Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017

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Law and Bills Digest Section

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Date introduced: 30 March 2017
House: House of Representatives
Portfolio: Veterans’ Affairs
Commencement: Sections 1 to 3 commence on Royal Assent. Schedules 1 to 8 commence on various dates, as set out in the digest.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at June 2017.
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Purpose of the Bill
The purpose of the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 (the Bill) is to make a series of minor changes to the veterans’ compensation law across several Acts. In his second reading speech the Minister for Veterans’ Affairs, Dan Tehan, stated that the Bill would:

... implement several small but necessary amendments to veterans legislation to clarify, improve or streamline the operation of the law.

... Each of the sets of amendments are relatively modest. They will enhance the operation of the department [of Veterans’ Affairs (DVA)] and will mean better outcomes for veterans.¹

Structure of the Bill
The Bill has eight schedules:

- **Schedule 1** amends the Veterans’ Entitlements Act 1986 (VEA) to update and align certain procedures of the Veterans’ Review Board (VRB) with those of the Administrative Appeals Tribunal (AAT)
- **Schedule 2** amends provisions of the VEA relating to the Specialist Medical Review Council (SMRC)
- **Schedule 3** expands the powers of the Minister for Veterans’ Affairs to make agreements with foreign governments
- **Schedule 4** makes minor amendments in relation to Employer Incentive Scheme payments
- **Schedule 5** makes changes to allow the Military Rehabilitation and Compensation Commission (MRCC) to disclose information to the Commonwealth Superannuation Corporation (CSC) to assist the CSC in the performance of its functions
- **Schedule 6** amends the Military Rehabilitation and Compensation Act 2004 (MRCA) to provide for the delegation of the Minister’s powers
- **Schedule 7** makes changes to allow certain legislative instruments to incorporate external material as it is amended from time to time
- **Schedule 8** repeals spent and redundant provisions in the VEA and MRCA, including those which relate to benefits that are no longer payable.

Structure of this Bills Digest
As the matters covered by each of the Schedules are independent of each other, the relevant background, stakeholder comments (where available) and analysis of the provisions are set out under each Schedule number.

Committee consideration
Foreign Affairs, Defence and Trade Legislation Committee
The Bill has been referred to the Senate Standing Committee on Foreign Affairs, Defence and Trade (the FADT Committee) for inquiry and report by 13 June 2017. Details are available at the inquiry home page.

Senate Standing Committee for the Scrutiny of Bills
The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) reported on the Bill in its Fifth Scrutiny Digest of 2017.² The Scrutiny of Bills Committee raised concerns with two Schedules of the Bill—specifically, provisions which allow for the broad delegation of administrative powers under the MRCA (Schedule 6) and provisions concerning the incorporation of external materials into legislative instruments (Schedule 7). Details of the Scrutiny of Bills Committee’s concerns are discussed under heading for the relevant Schedule below.

Policy position of non-government parties/independents
The ALP and other non-government parties and independents had not commented on the Bill at the time of writing.

Position of major interest groups
The comments by various stakeholders are discussed under heading for the relevant Schedule below.

Financial implications
The Explanatory Memorandum states that the Bill will have no financial impact.³

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.⁴

Parliamentary Joint Committee on Human Rights
In its Fourth Report of 2017, the Parliamentary Joint Committee on Human Rights concluded that the Bill does not raise human rights concerns.⁵

Schedule 1—Veterans’ Review Board

Quick guide to Schedule 1
The provisions of Schedule 1 to the Bill relate to the operation of the VRB. In particular they:
• align the statement of objectives in the VEA with that in the Administrative Appeals Tribunal Act 1975
• modify certain VRB procedures and
• give the Principal Member of the VRB the power to dismiss an application for review in certain circumstances.

Commencement
The provisions in Schedule 1 to the Bill commence on the day after Royal Assent.

Background
The VRB is an independent tribunal that exists to review decisions made by the Repatriation Commission under the VEA about:
• claims for acceptance of injury or disease as war-caused or defence-caused
• claims for war widows’, war widowers’ and orphans’ pensions
• assessment of pension rate for incapacity from war-caused or defence-caused injury or disease and
• claims for the grant, or assessment of, attendant allowance.

The VRB also reviews determinations under the MRCA made by:
• the Military Rehabilitation and Compensation Commission (MRCC) and
• the Service Chiefs of the Australian Army, the Royal Australian Navy, and the Royal Australian Air Force.⁶

With the enactment of the Budget Savings (Omnibus) Act 2016 (Cth), decisions made under the MRCA follow a single appeal path so that a claimant may seek reconsideration of an original determination by the MRCC. Any subsequent review of that decision is carried out by the VRB. The decision of the VRB may be the subject of an appeal to the AAT.

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4. The Statement of Compatibility with Human Rights can be found at pages v to xv of the Explanatory Memorandum to the Bill.
Key provisions

The amendments to the VEA in Schedule 1 of the Bill update VRB processes to make them consistent with the Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act). The changes do not significantly alter the functions and powers of the VRB, but clarify aspects of its processes.

VRB objectives

Item 1 repeals and substitutes section 133A which provides a statement of the VRB’s objectives. The current section provides that in carrying out its functions the Board must pursue the objective of providing a mechanism of review that is ‘fair, just, economical, informal and quick’. Whilst proposed section 133A preserves this objective, it also lists additional objectives, namely that the mechanism of review:

- be accessible
- be proportionate to the importance and complexity of the matter and
- promote public trust and confidence in the decision-making of the VRB.

This reworded provision mirrors the statement of objectives in section 2A of the AAT Act, as it was amended by the Tribunals Amalgamation Act 2015. The Explanatory Memorandum to the Tribunals Amalgamation Bill 2015 explained that the addition of these objectives:

… reflects the diversity of the amalgamated Tribunal’s jurisdiction, which would range from simple to highly complex matters, and reiterates the importance of the Tribunal continuing to be, and to be seen to be, an independent forum for review of the merits of Government decisions. 7

VRB procedures

Item 2 inserts proposed section 137A to specify that the parties to a non-finalised matter before the VRB have an ongoing obligation to lodge with the Board, as soon as practicable, any documents obtained which are relevant to the review. These requirements similarly apply to matters before the AAT. 8 Item 3 amends section 142 of the VEA to provide that the Principal Member may give written directions as to the provision of documents under section 137A, including documents that are or are not required to be lodged under that section.

Section 145C of the VEA provides that where the parties reach an agreement in the course of an alternative dispute resolution process to settle all or part of the matter, the Board may make a decision in accordance with the terms of this agreement. There is currently no provision for the variation or revocation of the decision. Item 4 inserts proposed subsection 145C(4) to specify that if the parties agree, in writing, to vary or revoke a settlement agreement, the Board may accordingly vary or revoke its decision where satisfied that it is appropriate and within its powers to do so. 9

Subsection 148(9) of the VEA currently states that in a review of a decision of the Repatriation Commission, the Commission must use its best endeavours to assist the VRB to make a decision in relation to the review. Item 5 repeals and substitutes this subsection to provide that all parties to a VRB review, and their representatives, are obliged to use their best endeavours to assist the VRB to fulfil its objectives as set out in section 133A.

Dismiss an application for review

Item 6 inserts proposed subsection 155(8A) to give the Principal Member of the VRB the power to dismiss an application for review if any one of the following criteria is satisfied, being that the application:

- is frivolous, vexatious, misconceived or lacking in substance
- has no reasonable prospect of success or
- is otherwise an abuse of the process of the Board.

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8. Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act), section 38AA.
9. This mirrors subsection 34D(4) of the AAT Act.
This aligns with the grounds for dismissal set out under subsection 42B(1) of the AAT Act. There is no existing provision of the VEA which allows the VRB to dismiss applications which it believes have no reasonable prospects of success. However, differences remain between the two Acts. After dismissing an application under subsection 42B(1), the AAT may issue a written direction that the person who made the application must not, without leave of the Tribunal, make a subsequent application of a specified kind. The Bill does not give the VRB similar power. A decision of the VRB to dismiss an application under proposed subsection 155(8A) is reviewable by the AAT.11

**Stakeholder comments**

Stakeholders have raised particular concerns with this provision. In their submission to the FADT Committee inquiry, Slater and Gordon Lawyers expressed concerns on two matters. First, it was argued that the power to dismiss an application could threaten an applicant’s right to natural justice and to a fair hearing. They argued that the grounds for summary dismissal of an application will be established ‘only in the rarest of cases’, and questioned whether the VRB is sufficiently versed in the legal nuances applying to such a decision to handle such matters. The RSL expressed the view that “to allow one member to decide on the prospect of success of an appeal is likely to reduce the belief of veterans that they have access to justice in the way they do now”.13

The submission to the FADT Committee by the Department of Veterans’ Affairs states that ‘to provide assurance and to prevent abuse of such a provision, there would be a right of appeal to the AAT for this type of dismissal’. However, this may be of little comfort to an applicant who finds that following the successful appeal to the AAT his, or her, matter is referred back to the VRB for its consideration. According to the RSL:

> In many cases, veterans lodging claims are affected by more than the injury or illness. They are often dealing with emotions associated with the loss of their military career, their inability or reduced ability to provide for their family, difficulty in obtaining employment post-service if they are injured or ill and strained relationships with family and friends.15

The second matter of concern to Slater and Gordon Lawyers was that section 166 of the VEA allows the Principal Member to delegate all of their powers to a Senior Member or acting Senior Member, and some powers—including those under section 155—to the National Registrar, a Registrar, Deputy Registrar or Conference Registrar.16 This opens the possibility of the dismissal powers conferred by proposed subsection 155(8A) being delegated to other Members and Registrars across the VRB. The Explanatory Memorandum is silent as to whether any delegation is likely to occur.

The Commonwealth Ombudsman, while noting that it is reasonable for agencies to formalise legislative provisions to deal with frivolous or vexatious applications, also commented on the issue of delegation, suggesting:

> It is important that the VRB considers the level of delegation required to make decisions under this provision, for example, senior officers. This will provide assurance that serious consideration has been given to the use of this provision at an appropriate senior level.17

The RSL also raised concerns with the provision, noting that there is no requirement for the Principal Member to provide reasons for the dismissal.18

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10. AAT Act, subsection 42B(2).
11. Item 7 of Schedule 1.
13. Returned and Services League of Australia (RSL), Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 [provisions], 12 May 2017, p. 5.
14. Department of Veterans’ Affairs (DVA), Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 [provisions], 12 May 2017, p. 2.
15. RSL, Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 [provisions], 12 May 2017, p. 4.
16. Slater and Gordon Lawyers, Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 [provisions], op. cit., p. 4.
Application
Most of the proposed amendments are to apply in relation to VRB applications made on or after the commencement of Schedule 1. Proposed subsection 145C(4) is to apply in relation to decisions made by the Board on or after commencement of the Schedule.

Schedule 2—Specialist Medical Review Council

Quick guide to Schedule 2
The provisions in Schedule 2 to the Bill relate to the Specialist Medical Review Council. In particular they:
- amend the process for appointing councillors
- allow for the payment of travel expenses for costs incurred when a person appears before the SMRC to make an oral submission and
- facilitate electronic lodgement of documents.

Commencement
The provisions in Schedule 2 to the Bill commence on the 28th day after Royal Assent.

Background
The SMRC is an independent statutory body which reviews decisions of the Repatriation Medical Authority (RMA) in relation to the contents of a Statement of Principles (SoP) made in respect of a particular kind of injury, disease or death, as well as decisions by the RMA not to issue or amend a SoP. Members of the SMRC are medical practitioners and scientists, appointed by the Minister of Veterans’ Affairs and selected by the Convener of the SMRC for the purposes of each specific review of a SoP that is before the Council.

The establishment and functions of the SMRC are provided for by Part XIB of the VEA. The Explanatory Memorandum notes:

The SMRC was created 1994. Legislative amendment is required to improve the operation of the SMRC and to better reflect the manner in which its functions and processes have evolved over time. These amendments would streamline some of the SMRC’s administrative arrangements. Further, many of the amendments are designed to assist the SMRC to modernise by allowing electronic lodgement of requests for review.

Key provisions

Appointments to the SMRC
The Bill proposes amendments to the process of appointing councillors. Currently, when making appointments the Minister must ensure that, at any time, there is a sufficient number of councillors—and no less than two—with experience in each branch of medical science expertise necessary for deciding matters referred to the SMRC for review, to ensure the proper exercise of the Council’s functions. Each appointee is selected from a list of nominees submitted (as requested by the Minister) by colleges or similar bodies of medical practitioners or medical scientists.

Items 9 and 10 repeal these requirements. The Minister must still have regard to the necessary branches of medical science expertise for deciding matters referred to the SMRC, but there are no further obligations with

18. RSL, Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 [provisions], op. cit., p. 2.
19. Item 8 of Schedule 1.
20. Item 8(2) of Schedule 1.
24. VEA, subsection 196ZE(3).
25. Ibid., subsection 196ZE(4).
regards to the number in each field. In regards to the existing list of nominations, the Explanatory Memorandum explains the removal of the requirement for nominees to be submitted by medical colleges by stating: ‘in practice, colleges forward the names of candidates who have responded to advertisements without assessing or recommending candidates’. Item 10 also inserts proposed subsection 196ZE(4) to provide that one of the councillors must have at least five years’ experience in the field of epidemiology.

**Travel expenses**

The VEA currently provides for the claiming of travel and medical expenses for costs incurred by a person in obtaining medical evidence submitted to the Review Council. Item 28 inserts proposed section 196ZQ to provide that a person who appears before the SMRC to make an oral submission (and that person’s attendant, if reasonably required) is entitled to be paid prescribed expenses for travel undertaken to appear. Travel expenses are not payable for travel outside of Australia, and will only be payable where a written application for payment is lodged with the SMRC within three months after the completion of the travel.

**Stakeholder comments**

Submitters to the FADT Committee inquiry were supportive of this amendment. Item 29 inserts proposed section 196ZR into a proposed Division 5 which provides that the Convener of the SMRC may give written directions as to:

- the manner of lodging requests or applications, including in electronic form and
- the time at which such requests or applications are taken to have been lodged.

Item 8 repeals and substitutes proposed subsection 196ZB(2), which relates to the content of a notice of investigation which must be published in the Gazette by the SMRC upon commencing a new review. The effect of the amendment is that the notice is no longer required to specify the date on which the SMRC will hold its first meeting for the purposes of the review. It will still be required to specify the closing date for submissions.

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27. VEA, sections 196ZN to 196ZP.
28. RSL, Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 [provisions], op. cit., p. 6.
30. VEA, subsections 196Y(3) (in relation to requests for review of the contents of SoPs, or decisions) and 196Z(2) (in relation to requests for review of an RMA decision not to carry out an investigation).
31. Item 3 repeals and substitutes paragraph 196Y(3)(c); Item 6 repeals and substitutes paragraph 196Z(2)(d).
32. Item 4 repeals and substitutes subsection 196Y(4); Item 7 repeals and substitutes subsection 196(3).
33. Item 16 repeals and substitutes paragraph 196ZN(4)(d); Item 24 repeals and substitutes paragraph 196ZO(5)(d). Item 17 repeals subsection 196ZN(4A) and Item 25 repeals subsection 196ZO(5A), which deal with the date of lodgement of requests for medical and travelling expenses, respectively. The Explanatory Memorandum notes that these two subsections will be redundant as such requests will be instead lodged with the SMRC, and the time of lodgement will be determined in accordance with written directions given by the Convener under section 196ZR (p. 9).
Schedule 3—international agreements

Quick guide to Schedule 3
The provisions in Schedule 3 to the Bill relate to the making of international agreements. In particular they will allow the Minister to enter into agreements with a broader range of foreign countries than is currently allowed to establish reciprocal arrangements for veterans’ affairs.

Commencement
Part 1 of Schedule 3 commences on the day after Royal Assent. Part 2 is contingent on the Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 (DRCA) coming into effect, and commences on the later of:

- the day after Royal Assent or
- immediately after the commencement of Part 2 of Schedule 1 of the DRCA.\(^{34}\)

Key provisions
Part 1 of Schedule 3 makes various amendments to allow the Minister to enter into agreements with foreign countries in relation to reciprocal arrangements for veterans’ affairs matters. Currently, section 203 of the VEA provides that the Minister may enter into reciprocal arrangements with the Government of a former or current Dominion of the Crown, to provide assistance and benefits to veterans of the armed forces of that country who are resident in Australia (and vice versa). Australia is entered into formal agreements with New Zealand and the United Kingdom under equivalent provisions of the now-repealed Repatriation Act 1920 (Cth), which continue to operate under transitional provisions of the Veterans’ Entitlements (Transitional Provisions and Consequential Amendments) Act 1986 (Cth).\(^{35}\)

The proposed amendments expand the countries with which the Government can enter into agreements beyond the Commonwealth. Item 4 repeals and substitutes section 203 to provide that the Minister can enter into agreements with any foreign country that make provision for reciprocal payments or treatment/rehabilitation, to or in relation to classes of persons specified in the agreement.

Proposed subsection 203(2) expands the potential scope of such agreements beyond veterans with service of a type equivalent to that covered by the VEA, so that these agreements may relate to payments or treatment provided for under the MRCA, Australian Participants in British Nuclear Tests (Treatment) Act 2006 (Cth) and the proposed DRCA.

The Repatriation Commission or Military Rehabilitation and Compensation Commission (MRCC) will be responsible for giving effect to and administering an agreement entered into under proposed section 203 of the VEA.\(^{36}\) Item 5 contains transitional provisions specifying that agreements in force under existing section 203 will continue in force as if they had been entered into under proposed section 203.

Items 1 and 2 insert into the British Nuclear Tests Act and MRCA, respectively, a note that under section 203 of the VEA, the Minister may enter into an agreement with a foreign country providing for the provision of payments or treatment comparable to payments or treatment under the (respective) Acts.

Defence-related claims Act
Part 2 of Schedule 3 to the Bill makes consequential amendments which are contingent on the enactment of the DRCA. The Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016 (SRC Amendment Bill), introduced into the House of Representatives on 9 November 2016, proposes to create a re-enacted version of the Safety, Rehabilitation and Compensation Act 1988 (SRCA) (Cth) which will apply to Australian Defence Force (ADF) members and their dependants.\(^{37}\) The SRC Amendment Bill will also amend the

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\(^{34}\) Clause 2, table items 4 and 5.


\(^{36}\) Item 4 of Schedule 3, proposed subsection 203(4).

SRCA to exclude ADF members and their dependants from its operation. At the time of writing, it had not yet been debated.

Item 6 inserts a note into the DRCA in the same terms as inserted by items 1 and 2 into the British Nuclear Tests Act and MRCA. Item 7 further amends proposed subsection 203(2) of the VEA to specify that international agreements may relate to payments or treatment provided for under the DRCA.

Schedule 4—Employer Incentive Scheme

Quick guide to Schedule 4

The provisions in Schedule 4 to the Bill relate to the Employer Incentive Scheme, which aims to provide certain rehabilitation assistance to eligible serving and former defence force members, reservists and cadets. The amendments to the MRCA, VEA and the DRCA (when enacted) will provide the Employer Incentive Scheme with more explicit legislative authorisation than the current arrangements.

Commencement

Part 1 of Schedule 4 commences on the day after Royal Assent. Part 2 is contingent on the DRCA coming into effect, and commences on the later of:

• the day after Royal Assent or
• immediately after the commencement of Part 2 of Schedule 1 of the DRCA.  

Background

The Employer Incentive Scheme enables DVA to provide incentive payments to employers who hire injured veterans who are undertaking an approved vocational rehabilitation program. To access the available incentives, employers must pay the employee full award wages at a rate comparable to that earned by other employees in the business doing similar work, be able to provide ongoing full or part time employment, and meet necessary work health and safety standards.

Key provisions

Part 4 of Chapter 3 of the MRCA deals with the provision of assistance in finding suitable work to current or former ADF members who are incapacitated for service or work due to a service injury or disease. The simplified outline of the operation of Part 4, which is contained in section 60 of the MRCA, notes that all such members are assisted in finding suitable Defence Force or civilian work. Item 1 of Schedule 4 to the Bill inserts a further statement in this section that employers who provide civilian work may be entitled to payments under a scheme determined by the Military Rehabilitation and Compensation Commission (MRCC).

Item 2 inserts proposed section 62A into the MRCA to provide the legislative basis for such a scheme. Proposed subsection 62A(1) states that the MRCC may, in writing, determine a scheme for the making of payments to employers in relation to the provision of suitable civilian work to eligible ADF members. The Scheme—and any subsequent variation or revocation—must be approved by the Minister to take effect. Once a determination by the MRCC to form, vary or revoke a scheme has been approved by the Minister, it will be a legislative instrument made by the Minister on the day on which it was approved. This will be subject to disallowance in Parliament. Item 3 inserts proposed paragraph 423(ba) to provide that the Consolidated Revenue Fund is appropriated for payments made under this Scheme.

Items 4 and 5 amend the VEA to explicitly accommodate the Employer Incentive Scheme as part of the VVRS. Section 115B of the VEA provides for the making of the VVRS, with subsection 115B(5) setting out the types of matters which may be provided for within the VVRS. Item 4 inserts proposed paragraph 115B(5)(h) into the VEA

38. Clause 2, table items 6 and 7.
40. Ibid.
41. That is, a Permanent Forces member or continuous full-time Reservist, part-time Reservist, cadet, declared member or former member who is incapacitated for service or work as a result of a service injury or disease for which the MRCC has accepted liability (sections 61 and 62).
42. Item 2 of Schedule 4, proposed subsections 62A(2), (3) and (4).
43. Item 2 of Schedule 4, proposed subsection 62A(5).
to expressly provide that this includes the payment of financial assistance to specified employers in respect of the provision of employment to veterans. Item 5 inserts proposed paragraph 199(da) to specify that the Consolidated Revenue Fund is appropriated to the extent necessary for payments under the VVRS.

Part 2 of Schedule 4 contains amendments contingent on the enactment of the DRCA. Item 6 inserts proposed section 40A into the DRCA, in equivalent terms to proposed section 62A of the MRCA and provides for the determination of an employer payment scheme by the MRCC. Item 7 inserts proposed subsection 160(1A) to provide that the Consolidated Revenue Fund is appropriated for the purposes of making payments under this scheme.

Stakeholder comments
The submission to the FADT Committee by the Alliance of Defence Service Organisations (ADSO) sets out the harm to be remedied by the amendment:

The provisions of s. 62 MRCA 2004 are silent on any incentive scheme for employers to employ veterans. The provisions of s. 62 clearly indicate that it falls to a veteran’s rehabilitation authority to make reasonable attempts to find suitable civilian work for the member concerned. This is not always successful and places a rehabilitation authority in the invidious position of being unable to offer any potential employer any form of incentive to employ an injured veteran.

ADSO contends the addition of new s. 62A will substantially redress this imbalance ... 44

The RSL also supported the amendment but added a note of caution:

... like any government payments they can be open to abuse. The amendment must ensure that the payment of wage subsidies is to those employers who are genuinely willing and able to offer injured veterans suitable, sustainable, productive and long term employment. 45

Schedule 5—disclosure of information

Quick guide to Schedule 5
The provisions in Schedule 5 to the Bill relate to the disclosure of information. In particular they amend the MRCA and DRCA to allow for information sharing between the MRCC and the Commonwealth Superannuation Corporation.

Commencement
The provisions in Part 1 of Schedule 5 to the Bill commence on the day after Royal Assent. Part 2 of Schedule 5 to the Bill is contingent on the DRCA coming into effect, and commences on the later of:

• the day after Royal Assent or
• immediately after the commencement of Part 2 of Schedule 1 of the DRCA. 46

Background
The calculation of incapacity payments under military compensation laws takes into account superannuation entitlements. The Explanatory Memorandum notes that although the MRCC is authorised to request information from the Commonwealth Superannuation Corporation (CSC) to assist with the calculation of incapacity payments, there is no reciprocal provision enabling the MRCC to provide information to the CSC to assist the assessment of superannuation benefits. 47 As a result, the CSC must request information from the MRCC in accordance with the Freedom of Information Act 1982 (Cth). 48

44. Alliance of Defence Service Organisations (ADSO), Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 [provisions], 5 May 2017, p. 7.
45. RSL, Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 [provisions], op. cit., p. 7.
46. Clause 2, table items 8 and 9.
48. Ibid., p. 21.
The Review of military compensation arrangements (2011), conducted by a six-member Steering Committee chaired by the Chair of the MRCC and Secretary of DVA, Ian Campbell, recommended further consideration of the scope for streamlining the administration of superannuation and compensation invalidity and death benefits, including through the consolidation of service delivery. The Government accepted the recommendation, noting:

... the legislative and administrative responsibilities of both ComSuper and DVA are unique and complex and there are interactions between the benefits paid by both agencies. This consideration, across government, provides the mechanism to scope opportunities for streamlining the administration of superannuation and compensation invalidity and death benefits ...

**Key provisions**

**Main amendments**

Subsection 409(2) of the MRCA sets out in table form the persons to whom and the purpose for which the MRCC, or a staff member assisting the MRCC, can disclose information obtained in the performance of his or her duties under the Act. This currently permits the giving of information to an employee of the Defence Department or the Chief of the Defence Force for specified purposes, or to a person or agency as prescribed by the regulations. Item 1 amends this subsection by inserting table item 2A into subsection 409(2) to allow the disclosure of information to the CSC, for purposes relating to the exercise of the Corporation’s functions or powers under an Act—or instrument under an Act—administered by CSC. Item 2 defines Act administered by CSC to have the meaning given by the Governance of Australian Government Superannuation Schemes Act 2011 (Cth).

Item 3 is an application provision stating that these amendments to the MRCA apply in relation to the provision of information on or after the commencement of these amendments, whether the information was obtained before, on or after this date.

**Contingent amendments**

Items 4 to 6 make amendments to section 151A of the DRCA, contingent on that Act’s enactment. These changes largely mirror those made to the MRCA, as discussed above, and allow the MRCC (or a staff member assisting the MRCC) to give information obtained in the performance of its duties under the DRCA to the CSC, for a purpose relating to the CSC’s functions and powers under Acts (and instruments made under Acts) administered by the CSC. Item 4 also restructures existing subsection 151A(1) into a table ‘to aid readability and improve clarity’.

Item 7 is an application provision stating that the proposed changes to the DRCA will apply in relation to the provision of information on or after the commencement of these amendments, regardless of when the information was obtained.

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49. DVA, Review of military compensation arrangements: report to the Minister for Veterans’ Affairs, volume 1, DVA, Canberra, February 2011, p. 50 (recommendation 12.5).
51. Section 4 of the Governance of Australian Government Superannuation Schemes Act 2011 (Cth) defines Act administered by CSC to mean:
   (a) the Defence Act 1903, to the extent that the Act deals with superannuation benefit in Part IIIAA;
   (b) the Defence Force Retirement and Death Benefits Act 1973; or
   (c) the Defence Forces Retirement Benefits Act 1948; or
   (d) the Military Superannuation and Benefits Act 1991; or
   (da) the Australian Defence Force Superannuation Act 2015; or
   (db) the Australian Defence Force Cover Act 2015; or
   (e) the Papua New Guinea (Staffing Assistance) Act 1973, to the extent that the Act deals with superannuation; or
   (f) the Superannuation Act 1922; or
   (g) the Superannuation Act 1976; or
   (h) the Superannuation Act 1990; or
   (i) the Superannuation Act 2005.
Stakeholder views

In its submission to the Senate inquiry, the Commonwealth Ombudsman expressed support for the proposed amendments. It reported that current limitations on information sharing were in some circumstances leading to overpayments, due to difficulties in determining the extent to which superannuation payments would affect a DVA entitlement:

This office has investigated a number of complaints about debt recovery which have involved debts being raised by DVA as a result of delays in receiving information from CSC that was critical to the determination of the relevant entitlement.

(...) Given the vulnerabilities of many DVA customers, debts not only have a significant financial impact but can exacerbate serious mental health issues. Therefore, the formalisation of data sharing between CSC and DVA should reduce the risk of overpayments linked to the delay or omission of superannuation related evidence.53

The ADSO, while supporting the amendment in principle, raised concerns about the expansion of information-sharing arrangements in light of issues surrounding the Department of Human Services’ data-matching programme, and incidents involving the accidental releases of private information.54 It stated that it was unconvinced that sufficient checks and balances had been put in place to ensure the integrity of the electronic data on DVA and Defence servers—and those of the Government more broadly.55 ASDO and the Office of the Australian Information Commissioner both raised concerns that a Privacy Impact Assessment of the proposed amendments does not appear to have been undertaken.56

Schedule 6—delegation

Quick guide to Schedule 6

The provisions in Schedule 6 of the Bill relate to the power of the Minister for Veterans’ Affairs to delegate any of his, or her, functions or powers. In particular, the delegation of the Minister’s power will be extended to:

• a Commissioner of the MRCC or
• a person appointed or engaged under the Public Service Act 1999.

Commencement

The provisions in Schedule 6 to the Bill commence on the day after Royal Assent.57

Key provisions

Item 1 of Schedule 6 to the Bill makes a single amendment to the MRCA, inserting proposed section 437A. This allows the Minister for Veterans’ Affairs to delegate any of his, or her, functions or powers under the Act, associated regulations and legislative instruments, to:

• a commissioner of the MRCC or
• a federal public servant—that is, a person appointed or engaged under the Public Service Act 1999 (Cth).

The Explanatory Memorandum notes that a Ministerial delegation provision is already contained in the VEA, and that the MRCA currently provides for the delegation of the powers and functions of the MRCC.58 It explains that 2014 departmental efficiency reforms led to the appointment of a Chief Operating Officer (COO) in DVA who has assumed some of the powers and functions of the MRCC and Repatriation Commission under delegation. A

54. ADSO, Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 [provisions], op. cit., pp. 8–9.
55. Ibid., p. 9.
56. Ibid., p. 10; Office of the Australian Information Commissioner, Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 [provisions], 8 May 2017, p. 2.
57. Clause 2, table item 10.
further envisioned administrative reform was the delegation to the COO of the Minister’s power to approve certain instruments made by the Commissions—specifically, variations to the Treatment Principles and Pharmaceutical Benefits schemes under sections 90 and 91 of the VEA, and section 286 of the MRCA. The power of the Minister to approve such variations under the VEA was delegated to the COO in 2014. 59

The Explanatory Memorandum states that should the proposed amendments take effect, the proposed initial delegation of the Minister’s powers under the MRCA will be limited to the approval of MRCC determinations in relation to variations to and the revocation of:

- the MRCA Education and Training Scheme (section 258) and
- the Treatment Principles and MRCA Pharmaceutical Benefits Scheme (section 286). 60

Scrutiny of Bills Committee

Proposed section 437A places no limitations on the Minister’s delegation powers. The Scrutiny of Bills Committee has expressed concern about the scope of the provision, noting that it allows for the delegation of powers to a public servant at any level and in any government department:

Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated, or on the categories of people to whom those powers might be delegated. The committee’s preference is that delegates by confined to the holders of nominated officers or to members of the Senior Executive Service ...

The explanatory materials do not explain why it is necessary to provide for such a broad delegation to a person of any level of the public service. 61

Schedule 7—legislative instruments and external material

Quick guide to Schedule 7

The provisions in Schedule 7 to the Bill relate to legislative instruments and external material. The proposed amendments to the VEA and MRCA will operate to expressly provide that a number of specified instruments may incorporate external materials ‘as in force or existing from time to time’. This will allow any changes to such materials to be automatically incorporated into the relevant instrument. Other changes largely work to clarify the language and structure of relevant provisions.

Commencement

The provisions in Schedule 7 to the Bill commence on the day after Royal Assent. 62

Background

The amendments in Schedule 7 to the Bill propose exempting certain legislative instruments from the operation of subsection 14(2) of the Legislation Act 2003 (Cth). This provides:

Unless the contrary intention appears, the legislative instrument or notifiable instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. 63

The effect of this provision is that as a general rule, a federal legislative instrument incorporating external materials such as standards, codes of conduct or manuals will incorporate such materials only as they exist at the point in time when the instrument is made. Any subsequent changes to the external material will only be

59. Ibid.
60. Ibid., p. 26.
63. Legislation Act 2003 (Cth), subsection 14(2).
incorporated if the legislative instrument is also amended. However, this principle will be overruled where the empowering Act expressly authorises otherwise.

In *Delegated Legislation in Australia*, Dennis Pearce and Stephen Argument explain the rationale for the general principle against the incorporation of materials as amended from time to time:

> It is suggested that provisions in delegated legislation incorporating other material on a from time to time basis are undesirable, as not only may members of the public be subjected to the problem of going to another source before being able to identify the law on a topic, but also they will be unsure to which particular instrument they should go as there is, of course, no obligation on other organisations to publish their instruments as amended from time to time.

**Scrutiny of Bills Committee**

The Scrutiny of Bills Committee has raised similar concerns in regards to the proposed amendments made by Schedule 7 to the Bill, noting that the incorporation of legislative provisions by reference to other documents can create uncertainty in the law; restrict the public’s access to the contents and terms of a particular law (particularly where the external materials are not publicly available); and raise the prospect of changes being made to the law in the absence of Parliamentary scrutiny. The Committee cites the June 2016 report of the Western Australian Joint Standing Committee on Delegated Legislation on *Access to Australian Standards adopted in delegated legislation*. In the report, the WA Committee focuses in particular on problems associated with delegated legislation incorporating standards to which public access is limited, due to the existence of copyright and licence terms, and recommends that any such standards should be supplied on request free of charge by the relevant department or agency. In regards to the adoption of Standards ‘as made from time to time’, the WA Committee notes:

> This is extremely convenient for the makers of the instrument, in that the regulations or local law need not be re-produced each time the Standard is updated or rewritten. Unfortunately, it also means that only the version of the Standard as it exists at the time the legislation is made is subjected to any sort of parliamentary scrutiny – when it is later amended or reproduced, it is effectively the private standard making body that is making law. It amounts to a sub-delegation of the delegation to make the instrument, albeit a lawful one. In some circumstances, an abdication perhaps.

**Rationale for the amendments**

The Explanatory Memorandum to the Bill states that the proposed amendments will address problems with the current situation in which a policy-driven change to an incorporated document (for example, the inclusion of a newly-available rehabilitation appliance) cannot take effect until the incorporating legislative instrument is amended to refer to the updated version of the document. It identifies four ‘substantial legislative instruments’ to which the amendments will apply:

- the Treatment Principles made under section 90 of the VEA
- the Treatment Principles made under section 286 of the MRCA
- the Repatriation Pharmaceutical Benefits Scheme (RPBS) made under section 91 of the VEA and
- the MRCA Pharmaceutical Benefits Scheme (MPBS) made under section 286 of the MRCA.

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65. Ibid.; it should be noted that the approach to this issue varies under state and territory legislation—for more information, see: D Pearce and S Argument, *Delegated Legislation in Australia*, op. cit., pp. 383–384.
66. Ibid., p. 384.
69. Ibid., p. 67 (Recommendation 3).
70. Ibid., p. 19.
71. Explanatory Memorandum, Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017, op. cit., p. 27.
The Explanatory Memorandum states that both sets of Treatment Principles incorporate approximately thirty non-legislative documents and the RPBS and MPBS each incorporate eleven non-legislative instruments. These include:

- non-legislative instruments made by DVA and the Department of Health, such as Fee Schedules and the Rehabilitation Appliance Program National Schedule of Equipment and
- reference documents such as the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5) and *Pharmacopoeia*, published by the US and UK Governments and the European Union.

The Scrutiny of Bills Committee has noted that in reference to this second category of materials, it is not clear whether all such documents will be freely available. The Committee has requested the Minister’s advice as to:

- the availability of documents in this category, and whether arrangements can be made to ensure such documents are freely and readily available to the public and
- whether a legislative provision could be included to require each incorporated document which has been prepared by DVA to be made freely available on the Department’s website.

**Key provisions**

**Amendments to the MRCA**

Section 286 of the *MRCA* enables the MRCC to make a written determination regarding the provision of treatment and pharmaceutical benefits under the Act. Schedule 7 amends both the structure and content of the provision, inserting new definitions of the types of determinations which can be made under the section and specifying that such determinations may incorporate external materials as they are amended from time to time.

The changes made to section 286 provide a useful example of the effect of other amendments made by Schedule 7.

**Changes to structure — not content**

*Item 10* repeals subsections 286(2) to (6) and substitutes proposed subsections 286(2) to (6B) of the *MRCA*. The majority of these proposed amendments vary the structure of the section but do not make substantive changes. For example, proposed subsection 286(2) provides that a determination made by the MRCC under subsection 286(1) has no effect unless the Minister approves it in writing. Proposed subsections 286(5) and (6) state that the MRCC may vary or revoke a determination made under the section, and that this will only have effect if approved by the Minister in writing. Together, these amendments replicate the content of existing subsections 286(2) and (3). Proposed subsection 286(6A) states that an approved determination is a legislative instrument made by the Minister on the day on which it is approved. This is currently provided for under subsections 286(4) and (5).

**Changes to content**

There have, however, been some changes to the content of section 286. First, proposed subsections 286(3) and (4) draw a new distinction between the two types of determinations which may be made under this section:

- proposed subsection 286(3) defines *pharmaceutical benefits determination* as a determination made in relation to paragraph 286(1)(c)—that is, a determination about the places and circumstances in which, and conditions subject to which, pharmaceutical benefits may be provided under the *MRCA*—approved by the Minister and as in force from time to time
- proposed subsection 286(4) defines *treatment determination* to mean any other determination made under subsection 286(1), approved by the Minister and as in force from time to time.

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72. Ibid., p. 28.
73. Ibid., p. 28.
75. *Item 7* inserts definitions of *pharmaceutical benefits determination* and *treatment determination* into subsection 5(1).
Second, **proposed subsection 286(6B)** provides that despite subsection 14(2) of the *Legislation Act*, a determination under **proposed subsections 286(1) or (5)** may apply, adopt or incorporate—with or without modification—any matter contained in an instrument or other writing as in force or existing from time to time.\(^{76}\)

Third, subsection 286(6) currently provides that the MRCC must make copies of all determinations under this section publicly available on the internet. This is not preserved in the proposed amendments, and the Explanatory Memorandum does not note or explain this omission. However, all approved determinations under section 286 are disallowable legislative instruments, and therefore subject to the registration and tabling requirements under the *Legislation Act*.\(^{77}\) As all material registered on the Federal Register of Legislation must be made publicly available online, the omission of existing subsection 286(6) does not appear to have substantive effect.\(^{78}\)

**Amendments to the VEA**

The Schedule makes a large number of changes to the *VEA*. Minor amendments include:

- the repeal and replacement of terms in the dictionary in subsection 5Q(1) relevant to the other changes to the Act\(^{79}\) and other consequential changes to terminology\(^{80}\)
- amendments to various provisions relating to the making of written determinations by the Repatriation Commission. These are largely similar to the type of amendments made to the *MRCA*, as described above, and include:
  - minor amendments to terminology—for example, the replacement of references to the ‘Guide to the Assessment of Rates of Veterans’ Pensions’ with the defined term *Approved Guide to the Assessment of Rates of Veterans’ Pensions* (section 29)\(^{81}\) and
  - structural amendments which do not have substantive effect—for example, **items 79 to 84** amend section 115B which provides for the Veterans’ Vocational Rehabilitation Scheme. These changes are structural in nature and do not alter the content of the section.

The Schedule also inserts ‘incorporation provisions’ into the *VEA*, similar to **proposed subsection 286(6B)** of the *MRCA*, which provide that despite subsection 14(2) of the *Legislation Act*, a determination made under the relevant provision may apply, adopt or incorporate any matter contained in an instrument or other writing as in force or existing from time to time. These are inserted in relation to the following determinations:

- an *Approved Guide to the Assessment of Rates of Veterans’ Pensions* (section 29)\(^{82}\)
- **Treatment Principles** (section 90)\(^{83}\)
- **Repatriation Private Patient Principles** (section 90A)\(^{84}\) and
- **a Repatriation Pharmaceutical Benefits Scheme** (section 91).\(^{85}\)

**Amendments to the British Nuclear Tests Act**

**Items 1 to 5 of Schedule 7 to the Bill** make consequential amendments to the *British Nuclear Tests Act* to reflect the changes made to section 91 of the *VEA*. These involve replacing references to an ‘approved pharmaceutical
scheme’ with the term Repatriation Pharmaceutical Benefits Scheme, and inserting a definition of this term into the Act.

**Schedule 8—minor amendments**

**Quick guide to Schedule 8**

The provisions of Schedule 8 to the Bill make minor amendments to a number of statutes. In particular they repeal redundant and spent provisions administered in the Veterans’ Affairs portfolio concerning benefits that are no longer payable and make amendments consequential to those repeals.

**Commencement**

The provisions in Schedule 8 to the Bill commence on the day after Royal Assent.\(^86\)

**Key provisions**

Schedule 8 makes minor amendments to various Acts. These include:

- the removal of spent payments under the VEA and MRCA—specifically, the repeal of definitions and provisions relating to the clean energy advance, clean energy bonus and clean energy payment\(^87\)
- the removal of references to obsolete veterans’ payments in the Income Tax Assessment Act 1997 (Cth), Social Security Act 1991 (Cth) and Social Security (Administration) Act 1999 (Cth)\(^88\)
- replacing an incorrect reference to the ‘Commission’ with the ‘Minister’ under the VEA\(^89\) and
- amending delegation provisions of the VEA to provide further clarification that the Repatriation Commission and Secretary of DVA can delegate powers under a legislative instrument made under the VEA. Although this was already specified under subsections 213(1) and 214(1) of the VEA, the amendments insert additional references to legislative instruments in subsections 213(2) and (4) (in relation to delegations by the Commission), and subsections 214(2) and (4) (in relation to delegations by the Secretary).\(^90\)

**Concluding comments**

Many of the amendments in this Bill are minor in nature, but that is not uniformly the case.

The amendment in Schedule 1 which will allow the principal member of the VRB to dismiss an application for review if satisfied that the application is frivolous, vexatious, misconceived or lacking in substance; or has no reasonable prospect of success; or is otherwise an abuse of process of the board has been the subject of some stakeholder angst. Importantly, stakeholders such as the RSL have cautioned that the amendment might cause some members of the veterans’ community to feel that they are being denied access to justice.

The amendments in Schedule 5 which will allow for information sharing between the MRCC and the Commonwealth Superannuation Corporation were welcomed by the Commonwealth Ombudsman. However the Alliance of Defence Service Organisations expressed its concern at the ‘declining level of trust in secure electronic storage’ and noted the ‘suspicion of any government initiatives involving information sharing between government agencies’.\(^91\) The ADSO was less open to the terms of these amendments because of its continuing concerns on behalf of its members about breaches of privacy.

Finally, the amendments in Schedule 7 which were the subject of little stakeholder comment are of some concern. According to DVA the amendments, which are designed to exempt certain legislative instruments from

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\(^{86}\) Clause 2, table item 10.

\(^{87}\) Items 1 to 10 (in relation to the VEA) and Items 20 to 25 (in relation to the MRCA).

\(^{88}\) Items 11 to 18, 26.

\(^{89}\) Item 28.

\(^{90}\) Items 30 to 33.

\(^{91}\) ADSO, Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Veterans’ Affairs Legislation Amendment (Omnibus) Bill 2017 [provisions], op. cit., p. 8.
subsection 14(2) of the *Legislation Act*, address ‘significant administration issues for the Department’. In its submission to the FADT Committee, the Department highlighted the positives of such a move:

The benefit to DVA clients is that, as new aids and appliances are added to the RAP schedule or new medications are added to the pharmaceutical benefits schemes for example, they will be available to clients straight away. Currently, because of the need to amend the legislative instruments to take account of changes to incorporated documents, there can be a delay of 3–6 months before new aids, appliances or medications are available to DVA clients.

Whilst this is correct, there is also a downside. At the moment there is a clear signal that the incorporated documents have changed—this is given by the tabling in Parliament of the relevant legislative instruments. In the absence of the tabling, DVA clients and their advocates may have some difficulty in identifying the correct version of an incorporated document and determining the time from which it applies.