

> *"That is to say, they require a judgement to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous…"*

Nothing in the Statute-barring provisions in the MRCA to veterans of an entitlement to accrued rights, remotely accords with *Cockcroft*. The vesting of accrued benefits for MRCA veterans is completely rational and reasonable and accords with Her Honour's detailed analysis in the *Australian Doctors'* case which followed *Cockcroft*.

In the *Australian Doctors* case, Beazely J relied on the Shorter Oxford Dictionary definition of *"reasonable"* to be taken relevantly to mean *"Agreeable to reason; not irrational, absurd or ridiculous*" and is in accordance with the ordinary common-sense meaning of the word. The definition of *"reasonable"* by Beazely J has never been disturbed by a Court of superior jurisdiction.

In the *Doctors Case*[23], the Court per Beazely J, held that "*an administrative decision may be quashed if the decision is so unreasonable no reasonable person would have come to it"*.
This finding by Her Honour followed the landmark statement in relation to the Principle of Unreasonableness set down in *Wednesbury* and the Federal Court decision in *Cockcroft.*[24]

I consider the Oxford definition cited by Her Honour to be completely ignored by Government. Ignoring the Court's Test of Reasonableness demonstrates clearly and unequivocally the intent of the Government to apply a policy which is now shown to be designed to deliberately statute-bar a class of veterans (MRCA veterans) from accessing accrued rights to be unconscionable and indefensible.

That offends on every level, every principle of reasonableness.

Similarly, the decision by Beasley J in the *Doctors' Case* gives further effect to the unconscionable nature of unreasonableness such as the one employed by the Commonwealth to save money at wounded and injured veterans' expense.

In summary, it follows that, if a decision is so unreasonable that no reasonable person acting reasonably could have made it, is directly relevant to the imposition of the denial of access to accrued rights.

There is no doubt that the exclusionary accrued rights provisions in MRCA 2004 offend every principle of reasonableness and should be rolled back.

The analysis of the relevant Common Law decisions supports quite strongly the argument that the statute-barring provisions excluding access to accrued benefits enshrined in MRCA, are unconscionable and act as a fetter to veterans obtaining natural justice.

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[21] ***Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft*** (1986) 10 FCR 180 per Bowen CJ and Sheppard and Beaumont JJ at [29] and followed in the *Australian Doctors'* by Beazely J at [21]
[22] **Law Cite** http://classic.austlii.edu.au/cgi-bin/LawCite?cit=%281986%29%2010%20FCR%20180#cases-cited [10/3/2023].
[23] ***The Australian Doctors' Fund Ltd v Commonwealth*** (1994), per Beazley J, 34 ALD 451-466 at [21].
[24] Above, n.23.

CAVEAT

It is critically important that in grandfathering provisions as part of the reform process, the accrued rights entitlements of VEA 1986 in respect of access by veterans to superseded SoPs is not in any way diminished or eliminated. The accrued rights applying to VEA veterans' entitlements, must be kept intact.

5.1 Contention
It is the RAAC Corporation's contention that:

1. As part of the reform process, s.341 of MRCA should on every level, be excised from the Act and that veterans be given access to accrued rights.

2. The grandfathering of accrued rights available to VEA veterans and claimants must be undertaken without prejudice to those entitlements.

ISSUE 6 DELIBERATELY WITHHOLDING MEDICAL ADVICE

6.1 Exercise in Frustration

A decision made by a public servant is a reviewable decision.

Any such review must as a matter of settled law have regard to all matters relevant to the decision in question, including in the Veterans' Division, disclosure of medial opinion from a medical practitioner employed by the Commonwealth.

It has become increasingly frustrating that the practice by the Commonwealth as represented by the Repatriation Commission or MRCC to refuse to issue s.137 Reports (the T-Documents) with no medical evidence. This includes advice from a Departmental Medical Adviser (DMA), validating a Delegate's decision to refuse a claim on which the Primary Decision-maker relies.

The Primary Decision-maker citing ***"based on medical advice***" that is always missing from the 137 Report is unacceptable and gives the lie to the illusion of transparency.

6.2 Refusal to Disclose

Practice Directions at the VRB[25] mandate disclosure by the parties not less than seven days prior to a hearing. The s.137 Reports are completely silent on what this medical advice is.

I consider the practice by the MRCC and Repatriation Commission to not produce crucial medical reports justifying decision to refuse a claim in a137 report, to constitute an unacceptable breach of current Practice Directions.

This then requires submissions to be made to a Conference Registrar at a first-instance ADR hearing seeking furthers and betters by seeking a Direction to Produce Documents vide s.146(A) VEA including those medical documents at the heart of the contested matter.

[25] The author has been a Practising Veterans' Lay Advocate (Appeals), since June 1986 and holds a TIP 4 Certificate of Tribunal Advocacy from the University of Canberra School of Law. He has successfully prosecuted appeals under VEA and MRCA legislation. His authorship of this submission also relies on the defence of considerable qualified privilege.

This leads to the following delays :

1. Waiting for the documents to be produced.
2. Perusing the documents with the veteran.
3. Having the veteran make a medical appointment to see their specialist.
4. Lengthy waits for the veteran to get in and see their treating practitioner.
5. Lengthy delays in specialists providing written reports.
6. Consequential delays in bringing the matter before the Board due to re-scheduling issues affecting timely adjudication.

These delays are a considered to be a major contributing factor in exacerbating the stress and distress of veterans undergoing the appeals process and contributes to a drawn-out VRB process which is not in the best interests of the veteran or the Board.

The Commonwealth as represented by DVA is deliberately contributing to a material degree the stress and distress on veterans by its trenchant refusal to provide the relevant DMA reports for a veteran's treating practitioners to peruse and rebut. I consider the deliberate action by DVA to constitute an error of law.

The deliberate withholding of medical advice is symptomatic of a gravely disturbing trend by the Commonwealth as represented by DVA, to refuse to include Departmental medical advice.

I consider this tactic to be a grievous denial of natural justice. It operates to deliberately exclude any medical opinion expressed by a DVA Medical Adviser (DMA) thereby denying the veteran and his medical practitioner/specialist from accessing a medical opinion enabling a veteran's medical practitioners and/or specialists to challenge and rebut what has been stated by a Departmental GP.

I consider this exclusion of a DMA report to be a deliberate action by the Commonwealth as represented by DVA.

I consider it to be an action carried out in bad faith which offends every principle of procedural fairness and as such constitutes an error of law.

It is demonstrably clear that a Delegate's deliberate exclusion of a DMA's report is a tactic designed to disadvantage a veteran and cause him or her significant detriment.

It is not outside the realms of possibility that an inference can reasonably be drawn that this action by the Commonwealth is an action designed to sabotage a veteran's claim through the application of a policy so egregious, that no reasonable person would contemplate it.

It is not an exaggeration either to contend that this would also be the opinion of an ordinary reasonable person.

I consider this deliberate practice to be a disgraceful example of the Commonwealth not acting as an honest broker in terms of good-faith disclosure. It is on any analysis a bad-faith practice designed to deny a veteran procedural fairness an dis counter to the Commonwealth's Model Litigant Principles.

The indefensible nature of this practice by DVA was addressed at the Royal Commission into Defence and Veteran Suicide in Canberra on 7th April 2022[26] by Mr Geoff Lazar, one of three Senior Solicitors from the Veterans' Advocacy Service of the NSW Legal Aid Commission appearing before the Royal Commission; viz

> *PETER SINGLETON: Thank you. The very last matter I want to discuss arises from what is on our screens. It is the bottom of the same page. You have actually turned to what will become Recommendation 7 and you write this: Often, the delegate relies upon the interpretation of DVA's in-house medical advisor but does not provide the Claimant with a copy of the report or memo from the medical advisor. And, operator, if we could go to the next page, you proposed, back in 2018, that the DVA should be required to provide a copy of all the evidence used to make a determination.*
> *The first question is: is it still the case that you are not provided with all of the evidence used to make determinations?*
> *GEOFF LAZAR: Yes.*
> *PETER SINGLETON: And is that routine?*
> *GEOFF LAZAR: Yes.* (This writer's highlighted emphasis).

I consider the deliberate withholding of vital medical information by Departmental Delegates to be a deliberate act of utter, bad-faith decision-making. It is on every level, an act that is completely indefensible.

I consider the continued refusal by agents of the Commonwealth namely Primary Decision-makers, to refuse to include a DMA advice to be on every level, an exercise in bad faith.

I consider the bad faith provision enshrined in the AD(JR) Act 1977 at s.6(2)(d). in fact supports the contention that a refusal to disclose could well offend other provisions in s.6(2); viz

> *(2) The reference in paragraph(1)(e) to an improper exercise of a power shall be construed as including a reference to:*
>
> *(a) taking an irrelevant consideration into account in the exercise of a power;*
>
> *(b) failing to take a relevant consideration into account in the exercise of a power;*
>
> *(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;*
>
> *(d) an exercise of a discretionary power in bad faith;*
>
> *(e) an exercise of a personal discretionary power at the direction or behest of another person;*
>
> *(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;*
>
> *(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;*
>
> *(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and*
>
> *(j) any other exercise of a power in a way that constitutes abuse of the power.*

[26] ***Royal Commission into Defence and Veteran Suicide***, Block 4 Canberra 7/9/20202, Transcript of Evidence at p. 27-2501.

6.3 Contention
It is the RAAC Corporation's contention that:

1. The deliberate and egregious practice of denying a veteran and their treating medical practitioner or specialist access by way of disclosure, of a DMA's opinion is unconscionable conduct by DVA whose duty is to act as an honest broker and as a model litigant.

2. The application of such a policy should be rescinded and a provision included in any re-engineering of MRCA, VEA and DRCA compelling disclosure, and that any such direction to disclose, also be promulgated in CLIK

ISSUE 7 REMUNERATIVE WORK HOURS

The current status of veterans who have been awarded a TPI pension (vide s.24 VEA) or a SRDP pension (vide s.299 MRCA), is based *inter alia* on the capacity of veterans to undertake remunerative work for no more than 8 hours per week (VEA) and no more than 10 hrs remunerative work per week (MRCA).

The 10-hour rule imposed on MRCA veterans is clearly more generous than that currently in force for VEA TPI veterans. As such, it is considered that an inconsistency exists to the extent an unequal application of a policy for TPI/SRDP veterans, exists.

Both categories of veterans are entitled to equal benefits and rates of pension payment.
It follows that, this should also apply to equality of the capacity to undertake remunerative work to be not more than 10 hours per week in both Acts. It is considered to be cost-neutral to the Government.

Why an application of equal remunerative hours consistent with what can best be described as parallel TPI/SRDP entitlements does not exist, is illogical and needs to be rectified.

7.1 Contention
It is the RAAC Corporation's contention that, as part of the harmonising process being undertaken, that the remunerative hours provision VEA 1986 is completely out of date and the relevant provisions of s.24 should be amended to no more than 10 hours remunerative work per week ensuring harmonised and consistent application of policy.

ISSUE 8 CONFLICTING STANDARDS

Both Acts have in them a provision which imposes a reverse criminal standard of proof on the Commonwealth as represented by DVA, by imposing on a Determining Officer or Delegate, a statutory duty where they must be *"satisfied beyond reasonable doubt, that there is no sufficient ground for making that determination."* This applies to s.120 VEA and s.335(1) MRCA.

Significantly, the reverse criminal standard applies to MRCA determination in respect of warlike and non-warlike service; viz "*Standard of proof for claims relating to warlike or non-warlike service."* The provisions of s.120 VEA are silent on the criminal standard applying to operational (non-warlike) service.

It is considered that, as part of any legislative reform process, the heading in s.120 be amended to reflect the same wording as that in the title of s.335(1) in MRCA. Given that the legislative reform process is considering moving to a single standard of proof it is not unreasonable to argue that the essential nature and intent of the reverse criminal standard is fundamental to the decision-making process and must be retained at all costs.

8.1 Contention
It is the RAAC Corporation's contention that, to ensure equality of treatment in the claims determining process that the reverse criminal standard as applied vide s335 MRCA for warlike service and s.120 VEA, be retained.

PART B

ISSUE 9 - PRODUCTIVITY COMMISSION RECOMMENDATIONS

It is noted in the Legislative Reform Booklet the intent of Government based on the recommendations of the RC to include in the harmonising exercise, a number of recommendations from the **Draft** (not substantive) Report by the Productivity Commission (PC) into DVA, sent to ESOs and stakeholders in late December 2018. These recommendation are: **RC Recommendations 8.1, 8.4, 13.1, 14.1 and 19.1** respectively (at p.2).

The RAAC Corporation responded to those recommendations in its response to the PC's Draft. It is the RAAC Corporation's considered position that the matters raised in its response to the PC's Draft Report are properly and materially relevant now as they were in the RAAC Corporation's submission to the PC on 31/1/2019.

For this reason, the relevant responses tendered in 2019 are again included in this submission. Where necessary they have been adjusted to reflect any matters which have arisen since the RAAC Corporation's submission to the PC.

ISSUE 9.1 - HARMONISING SoPs (PC Draft Report, p.307)

The SoPs are created at two different standards of proof for the underlying medical-scientific evidence — a beneficial 'reasonable hypothesis' standard for operational service under the MRCA and VEA, and a 'balance of probabilities' standard for all other types of service.

- *The Commission is proposing that only one standard should apply, but is seeking feedback on the systemic impacts (such as cost and acceptance rates) of moving to a single standard across all three Acts, and on which standard should be used.*

It is well settled that SoPs are subordinate law and have the force of law.
The proposal by the Productivity Commission to harmonise the two SoP regimes into one, has merit.

However, this must be tempered by one single point that differentiates a Reasonable Hypothesis (RH SoP) - **operational service**, from that of a Balance of Probabilities SOP (BOP SoP) - **eligible Defence service**, (non-operational service) and that is in the number of Risk Factors set out in each type of SOP.

A veteran who has rendered operational service must, as a minimum, meet only one of the Risk Factors listed in either category of SoP. In the case of a RH SoP claim, veterans are able to base their claim on accessing a larger number of listed Risk Factors for a claimed disability, whereas a veteran who has rendered eligible Defence Service only, is required to base their claim via a BOP SoP which has a reduced number of listed Risk Factors that can be accessed.

It is common ground that the intent of Parliament here is clear through the provision of a more beneficial approach, to provide for a more beneficial intent through the provision of a larger number of Risk factors for a RH SoP claim due to the nature of a veteran's operational service.

The RAAC Corporation acknowledges what the Courts believed, namely that Parliament had drafted a law to give preferential treatment to veterans who had actually rendered active (operational) service.

That has passed on to the application of a RH SoP for veterans who have rendered operational service, as has been held in *Kohn*[27] per Hill J., viz

> *54.* ***The legislative policy behind the Veterans' Entitlements Act is that a person who has rendered operational service in the sense defined in s.6(1) should more readily be able to obtain a pension than a person who has not rendered such service****. It was the intention of the legislature that it was only members of the Armed Forces who, in truth, were on service outside Australia during World War 2 who should receive this preferential treatment as to pensions****. It cannot be conceived that Parliament intended that veterans who were at all times stationed in Australia but who travelled from one place in Australia to another and thereby were for short periods of time outside Australia, should be treated in the same way as veterans who fought in a theatre of war, sailors who served continuously on a ship engaged in or likely to become engaged in combat or members of the Air Force engaged in flying missions outside Australia.* (This writer's bold emphasis).

The RAAC Corporation acknowledges what the Courts believed, namely that Parliament had drafted a law to give preferential treatment to veterans who had actually rendered active (operational) service. This includes the crafting of beneficial RH SoPs. Nothing in any subsequent decision by a Court of superior jurisdiction has disturbed *Kohn.*

It is essential that during the proposed legislative reform process, Government must also and always, have due regard to Common Law decisions of the Courts and AAT in the Veterans' Division that are and continue to be applied and argued by Advocates in favour of veterans entitlements and their families. The mere fact a major re-engineering process to be undertaken does not on every level, does not vitiate the Commonwealth's responsibility in that regard.

The beneficial intent in that regard is clear as is evidenced by a large number of Common Law decisions, including the Federal Court decision in *Kohn*, previously discussed.

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[27] ***Repatriation Commission v Kohn*** (1989) FCA 244 (3 July 1989), per Hill J, at [54].

This is the critical choke point that will have a significant impact on harmonising SoPs into a single document.

The challenge for the legislative reform process will be to design a single SOP that encompasses both classes of service **without any detriment** to veterans by reducing RH Risk Factors.

In order to not offend the current rules of evidence applying to both categories of SoPs, it will be necessary to increase the number of Risk Factors in the BOP SoP to a level where they are not quite a full suite of RH-equivalent Risk Factors but are sufficient to enhance a veteran's chances of meeting one of the additional Risk Factors.

There appears to be no information or policy on either the RMA website or in the CLIK database related to SoPs which would prohibit the RMA for considering this course of action.

A question arises in respect of the potential impact, harmonsing of the SoPs may have on the more beneficial of the two SoPs – the RH (operational service) SoP which applies a Common Law **test** in lieu of the stricter **civil standard of proof** for non-operational service.

It is worth noting that in the section ***Dual Standards of Proof*** (Draft Report pp. 330-332), the Commission contended, *inter alia*:

> *the Commission is of the view that the existing divides between operational and peacetime service are not justified. This is on the basis that 'an injury is an injury', regardless of where it occurred.* (p.331).

The Commission's assertion is consistent with the Corporation's contention that a case can be made out to harmonise the SoPs without detriment to the RH level of evidentiary requirements. This finds further support by the Commission in citing Baume *et al* (1994) who argued:

> *Historically, a single standard of proof also applied for all operational and non-operational service from the genesis of the Repatriation Act 1920 until the legislative amendments in 1977 (Baume, Bomball and Layton 1994, p. 26).* (p.331).

The Productivity Commission's statement in Draft Recommendation 8.1 that DVA consider

"making the heads of liability and the broader liability provisions identical under all three Acts along with *"adopting a single standard of proof for determining causality between a veteran's condition and their service under the VEA, DRCA and MRCA*,

is supported by the RAAC Corporation.

According to the repatriation Medical Authority (RMA) , it has *"created around 2500 SoPs, and over 300 injuries or diseases included"* in them (Draft Report, p.316).

The challenge for DVA, DVA Legal and the RMA, is to come up with an appropriate form of words addressing the Preamble in ***"Factors"*** as set out in all SoPs as is seen in the following example:

> *The factor that must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting* ***lumbar spondylosis*** *or* ***death from lumbar spondylosis*** *with the circumstances of a person's relevant service is:* (the RMA's bold emphasis).

by combining both RH and BoP rules of evidence, without compromising either, into one single harmonised multi-application SoP, will be considerable, but achievable.

The question to be answered, lies in whether harmonising both SoPs into one will damage, prejudice, or completely nullify the beneficial RH test, causing detriment to all future claims, which currently exists in a separate SoP.

9.2 ENVIRONMENTAL SCAN

The legislative reform process proposes one set of SoPs to simplify and improve their administration and operation at Delegate and Advocate level. The current double SoP process presently in operation, is oppressive and onerous and acts as a fetter to enhancing timely and effective decision-making, causing manifest distress and anger amongst veterans and families as has been heard by the RC.

It places a very heavy evidentiary burden on veterans to comply with a SoP Factor to the extent veterans will give up in despair and walk away from the process.

The proposal to have one set of SoPs will generate significant comment and include a backlash against such a proposal, based on the firmly-established Common Law principle that veterans who render operational service should be entitled to a more beneficial treatment than those who do not render operational service (*Kohn*) and *Whiteman et al*[28].

There are a total of **770 SoPs** in two even categories of SoPs – namely **385 RH SoPs** and **385 BOP SoPs** listed by name and SoP numbers in the RMA's SoP Summary spreadsheet prepared by that organisation and published on its website[29], and is correct as of 8 March, 2023.

It is self-evident that the bewilderingly large array of SoPs currently in force will operate to create confusion and distress in veterans place a significant workload burden on Advocates and ESOs.

The sheer size of the SoP suite cries out for review, reform and culling.

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[28] ***Whiteman v Secretary Dept of Veterans' Affairs*** (1996) per Madgwick J, 43 ALD 225 at 232-233. ***Starcevich v Repatriation Commission*** (1987) 76 ALR at 454; 18 FCR 221 at 225 followed; ***Repatriation Commission v Hawkins*** (1993) 117 ALR 225 at 231;30 ALD 51 at 56 followed).

[29] http://www.rma.gov.au/SoPs/ [accessed 11/3/2023]. The Spreadsheet and pdf SOP lists can be found in the right-hand column listed under **SOP Summary**.

An environmental scan of this issue argues the following:

Strengths

- The ability of the RMA to eliminate 50% the 770 SoPs in force by an instrument repealing the operation of all BOP SoPs, reducing unnecessary duplication and reducing the administration of these documents and their modifications.

- A reduction in workloads for Advocates in managing claims where a multiplicity of conditions in a veteran covering both classification exists.

- Improving the decision-making process at Primary Decision-maker and s.31 and s.347 Internal Review.

- An improvement in TTP for claims.

- An improvement in the Decision-making process at the VRB through the elimination of one facet of the appeals process resulting in improved decision-making turnarounds.

- A reduction in turnaround in claims with an improved TTP reducing stress and anger from veterans and their families.

Weaknesses

- A potential lack of Government willpower to implement the proposed changes leading to delays and policy paralysis at Government and Departmental level.

- A potential lack of support from the veteran community and ESOs in supporting this recommendation.

Opportunities

- Significant improvement in the RMA capacity to manage a more streamlined SoP environment.

- A significant improvement in VRB decisions at all levels steps of the review process due to elimination of 50% of the 770 SoPs currently in force, eliminating a significant degree of confusion in an appeal from veterans who have a multiplicity of conditions for both operational (RH) and non-operational (BOP) service.

- Improved TTP within the DVA determining system.

- Reduced training burden on trainee Delegates.

Threats

- A change of Government priorities.

- Budget priorities.

- Change of Minister and consequential change of policy.

- A lack of commitment from senior Government and DVA leadership.

- Resistance from ESOs and other veteran groups given that operational (warlike or non-warlike) service is considered by veterans, to be assessed on a more beneficial footing than non-operational (peacetime) service.

9.1 Contention

The RAAC Corporation's contention is that:

1. The current SoP scheme is one of considerable complexity for veterans and those representing their interests. Regardless of improvements made to the SoP process (e.g. heavy lifting as an automatic acceptance in some military trades), a heavy evidentiary burden and confounding English usage is placed on veterans to meet the relevant Factors.

2. In *Linwood*[30], Logan J made some very pertinent comments related to the complexity of SoPs in stating:

   > *Since the SoP regime was introduced, a plethora of SoP have been determined, repealed and re-determined. Within the limits of their language and application, they do achieve a consistency of sorts, but for those administering the Act or advisors, let alone an Australian Defence Force member who has rendered service covered by the Act or his or her dependents, they have also in practice added an additional layer of complexity to the already elaborate provisions of the Act.* At [16].

3. I consider that the complexity of the SoP system as discussed by His Honour to be a massive impediment to a more efficient and effective determining system.

4. The fact the complexity identified in *Linwood* still exists, suggests the RMA as custodians of the SoP policy, has failed manifestly to heed relevant persuasive authority. This is on every level a failure of policy that has failed the veteran community.

5. A complete overhaul including a review of the language used in the SoPs along with a move to a single-step rule of evidence (the Common Law RH Test) for all classifications of service will go some way to removing that impediment.

6. In order to properly assess the potential benefits or dangers of harmonsing two SoPs - one with no standard of proof (RH with more Risk Factors) and one with a standard of proof (BOP with less Factors) into one SoP without prejudice to veterans, careful and rigorous due diligence be undertaken in order to achieve the right balance without prejudice to veterans and their families.

[30] ***Linwood v Repatriation Commission*** [2016] FCA 90, 16 February 2016.http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2016/90.html?stem=0&synonyms=0&query=Linwood. [10/3/23].

7. The introduction of a single SoP **based as a minimum** on the Common Law RH Test established by the Full Federal Court in *East*[31] is a proposition that has considerable merit and should, based on the discussion above, be pursued.

8. The re-engineering of the current process to a single SoP process must be treated with great caution and must involve all stakeholders including rigorous due diligence.

ISSUE 9.2 – PC RECOMMENDATION 8.4 MOVE MRCA TO A SINGLE STANDARD OF PROOF (COMMISSION'S FORMAL REPORT)

The Australian Government should remove the distinction between types of service when determining causality between a veteran's condition and their service under the Military Rehabilitation and Compensation Act 2004 (MRCA). This should include:

- *amending the MRCA to adopt the reasonable hypothesis Statement of Principles for all initial liability claims*
- *requesting that the Australian Law Reform Commission conduct a review into simplifying the legislation and moving to a single decision-making process for all MRCA claims, preferably based on the reasonable hypothesis process.*

COMMENT

In its original (May 2018) submission to the Commission[32], including on the provisions of **PC Recommendation 8.4**, the RAAC Corporation contended, *inter alia*[33]:

> *"The beneficial application of RH SoPs by DVA has in some ways created a double-edged sword in assessing claims based on a veteran's service. It is well settled that, but for the aggravating circumstances of death or wounding by enemy action, the risk of death or injury in Australia towards veterans who have not deployed overseas, remains a constant.*
> *It follows that, conflict and confusion in the veterans' space as to why two differing standards apply exists, regardless of the type of service rendered.*
>
> *The beneficial application of RH SoPs by DVA has in some ways created a double-edged sword in assessing claims based on a veteran's service.*
>
> *It is well settled that, but for the aggravating circumstances of death or wounding by enemy action, the risk of death or injury in Australia towards veterans who have not deployed overseas, remains a constant. It follows that, conflict and confusion in the veterans' space as to why two differing standards apply, exists regardless of the type of service rendered. As such, it is contended that consideration should be given to establishing a standard of proof or test that could apply to both operational service and eligible Defence service."* (2018).

It is acknowledged however, that amending the rules of evidence to include non-operational service in the same evidentiary regime as for all operational service may be problematic. This is considered to be attributable to differing views in the ESO and veteran community, that a definite difference between eligible defence service and operational warlike/non-warlike service exists.

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[31] ***East v Repatriation Commission*** [1987] FCA 242 (22 July 1987) defined a reasonable hypothesis thus:
We agree with this analysis. A reasonable hypothesis requires more than a possibility, not fanciful or unreal, consistent with the known facts. It is an hypothesis pointed to by the facts, even though not proved upon the balance of probabilities. At [42].

[32] RAAC Corporation Submission 29, 30 May 2018, 63pp.

[33] Above, n.31, at p.19.

The RAAC Corporation remains steadfast in its view that any proposed single rule of evidence **must not on every level, be less than that of the Common Law Reasonable Hypothesis Test** if a single rule of evidence was created. Similarly, the reverse criminal standard of proof which lies on any decision made by DVA primary decision-makers or within the MRCC must remain in Veterans' Law and must not be repealed.

Absent agreement on the creation of a single rule of evidence based on the RH test, it is contended that DVA should examine the US Veterans' Affairs (VA) standard of proof for consideration of adopting a similar rule of evidence. In VA benefits cases, according to their website, the standard of proof is a ***"preponderance of the evidence"[34];*** viz

> *"Because "preponderance" means the "majority," an award should be granted when the evidence supporting a claim is ever so slightly more than the evidence against a claim. Another way of stating this is that VA is supposed to grant a award unless more evidence is against the claim than supports the claim.*
>
> *The preponderance of the evidence standard leads directly to another important rule, known as the "benefit of the doubt" rule. The law requires that, after consideration of all the evidence, if there is an approximate balance of positive and negative evidence, the benefit of the doubt in resolving each such issue should be given to the claimant. In other words, if VA finds that the evidence is equally divided between evidence supporting a claim and evidence against a claim, such as two conflicting medical opinions, the claimant gets the benefit of the positive evidence. For this reason, the rule is also known as the "tie goes to the runner" rule, where the claimant is the runner."*

The above statement comes with a caveat; viz ;

> *"The benefit of the doubt rule, however, is widely misunderstood and is often the source of great frustration for claimants. Despite what many believe, the rule does not mean that VA must make an award anytime a claimant submits an account of an event supporting an award. The rule also does not mean that VA has to believe a claimant, a claimant's spouse, or claimant's doctor when other evidence is in conflict with their statements. VA is always required to weigh such evidence against other evidence, such as service records or other medical opinions, but VA can find other evidence more convincing."*

9.1 Contention

It is the RAAC Corporation's contention that:

1. Notwithstanding the caveat, this is a very low and more easily met evidentiary standard and is one that could be considered for application to all operational service ,enabling the application of the RH test to be cross-vested to non-operational service; and

2. The critical criterion which in the RAAC Corporation's view **is not negotiable**, is that veterans subjected to this recommendation the Productivity Commission **must not in any way suffer detriment** in meeting any rule of evidence proposed – be it single or dual depending on the nature of their service. The recommendation to move to a single standard of proof based on the contentions discussed above, is supported.

[34] Online at https://helpdesk.vetsfirst.org/index.php?pg=kb.page&id=1781 [accessed 8/7/19, 20/2/19, 7/3/23].

ISSUE 9.3 – PC DRAFT RECOMMENDATION 13.1 HARMONISING TABLES 23.1 AND 23.2 GARP 5(M)

The Australian Government should amend the Military Rehabilitation and Compensation Act 2004 to remove the requirement that veterans with impairments relating to warlike and non-warlike service receive different rates of permanent impairment compensation from those with peacetime service. The Department of Veterans' Affairs should amend tables 23.1 and 23.2 of the Guide to Determining Impairment and Compensation to specify one rate of compensation to apply to veterans with warlike, non-warlike and peacetime service.

The provisions of **PC Recommendation13.1** relate to harmonising the Incapacity Conversion Tables in order to provide a single path process for calculating Lifestyle and Impairment effects for Permanent Incapacity (PI) for both warlike service and non-warlike service. The proposal has merit but must be viewed with great caution by ESOs and veterans alike.

The two rules of evidence required to establish eligibility for compensation, namely the Reasonable Hypothesis Test (RH) and the civil standard on the Balance of Probabilities (BOP), remain extant. This response to Recommendation 13.1 focuses only on the two differing methods of calculating a PI payment regardless of these eligibility tests.

Any attempt to undertake a review of **Tables 23.1** and **23.2** in **GARP 5(M)** must be viewed with suspicion on the basis that previous reviews of VEA-applied GARP 5, have resulted in values and pension calculations being diminished, in effect derating the Lifestyle points allocation for calculation of Disability Pension. It is contended the same applies to the two same Tables under GARP 5(M).

The calculation of PI rates of compensation using the Tables in question, operates on two limbs – for Operational (**warlike and non-warlike**) service and non-operational (**peacetime**) service.

It is disturbing to see these Tables continuously applied in a callous and grievously unjust manner across two separate natures of military service. As such, the application of two discriminatory Tables constitutes an abuse of process, and is an act of procedural bastardry.

This is particularly so in circumstances where these Tables are used to calculate payment of PI compensation eligibility in the case of, for example, an Armoured Corps crewman who on peacetime service, falls off an ASLAV Armoured Fighting Vehicle during a military exercise, suffers a crush fracture at T4 and fracture dislocation at C6 resulting in the development of Thoracic and Cervical Spondylosis L4 and L5 and another Armoured Corps soldier suffers precisely the same injuries on the same vehicle on operational service.

That both can be assessed for an identical injury incurred in different service category circumstances, with differently calculated levels of compensation payment, defies belief.

The use of two Tables has generated significant stress and anger in the veterans' compensation space as it is seen to have created a them and us situation – operational versus non-operational service. Again, the haves and have-nots.

That should never have been allowed to happen and it remains a stain on the Commonwealth Government enacting such legislation, allowing it to create a divisive and prejudicial set of Tables.

I consider this to be a classic example of the Government again failing to act as an honest broker.

I consider the application of two Tables to be nothing less than a money-saving exercise which generated significant animus by veterans towards DVA.

The continued operation of Tables 23.1 and 23.2 is again a significant example of why MRCA 2004 is nothing less than an adversarial approach by Government towards veterans, and serves as another example for its repeal and replacement with a completely new Omnibus Act.

The creation of a single-use Table does not *de minimis* service outside Australia.
Rather, it harmonises and restores equilibrium and uniformity of application right across the board in terms of calculating a PI payment. It is also seen to deliver efficiencies in that Advocates as well as Departmental Delegates, need only to refer to a single-use Table.

The proposed review of the Tables in question has merit and the Corporation conditionally supports Draft PC **Recommendation 13.1**, subject to the following caveats:

1. Table 23.2 (**peacetime service**) must be abolished.

2. A single Table incorporating mathematical values to calculate payments at the **higher rate** of PI payment for Defence service **regardless of the nature of that service**, must be developed.

3. The dollar calculation **must not as a minimum, be less than that which now applies to Table 23.1.**

4. Consideration must be given to expanding the shaded area and in Table 23.1 in order to enable a more generous and equitable amount of compensation for a PI to be calculated.

5. Compensation payments which are calculated using the current three decimal place values, must be calculated at the **higher rate** of compensation payment in order that veterans who render peacetime service only, are no do not suffer financial detriment.

6. Nothing less is acceptable

ISSUE 9.4 - PREVIOUS SUBMISSION TO DVA 9/11/2017 TABLES 23.1 AND 23.2 GARP 5(M)

9.4.1 Medical Impairment

The provisions of the DVA Guide to the Assessment of Rates of Veterans' Pensions 5th edition (GARP 5) has been cross-vested to MRCA under the guise of GARP 5(M).

The Permanent Impairment (PI) for Compensation Tables at Chapter 23 in GARP 5(M) for MRCA claims in respect of impairment assessments for compensation payments, are calculated to three decimal places and operate to reduce by mathematics, the impairment rating for calculation of a veteran's compensation sum.

It in effect operates to place a cash value on a veteran's service and sacrifice to the nation and then reduces that value by applying these Tables. That cheapens a veteran's service and sacrifice in respect of the injury, illness or disease suffered by a veteran in his or her service to the nation.

The deliberate derating of a claimant's entitlement to an equitable compensation sum by a set of mathematical values such as this, is considered on any level to be the most egregious application of legislation designed to deny benefits to persons for whom the legislation was intended to benefit. That is unconscionable and indefensible.

It is not an exaggeration to contend that the application of such a policy to use a set of mathematical tables so designed, operates to rob veterans of their legitimate entitlement to equitable compensation payments.

In redrafting the legislation, it is the RAAC Corporation's stated position that the entire GARP 5 (M) should be subject to rewrite as it is considered to operate to the advantage of the Commonwealth, to the detriment of the veteran.

The use of this particular process in Chapter 23 makes it demonstrably clear that by applying this Guide, the Commonwealth as represented by DVA, is not acting as an honest broker.

This contention finds support from Creyke and Sutherland[35] who wrote that s.67(2) in MRCA requires the Commonwealth to use two tables that are not used for VEA veterans under GARP 5.

The major difference in this respect is that GARP 5(M) is used to calculate the amount of compensation to be determined and paid in the following categories of service:

> *Warlike and non-warlike service as distinct from peacetime service, because different compensation factors will apply for the same impairment rating."*[36].

[35] Above, n.14 at p.626.
[36] Above, n.14 at p.627.

The fact these Tables are used to calculate payment of compensation eligibility in the case of for example, a veteran who suffers prolapsed discs at L4 and L5 in peacetime and another veteran suffers precisely the same injury on operational service, can be assessed completely separately for an identical injury incurred in different service category circumstances, defies comprehension.

It is noted that the Apportionment Tables in GARP 5(M) maintain to a certain degree, the numerical values calculated in the same Tables in GARP. Similarly, the Combined Values Charts in both versions of GARP are the same.

A difficulty arises however in the application of the apportionment of permanent impairment to calculate payment of compensation under GARP 5(M), a factor which does not apply to GARP 5.

The calculations in Tables 23.1 and 23.2[37] in GARP 5(M) clearly show in the shaded areas, a deliberate attempt to keep a veteran's permanent impairment rating required to calculate payments, away from the higher and more financially beneficial numerical values which, if applied would beneficially in a non-discriminating and non-punitive manner, allow for a grant of more equitable compensation payments for permanent impairment. A copy of the Tables is at **ATTACHMENT A**.

I consider the use of Tables 23.1 and 23.2 to be oppressive and manifestly unjust.
They act as a fetter to equitable decision-making and place veterans in a situation where litigating through the appeals process and its adverse consequences on their health, is the only option to consider.

I consider the use of these Tables as opposed to those in GARP 5 in terms of an identical illness, or injury or disease incurred, accelerated or aggravated on operational or peacetime service, operates to create in terms of differing compensation payments, a class of haves and have-nots.

As such, it is clear on the facts that this is a deliberately created unacceptably uneven playing field for veterans, and is many ways suggestive of a discriminatory practice in applying different tests in the example above, for the same injury. The perception by veterans and ESOs alike that the deck is stacked against a veteran, finds significant credence in examining the use of this iniquitous and egregious set of money-saving Tables.

9.4.2 Contention

It is the RAAC Corporation's contention that, that Tables 23.1 and 23.2 should be rescinded and a new PI Table incorporating operational (warlike and non-warlike) service and non-operational (peacetime) service be incorporated under one Table.

[37] **GARP 5 (M) Chapter 23 Calculating Permanent Impairment Compensation** pp. 224-227

ISSUE 10 – PC RECOMMENDATION 14.1 A SINGLE RATE OF PERMANENT IMPAIRMENT COMPENSATION

The Australian Government should amend the Military Rehabilitation and Compensation Act 2004 to remove the requirement that veterans with impairments relating to warlike and non-warlike service receive different rates of permanent impairment compensation from those with peacetime service. The Department of Veterans' Affairs should amend tables 23.1 and 23.2 of the Guide to Determining Impairment and Compensation to specify one rate of compensation to apply to veterans with warlike, non-warlike and peacetime service. This should be achieved via a transition path, with the compensation factors merging to a single rate over the course of about 10 years.

Prior to setting the single rate the Australian Government will need to balance the lifetime fiscal implications of the change with the benefits needed by veterans, as well as the transitional arrangements that will be necessary to implement a single rate.

COMMENT: The Legislative Reform Booklet cites **PC Recommendation 14.1** from the PC's final formal report. The RAAC Corporation's position was addressed in its in its submission of 9/11/17 to the DVA Legal's Legislative Workshop, its response (134pp) to the Draft PC Report, in its subsequent response to the PC's 2019 Final Report in respect of Tables 23.1 and 23.2 and as discussed in this brief (Issue 9.4), remained then and remains now, unchanged.

Rescinding both Tables and substituting them with a harmonised single-use PI Table, remains the RAAC Corporation's position.

ISSUE 11 – PC RECOMMENDATION 19.1 TWO SCHEMES FOR VETERAN SUPPORT

By 2025, the Australian Government should create two schemes for veteran support — the current Veterans' Entitlements Act 1986 (VEA) with some modifications ('scheme 1') and a modified Military Rehabilitation and Compensation Act 2004 (MRCA) that incorporates the Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 (DRCA) ('scheme 2'). Eligibility for the schemes should be modified so that:

- *veterans who only have a current or accepted VEA claim for liability at the implementation date will have all their future claims processed under scheme 1. Veterans on the VEA special rate of disability pension would also have their future claims covered by scheme 1*
- *veterans who only have a current or accepted MRCA and/or DRCA claim (or who do not have a current or accepted liability claim under the VEA) at the implementation date will have their future claims covered under scheme 2. Other veterans on MRCA or DRCA incapacity payments would have their future claims covered by scheme 2*
- *remaining veterans with benefits under the VEA and one (or two) of the other Acts would have their coverage determined by the scheme that is the predominant source of their current benefits at the implementation date. If this is unclear, the veteran would be able to choose which scheme they would be covered by at the time of their next claim.*

Veterans who would be covered under scheme 1 and are under 55 years of age at the implementation date should be given the option to switch their current benefits and future claims to scheme 2.

Dependants of deceased veterans would receive benefits under the scheme that the relevant veteran was covered by. If the veteran did not have an existing or successful claim under the VEA at the implementation date, the dependants would be covered by scheme 2. Veterans who would currently have their claims covered by the pre-1988 Commonwealth workers' compensation schemes should remain covered by those arrangements through the modified MRCA legislation.

ISSUE 11 - A TALE OF TWO SCHEMES (PC Draft Report pp.2, 37-38)

11.1 Forced Migration from the VEA 1986

The Commission in its Key Points (p.2) proposes the creation of two pension/compensation schemes by forcibly limiting pre-2004 veterans to the VEA (Scheme 1) vide **PC Recommendation 19.1**.

This proposal is dangerous and flies in the face of the positive and welcome policy change introduced in 2008 during the Rudd-Gillard-Rudd Government's term in office, to restore access to the VEA to ADF members who had VEA coverage pre-2004 and who continued to serve post-2004, as an option to being held within the confines of MRCA.

At the time MRCA 2004 came into effect, that cohort of ADF members found themselves, forced against their will, out of the protection of the VEA and press-ganged into the convoluted and nightmarish process enshrined in MRCA. The change in policy removed that egregious and unwelcome impediment.

To force post-2004 veterans who continued to service in the ADF after 1 July 2004 out of that Act and its beneficial and remedial support mechanisms into what is essentially bad law defies logic. It again reinforces the contention that the Commission's true purpose is to act as an unelected Government razor gang, in effect a fiscal toe-cutter.

Similarly, the Commission's proposition to introduce Scheme 2 (p.2) is on its face, an action which should be viewed with deep suspicion. The optimism of the Commission in asserting that a modified MRCA incorporating DRCA as Scheme 2 to become "*the dominant scheme"* (p. 37) should fill any reasonable reader and every veteran with deep apprehension and suspicion.

The intent to freeze veterans who have pre and post-2004 VEA eligibility out of access to the provisions of that Act, is dangerous on every level. The statement by the Commission that, *"any veteran who does not have a current VEA liability claim by 1 July 2025 will no longer be eligible to make claims under this scheme"* (p.37), cannot go unchallenged.

11.2 Protections in DRCA

Similarly, the Commission's proposal to incorporate DRCA into MRCA (p.37) is silent on what provisions the Commission recommends. The proposal to **incorporate** DRCA into MRCA is considered to be disingenuous when the Commission contends,

"A two scheme approach will reduce confusion around eligibility and minimise/remove the need for offsetting, and it will effectively abolish the DRCA." (Draft Report, p. 631).

The complete absence of any suggested provisions to be migrated into MRCA is to be viewed with suspicion. DRCA contains a critical beneficial provision which needs to be harmonised across all three Acts in the event no Omnibus Bill is drafted. DRCA contains section 121B; viz

121B Regulations modifying the operation of this Act 21

(1) The regulations may modify the operation of this Act.
(2) Before the Governor-General makes regulations under subsection (1), the Minister must be satisfied that it is necessary or desirable to make the regulations to ensure that no person (except the Commonwealth) is disadvantaged by the enactment of this Act.

The inclusion of this section is significant as it provides ultimate protection to members covered by DRCA.

The provisions of s.121B impose a **reverse disadvantage** on the Commonwealth.
In essence the provisions of the section make it possible for the Minister to make regulations modifying the Act, in essence a reverse of the primary legislation (DRCA) having supremacy over Regulations.

The section will enable the Minister to make a Regulation in circumstances such as a Federal Court decision which reads down an appeal or part of the Act that would act to the detriment of all ADF members covered by this Act. The provisions known as the **Henry VIII** clause, was addressed in detail in the EM to the Bill at p.24 and is discussed at Issue 3 in this submission.

The provisions of this section will also operate to ensure no ADF members' entitlements under the new DRCA are displaced by any transitional provisions arising from this new legislation.

This is a hugely beneficial provision and the dismantling of DRCA to have it subsumed by MRCA as part of further cost-cutting measures, is one that will need to be very carefully monitored by all ESOs and vigorously challenged where any diminution of a beneficial provision in the migration process threatens the entitlements of members subject to the DRCA/MRCA mix. The lack of detail by the Commission is in many respects as disturbing as those matters it discusses.

11.3 Older and Younger Veterans

The Commission infers that it is only *"an older cohort"* of aged VEA veterans who will end up with coverage under this Act (p.37). The entire Report is silent on the matter of life expectancy of male and female Australians. That is disturbing as it was reasonably open to the Commission to properly and relevantly have regard to the research conducted in this area, before making such a statement.

According to the Australian Institute of Health and Welfare (AIHW) (July 2018)[38] the life expectancy for Australian males is estimated to be **80.4 years** and females **82.5 years**. There are a number of very basic assumptions that can reasonably be made, having regard to the provisions of **AIHW Table 6.3**. These are:

[38] ***Table 6.3 Life expectancy (years) at birth, top 10 OECD countries by sex, 2015,*** online at: https://www.aihw.gov.au/reports/life-expectancy-death/deaths-in-australia/contents/life-expectancy [accessed 19/1/19]

Assumption 1: Assuming male veterans (born 1981) enlist in 1998 aged 17, it can be reasonably postulated their life expectancy will see them retain and require VEA coverage for another 63.4 years taking that coverage to **2061** and for female veterans in the same age cohort by another 4.1 years, to at least **2065**.

Assumption 2: Assuming the average age of male veterans (born 1986) who enlisted pre-2004 and who for example served Afghanistan in 2011, is 25 years, their VEA coverage eligibility will see the requiring VEA support out to **2066** with an additional 4.1 years for female veterans in the same age cohort taking the requirement for VEA eligibility and coverage out to **2070**.

Finally, it is worth noting that in applying both these notional age assumptions as exemplars, it is difficult to see any justification in the Commission's contention that any veteran not in receipt of a Disability Pension by 2025, will be ineligible after that date for further VEA coverage and protection.

The preceding analysis makes it impossible to calculate when a veteran will make the decision to lodge a claim for a disability pension. The clear contention here is that the VEA 1986 will not be extinguished and will remain in operation for quite some time.

11.4 Comparative Analysis of Both Schemes

The breakdown of the two schemes as set out in the PC's Draft Report suggests a closer examination of what is proposed, given the threat to veterans' rights and entitlements contained within the proposal to introduce these two scheme as illustrated in Figure 9, below.

Figure 9: Compensation available under the schemes

	Scheme 1	Scheme 2
Impairment compensation	General rate disability pensions Additional payments for specific disabilities	Permanent impairment payments
Income replacement	Above general rate disability pensions Superannuation invalidity pensions	Incapacity payments Superannuation invalidity pensions (offset)
Dependant benefits	Widow(er)'s pension Orphan's pension Funeral allowance Bereavement payment Income support supplement Education allowance (under 16 only)	Wholly dependant partner payments Payments for eligible children Payments to 'other' dependants Funeral allowance Bereavement payment Income support supplement Education allowance (under 16 only)
Health care	Gold Card White Card Attendant care Household services	Gold Card White Card Attendant care Household services
Other allowances	Service pension Motor Vehicle Compensation Scheme	Service pension Veteran payment Motor Vehicle Compensation Scheme Legal and financial advice

Source: Productivity Commission Draft Report December 2018, at pp. 38, 641)

11.5 Impairment Compensation

Under Scheme 1, payment of benefits is completely non-taxable and does not become automatically extinguished at age 65 forcing veterans on to the aged Centrelink pension. Veterans, both former and currently serving members, consider any thought of becoming enslaved by Centrelink, to be anathema. This level of benefit and allied support continues under the VEA for the entire life of the veteran, free from the clutches of Centrelink.

Under Scheme 2:

> *SRCA and MRCA incapacity payments are generally payable to age 65 and reduce VEA service pension payments on a dollar for dollar basis before Age Service Pension age.*
> *They are counted as income when determining the rate of VEA income support supplement and when determining financial hardship. SRCA and MRCA incapacity payments are taxable.*[39]

The beneficial application of impairment compensation under Scheme 1 speaks for itself.

11.6 A Cautionary Note

Further, the Commission contends that:

> *For example, those on a VEA Special Rate Disability Pension could prima facie be covered by scheme 1. For veterans on incapacity payments, they could be covered by scheme 2 (their existing VEA benefits would not be affected).* (Draft Report, p. 642).

This contention is inconsistent with the commentary in Figure 9 above -*Impairment Compensation* – which mentions *"General rate disability pensions"* (plural).

The RAAC Corporation takes this to mean the **entire suite** of VEA-specific Disability Pensions will remain in Scheme 1 – as they must do. Not every eligible veteran in receipt of a VEA Disability Pension will be in receipt of a Disability Pension paid at Gold Card level.

However, the comment by the Commission above addresses the Special Rate of Pension under VEA to the complete exclusion of the remaining levels and classes of White and Gold Card pensions.

The PC's contention at p.642 is deficient in a material particular in its failure to include **all classes of DVA Disability pension** and not just one. As such, the PC's contentions fall on fallow ground.

Although the Commission's contention is only an example, the mere fact it addresses only one level of VEA pension is to be regarded by ESOs and veterans alike, with considerable caution. There may be a perfectly valid explanation, however regardless of that, the subliminal effect of an innocuous example are known to take on the existence of fact and morph into policy without a shot being fired and resulting in all other pension levels disappear into Scheme 2.

[39] 4.3.5.60 Dept of Social Security, ***About DVA Compensation Payments***, http://guides.dss.gov.au/guide-social-security-law/4/3/5/60 [accessed 21/1/19].

The inference to be gained from reading of the Draft Report *in toto* is that the Commission has developed an unhealthy obsession for and dislike of, the Special (TPI) Rate of Pension to the extent it is biased against this level of pension and fails to have regard to the other levels of Gold Card pensions and their value to veterans.

Any protective mechanisms to retain the Special (TPI) Rate Pension in Scheme 1 must, as a minimum, include retention of all existing pension categories in Scheme 1 also.

11.7 Income Replacement

The Disability Pension regime under VEA (Scheme 1) provides for pension support and consequential medical treatment for and accepted disability or disabilities, calculated at 10% gradients up to 100% of the General Rate (GR). The Above GR (AGR) family of pensions (over 100%) has eligibility assessed subject to stringent legislative tests for each category of AGR pension.

Offsetting may occur in instances by way of an example where a lump sum compensation payment made under the *Commonwealth Employees Compensation Act* 1948 and the *Compensation (Commonwealth Government Employees)* 1971*,* is made. However, the offsetting payments are so minimal as to not have not have an effect on the whole of a GR Disability Pension. Thankfully, there is no MRCA-style offsetting under this scheme, again confirming Scheme 1's beneficial and remedial application as being superior to that of Scheme 2.

The MRCA in terms of Scheme 2, is an unacceptable application of a policy that continues to claw back where it can, hard-won entitlements of MRCA-covered veterans, by offsetting a significant portion of their SRDP pensions in certain circumstances, a practice noted by the Commission as one that *"can also lead to errors in compensation estimates which can have serious consequences for veterans."* (Draft Report, p.17).

This clawing back occurs due to the fact MRCA veterans receiving the Special Rate Disability Pension (SRDP) are seen to be double-dipping and offsets vide Section 204, a SRDP by 60% in circumstances where a SRDP veteran is in receipt of superannuation. This is considered to be an insult to a veteran's integrity to be tarred with the brush of double-dipping and is indefensible in the extreme.

The detestation of offsetting amongst veterans and ESOs is well established and concurs with the Vietnam Veterans Federation of Australia's (VVFA) contention that offsetting is discriminatory. The RAAC Corporation also notes and agrees with the following responses from the VVAA and TPI Federation; viz

> *The Vietnam Veterans' Association of Australia (sub. 78, p. 10) stated that superannuation offsetting was 'unreasonable'. The TPI Federation stated that it 'is criminal that a veteran and the veteran's family is put in the position where they receive no compensation because of a superannuation income protection payment …' (sub. 134, p. 14).* (Draft report, p.504)

The Commission has made its cost-cutting intention quite clear in stating *inter alia* at Draft Finding 12.1:

> *There is no case for changing the current offsetting arrangements between government-funded superannuation payments and incapacity payments.* (Draft report, p.57).

The application of a purely money-grabbing policy allied with the fact it is to be retained in Scheme 2, gives further weight to the contention that Scheme 2 continues to be hostile to veterans and will continue to be so, unless close, due diligence by ESOs and major legislative reform - preferably repeal of MRCA, is undertaken.

11.8 Dependant Benefits

As stated by the RAAC Corporation in its formal submission to the Commission, families of deceased veterans are better off financially under MRCA than they are under VEA. Funeral benefits under MRCA are superior to those under VEA, namely $11470 under MRCA and DRCA and a mere $2000 under VEA.

The fact funeral benefits under VEA have not been increased in the 32 years the Act has been in operation, stands as a deliberate attempt by the Federal Government to save money. Death is the ultimate leveller but that does not appear to be recognised by either Government or the Commission and which is amply demonstrated by the parsimonious approach by Government, to VEA-based funeral support.

Even with bereavement payments added to that of a TPI-based funeral benefit which tops out at approximately $7,000 dollars (Funeral Benefit and Bereavement Payment), the VEA funeral benefit is still well short of the MRCA benefit.

The failure by the Commission to even address and recommend restoring equality and balance in both funeral benefit schemes, is disappointing and gives further credence to the contention the Commission continues to demonstrate a complete lack of understanding of the issues concerning the veteran community, including in the area of funeral and bereavement support.

According to the PC:

> *When a veteran dies, dependants would receive compensation based on the scheme the veteran was covered by. If the veteran did not have an existing claim accepted by the DVA prior to implementation date, dependants would receive compensation through scheme 2. In most cases, the compensation available to dependants through scheme 2 would be higher than that available under scheme 1* (Draft report, p.642).

This particular comment by the Commission has some merit as it is generally agreed that dependants of deceased veterans are better off financially under MRCA, than under the VEA.

11.9 Health Care

While acknowledging the consistency of application to both schemes in respect of health care, nothing in the Draft provides the average reasonable reader with any comfort in whether or not an ulterior motive exists to have services hived off to non-veteran-centric and focused agencies such as NDIS, *My Health* and *My Aged Care,* to the complete detriment of veterans under both Schemes.

11.10 Other Allowances

The Commission has failed acknowledge or include in Scheme 1 the valuable support provided under the VEA by DVA, to veterans through the **Repatriation Appliances Programme (RAP),** providing invaluable support in the following areas:

- *mobility and functional support;*
- *continence;*
- *oxygen and continuous positive airways pressure (CPAP);*
- *cognitive, dementia and memory assistive technology;*
- *personal response systems (PRS);*
- *falls prevention;*
- *low vision;*
- *prostheses;*
- *orthoses;*
- *hearing appliances;*
- *speech pathology appliances;*
- *diabetes; and*
- *home modifications and household adaptive appliances.*[40]

The inference to be drawn from this unacceptable omission by the Commission is that an intent exists to devolve by stealth, the functions of the RAP to a non-veteran specific entity such as the NDIS.

This is again considered to be another cost-saving measure contingent on DVA's destruction - being undertaken at the expense of and to the detriment of, veterans. This contention is given further weight by virtue of the fact there is no recommendation by the Commission to have the RAP to be applied to Scheme 2.

11.11 Motor vehicle assistance.

The Vehicle Assistance Scheme (VAS) vide s.105 VEA 1986, is similar to that applied vide s.212, MRCA 2004, with some slight differences which appear on balance, to favour the MVCS as being the more beneficial of the two schemes. A comparison of the relevant features at Table 2 below, sets out these features.

[40] https://www.dva.gov.au/factsheet-hsv107-clients-rehabilitation-appliances-program [accessed 21/1/19].

Table 2 – Vehicle Scheme Comparisons

Purpose	To assist an eligible veteran, member of the Forces, member of a Peacekeeping Force or Australian mariner, by providing him or her with a motor vehicle, modifying the vehicle as necessary, and assisting with running costs and maintenance.	To provide for the reasonable costs of a vehicle's modification (and vehicle purchase in some circumstances) required because of injury or disease for which liability has been accepted under the MRCA.
Eligibility	Former member (veteran) who is clinically assessed as able to derive benefit from assistance due to such physical conditions as a leg/arm/wrist amputation, paraplegia or a condition of similar severity or effect	For an ADF serving or former member who has an accepted condition and has been clinically assessed as being unable to drive or be driven in a motor vehicle in safety and reasonable comfort without modifications. The person must be considered able to drive or derive a benefit from using the motor vehicle at least twice a week.
Benefits	• A new motor vehicle • Professionally recommended modifications to the motor vehicle • Assistance with running costs and maintenance	• Professional recommended vehicle modifications • Provision of a new vehicle with professionally recommended modifications (in some circumstances) • Insurance and repairs for the recommended modifications
Responsibility of the Client	• Registration • Stamp Duty • Insurance • Optional extras • Garaging	• Registration • Stamp duty • Insurance • Optional extras • Garaging • Maintenance & running costs

Source: Adapted by this writer from the Consolidated Library of Information and Knowledge (CLIK) database, compiled by DVA: *10.12 The Motor Vehicle Compensation Scheme (MVCS).*

There is no requirement under VAS to have to drive a vehicle at least twice weekly. There are no such provisions in the VAS for that criterion. The VAS requires that a veteran "*who can drive"*[41] and in order to derive a benefit *"must drive the motor vehicle regularly"*[42].

[41] CLIK 6.4.1 ***Eligibility for the VAS***, at para 2.
[42] Above, n.96.

This is considered to be more generous by not imposing a strict minimum weekly use on either a driving veteran or a non-driving veteran's driver. However, although both schemes acknowledge the need for a veteran to drive, or be driven, it is contended the more generous nil minimum time of the VAS should apply to the MVCS and should apply across both schemes proposed by the Commission.

The provision of maintenance and running costs under VAS is considered to be more beneficial than that under MVCS (non-existent) and should be applied to both schemes.

Similarly, the provision under the MVCS of insurance to cover any modifications is a beneficial provision that is not available to VAS veterans. This is seen to be a defect in a material particular, in the operation of the VAS.

Of particular concern to the Corporation under MVCS, is provision of *"a new vehicle with professionally recommended modifications (in some circumstances)."*

The '*in some circumstances'* caveat is concerning. The MVCS differs significantly from that of the VAS, which mandates a vehicle must be a **new** vehicle. Under the MVCS[43]:

> *Where the Commission subsidises the purchase of a motor vehicle for a person for the first time, that vehicle is known as an "initial motor vehicle." The initial vehicle may be a new vehicle,* ***or a second-hand*** *vehicle.* (This writer's bold emphasis).

The Corporation contends this feature of the MVCS is flawed in that a used car warranty is significantly less than that which accompanies the purchase of a new car. As such, this places a MVCS veteran at risk of not receiving the full warranty protecting afforded to a new car purchaser in the community, or a veteran eligible for a vehicle under the VAS.

That is considered to be on any analysis, a grossly unfair situation and demonstrates a significant imbalance in the beneficial and remedial application of the MVCS as opposed to the VAS.

It is well settled that litigation and disputes between purchasers and vehicle dealers over warranty difficulties and flaws, have received considerable publicity over many years. The stress placed on a veteran who is required by the application of a MVCS policy to purchase a second-hand car with ongoing warranty problems (a lemon), requires no further elaboration.

The proposal by the Commission as illustrated in Figure 9 (p.38) (Table 2 above) are of such a nature that on balance, the MVCS provisions which are beneficial and not found in the VAS should be cross-vested in the VAS. It is also contended that further examination of the differences in both schemes be undertaken s ensure they are equal and neither scheme will cause veterans to suffer detriment.

[43] CLIK 10.12.7 ***Subsidising the purchase of an initial new or second-hand motor vehicle***.

11.12 Conclusion

This particular issue is a matter that like everything else in this legislative reform process must be very carefully dissected examined and reassembled to ensure no hidden minefields are contained in this proposal.

It is not an exaggeration to contend that minefields exist in **Issue 11** and based on that contention, the two-scheme proposal is not supported.

11.13 Contention

It is the RAAC Corporation's contention that:

1. In examining the issues related to the legislative reform process, no justification exists to have two separate schemes, which as discussed, will cause significant detriment to veterans.

2. There is a well-founded fear by veterans of services being, reduced, cancelled or devolved to other non-veteran – centric agencies throwing veterans into the monolithic and uncaring organisational soup that is represented by Defence (VSC), Centrelink, NDIS, My Health and My Aged Care.

3. This will destroy the unique place veterans, their families and serving ADF members enjoy in the community, and completely nullifies the uniqueness of that military service.

4. The proposal has only one objective in mind, to save money at the expense of providing veteran-specific support by a veteran-specific and focused Department, to veterans.

ISSUE 12 RATIONALITY IN DECISION-MAKING

The significant modelling required to harmonise the legislation, advances the proposition that decision-making processes employed by DVA now appear, based on the RC's Interim Report, to be failing their stakeholder base – veterans.

It is not an exaggeration to contend that the assessment and decision-making fails to follow a logical, consistent and systematic process that rationality implies in decision-making. This assumption finds support from Robbins *et al*[44] who identified 10 limits to rationality in decision-making: viz

1. *There are limits to an individual's information-processing capacity.*
2. *Decision-makers tend to intermix solutions with problems.*
3. *Perceptual biases can distort problem identification.*
4. *Many decision-makers select information for its accessibility than for its quality.*
5. *Decision-makers tend to commit themselves prematurely to a specific alternative in the decision process, thus biasing the process towards that alternative.*
6. *Evidence that a previous solution is not working does not always generate a search for new alternatives.*
7. *Prior decision precedents constrain current choices.*

[44] Robbins, S.P., Bergman, R., & Stagg, I. 1997, ***Management***, Prentice Hall, Australia, pp. 183-185.

8. *Organisations are made up of divergent interests that make it difficult, even impossible, to create a common effort toward a single goal.*
9. *Organisations place time and cost restraints on decision-makers.*
10. *A strong conservative bias exists in most organisational cultures. Most organisational cultures reinforce the status quo, which discourages risk taking and innovation.*

12.1 Contention
It is the RAAC Corporation's contention that:

1. It is not an exaggeration to contend that, the rationality limits cited above have to an extent infected DVA's deeply troubled decision-making processes in respect of veterans' claims and caused it to fall into serious error resulting in errors of law being committed by Primary Decision-makers and Internal Review Officers (IROs).

2. The lack of rationality has created an uncured defect in the assessment and determining process causing significant detriment to veterans with its attendant distress and worse.
   Poor rationality suggests a cultural and attitudinal problem.

3. The work being undertaken by DVA to rebuild trust and reverse these perceptions through the legislative reform process including building rationality in decision-making, sits at the base of addressing and remedying the current difficulties veterans are experiencing with the MRCA/DRCA and VEA determining processes.

ISSUE 13 RETENTION OF THE VRB

The retention of the VRB as the first port of call in the veterans' appeals/review process is noted. The critical importance of retaining this merits review Tier 1 Tribunal, cannot be over-emphasised.

As an inquisitorial Tribunal charged to act according to substantial justice and the merits of the case, the Board is unique in the veterans appeal landscape. The adversarial nature of AAT proceedings which focus on points of law and legal practitioners at 20paces with some financial cost to veterans can be a stressful and traumatic process for veterans , in particular emotionally vulnerable veterans.

The nature of AAT proceedings was no better enunciated thana former Registrar and CEO of the AAT and more latterly as VRB Principal Member Mr Doug Humphreys AM[45], who stated in his evidence[46] to the Royal Commission to a question by Mr Singleton Counsel Assisting:

[45] Above, n.3, ***Royal Commission into Defence and Veteran Suicide***, Mr Humphreys is now a Judge of the Federal Circuit and Family Court of Australia, Division 2. He holds the position of a Senior Reserve Officer for the Army Command Legal Panel with the rank of full Colonel and is a former Infantry officer prior to transferring to the Army legal Corps. He was the Principal Member of the VRB from 2010to 2018 Transcript of evidence at p. 27-2416.
[46] Above, n.3, Block 4 Canberra 7/9/20202, Transcript of Evidence at p. 27-2419.

Q. Just to give that some context, DVA decisions made under the DRCA, once they leave the DVA for review, go straight to the AAT; is that right?

A. That's right. Look, I've been in both. I was the Principal Registrar and CEO of the AAT for seven years, so I know how both works. That was before, I should add, the AAT was given -- or the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Tribunal folded into the AAT, so it is a much bigger organisation than when I was there. ***But the fact is the AAT is far more court-like. That frightens veterans. They don't want to go to court.***
(This writer's bold highlighted emphasis).

The evidence by Judge Humphres is instructive to say the least and a copy of his remarks[47] are at **ATTACHMENT B.**

It follows that, every attempt should be made at VRB level to have the matters under review dealt with by the Board.

The fact legal practioners are statute-barred from appearing vide s.147 VEA, is a very good thing in that it removes considerable stress and confusion for a veteran at a first-instance appeal from being confused by lawyerly arguments. The VBR process is designed to be as stress free as possible and the application s.147 goes a long way towards ensuring the stress for a veteran is as minimal as possible.

It is the RAAC Corporation's very strong position that this must never change and that s.147 be retained.

Similarly, it is this writer's experience that the Board is not overly legalistic as has been suggested. The Board is as a matter of settled law, obliged to make decisions in which it is required to applying where necessary relevant persuasive authority is necessary. Its decisions are reviewable all the way to the High Court. To do any less without oversight by Courts and Tribunals of superior jurisdiction, opens the Board to committing serious errors of law.

The ADR processes now in place enable veterans to be managed more effectively.
The introduction of the Vulnerable Veterans Protocol[48] which has been applied to this writer's clients, is an outstanding initiative.

Of equal importance is by the decision by the Government (per the Commonwealth Attorney-General) to do away with the AAT in its present form and replace it with another creature it intends creating.

To that end, the retention of the Board as the Court of Last Resort takes on added critical importance.

The following comments in Issue 14 which were tendered by this writer in response to the Productivity Commission's Draft Report (2018) in respect of the VRB, remain unchanged.

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[47] Above, n. 3, Transcript of Evidence 27-2418 to 27-2420. Judge Humphrey's evidence covers pp.27-2418 to 27-2446 inclusive and is a master class for DVA on how to conduct its business.
[48] https://www.vrb.gov.au/vulnerable-veteran-protocol [Accessed 15/3/2023].

ISSUE 14 - VETERANS' REVIEW BOARD (PC Draft Report, p.387)

Dispute resolution: The VRB's role should be modified to specialise in resolving cases through ADR processes, but not to have determinative powers (nor conduct hearings).

The above contention by the Productivity Commission is not supported on any level.

14.1 The Value Of The VRB in the Veterans' Merits Review Continuum

The VRB is a merits review body established under the VEA 1986 and is seen by many veterans as their Court of last resort. The Board enjoys a very good reputation amongst veterans and Advocates, alike. It is purely inquisitorial in nature and hears matters before it as *de novo* hearings.

The Act prohibits legal practitioners from appearing before it (s.147B). Along with the Board's inquisitorial nature, these two factors are considered to be the jewels in the VRB's crown.

By eliminating the VRB from its current role to one purely as an ADR and conciliation body devoid of making findings of fact based on the evidence before it, veteran appellants including vulnerable veterans, will find themselves locked out of a very successful and effective Tier 1 Tribunal, and be forced to go to the AAT which is not inquisitorial but is adversarial in nature, and determines matters on points of law.

Appearances by veterans before the AAT will in most cases, require representation by either a solicitor or barrister. In some instances, representation by a TIP4 –qualified Advocate may be available to a veteran or veteran's widow.

The adversarial process at AAT level will result in unwanted stress for veterans and create a great deal of stress and confusion for a veteran appellant enduring legal practitioners arguing points of law which any reasonable persons will not understand.

There is no such environment at the VRB and with good reason, due to its method of operation.

The current policy for granting legal aid to veterans applies only those veterans who have rendered operational service. Legal aid for veterans who have rendered eligible Defence service only, is at member's expense.

The funding for Legal Aid to assist veterans prosecuting their appeal from the VRB to the AAT or to a Court of superior jurisdiction come within the budgetary purview of the Commonwealth Attorney General's Department.

Veterans appeal funding is contained within that budget and is not quarantined from the main Legal Aid budget.

It follows that, the allocation of funding for a veteran's appeal is subject to the vagaries of competing Legal Aid interests. This is considered to be an unacceptable situation and an one which actually militates against veterans prosecuting an appeal to seek natural justice, with the risk of limited or no funding, causing a veteran to vacate their appeal.

To place veterans in this situation by taking determinative powers away from the VRB and in effect pulling its decision-making teeth, is profoundly unsafe and unsound for veterans and veterans' widows.

The appearance before the VRB represented by a suitably qualified Advocate is carried out *pro bono* – the Veterans Indemnity and Training Association (VITA) has a prohibition on Advocates charging a fee. The *pro bono* approach espoused by veterans' practitioners is essential in ensuring veterans do have a representative at the VRB.

Equally importantly are recent are recent changes to veterans' legislation which have cross-vested an appeals path to the VRB for MRCA veterans pursuing an appeal against a decision of the MRCC.

On 1 September 2016, Parliament passed the *Veterans' Affairs Legislation Amendment (Single Appeal Path) Bill 2016* which contains Schedule 24 containing all provisions sought to have the single-path appeal process enshrined in law (strongly supported by the Corporation), to give serving and former ADF members access to a more equitable merits review appeals process via the VRB and the AAT, and access to the provision of costs being awarded in the event of a successful AAT appeal, in certain circumstances.

Awarding of costs does not apply to appellants who have Legal Aid. The Bill became law on and from 1 January 2017. That is a major improvement in the natural justice (appeals) process.

The powers and functions of the Board in respect of Alternative Dispute Resolution (ADR) are enshrined in Division 4 of the VEA[49]. They enable the Board to vary or revoke the decision under review with the consent of the parties to the matter before the Board (s.145C(4).

I consider the Board to exercise a power and function in this regard similar to that employed in respect of a joint (consenting party) decision, as is the case with the AAT Act vide s.34D (4).

A Conference Registrar is always allocated a Senior Member as a riding Senior Member who, on examination of the evidence with the Conference Registrar following a telephone outreach conference or a video conference, is able to exercise a power and function to affirm the decision under review or vary or revoke the decision under review and substitute it with another decision.

A Board Member stands in the shoes of the Board in that regard. VB Outreach *"Conference Registrars and Board Members are dispute resolution experts"*[50] and are available to guide veterans through the process. A telephone outreach decision that does not favour a veteran can be appealed by a veteran directly to an ADR process or elect for the matter to be heard by the full Board.

[49] ss.145A to 145G inclusive.

[50] ***A guide to appearing before the VRB – for self-represented veterans and representatives*** (2021) at p.21.

The number of options available to veterans is a major strength of the Board which now uses the following strategies for resolution to a contested matter:

1. Online Dispute Resolution (ODR),
2. Telephone Outreach or videoconferencing,
3. ADR, and
4. Full Board hearings.

Based on experience, I consider that the options open to veterans encountering this process after many years of only being able to appear before a full Boar only represent a major and significant improvement on the older appeals and review process of the past. It can be considered to be a jewel in the crown of the Board.

This is a power and function that is exercised by the full Board and works effectively, in this writer's experience, as part of the ADR process. Its value to that process cannot be overstated.

The threat to the Board by the PC's recommendation presents a clear and present danger to veterans seeking natural justice, should the current formal decision-making powers of the VRB be neutered.

The lack of foresight by the Productivity Commission on the potential damage to the natural justice continuum afforded to veterans by the Board in all its ADR, Vulnerable Veteran Protocols and full Board processes, is unacceptable. It is on its face considered by the RAAC Corporation to prejudice the administration of natural justice by the lack of an appreciation by the Commission of the Board's capacity to act in a manner as a Court of last Resort, to the satisfaction of the parties to a matter before the Board.

This proposal by the Commission to have a determinative process abolished as a power and function of the VRB, is dangerous. It is not an exaggeration to contend that such a proposal is on any analysis, another attempt to apply economic rationalism (cost-cutting) which will operate to the detriment of all first – level veteran appellants.

It follows that, as a consequence of the Government's decision to do away with the AAT in its present form, the necessity to have an operating Board capable of service delivery of a high order is even more critical. It must include having determinative powers throughout the ADR process.

14.1.1 Contention

It is the RAAC Corporation's contention that:

1. Any such move to even remotely contemplate extinguishing the VRB's primary function and substituting it with another conciliatory body as discussed, should be strongly rejected.

2. The determinative process as currently exercised by Senior Board Members as part of the ADR and Outreach processes must at all costs, be retained.

14.2 Clarifying VRB Reasons for Decision (Draft report, p. 406)

DRAFT RECOMMENDATION 10.1
The Department of Veterans' Affairs (DVA) should ensure that successful reviews of veteran support decisions are brought to the attention of senior management for compensation and rehabilitation claims assessors, and that accuracy of decision making is a focus for senior management in reviewing the performance of staff.

Where the Veterans' Review Board (VRB) identifies an error in the original decision of DVA, it should clearly state that error in its reasons for varying or setting aside the decision on review.

The Commission's recommendation in respect of requiring the VRB to clearly state its reasons for varying or setting aside or for that matter affirming a decision under review (the latter not addressed by the PC in the Draft Report), is unusual.

The Board does in some cases, hand down an *ex tempore* decision once a hearing is concluded and will as required by law, send a written copy of its reasons for decision to veterans and their ESO representatives.

It is this writer's experience that the written reasons for decision contain sufficient information to properly and relevantly inform veterans and their Advocates as to why the Board arrived at its decision. Failure to include such reasons constitutes an error of law and is appealable.

In essence, the Board's reasons for decision will include the nature of the matter being reviewed, evidence tendered from the very first instance a claim or AFI is lodged with DVA.

This may well include additional evidence tendered to support a veteran's case before the Board, relevant legislative authority (e.g. standard of proof to be applied vide s.120 VEA 1986) relevant persuasive authority(case law) where applied by both parties, and will also cite the relevant legislative and Common Law and other persuasive authorities it applies in its *de novo* decision-making process.

It is this writer's experience that nothing in a Board decision is of such a nature that a veteran is not sufficiently informed as to the Boards decision. The decisions are well-written, clear, concise and easily understood by the average reasonable reader (veteran) as opposed to decisions by a tribunal or court of superior jurisdiction, such as the AAT and Federal Court.

14.3 Expanding the jurisdiction of the VRB

According to the Minister's Legislative Reform Booklet (at p.2);the Minister contends:
"…that significant changes are not required to be made to the DRCA to harmonise it with the improved MRCA, as reform could be focused on the one ongoing scheme."

That contention is rejected. The value of the VRB to veterans has been made out by the RAAC Corporation in this submission. The creation of a single-path appeals process for MRCA appeals to be heard by the VRB was a very welcome policy decision to enable veterans to have their appeals come within the Board's jurisdiction. As such, access to the VRB is denied to veterans who come within the template of DRCA.

Appeals against a decision of a DRCA Delegate lie only with the AAT as a first-instance appeals jurisdiction.

It is an adversarial environment where only matters of law are addressed. The VRB is inquisitorial in nature and not adversarial and owes a statutory duty to act according to substantial justice and the merits of the matter before it.

That is a completely different world from the AAT where legal practitioners operate as opposed to no legal practitioners at the VRB.

The involvement of legal practitioners at the AAT potentially comes with a financial cost to veterans who wish to appeal an adverse decision. .
The stress levels that subjects veterans to at that jurisdictional level needs no further elaboration.

I consider the failure of the Government to create a first-instance appeal path from DRCA decisions to the VRB to be completely unacceptable. It is illogical.

I consider this fatally flawed policy to be of such a nature that it actively discriminates against a particular class of people, namely DRCA veterans in barring them from an appeals process available to every other non-DRCA member of the ADF.

The precedent has been set apropos MRCA appellants.
It follows that, action must be taken to resolve this lacuna in the first-instance appeals process as a matter of priority and natural justice.

Should DRCA be folded into the single Act concept as envisioned in the legislative reform process, provision must be made to single-path all DRCA appeal matters to come within the VRB's jurisdiction.

DRCA is a creature born out of the Commonwealth SRC Act 1988, initially designed for Commonwealth public servants.

The enactment of DRCA – the operative phrase being **Defence-related** forming part of the Act's title makes it demonstrably clear to the average reasonable reader that this Act is **veteran-specific** only as is made out in s.4AA of that Act.

The provisions of s.5 ***"Employees",*** clearly establish eligible ADF members as being the eligible cohort to the exclusion of public sector employees.

To that end, in order to enhance DRCA's **veteran-specific** legislative purpose and intent, the Act should have enshrined in it, a merits review process other than the AAT available for veterans that it currently denies them. That denial of access to the VRB is indefensible.

The preceding analysis identified a serious defect in the veterans' appeals process.
As such, I consider it to be a defect that must be cured as part of the legislative reform process.

14.3 Contention

It is the RAAC Corporation's contention that;

1. The VRB as a Tier 1 Tribunal inquisitorial in nature and under a statutory duty to act according to substantial justice must be retained and that sufficient funding and resources are allocated to ensuring its operation is not prejudiced in any way.

2. The operation of the Board in the veterans' review and appeals continuum now assumes greater critical importance given the proposed abolition of the AAT as it currently exists.

3. The DRCA appeals pathway discriminates against veterans.

4. Steps must be taken in any legislative reform process to ensure legislative action is taken to include DRCA appeals being cross-vested in the VRB to enable the Board to hear and adjudicate on DRCA appeals matters in the same way as for VEA and MRCA veterans.

SUMMARY

1. In summary, the proposed legislative reform process is welcomed. It is however an exercise that must be viewed and approached with great caution. An Omnibus Act must still remain in contention.

2. It is not beyond the realms of reasonableness to come to the view that the current three-Act legislative umbrella of veterans' entitlements based on the RC's Interim Report and cases cited herein, is broken.

3. The fact DRCA veterans are deliberately excluded from statutory relief through the VRB, constitutes a gross injustice.

4. The fact no action has been taken to rectify that discriminatory anomaly is completely unacceptable and should have been undertaken at the same time MRCA veterans were granted access to the VRB process. That is a complete failure of policy.

5. Government must not lose sight of the fact the proposed new system is perceived to be nothing more than a patch-up of faulty law and must give consideration to drafting and enacting Omnibus legislation freed from procedural hurdles.

6. The SoP process has been exposed as a baffling minefield of language that acts as an impediment to effective claims determination.

7. The dual-standard SoP regime is not working and should be replaced with a single-standard instrument.

8. It is vital that all matters relevant to the legislative reform process are subject to rigorous due diligence.

9. Allied to that is ensuring involvement of ESOs, veterans their families and other interested stakeholders, in order that the processes very carefully managed.

10. It is critical to the success of legislative reform that no detriment must occur which disadvantages any veteran or their family or widows/ers. The no detriment criterion is non-negotiable.

CONCLUSION

It is the RAAC Corporation's respectful submission that, all matters addressed in this submission are relevant considerations for the upcoming legislative reform exercise.

The following 41 conclusions are made:

1. The issues discussed in this brief are considered on their face, to be relevant to legislative reform. They are tendered in good faith and with sincere intent.

2. DVA is a 107-year old niche, specialist pioneer Department of State, delivering an enormous suite of pension and support services, to veterans and their families. It is considered to be a market leader in the veterans' support sphere, with a durability and dominant brand awareness level throughout Australia and internationally, giving it a strategic competitive edge.

3. It is considered world's best practice in what is a niche field. That mantle has now been badly tarnished as a consequence of what has been adduced at the Royal Commission.

4. There has been catastrophic loss of confidence, trust and faith by veterans and their families in the integrity of the assessment and determination processes currently in place.
   Consequently, the proposed reforms will be viewed with caution.

5. DVA will need to invest significant efforts in its reform process and corporate attitude towards veterans and their families, to regain their trust and restore lustre to its position as a market leader in veterans' care and management.

6. DVA will have to work hard to improve its effectiveness in reducing TTP in processing all compensation and disability pension claims and AFIs, in order to retain its rightful position as a stand-alone pioneer leader Department in the veterans care and welfare sphere.

7. The decision by Government to act on the RC **Recommendation 1** in a timely manner
   is welcomed. It will need to heed the comments of the Full Federal Court, per Rares J in *Smith* (2014).

8. The complexity of the SoP regime was criticised in the Federal Court in *Linwood* by Logan J.

9. The manifest failure by DVA to have regard to very relevant Common Law persuasive authority in the decisions discussed, to remove and/or rectify procedural anomalies in the military compensation and pension determining systems, is a blot on the Department's corporate escutcheon.

10. An Omnibus Act must remain in the mix.

11. The deliberate practice of refusing to include DMA opinions in s.137 reports for a contested matter, is a clear breach of Practice Directions regarding Disclosure and is a breach of DVA's duty of care as an agent of the Commonwealth, to act as a model litigant and an honest broker.

12. Consideration must begiven to drafting and designing Omnibus legislation from the ground up to remove any veteran-adverse processes that may carry over into the proposed new system.

13. The current proposal for legislative reform is considered to be a once in a lifetime opportunity for veterans, their families and other interested stakeholders to have their say.

14. The SoP Scheme as it currently exists is onerous and oppressive. It imposes an unacceptably heavy evidentiary burden and hampers efficient decision-making and as a fetter to veterans obtaining natural justice.

15. As custodian of the SoPs, the RMA has failed in its duty to have regard to Common Law criticism of the complexity of the language the RMA employs in these instruments.

16. The sheer size of the SoP suite managed by the RMA (770 SoPs in total), is such that a review and culling process is required in order to proceed to single-use harmonised SoPs for all conditions related to all classifications of military service.

17. A review of the language used and the introduction of a single (RH Test) standard SoP will remedy the current situation.

18. An environmental scan supports the imposition of a single-purpose SoP for operational and non-operational service.

19. Tables 23.1 and 23.2 should be rescinded and replaced with a single-use harmonised PI Table.

20. A single standard of proof should be applied to all claims lodged with the MRCC and Repatriation Commission.

21. The three Acts - in particular MRCA 2004, have been exposed as failures due to their complexity and overly burdensome claims investigation, assessment and determining processes, which is considered to be an abuse of process.

22. The benefit of the doubt has been taken away from veterans.

23. Notwithstanding the few positives in MRCA 2004, the Act as it currently operates, stands as a blot on the veterans' entitlements landscape and will require significant re-engineering to restore trust by veterans in its application.

24. The failures in the determining system were clearly and unambiguously enunciated by in the decision of the Full Federal Court in *Smith*, per Justice Rares.

25. Notwithstanding this proposed re-engineering exercise which is in essence a repair process which on any reading can be reasonably viewed as a broken set of legislation, consideration must be given to drafting a single Omnibus Bill.

26. A degree of suspicion in reforming the current suite of legislation exists amongst veterans with good reason. To that end, it is completely reasonable to argue that consideration must be given by the Government to drafting a brand new Omnibus Bill free of any legislative sins that presently exist in the current legislation.

27. The re-engineering of this legislation must be a root and branch reform exercise. Cosmetic tinkering around the edges will not suffice and will break faith with the veteran community.

28. Rationality in decision-making must be effected through legislative and cultural (attitudinal) change and a change to any relevant policies enshrined in CLIK.

29. The proposed merging into a single Act is one that will be watched closely by all interested parties and considerable consultation will be critical to the success of this approach.

30. It will fall to the veteran community and ESOs as primary stakeholders to undertake rigorous due diligence of every single change proposed for all three Acts, in particular MRCA which appears to be the primary focus of this exercise as a proposed single harmonised Act.

31. The appeal provisions under DRCA discriminate against a class of veterans, namely veterans subject to the jurisdiction of the DRCA appeals process to the AAT at first instance.

32. Provision must be made in this process to cross-vest entitlements to DRCA veterans to have a single-path access to the VRB as for veterans under MRCA and VEA instead of to the AAT at first instance.

33. DRCA veterans must have also access to the usual AAT appeals process where an adverse VRB adjudication is made as for VEA and RCA veterans.

34. The failure by drafters and stakeholders in the MRCA process failed manifestly to have regard to substantial favourable High Court and Federal Court Common Law decisions regarding the accrued rights relating to superseded SoPs. It is essential that this not be allowed to occur with this legislative reform process.

35. Due care and diligence by ESOs and the veteran community and other stakeholders must be taken to ensure any favourable Common Law decisions relevant to harmonising beneficial provisions are disclosed and acted upon in the drafting process.

36. The Transitional and Consequential provisions related to this exercise will be significant and will on any view, require careful drafting in order to eliminate any statutory error.

37. The veteran community has suffered a catastrophic loss of trust in DVA, a fact in issue that has not escaped the attention of the current Royal Commission into Defence and Veteran Suicide. A client's comment in respect of a contested decision in which he stated; *"This does not make DVA a trusted litigant"* has considerable merit.

38. The retention of the VRB is critically important in the veterans' entitlement and appeals space.

39. This Act and its catastrophic effect on veterans has been the subject of intense examination in no less than three Senate Inquiries alone. It is now the subject of a long-overdue forensic examination by the current Royal Commission into Defence and Veteran Suicide.

40. Now is the time for the Commonwealth to draft a new harmonised provisions for incorporating, amendments and harmonsing all beneficial provisions across all three Acts and Acts as a matter of urgency and in good faith for the benefit of the veteran community.

41. The application of the current legislation which acts in a financially parsimonious and crushingly cold and bureaucratic manner, is an abrogation by the Commonwealth of its duty to not put a cash value on the service and sacrifice of those who serve the nation.

RECOMMENDATION

1. That you note the above; and
2. Consider the recommendations contained therein for inclusion in the legislative reform process.

For your consideration and action.

Noel Mc Laughlin OAM MBA
Chairman
RAAC Corporation
17 March, 2023

ATTACHMENT A

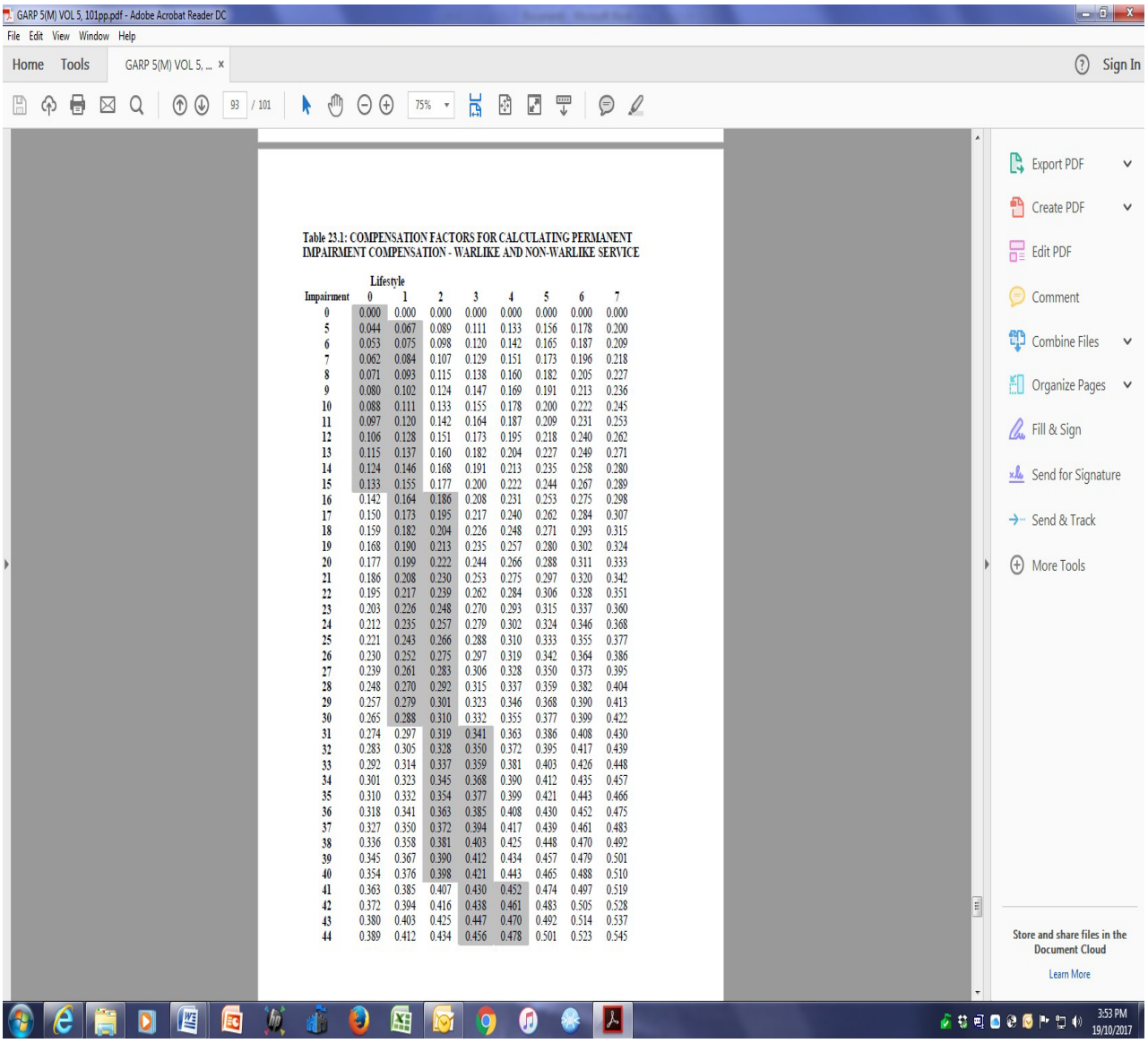
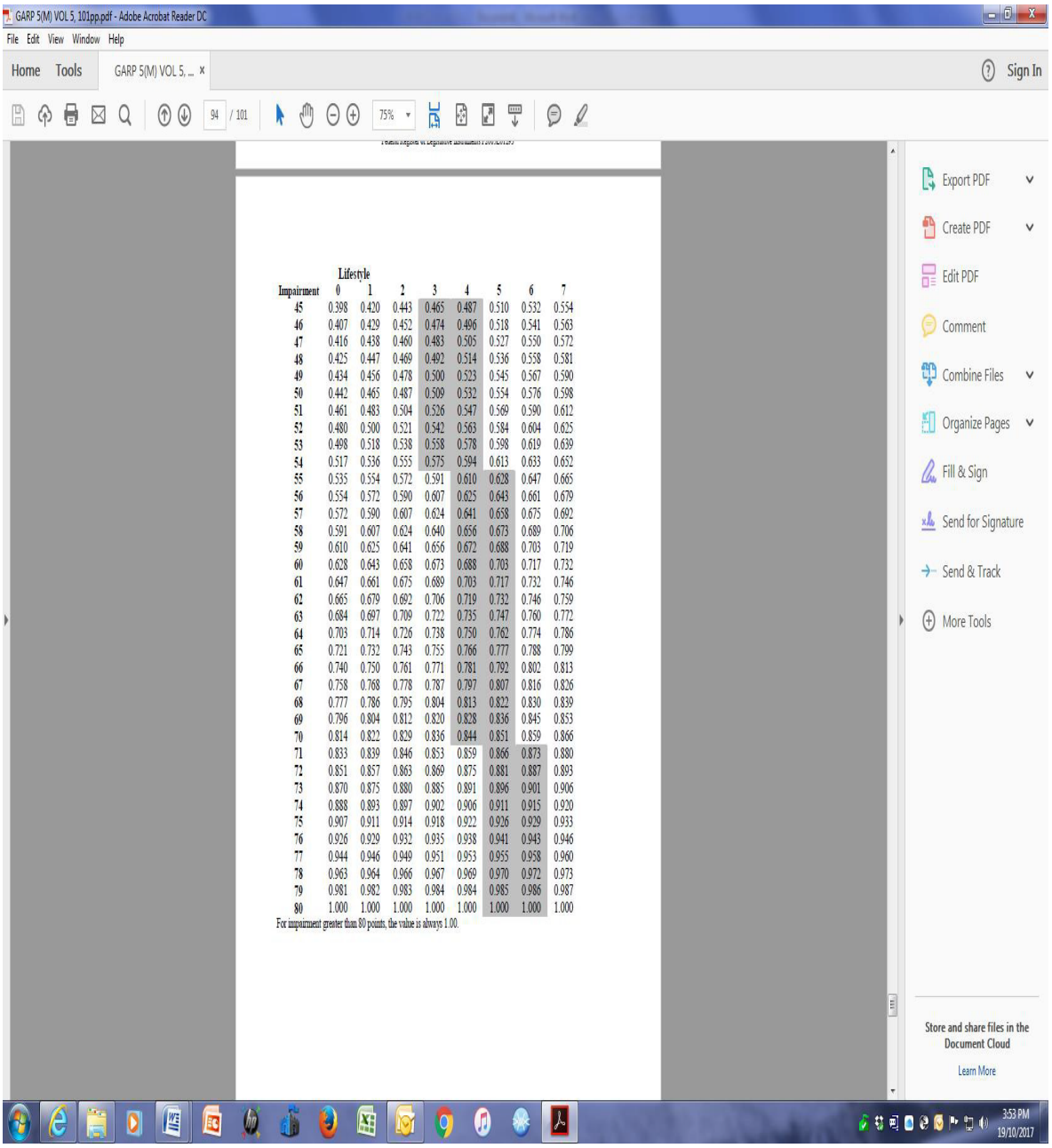


Table 23.1: COMPENSATION FACTORS FOR CALCULATING PERMANENT IMPAIRMENT COMPENSATION - WARLIKE AND NON-WARLIKE SERVICE

	Lifestyle							
Impairment	0	1	2	3	4	5	6	7
0	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000
5	0.044	0.067	0.089	0.111	0.133	0.156	0.178	0.200
6	0.053	0.075	0.098	0.120	0.142	0.165	0.187	0.209
7	0.062	0.084	0.107	0.129	0.151	0.173	0.196	0.218
8	0.071	0.093	0.115	0.138	0.160	0.182	0.205	0.227
9	0.080	0.102	0.124	0.147	0.169	0.191	0.213	0.236
10	0.088	0.111	0.133	0.155	0.178	0.200	0.222	0.245
11	0.097	0.120	0.142	0.164	0.187	0.209	0.231	0.253
12	0.106	0.128	0.151	0.173	0.195	0.218	0.240	0.262
13	0.115	0.137	0.160	0.182	0.204	0.227	0.249	0.271
14	0.124	0.146	0.168	0.191	0.213	0.235	0.258	0.280
15	0.133	0.155	0.177	0.200	0.222	0.244	0.267	0.289
16	0.142	0.164	0.186	0.208	0.231	0.253	0.275	0.298
17	0.150	0.173	0.195	0.217	0.240	0.262	0.284	0.307
18	0.159	0.182	0.204	0.226	0.248	0.271	0.293	0.315
19	0.168	0.190	0.213	0.235	0.257	0.280	0.302	0.324
20	0.177	0.199	0.222	0.244	0.266	0.288	0.311	0.333
21	0.186	0.208	0.230	0.253	0.275	0.297	0.320	0.342
22	0.195	0.217	0.239	0.262	0.284	0.306	0.328	0.351
23	0.203	0.226	0.248	0.270	0.293	0.315	0.337	0.360
24	0.212	0.235	0.257	0.279	0.302	0.324	0.346	0.368
25	0.221	0.243	0.266	0.288	0.310	0.333	0.355	0.377
26	0.230	0.252	0.275	0.297	0.319	0.342	0.364	0.386
27	0.239	0.261	0.283	0.306	0.328	0.350	0.373	0.395
28	0.248	0.270	0.292	0.315	0.337	0.359	0.382	0.404
29	0.257	0.279	0.301	0.323	0.346	0.368	0.390	0.413
30	0.265	0.288	0.310	0.332	0.355	0.377	0.399	0.422
31	0.274	0.297	0.319	0.341	0.363	0.386	0.408	0.430
32	0.283	0.305	0.328	0.350	0.372	0.395	0.417	0.439
33	0.292	0.314	0.337	0.359	0.381	0.403	0.426	0.448
34	0.301	0.323	0.345	0.368	0.390	0.412	0.435	0.457
35	0.310	0.332	0.354	0.377	0.399	0.421	0.443	0.466
36	0.318	0.341	0.363	0.385	0.408	0.430	0.452	0.475
37	0.327	0.350	0.372	0.394	0.417	0.439	0.461	0.483
38	0.336	0.358	0.381	0.403	0.425	0.448	0.470	0.492
39	0.345	0.367	0.390	0.412	0.434	0.457	0.479	0.501
40	0.354	0.376	0.398	0.421	0.443	0.465	0.488	0.510
41	0.363	0.385	0.407	0.430	0.452	0.474	0.497	0.519
42	0.372	0.394	0.416	0.438	0.461	0.483	0.505	0.528
43	0.380	0.403	0.425	0.447	0.470	0.492	0.514	0.537
44	0.389	0.412	0.434	0.456	0.478	0.501	0.523	0.545



	Lifestyle							
Impairment	0	1	2	3	4	5	6	7
45	0.398	0.420	0.443	0.465	0.487	0.510	0.532	0.554
46	0.407	0.429	0.452	0.474	0.496	0.518	0.541	0.563
47	0.416	0.438	0.460	0.483	0.505	0.527	0.550	0.572
48	0.425	0.447	0.469	0.492	0.514	0.536	0.558	0.581
49	0.434	0.456	0.478	0.500	0.523	0.545	0.567	0.590
50	0.442	0.465	0.487	0.509	0.532	0.554	0.576	0.598
51	0.461	0.483	0.504	0.526	0.547	0.569	0.590	0.612
52	0.480	0.500	0.521	0.542	0.563	0.584	0.604	0.625
53	0.498	0.518	0.538	0.558	0.578	0.598	0.619	0.639
54	0.517	0.536	0.555	0.575	0.594	0.613	0.633	0.652
55	0.535	0.554	0.572	0.591	0.610	0.628	0.647	0.665
56	0.554	0.572	0.590	0.607	0.625	0.643	0.661	0.679
57	0.572	0.590	0.607	0.624	0.641	0.658	0.675	0.692
58	0.591	0.607	0.624	0.640	0.656	0.673	0.689	0.706
59	0.610	0.625	0.641	0.656	0.672	0.688	0.703	0.719
60	0.628	0.643	0.658	0.673	0.688	0.703	0.717	0.732
61	0.647	0.661	0.675	0.689	0.703	0.717	0.732	0.746
62	0.665	0.679	0.692	0.706	0.719	0.732	0.746	0.759
63	0.684	0.697	0.709	0.722	0.735	0.747	0.760	0.772
64	0.703	0.714	0.726	0.738	0.750	0.762	0.774	0.786
65	0.721	0.732	0.743	0.755	0.766	0.777	0.788	0.799
66	0.740	0.750	0.761	0.771	0.781	0.792	0.802	0.813
67	0.758	0.768	0.778	0.787	0.797	0.807	0.816	0.826
68	0.777	0.786	0.795	0.804	0.813	0.822	0.830	0.839
69	0.796	0.804	0.812	0.820	0.828	0.836	0.845	0.853
70	0.814	0.822	0.829	0.836	0.844	0.851	0.859	0.866
71	0.833	0.839	0.846	0.853	0.859	0.866	0.873	0.880
72	0.851	0.857	0.863	0.869	0.875	0.881	0.887	0.893
73	0.870	0.875	0.880	0.885	0.891	0.896	0.901	0.906
74	0.888	0.893	0.897	0.902	0.906	0.911	0.915	0.920
75	0.907	0.911	0.914	0.918	0.922	0.926	0.929	0.933
76	0.926	0.929	0.932	0.935	0.938	0.941	0.943	0.946
77	0.944	0.946	0.949	0.951	0.953	0.955	0.958	0.960
78	0.963	0.964	0.966	0.967	0.969	0.970	0.972	0.973
79	0.981	0.982	0.983	0.984	0.984	0.985	0.986	0.987
80	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000

For impairment greater than 80 points, the value is always 1.00.

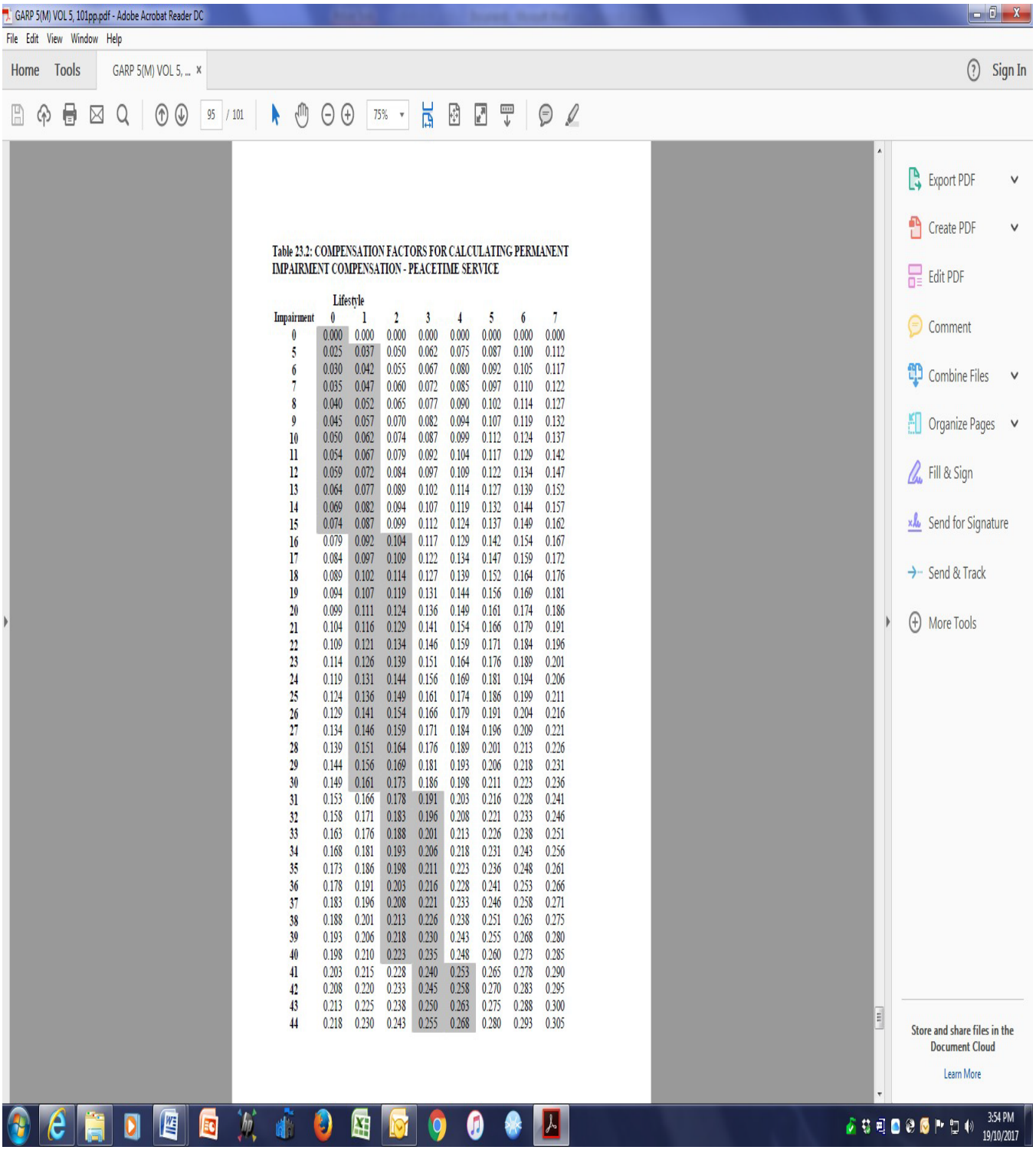


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Table 23.2: COMPENSATION FACTORS FOR CALCULATING PERMANENT IMPAIRMENT COMPENSATION - PEACETIME SERVICE

	Lifestyle							
Impairment	0	1	2	3	4	5	6	7
0	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000
5	0.025	0.037	0.050	0.062	0.075	0.087	0.100	0.112
6	0.030	0.042	0.055	0.067	0.080	0.092	0.105	0.117
7	0.035	0.047	0.060	0.072	0.085	0.097	0.110	0.122
8	0.040	0.052	0.065	0.077	0.090	0.102	0.114	0.127
9	0.045	0.057	0.070	0.082	0.094	0.107	0.119	0.132
10	0.050	0.062	0.074	0.087	0.099	0.112	0.124	0.137
11	0.054	0.067	0.079	0.092	0.104	0.117	0.129	0.142
12	0.059	0.072	0.084	0.097	0.109	0.122	0.134	0.147
13	0.064	0.077	0.089	0.102	0.114	0.127	0.139	0.152
14	0.069	0.082	0.094	0.107	0.119	0.132	0.144	0.157
15	0.074	0.087	0.099	0.112	0.124	0.137	0.149	0.162
16	0.079	0.092	0.104	0.117	0.129	0.142	0.154	0.167
17	0.084	0.097	0.109	0.122	0.134	0.147	0.159	0.172
18	0.089	0.102	0.114	0.127	0.139	0.152	0.164	0.176
19	0.094	0.107	0.119	0.131	0.144	0.156	0.169	0.181
20	0.099	0.111	0.124	0.136	0.149	0.161	0.174	0.186
21	0.104	0.116	0.129	0.141	0.154	0.166	0.179	0.191
22	0.109	0.121	0.134	0.146	0.159	0.171	0.184	0.196
23	0.114	0.126	0.139	0.151	0.164	0.176	0.189	0.201
24	0.119	0.131	0.144	0.156	0.169	0.181	0.194	0.206
25	0.124	0.136	0.149	0.161	0.174	0.186	0.199	0.211
26	0.129	0.141	0.154	0.166	0.179	0.191	0.204	0.216
27	0.134	0.146	0.159	0.171	0.184	0.196	0.209	0.221
28	0.139	0.151	0.164	0.176	0.189	0.201	0.213	0.226
29	0.144	0.156	0.169	0.181	0.193	0.206	0.218	0.231
30	0.149	0.161	0.173	0.186	0.198	0.211	0.223	0.236
31	0.153	0.166	0.178	0.191	0.203	0.216	0.228	0.241
32	0.158	0.171	0.183	0.196	0.208	0.221	0.233	0.246
33	0.163	0.176	0.188	0.201	0.213	0.226	0.238	0.251
34	0.168	0.181	0.193	0.206	0.218	0.231	0.243	0.256
35	0.173	0.186	0.198	0.211	0.223	0.236	0.248	0.261
36	0.178	0.191	0.203	0.216	0.228	0.241	0.253	0.266
37	0.183	0.196	0.208	0.221	0.233	0.246	0.258	0.271
38	0.188	0.201	0.213	0.226	0.238	0.251	0.263	0.275
39	0.193	0.206	0.218	0.230	0.243	0.255	0.268	0.280
40	0.198	0.210	0.223	0.235	0.248	0.260	0.273	0.285
41	0.203	0.215	0.228	0.240	0.253	0.265	0.278	0.290
42	0.208	0.220	0.233	0.245	0.258	0.270	0.283	0.295
43	0.213	0.225	0.238	0.250	0.263	0.275	0.288	0.300
44	0.218	0.230	0.243	0.255	0.268	0.280	0.293	0.305

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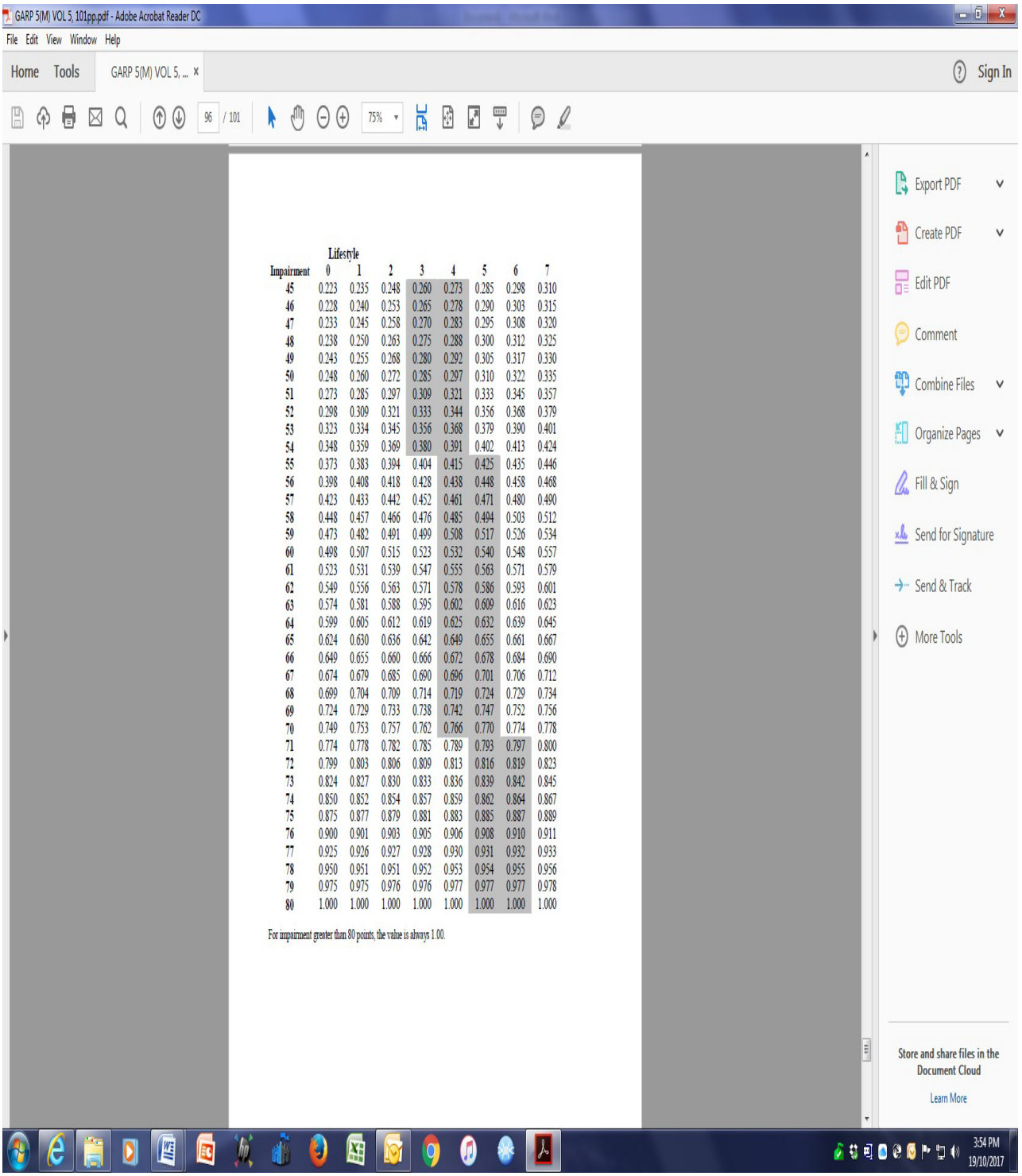

	Lifestyle							
Impairment	0	1	2	3	4	5	6	7
45	0.223	0.235	0.248	0.260	0.273	0.285	0.298	0.310
46	0.228	0.240	0.253	0.265	0.278	0.290	0.303	0.315
47	0.233	0.245	0.258	0.270	0.283	0.295	0.308	0.320
48	0.238	0.250	0.263	0.275	0.288	0.300	0.312	0.325
49	0.243	0.255	0.268	0.280	0.292	0.305	0.317	0.330
50	0.248	0.260	0.272	0.285	0.297	0.310	0.322	0.335
51	0.273	0.285	0.297	0.309	0.321	0.333	0.345	0.357
52	0.298	0.309	0.321	0.333	0.344	0.356	0.368	0.379
53	0.323	0.334	0.345	0.356	0.368	0.379	0.390	0.401
54	0.348	0.359	0.369	0.380	0.391	0.402	0.413	0.424
55	0.373	0.383	0.394	0.404	0.415	0.425	0.435	0.446
56	0.398	0.408	0.418	0.428	0.438	0.448	0.458	0.468
57	0.423	0.433	0.442	0.452	0.461	0.471	0.480	0.490
58	0.448	0.457	0.466	0.476	0.485	0.494	0.503	0.512
59	0.473	0.482	0.491	0.499	0.508	0.517	0.526	0.534
60	0.498	0.507	0.515	0.523	0.532	0.540	0.548	0.557
61	0.523	0.531	0.539	0.547	0.555	0.563	0.571	0.579
62	0.549	0.556	0.563	0.571	0.578	0.586	0.593	0.601
63	0.574	0.581	0.588	0.595	0.602	0.609	0.616	0.623
64	0.599	0.605	0.612	0.619	0.625	0.632	0.639	0.645
65	0.624	0.630	0.636	0.642	0.649	0.655	0.661	0.667
66	0.649	0.655	0.660	0.666	0.672	0.678	0.684	0.690
67	0.674	0.679	0.685	0.690	0.696	0.701	0.706	0.712
68	0.699	0.704	0.709	0.714	0.719	0.724	0.729	0.734
69	0.724	0.729	0.733	0.738	0.742	0.747	0.752	0.756
70	0.749	0.753	0.757	0.762	0.766	0.770	0.774	0.778
71	0.774	0.778	0.782	0.785	0.789	0.793	0.797	0.800
72	0.799	0.803	0.806	0.809	0.813	0.816	0.819	0.823
73	0.824	0.827	0.830	0.833	0.836	0.839	0.842	0.845
74	0.850	0.852	0.854	0.857	0.859	0.862	0.864	0.867
75	0.875	0.877	0.879	0.881	0.883	0.885	0.887	0.889
76	0.900	0.901	0.903	0.905	0.906	0.908	0.910	0.911
77	0.925	0.926	0.927	0.928	0.930	0.931	0.932	0.933
78	0.950	0.951	0.951	0.952	0.953	0.954	0.955	0.956
79	0.975	0.975	0.976	0.976	0.977	0.977	0.977	0.978
80	1.000	1.000	1.000	1.000	1.000	1.000	1.000	1.000

For impairment greater than 80 points, the value is always 1.00.

EXHIBIT 27-2 (CONFIDENTIAL) - UNREDACTED STATEMENT OF DOUGLAS JOHN HUMPHREYS DATED 1 APRIL 2022

PETER SINGLETON: Thank you. Mr Humphreys, that will allow me not to have you rehearse the whole lot. But can I draw your attention to paragraph 22, where you point out that the Veterans' Review Board has jurisdiction to conduct merit reviews of decisions made under the VEA and the MRCA, but not the DRCA. We have heard evidence that explains the historical reasons for that, the different streams of legislation and that's the way it turned out. But are you aware of any argument at the level of principle or logic for why the VRB should deal with two but not three of these Acts?

A. I can think of no argument, in logical principle, why there should not be a single stream in relation to all veterans' entitlements, no matter what Act they are under. The Board is well set up -- and it would require some further training and education, but the Board is well set up to deal with these very effectively and quickly. Perhaps we can go into it later, but if you look at the processing times of the Board at the moment, compared to the AAT, they are chalk and cheese. The Board is processing matters far more quickly, far more effectively. The use of ADR within the Board is resulting in much, much better outcomes, and I think if the Board was given the extra jurisdiction, it would be able to get a hold of those matters and deal with them quickly, effectively and to the satisfaction of the applicants.

Q. Just to give that some context, DVA decisions made under the DRCA, once they leave the DVA for review, go straight to the AAT; is that right?

A. That's right. Look, I've been in both. I was the Principal Registrar and CEO of the AAT for seven years, so I know how both works. That was before, I should add, the AAT was given -- or the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Tribunal folded into the AAT, so it is a much bigger organisation than when I was there. But the fact is the AAT is far more court-like. That frightens veterans. They don't want to go to court.

When I arrived at the Veterans' Review Board, it was euphemistically termed by some of the people involved with it as the "Veterans' Refusal Board". We managed to change over the period of time that I was there and it stayed completely the culture, in that it's beneficial legislation, it needs to be applied beneficially.

Now, the Board -- first of all, DVA as the respondent does not appear at the Board. The easiest way I can describe a Board session is a roundtable discussion. There's no bowing. If it is a three-member tribunal, one of the members will go and get the person, they'll come in, they will have their advocate with them.

The biggest thing I have said to members of the Board while I was there is that we wanted people to be heard and I wanted -- and I would say to veterans, "Look, at the end of the hearing, I want you to feel as if you have had everything that you want to say, say. It doesn't matter whether you think it's relevant or not, don't go away from here not saying something you want to say." Now, what that has meant is that in the long-term, people have been happy with outcomes.

Now, one of the most telling things I got was a letter from a widow, a war widow. She wrote to say she wanted to thank the Board for the hearing, but she said, "I didn't get what I wanted, which was a Gold Card and a widow's pension, but I actually now understand why it is I cannot get what I was told I could, and I want to thank you because you made me feel welcome and you made me feel -- and you went through and you explained the process to me." That is an essential difference of the Board to the AAT.

The Board is there to turn around and engage with veterans. It's there to turn around and go through their claims with them, to talk to them.

We have a preponderance of military members of the Board, and when I say "military members", they are people like me who have military service so they actually feel comfortable talking to us because they understand. They can use the acronyms that are so prevalent in the military, and we can actually get what it's like when they turn around and say -- and a lot of things that people who haven't served would turn around and say, "That's ridiculous, that couldn't have happened", and you can think back to your own service and say, "Well, yeah, it did."

Now, the biggest thing is that -- I have also said we sometimes get people who come in and tell what I can euphemistically describe as recollections that may not necessarily accord with the historical records.

That happens. That's fine. The biggest thing is that we don't call them liars, we don't call them people who are malingering or trying things on. We simply find that the evidence doesn't satisfy the standard of proof. We respect the veteran, we respect their service, that's the important difference. We don't have to necessarily accept what they're telling us, but they're still entitled to respect for being a veteran and having served.

Q. To the extent that you have described a qualitative difference and experience, could I ask you now to turn to what might be called a qualitative difference and that 5 is to ask you about the efficiency of the VRB, how quickly it can deal with processes, what administrative techniques it has got to handle the workload?

A. When I started with the Board, they didn't have alternative dispute resolution as a big thing. There had been a recommendation that ADR be introduced. We went through a fairly exhaustive process of looking at the best models we could come up with and we trialled a number of them.

The fact is that what we call outreach or the Board calls outreach, in which we proactively get in contact with the veteran or the veteran's advocate and say to them, "Well, we've had a look at this case. If you want this, you're going to have to get some more evidence. Can you get that evidence?"

Or we can probably turn around and in relation to -- there might be a number of claims in relation to the assessment of pension. "Well, based on the evidence you've given us, you can probably get this and get that, but you are going to have to go away and get a heap more evidence in relation to the third thing." In many cases what will happen is they will turn around and say, "We're happy with that, please do a decision on the papers and do that." In my statement I describe in my own case where a decision on the papers was done in relation to intervertebral disk prolapse.

Outreach has been an enormously successful thing and it's because we go out, or the Board goes out -- I use "we" because I still have an attachment to the place. The Board goes out and physically engages with people and talks to them about what it is they want, what it is they can get, what they might have to be able to provide. And if they can't provide stuff, as I said, in many cases they're quite happy.

Look, there was some evidence given by Professor Creyke about the Board on Tuesday. I have read what she said. She made some comments about -- that she felt eventually the Board could be folded into the AAT and I'll be honest, I think that would be a disastrous mistake. When I was at the AAT, the AAT enjoyed bipartisan political support. It doesn't today. That is difficult. What you have is a specialist, small, highly veteran-centric Board that deals with veterans. The AAT is a much, much bigger organisation now than when I was there and its problems are well-known in the media and, indeed, I think the recent Senate report said it should be disestablished. I don't know what that means. It doesn't sound real flash. That's not indicative of a body that enjoys high levels of bipartisan support.
99