Submission Brief

GS/DVA/001

PRODUCTIVE COMMISSION SUBMISSION

Reference:

A. http://clik.dva.gov.au/compensation-and-support-reference-library/commission-guidelines/cm5056-section-31-review-powers

Introduction

1. **Purpose**. This brief has been written to convey my concerns with the section VEA SECT 31 review instrument, and what I believe are largely considered by many veterans to be an impotent, unhelpful, obstructive, worthless and misleading process.

2. **Background**. The background of the brief are linked to personal experience.

a. Some two years ago the circumstances surrounding a refused dental attrition claim were instrumental in me being driven to gain a greater understand Administrate Law in relation to decision making.

b. In investigating this process I identified a systemic irregularity of the VEA (Veteran Entitlement Act) review process that has its roots in the introduction of the expanded powers of VEA S31(Section 31) which goes back to 1996 as a result of massive backlog of claims at the VRB. The commission at the time expanded the S31 powers to allow for a pre VRB review on appealed primary decisions, and in doing so added another layer of complexity to the well acknowledged VEA claims mire.

Expansion of Section 31 review process

- Despite it being well known there were a significant number of major conditions that could be attributed to service, that did not have a SoP (Statement of Principles). The Commonwealth decided to prematurely introduce SoP's, this on the basis it was believed at the time that it would take three months to create a SoP. This proved to not be the case, even today it can take in excessive of a year for the RMA to finalise an investigation and decide on a SoP.

  - The delays in creating SoP's provided an opportunity for applicant to have 2 bites of the claims cherry, and many held off on taking a refused claim to the review board, in the hope that the new SoP might provide a factor to have a condition accepted.

  - The expanded powers proved to be largely successful to resolve the backlog, resulting in 2200 of 5500 of the investigated backlogged claims to be accepted without a requirement for the matter to go before the VRB, the downside is that once the backlog issue was resolved no consideration was given to reverting to the original legislation.

- The expanded S31 powers which were introduced in 1995 to address a temporary issue still exist (reference A), I feel it can easily be demonstrated the decision to expand the S31 powers is entirely responsible for corrupting or polluting an otherwise perfectly workable, and mechanically sound review instrument.

- Although under FOI I have not at this stage been provided the documents to confirm, another section of the act that seemed to have been interfered with as a result of the premature legislation of the SoP instrument is SECT 148 Procedure of Board.

It is evident that without any logic or reason the Principal Member of the VRB now has power to force a matter that resides, and is still being administered by the Commission to a Directions Hearing. This power was not available when the act was created, and logic would suggest it was expanded to force applicant to review where they were seen to be taking advantage of systemic shortcoming.

Section 31 Review powers

- CM5056 Section 31 Review Powers clearly provides for a claimant that has concerns surrounding the decision to have the merit of a decision addressed at the VRB. This triggers an automatic S31, and the second S31 on application after the applicant receives the 137 report.

  Although the departments policy document makes it abundantly clear there is a second, on request S31 review available to the applicant, the S31 review officer inevitably directs the applicant to the VRB. In the last three years I have had three different review officers for my claims, and they have stated the following

  1. Case to proceed to the VRB,
  2. Case sent to the VRB for consideration, and
  3. Case to proceed to the VRB.

  The feedback I have received via social medial demonstrates this a typical response, and largely it is considered S31 reviews are a pointless waste of time, and little more that a procedural or administrative tic in the box.

- This is concerning, being force fed a single appeal process verges on systemic departmental negligence, every applicant but especially those self-repressing must be provided information on every “next step” option, not just the one that meets the department’s self-interest.
  It’s evident those that created the legislation created S137(3) not, only as a safety net instrument to allow the applicant to question if a matter is a “howler”, but also to provide the Secretary with the means to deal with it. For a number of obvious reasons it rather seems counterproductive to take a matter to the VRB if it can be resolved at the Commission.

- Attachment 1 is what I believe to be the pre expanded S31 powers flow chart, and with the exception of the ADR instruments at both the VRB and AAT, attachment 2 is what I believe to be the post expanded S31 powers flow chart immediately at the time of introduction.

Section 137(3)

- Under VEA SECT 137(3) applicants are able to "put matters of concern in relation to the 137 report to the Secretary". "Matters of concern", is clearly wide ranging, and 137(3) provides no restriction or governance to the applicant. It is clear that those that drafted the legislation had it in mind that it was up to the applicant to decide what is, a "matter of concern". And reason and logic would suggest that this could include the lawfulness of the decision that might come about by a simple and blatant wrongdoing by the decision maker, that might only be identified once the applicant views the 137 Report. An example might be where the Delegate has inadvertently not used an up-to-date specialist report in deciding the claim.

- CM5056 Section 31 Review Powers is evidently part of the merit review process and the legislation seems to only allow for a decision to be varied, it does not provide for the S31 review Officer to have a matter remitted (it still resides at the Commission), nor does it seem to provide the Review Officer with the powers to find a matter unlawful and have the decision remade. Whereas should the Secretary be advised the decision is unlawful, they can take measures to have the decision made void, and remade. (An unlawful decision is to be deemed not to have been made)

- It needs highlighting that an applicant need only suspect the decision to be unlawful for them to raise this as a matter of concern to the Secretary, it lay with the Secretary to clarify and decide on this matter. This bearing in mind that should the Secretary deem the matter to be lawful, it seemingly clears a path for the Applicant to seek orders at the ADJR in order to seek judicial finality on the issue of lawfulness.

- Evidence of how ignorant the Department is regarding 137(3) lay in my complaint number CMFS 37975, made on 3 May and 8 May 2018, the complaint was lengthy, but in essence rendered down to concerns that "that irrelevant materials are contained within the 137 report". This was responded with, "**At no point does the VEA say that other material such as a cover or index are to be excluded**". And "The Department will therefore not be preparing a new S137 report, however you are welcome to ask for amendments to the report in the course of your appeal to the VRB".

  It needs noting that the Excusive Assistant to Principal Member Veterans Review Board was included in on the email, that he didn't raise intent of S137(3) to the attention of my CLU Contact is also somewhat questions the VRB's awareness of S137(3)

Recommendation(s)

- It needs broadcasting that VEA137(3) is still a live option available to applicants, my recommendation would be that if the primary decision is not varied by the S31 Review Officer, the Applicant be advised in the screening minute of all the option of the second S31 review and also of their entitlement under S137(3), the capacity to take matters of concern in relation to the 137 Report to the Secretary. As per the Proposed letter to be included on 137 report (attachment 3.)

- The Productivity Commission conduct an investigation to identify how many self-represent appeals have been varied at the VRB, that could have been corrected via S137(3) had the applicant had been advised that this was an option. This with a view to identify potential savings to the Commonwealth if this process be widely adopted, promoted and a system of Advocate education be created.

- In line with attachment 3 (Proposed decision/appeal flow chart), it largely appears that the ADR/outreach instrument of the VRB was and still effectively is a function

available to the Secretary under S137(3), on this basis I recommend formalising the "matters to the Secretary" so they undertake the same processes of the VRB ADR, and retire the VRB ADR processes. It needs highlighting the AAT also has a compulsory outreach instrument.

- The model as per the Proposed decision/appeal flow chart as per (attachment 4) be adopted, this includes a Complex Decision Screening (CDS) process be implemented for known and acknowledged complex claims such as but not limited to, non SoP claims, claims where the applicant has not used an advocate, and claims which the delegate believes are complex. This would effectively change the current S31 screening which only get undertaken on appeal to automated process on complex claims

- It seems that the VRB, or it's predecessor was effectively created in 1920 in order to have a less formal and intermediary review mechanism, prior to an applicant having to take a matter to the High Court to seek review on a decision on which they believed they had been adversely effected. In 1975 the AAT was enacted and it largely seems this provides the same function as the VRB, with the benefit of Judicial finality, bearing in mind the AAT now has a less formal ADR process it seems that all the functions of the VRB are duplicated at S137(3) or the AAT outreach process or the AAT itself.

  In May 2014 the Attorney General introduced the Tribunals Amalgamation Bill, and the a number of appeals and review tribunals were merged into the AAT. There is no reason with the protection of a fully functioning and efficient S137(3) process that the VRB couldn't also be incorporated into the AAT, this would leave the Classification Review Board as the nation's sole remaining review instrument.

Conclusion

Its's important to highlight the general statistic that 50% of applications to the VRB get varied, the question is how many of these matters would be resolved if the applicant has raised them as "matters of concern" to the Secretary first? And why hasn't this statistic diminished with the passage of time? It is well accepted that whether they are represented or not applicants suffer considerable stress and pressures in taking a matter of concern to the VRB. It is also well understood and acknowledged there are significant administrative and monetary saving to be gained by having claims issues resolved at the Commission rather that the VRB.

Unquestionably the blame for un underutilisation of S137(3) and belligerent manner in which the Department use S31and direct applicants to the VRB lay at the feet of those that educate Advocates, their ignorance of the basic principles of admissive law combined with a lack of understanding of the VEA. It would be difficult not to quickly come to the realisation that this has possibly accounted for countless thousands, possibly tens of thousands of matters to that could have been corrected at the Commission having to be unnecessarily passed and addressed to the VRB.

More concerning is the fact that in not taking maters of concern to the Secretary, systemic failure and the Advocate Corps, have deprived the Secretary of the capacity to be educated on wrongful matters and process, and unlawful decisions. And in doing so have deprived him/her of the obligation to correct policy, and implement procedural initiatives in order to prevent the same wrongdoing occurring again, either by the same delegate, his/her peers or those that follow.

It is well acknowledged that for a number of reasons the ranks of Advocates are thinning, excessive workload as a result of defective primary decision making resulting in what seems to be in many cases an unnecessary journey to the VRB is clearly one of the matters having an impact. Any measures such as correction in policy or procedures, or simplifying legislation to reduce that workload can only be beneficial, and without refute broader knowledge and application of 137(3) alone will significantly reduce the burden Advocates carry.

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9 August 2018

Attachment(s):

1. Pre expanded S31 powers flow chart
2. post expanded S31 powers flow chart
3. Proposed letter to be included on 137 report
4. Proposed decision/appeal flow chart