



Administrative  
Appeals Tribunal

# **SUBMISSION ON THE PRODUCTIVITY COMMISSION DRAFT REPORT**

**A Better Way to Support Veterans**

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## Introduction

1. The Productivity Commission (PC) is undertaking an inquiry into the system of compensation and rehabilitation for veterans (Serving and Ex-serving Australian Defence Force members). On 14 December 2018 the PC released its draft report - *A Better Way to Support Veterans*

The Administrative Appeals Tribunal (AAT) welcomes the opportunity to provide its comments regarding the PC's draft report.

The AAT has jurisdiction to review decisions under the relevant Acts in its Veterans' Appeals Division. The relevant Acts are:

- Veterans' Entitlements Act 1986 (VEA),
  - Military Rehabilitation and Compensation Act 2004 (MRCA); and the
  - Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 (DRCA).
2. While the draft report undertakes a wide-ranging consideration of decision-making in the veterans' area (including internal review of decisions by the Department of Veterans' Affairs (DVA)), this submission will focus on the proposed options for review at the external review stages and the potential impact on the AAT (Draft report, Chapter 10 – *Reviews* – commencing at p387).
  3. The PC's draft report considers a number of options for the external review of decisions in the veterans' jurisdiction which will be canvassed below.

## Current review process

4. As noted by the PC, after an internal review or reconsideration by DVA, reviews progress to either the Veterans' Review Board (VRB) or the AAT. For some decisions, the AAT is the first point of review, while for others, the AAT only reviews the case after the VRB has made a decision. In general:
  - For decisions made under the VEA and MRCA, applicants must first appeal to VRB, then to AAT.
  - Applicants with adverse decisions made under DRCA must first request an internal reconsideration by a delegate of the Military Rehabilitation and Compensation Commission, before lodging with the AAT.
5. In its draft findings, the PC notes that:

Current review processes are ensuring that many veterans receive the compensation or support that they are entitled to under the law, albeit sometimes with significant delays. The majority of cases that are reviewed externally result in a change to the original decision made by the DVA (Draft finding 10.1, page 403).
6. The latter observation in this draft finding is borne out by the statistics for lodgements and finalisations for the external review of DVA decisions.



## Lodgement and finalisation statistics

### Administrative Appeals Tribunal

7. According to the AAT's Annual Report 2017/18, **361 applications for review** were filed with the AAT during 2017/18 (see Table 3.4, page 28).
8. The Annual Report shows that 480 applications were **finalised** during 2017/18, with 37% of those applications resulting in a change to the decision under review (see Table A4.2, page 129). Thirty eight percent (38%) of all applications were finalised by consent during the AAT's ADR processes (see Table A4.3.2, page 131). The statistics show that:
- 85% of applications finalised by consent (153 of 181) resulted in the decision under review being varied or set aside (or 32% of all applications finalised in 2017/18).
  - 29% of applications finalised by a decision of the Tribunal after a hearing (23 of 80) resulted in the decision under review being varied or set aside (or 5% of all applications finalised in 2017/18).
  - There was a high proportion of applications withdrawn by the applicant prior to hearing (43%, or 204 of 480)
9. For the year to date (1 July 2018 – 31 December 2018) there have been:
- 142 new applications for review lodged
  - 204 applications were finalised
  - With 42% of those (85 applications) finalised during the AAT's ADR process.
10. The new lodgements comprise the following (see AAT Annual Report 2017/18, Table A4.1, page 128):

	2017/18	2018/19 (from AAT statistics 31/12/18)
<b>Military Rehabilitation &amp; Compensation Act 2004</b>	43	20
<b>Safety, Rehabilitation and Compensation Act 1988 (defence-related claims) / Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988</b>	139	41
<b>Veterans' entitlements</b>	179	81
<b>TOTAL</b>	<b>361</b>	<b>142</b>

### Veterans' Review Board

11. The high set aside rates also apply in the VRB. Below is an edited table from The Veterans' Review Board Annual Report, 2017/18 in *The VRB at a glance 2017–18* section shows the following volume (at page 2):

<b>Applications lodged</b>	2923
<b>Applications decided</b>	2780
<b>% of matters set aside</b>	59.8%
<b>% of matters affirmed</b>	40.2%
<b>Hearings arranged 1108</b>	1108
<b>% of decided cases where hearing held</b>	34.9%
<b>% of applications appealed to the AAT</b>	6.7%

12. The VRB's Annual Report, 2017/18 also highlights the role of alternative dispute resolution processes in the early resolution of applications. The report states that:

During 2017–18, 82.6% of cases referred to an ADR process were finalised without the need for a hearing on average in 4.5 months (page 2).

13. The ADR process in the VRB has been progressively rolled out across Australia since it started in January 2015 in NSW and the ACT. During 2017/18 the VRB's ADR program operated in all VRB locations in Australia, with the exception of Queensland, where it was introduced for applications for review lodged on or after 1 January 2019.

## **Comments on specific draft findings and draft recommendations**

### **Possible change of roles for the VRB and AAT - draft recommendation 10.3**

14. The PC states in its draft report that, in its view, the system for review of DVA decisions is unnecessarily complex, noting that "...there are unjustified differences and complexities in the rights of review available to claimants under each Act" (draft finding 10.3, page 409).

15. The PC recommends that the current review system be changed to a single pathway for all decisions across all 3 three Acts (see pp 409-410 & draft recommendation 10.2, draft report). In that context, at page 414 of its draft report, the PC canvasses three options for reform of the VRB:

- a. status quo.
- b. amalgamation with the AAT.



- c. ADR only role – this is the recommended option of the PC.

*ADR only role for the VRB (preferred recommendation by the PC)*

16. This is the option which involves the most significant change to the current review system, as the VRB would no longer be a determinative body.
17. Draft recommendation 10.2 of the PC draft report (see p418) describes the proposed change as follows:

The Australian Government should introduce a single review pathway for all veterans' compensation and rehabilitation decisions. The pathway should include:

- Internal reconsideration by Department of Veterans' Affairs. In this process, a different and more senior officer would clarify the reasons why a claim was not accepted (partially or fully); request any further- information the applicant could provide to fix deficiencies in the claim, then make a new decision with all of the available information
- Review and resolution by the Veterans' Review Board, in a modified role providing alternative dispute resolution services only (draft recommendation 10.3)
- Merits review by the Administrative Appeals Tribunal
- Judicial review in the Federal Court of Australia and High Court of Australia

18. In relation to review by the AAT, the PC clarifies that (see page 414):
- if agreement is not reached at the VRB, the claimant would have the right to apply to the AAT for a full merits review.
  - the VRB could also refer complex cases to the AAT where a VRB member has deemed the application unsuitable for resolution by ADR and the claimant consents.

19. The PC acknowledges that:

The removal of the full merits review stage at the VRB may at least in the earlier stages result in more cases being heard by the AAT (draft report, p 416)

**Potential issues for the AAT with the proposed single pathway and VRB's ADR function only**

*Workload & of role conferences*

20. If this recommendation was to be implemented, the main issue for the AAT would be to ensure that it is appropriately and sufficiently resourced to deal with any resulting increase in workload and, in particular, having sufficient members with relevant expertise such as legal, medical and military knowledge. Another option identified by the PC would be to redirect some of the resources of the VRB (particularly some of the experienced members)

into the AAT (draft report, p416).

21. An increase in the number of applications would also lead to an increase in demands on the AAT Registry functions.

22. The PC posits that:

.... given that VRB ADR processes may have been extensive prior to the case reaching the AAT, tribunal members may choose not to require the parties to proceed with further ADR within the Tribunal (draft report, p418)

23. However, this observation under-estimates the role the AAT's conference process plays in preparing matters for hearing. The draft report states that:

There is no reason to require parties to complete all of the ADR processes [in the AAT] beyond an initial conference: in some cases, the breakdown of the relationship between DVA and the claimant means that the case will require a formal hearing (page 418).

24. In most cases, the AAT's conferencing process combines ADR functions with pre-hearing case preparation functions. The practicalities of pre-hearing preparation, identification of issues and exchange of documents, can have the effect that the parties become more willing to reach agreement.

25. Where ADR functions have been conducted externally, it is likely that the pre-hearing preparation functions will still be required. In any event, if there was a greater emphasis on an early ADR process at the VRB stage, as proposed by the PC's recommended option, the AATs conferencing process is sufficiently flexible to adapt.

26. In addition, the issue of the status of partial agreements at the VRB ADR stage is unclear, and these may have to be further considered in the conference process (see discussion of this issue below).

#### *Partial agreements at the VRB/ADR stage*

27. It is not uncommon for there to be a number of issues in a particular VRB matter. The status of the resolution of some, but not all, of the issues in the case during the ADR process is unclear if the VRB has no decision-making powers. The PC notes in its draft report that as a result of the VRB not having decision making powers:

.... references to reviews of VRB decisions (for instance, in s. 175 of the VEA and s. 354 of the MRCA) should be replaced with references to 'DVA decisions that have been through an ADR process at the VRB'. (page 418, draft report)

28. While it is recognised that this is an early observation of how the proposed review system could work, the AAT is concerned to clarify how agreement at the VRB stage on some, but not all, of the issues (legal and factual) in dispute would be dealt with in practice. For example, would the proceedings in the AAT be limited to those applications on which



agreement was not reached? What would be the status of the issues agreed to in the VRB ADR process – would those issues be outside the scope of the AAT proceedings?

## **Implementation**

29. The draft report proposes that the role and necessity of the VRB be re-examined once the impact of a reformed veteran support system is fully realised — likely between five and seven years after the passage of reform legislation (see page 425 draft report). Bearing in mind the terms of draft recommendation 10.4 (at page 426), the AAT would be keen to provide its views to any review.

The Australian Government should conduct a further review in 2025 on the value of the continuing role of the VRB, once significant reforms to the initial claim process for veterans are established. In particular, the review should consider whether reforms have reduced the rate at which initial decisions in the veteran support system are varied on review. If the review finds that the VRB is no longer playing a substantial role in the claims process, the Australian Government should bring the ADR functions of the VRB into DVA or its successor agency, the proposed Veteran Services Commission.

## ***Amalgamation with the AAT (not recommended by the PC)***

30. This option, if adopted, would have the greatest impact on the AAT, and we note the issues raised by the PC in this regard.

31. This option would involve the introduction of a first tier of review within the AAT (a *Veterans' Division* of the AAT), similar to the Social Services and Child Support Division which replaced the former Social Security Appeals Tribunal, with a further right of review to the current Veterans' Appeals Division (see page 414, draft report).

32. If this option was adopted, there would be a significant impact in terms of the resources required to incorporate the VRB into the AAT's structure. Given that nearly 3,000 applications were filed in the VRB during 2017/18 (see above), the impact would include:

- An increased demand on Registry functions.
- Requirements for additional members with appropriate expertise to conduct hearings and other officers to conduct alternative dispute resolution processes (assuming these are retained).
- A series of one-off costs including changes to: accommodation requirements; human resources; re-branding; and other administrative costs of amalgamation.

33. Consideration would also have to be given to other issues such as:

- Whether the current prohibition on legally qualified advocates in hearings before the VRB (but not in the ADR process) would be retained.
- Whether multi-member panels would be retained (the VRB generally conducts hearings before 3-member panels).



## **Feedback to DVA from merits review - draft finding 10.2 & draft recommendation 10.1**

34. The PC was of the view that:

*The Veterans' Review Board and Administrative Appeals Tribunal are not providing sufficient feedback from their review processes to the Department of Veterans' Affairs to better inform decision-making practice. Further, the Department is not incorporating the limited available feedback into its decision-making processes. This means that opportunities for process improvement are being missed (draft finding 10.2, page 405)*

35. The AAT notes that the subsequent recommendation (draft recommendation 10.1) did not refer to this. Nevertheless, we note that the role of both the AAT and VRB is merits review, which does not involve a search for errors of reasoning in the original decision. Moreover, both tribunals provide written reasons for most of their decisions in applications decided by hearing. The DVA reviews these reasons and may analyse them. In addition, it is not part of ADR to record errors in the original decision. Significant resourcing would be required to undertake the task identified by the PC.

## **Legal representation at the VRB and AAT**

36. In its draft report the PC addresses the issue of legal representation for veterans, particularly at the VRB stage. The PC also discusses, on page 423, issues relating to whether veterans are at a disadvantage in the AAT, where DVA is often legally represented. In general, the PC appropriately seeks in its draft report to promote a decision-making system in which better decisions are made at the primary level with sound internal review before matters proceed to external review, which is more extensive and expensive.

## **Expert advice and/or representation about their circumstances and what information is required.**

37. The PC has not expressed a final position on the question of legal representation pending the release of a report by Robert Cornall AO, who conducted a review of Veterans' Advocacy and Support Services during 2018. It is understood that the report has been provided to the Minister for Veterans' Affairs and is currently being considered by the Government.

38. The AAT will also wait for the release of the Cornall review and it may wish to comment on the issue of representation when that report is available. In the meantime, the AAT generally endorses the observations made in the PC draft report that each of the legislative frameworks in the veterans' jurisdiction is complex and many cases raise complex medico-legal questions.

39. By way of general observation, the AAT's experience is that competent lawyers and other competent professional representatives, such as veterans' advocates, contribute to the effective and efficient resolution of applications.



## Costs & disbursements

40. By way of general comment, whatever set of arrangements is put in place to provide assistance to veterans with claims under the relevant legislation through the entire decision-making process, consideration should be given to how to enable claimants to obtain:

- expert advice about their circumstances and what information is required to support their claim; and
- financial support for expert medical and other reports.

at the earliest reasonable point in the decision-making process.

## Legal costs

41. A claimant under MRCA or DRCA cannot recover any legal costs until the reviewable decision has been appealed to the AAT. In general, if a veteran retains a lawyer and succeeds on review in the AAT in a case under the MRCA or DRCA, they can obtain up to 75 per cent of their costs from DVA.<sup>1</sup>

42. The AAT notes the PC's comments (at p. 423) regarding the award of costs in applications for review of decisions under the MRC Act and DRC Act and provides the following comments by way of clarification of the AAT's practice and process in relation to legal costs.

- As in the courts, where a claimant is successful on review, the AAT generally awards costs, although various factors may be taken into account in deciding the level, such as the existence of a "Calderbank" offer, if the applicant is only partially successful or there has been poor practice by the representative.
- This general position is subject to the particular requirements in section 357(6A) of the MRC Act. That provision prevents the AAT from making a costs award if new documentary evidence is submitted at the AAT that could have been submitted to the VRB, without unreasonable expenses or inconvenience, and it would have led to a more favourable determination at the VRB. There are similar limitations set out in subsection of the 67 DCR Act
- The PC notes in its draft report that costs orders are made at the discretion of the AAT member deciding the case, and suggests that this means it is not guaranteed that plaintiffs will recover costs (see p 423). However, the AAT's general practice is that costs are awarded if the applicant is successful on the review.
- That costs orders in the AAT are generally for party-party costs is consistent with what occurs in the courts. In appropriate circumstances, it is open to the AAT to order that solicitor-client costs be paid and to depart from the usual position that the claimant may only recover professional costs at 75% of the rate under the Federal Court scale. However, these situations are rare.

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<sup>1</sup> The draft report accurately cites the AAT's Taxation of Costs Practice Direction as the source for this but does not clarify that the costs payable are witness expenses at the prescribed rates, all reasonable and proper disbursements in full and 75% of professional costs that would be allowable under the Federal Court scale for those items with non-discretionary amounts.



## Disbursements/expenses

43. The ability for veterans to pay for expert reports may affect the quality of the evidence presented by the veterans in support of their application. There are currently avenues available for a veteran to obtain all or some of the costs associated with obtaining medical evidence at the merits review stage. For example, a veteran who has filed an application with the VRB can apply to DVA to be reimbursed the costs of obtaining "relevant documentary medical evidence" (including associated travel costs) in support of their application, subject to certain conditions, such as:

- A maximum amount of \$1,000 is available for obtaining such relevant documentary medical evidence for each condition may be reimbursed (emphasis added);
- The relevant documentary medical evidence must be submitted to the VRB (including cases where the VRB claim has been withdrawn);
- Reimbursement of reasonable travelling expenses incurred in obtaining such medical evidence, and travelling expenses for those of an attendant, to a maximum of \$500.

[Source: *Claim for Costs of Relevant Documentary Medical Evidence Incurred by Applicants to the Veterans' Review Board (VRB)* – accessed on 22/01/2019, at <https://www.dva.gov.au/dvaforms/Documents/D7526.pdf>]

44. The VRB also has powers under section 152 VE Act to arrange for the making of any investigation, or any medical examination, that the Board thinks necessary with respect to a review, and to forward to the Board a report of that investigation or examination. The VRB has the same powers for reviews of MRC Act decisions (see section 353 MRC Act).