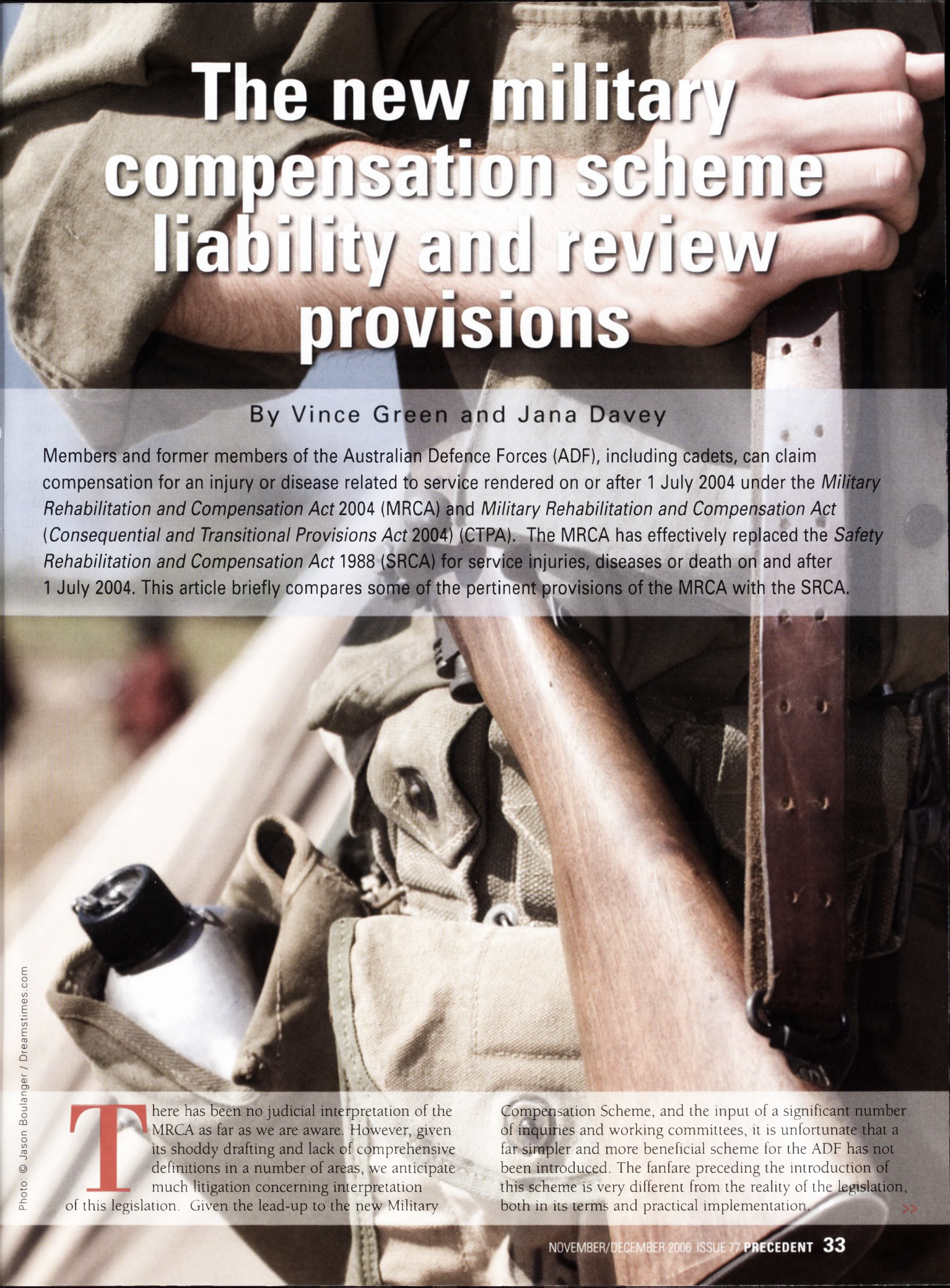
The new military compensation scheme liability and review provisions

By Vince Green and Jana Davey

Members and former members of the Australian Defence Forces (ADF), including cadets, can claim compensation for an injury or disease related to service rendered on or after 1 July 2004 under the *Military Rehabilitation and Compensation Act* 2004 (MRCA) and *Military Rehabilitation and Compensation Act* (*Consequential and Transitional Provisions Act* 2004) (CTPA). The MRCA has effectively replaced the *Safety Rehabilitation and Compensation Act* 1988 (SRCA) for service injuries, diseases or death on and after 1 July 2004. This article briefly compares some of the pertinent provisions of the MRCA with the SRCA.



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There has been no judicial interpretation of the MRCA as far as we are aware. However, given its shoddy drafting and lack of comprehensive definitions in a number of areas, we anticipate much litigation concerning interpretation of this legislation. Given the lead-up to the new Military Compensation Scheme, and the input of a significant number of inquiries and working committees, it is unfortunate that a far simpler and more beneficial scheme for the ADF has not been introduced. The fanfare preceding the introduction of this scheme is very different from the reality of the legislation, both in its terms and practical implementation. >>

BACKGROUND

Eligibility for 'defence service' under the *Veterans' Entitlements Act* (VEA), which was enacted in 1986, was to continue only until the establishment of a new Military Compensation Scheme. The ADF made some specific amendments to the SRCA in 1994 to establish the Military Compensation Scheme and the government made some minor adjustments to the Scheme after the Blackhawk helicopter disaster. Defence Determination 2000/2001 effectively provides additional compensation to that provided by the SRCA for those who suffer an injury that results in death or severe impairment on or after 10 June 1997.

In the second reading speech to the Bill of the MRCA on 4 December 2003, the Minister for Veterans Affairs stated:

> 'The Military Rehabilitation and Compensation Bill and the associated Transitional and Consequential Provisions Bill are proof of this Government's commitment to a *military-specific rehabilitation and compensation scheme* that will meet the needs of all Australian Defence Force members and their families in the event of an injury, disease or death in the service of our nation.' [our emphasis]

Laudatory words that are not reflected in the Act. Apart from a few military-specific incapacity-for-work provisions, and subject to what follows, it is unclear how the Act produces a 'military-specific' scheme.

STATEMENT OF PRINCIPLES

The most important elements introduced into the MRCA are the new liability provisions that connect injury, disease or death with 'service'; in particular, the statement of principles (SOPs)[1] that apply to liability connections in ss27 and 28 of the Act.

The SOPs are imported from the VEA which, in effect, provided a new mechanism to regulate medical and scientific evidence that connects an injury to service life. The SOPs are applied by the Repatriation Medical Authority.

The introduction of the SOPs into the MRCA meant that, for the first time, all ADF members must face an additional hurdle to getting an admission of liability. Previously, only those ADF members who wished to claim under the VEA had to meet SOPs. However, the SRCA was always available as an alternative non-SOP regime. The result of the MRCA was certainly a more 'military-specific' scheme in that ADF members were removed from the more beneficial liability regime of the SRCA. The SOPs make obtaining an admission of liability far more difficult than under the SRCA and no other Commonwealth public servant has to meet their requirements, save for ADF members.

The MRCA claimant must identify the relevant SOP for the injury or disease and demonstrate that s/he satisfies one or more of the factors listed within that statement.

Generally speaking, there are two statements for each condition reflecting the two standards of proof under the MRCA. The more beneficial reasonable hypothesis[2] test is applied to those who attribute their injury or disease to warlike or non-warlike service. The higher standard, balance of probabilities,[3] is applicable to peacetime service.

The large body of case law under the VEA in relation to the interpretation of the standards of proof means that the legal position, as it applies to the facts in any particular case, is by no means always certain.[4]

The use of SOPs could lead to a harsh and absurd compensation outcome. For instance, an ADF member subject to the MRCA is moving a piece of furniture at work at Russell HQ in Canberra, with the assistance of a civilian Commonwealth public servant. An accident while lifting the furniture produces identical injuries to both workers' backs. The Commonwealth public servant would have little difficulty establishing that his/her injury arose out of and in the course of employment, whereas the ADF member may find that s/he did not meet the relevant SOP applicable for the back injury under the MRCA. In other words, identical injuries may result in two diametrically opposed results, with one person receiving compensation and the other person not. The veterans' community and some others involved in the consultation process have sadly let down past, present and future members of the ADF in even countenancing the introduction of the SOPs into the MRCA. After all, the MRCA – insofar as it deals with peacetime injuries – should be the equivalent of the SRCA in the sense that it is a form of workers' compensation legislation. It should not make it more difficult for a person to obtain an admission of liability for a simple work-related accident.

Another simple example further illustrates the point. Soldier A is diagnosed with chondromalacia patellae (changes in knee cartilage), which he attributes to an incident where he fell during the course of his employment and struck his knee on a hard object. He recalls suffering pain in the affected area for approximately 18 hours subsequent to the incident, and submits his claim accordingly.

Soldier A's doctor states that the chondromalacia patellae was caused by the blow, and so his employment caused or materially contributed to his condition. Soldier A's claim for liability[5] should be accepted and he can apply for benefits, such as lump-sum compensation.[6]

If Soldier A's claim was being assessed under MRCA, the SOP[7] for chondromalacia patellae would apply. Where trauma such as a direct blow is the causal factor, the SOP requires *inter alia* the claimant to have experienced pain following the trauma for at least 24 hours. Because Soldier A suffered pain for only 18 hours, he would not satisfy the SOP and liability for his condition would be disallowed, but if he were covered by SRCA there would be absolutely no difficulty in establishing liability.

Review of SOP options is limited. Prepared by the Repatriation Medical Authority, SOPs may be appealed to the Specialist Medical Review Council, but it cannot consider any evidence in addition to that which was before the Repatriation Medical Authority. In addition, a claimant is unable to postpone a review (such as a review of a decision by the Veterans Review Board (VRB)) until the Council has completed its review.[8] In practice, the review process is slow, complex and ineffective.

DIFFERENT STANDARDS OF PROOF

Once a claimant under the MRCA satisfies the 'service

eligibility'[9] requirements, the claimant then needs also to identify whether the relevant service is warlike, non-warlike or peacetime, collectively referred to as 'defence service'.[10]

One could not argue with the application of different standards of proof depending on the type of service. One can understand generous provisions, such as the reasonable hypothesis test, to connect warlike and non-warlike service, but such generous provisions did not require the introduction of SOPs. Many claims have been successfully processed under the SRCA on the balance of probabilities test for injuries sustained during peacekeeping or hazardous operations without the need for SOPs. The bulk of military compensation claims arise during peacetime service. In essence, these are simple workers' compensation claims, yet they have the added burden of having to satisfy SOPs.

In the actual drafting of the MRCA, the government has achieved a very uneasy reunion. It is clear that, in addition to amending and updating the SRCA, the legislation draws on many concepts used by the VEA 1986 – for example, the eligibility provisions and the impairment assessment system strongly reflect those of the VEA. Other provisions bear clear similarities to the SRCA. Some sections, such as the appeal provisions, have adopted review routes from both schemes. For those familiar with the SRCA, the MRCA represents a strange amalgamation of the SRCA and the VEA, and means that caselaw considering either (or both) pieces of legislation may be pertinent to a particular decision. This leads to an odd synthesis of new and old.

Once 'service' eligibility is established, consideration needs to be given to the relationship to service. Instead of the two familiar SRCA 'arising out of or in the course of employment' and 'material contribution' tests, the MRCA introduces a plethora of liability provisions,[11] which include:

- Occurrence: where the injury resulted from an occurrence while rendering service;
- Arose out of or was attributable to service:
- But for: if the injury or disease would not have been suffered or contracted but for the service rendered;
- Accident: while travelling to or from duty;
- Aggravated or materially contributed to by service; and
- Unintended consequence of medical treatment, see s29 MRCA.

An injury, disease or death is service-related if;

(a) it is related to defence service in the ways mentioned in ss27 and 28; or

(b) it resulted from certain treatment provided by the Commonwealth (see s29); or

(c) it is an aggravation of, or a material contribution to, a sign or symptom of the injury or disease that relates to defence service (see s30).

However, even if an injury, disease or death is a service injury or disease, the Commission might be prevented from accepting liability for the injury, disease or death by one of the exclusions under part IV of the MRCA. The five kinds of >>

exclusions relate to the following:

1. serious defaults or wilful acts, etc;
2. reasonable counselling about a person's performance as a member;
3. false representation;
4. travel during peacetime service;[12] and
5. the use of tobacco products.[13]

DEFINITIONS

'Disease' is defined in s5 of MRCA as:

'(a) any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development); or

(b) the recurrence of such an ailment, disorder, defect or morbid condition;

but does not include:

(c) the aggravation of such an ailment, disorder, defect or morbid condition; or

(d) a temporary departure from:

(i) the normal physiological state; or

(ii) the accepted ranges of physiological or biochemical measures;

that results from normal physiological stress (for example, the effect of exercise on blood pressure) or the temporary effect of extraneous agents (for example, the effect of alcohol on blood cholesterol levels).'

Whereas, under s4 of the SRCA, 'disease' is defined as:

'(a) any ailment suffered by an employee; or

(b) the aggravation of any such ailment;

being an ailment or an aggravation that was contributed to in a material degree by the employee's employment by the Commonwealth or a licensed corporation;'

'Aggravated injury or disease' is defined in the new scheme as:

'an injury or disease that is a service injury or disease because of paragraph 27(d), subs29(2) or s30 (aggravation, etc) (and only because of that paragraph, subsection or section).'

This definition of 'aggravation' is most unhelpful, which is defined in s4 of the SRCA as 'including acceleration or recurrence'. No such amplification exists in the MRCA. Similarly, the MRCA definition of 'disease' includes vague concepts such as 'normal physiological stress' and 'temporary departure from accepted ranges of physiological or biochemical measures' – whatever that may mean.

IMPAIRMENT ASSESSMENT UNDER THE MRCA

The *Comcare Guide to the Assessment of the Degree of Permanent Impairment* (the Comcare Guide) from SRCA has been replaced by a modified version of the impairment guide used under the VEA, known as the *Guide to the Assessment of Rates of Veterans' Pensions V Modified* (GARP V (M)).

Whereas the Comcare Guide was a mere 65 pages, the GARP V (M) stretches to a massive 232 pages. While it might be considered by some to be more comprehensive than the Comcare Guide, it is also far more complex and requires the use of a number of mathematical conversions or adjustments.

It is interesting to note that the GARP V (M) table used to assess functional lower limb impairment[14] allows pain experienced by the claimant to be taken into account by the doctor when assessing impairment. Under the equivalent Comcare table,[15] the issue of whether pain experienced by a claimant was relevant to the concept of 'difficulty' under Tables 9.4 and 9.5 has been a much litigated issue.[16]

REVIEW ROUTES UNDER THE MRCA – AN IMPORTANT ELECTION

When a primary decision is made by a MRCA delegate and the claimant is dissatisfied with it, two options are open for initial review.

The first is to apply to the VRB for a review.[17] A review application must be lodged within 12 months, and no extensions of time are permitted.

The second is to submit an application for reconsideration[18] to the Military Rehabilitation and Compensation Commission (MRCC). The application must be lodged within 30 days, although extensions of time are available at the discretion of the delegate, both before and after the expiration of the 30-day period.

If the claimant is not satisfied with the VRB or MRCC decision, the next step is to apply to the Administrative Appeals Tribunal for review.[19] From the VRB, application must be made within 3 months, but the Tribunal has the power to extend this for up to 12 months. From a MRCC review, application must be made within 60 days. Again, the Tribunal has the discretion to extend this time.

The vital point to note when advising a claimant as to which review path is preferable is that *no costs can be awarded by the Tribunal in appeals from the VRB*. By comparison, an award of party:party costs is available to a successful applicant from a MRCA reconsideration application.[20]

Further, as is the position under the VEA, legal practitioners cannot appear before the VRB when it is hearing a claimant's matter. This may be of some concern to claimants who wish to appear before the VRB, but do not wish to do so without the assistance of their legal practitioner.

REMOVAL OF RIGHT TO CLAIM FOR TOBACCO-RELATED DISEASES

Under the VEA, claimants who used tobacco products prior to 1 January 1998 or increased their use prior to that date and could link such use to their military employment, were entitled to claim for that tobacco-related disease.[21]

Similarly, liability would arise under the SRCA where claimants could establish that their use of tobacco products arose in the course of their employment, and that such use contributed in a material degree to their disease condition.[22]

However, illnesses or disease relating to tobacco use have been specifically excluded under the MRCA. Section 36 states, in effect, that if the only service-related cause of the disease is the use of tobacco products, then the Commission must not accept liability.

PERIODIC PAYMENTS OR LUMP SUM?

The MRCA introduces the concept of choosing periodic payments or lump-sum compensation for permanent impairment and non-economic loss:

'(3) The choice must be made in writing and must be given to the Commission within six months after the date on which the person received the notice.

(4) The Commission may, either before or after the end of that period, extend the period within which the choice must be made if it considers there are special circumstances for doing so.'[23]

CONCLUSION

The words 'military-specific compensation scheme' in the Minister's second reading speech, which were intended to meet the needs of all ADF members and their families, ring somewhat hollow. The rehabilitation and compensation benefits provided by MRCA are available for those who suffer a service injury or disease. If the ADF member cannot satisfy the relevant SOP for the service injury, then liability will not be accepted and no compensation available. ADF members are consequently far worse off from a liability point of view than they were under SRCA. MRCA is just another example of government attenuation of the rights of injured persons. No liability acceptance, of course, means no ongoing compensation for medical treatment for the injury after discharge from the ADF. ■

Notes: **1** Sections 335–41 of the MRCA. **2** See s335(1) and (2) of the MRCA regarding the 'reasonable hypothesis' or 'beyond reasonable doubt' test. **3** See s335(3) of the MRCA regarding the 'reasonable satisfaction' or 'balance of probabilities' test. **4** See *Repatriation Commission v Deledio* (1988) 83 FCR 82, 96, where the full Federal Court held, in effect, when considering ss120 and 120A of VEA that, for the connection between injury or disease and the requisite service to be established, the material before the decision-maker has to raise or point to an hypothesis that fits the template of the applicable SOP as set out by the full Federal Court in *Repatriation Commission v Hill* (2002) 69 ALD 581. The reasoning of the full Federal Court in *Deledio, Hill*, and like cases, will no doubt be applied to SOPs under the MRCA, raising the question as to why such a complex and debated standard was employed. **5** See ss4, 7 and 14 of the SRCA. **6** See ss24 and 27 of the SRCA. **7** See SOPs concerning chondromalacia patellae Instrument No. 24 of 2001, as amended by Instrument No. 27 of 2005. **8** *Beale v AAT* (1998) and *McMillan v Repatriation Commission* (1998). **9** Chapter 1 of the MRCA. **10** Section 6.1.d of the MRCA. **11** See ss27, 28 and 29 of the MRCA. **12** Section 35 of the MRCA needs to be compared with s6 of the SRCA. **13** ADF members are now worse off under MRCA in relation to injury, disease or death flowing only from the use of tobacco products. The use of the word 'only' in the penultimate line of s36 dealing with tobacco exclusions will, we think, be a fruitful source litigation. We can only wait to see how this is interpreted. **14** Table 3.2.2. **15** Table 9.5. **16** See, for example, the full Federal Court decision of *Comcare v Fiedler* (2001) 115 FCR 328. **17** Section 352 of the MRCA. **18** Section 349 of the MRCA. **19** Chapter 8, Part 5 of the MRCA. **20** Chapter 8, Part 5 of the MRCA. **21** Sections 9(7) and 70(9A) of the VEA. **22** Sections 4, 7 and 14 of the SRCA. **23** Section 78, subsections (3) and (4) MRCA.

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