

Military Rehabilitation and Compensation Regulations 2004 2004 No. 156

EXPLANATORY STATEMENT

STATUTORY RULES 2004 NO. 156

Issued by the Minister for Veterans' Affairs

Military Rehabilitation and Compensation Act 2004

Military Rehabilitation and Compensation Regulations 2004

The *Military Rehabilitation and Compensation Act 2004* (the Act) received Royal Assent on 27 April 2004. The Act provides for compensation and other benefits to be provided for current and former members of the Defence Force who suffer a service injury or disease. The Act also provides for compensation and other benefits to be provided for the dependants of some deceased members.

Section 440 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, the regulations are made pursuant to the provisions listed in Attachment A. Section 440 of the Act will take effect from 1 July 2004.

The purpose of the proposed Regulations is to provide for the calculation of compensation in relation to cadets and declared members. Declared members include persons who hold honorary ranks in the Australian Defence Force, persons who are on Career Transition Assistance under an arrangement made by the Australian Defence Force and members of approved philanthropic organisations serving the Defence Force. The proposed Regulations would also provide for the interaction of the Act with the *Veterans' Entitlements Regulations 1986*.

Details of the Regulations are set out in Attachment B.

The Act specifies no conditions that need to be met before the power to make the Regulations may be exercised.

Subsection 4(1) and 4(2A) of the *Acts Interpretation Act 1901* read together, provide that regulations may be made between the passing and commencement of legislation upon which they rely for their authority, as long as such regulations do not commence before that legislation.

The regulations commence on 1 July 2004.

ATTACHMENT A

Details of other relevant legislative provisions in the Act used to make the *Military Rehabilitation and Compensation Regulations 2004*

- Section 116 - provides that the regulations may prescribe one or more methods of working out the normal and actual earnings for persons who are cadets or declared members. Item 6 of the table to subsection 89(3) provides that the regulations set out the meanings for actual and normal earnings for a cadet or a declared member.
- Section 175 - provides that the regulations may prescribe methods for working out normal earnings, actual earnings and normal weekly hours for persons who were cadets and declared members. Item 7 of the table in subsection 132(2) of the Act provides that the regulations set out the definition of normal earnings and normal weekly hours for former cadets or declared members.
- Section 196 - applies to working out the amount of compensation the Commonwealth is liable to pay under Part 3 or 4 of Chapter 4 of the Act if a person is only entitled to compensation for part of a week and not a whole week.
- Subsection 439(1) - provides that the regulations may provide for how Chapter 2 and Parts 3 and 4 apply in respect of cadets and declared members.

ATTACHMENT B

Details of the *Military Rehabilitation and Compensation Regulations 2004*

Part 1 Preliminary

Regulation 1 This regulation provides that these regulations are to be cited as the *Military Rehabilitation and Compensation Regulations 2004*.

Regulation 2 This regulation provides that these regulations commence on 1 July 2004.

Regulation 3 This regulation contains definitions relevant to the regulations.

In subregulation 3(1) *Act* is defined to mean the *Military Rehabilitation and Compensation Act 2004* (the Act) and *remunerated cadet* is defined to mean an Officer of Cadets or an Instructor of Cadets, who is remunerated for his or her service as a cadet.

Subregulation 3(2) provides that a reference to a person undertaking a period of career transition assistance means a person, who under subsection 8(1) of the Act, is taken to be a member by reason of undertaking Career Transition Assistance under an arrangement made by the Australian Defence Force.

Part 2 Matters relating to cadets

The Act provides compensation coverage to a "member" and a "former member" as defined in section 5 including current and former cadets and declared members.

Section 5 defines a "cadet" to mean "a member of the Australian Defence Force Cadets" and "Australian Defence Force Cadets" is further defined in section 5 to mean:

- (a) the Australian Navy Cadets established by the *Naval Defence Act 1910*;
- (b) the Australian Army Cadets established by the *Defence Act 1903*; and
- (c) the Australian Air Force Cadets established by the *Air Force Act 1923*.

The Australian Defence Force Cadets (ADF Cadets) is a community based, youth development program, sponsored primarily by the Australian Defence Organisation. The Defence Service Chiefs exercise command and are responsible for their respective Cadet Corps organisations. The day-to-day management and administration of the Australian Navy Cadets (ANC), the Australian Air Force Cadets (AAFC) and the Australian Army Cadets (AAC) is largely through the voluntary effort of state-based regional Cadet organisations.

The ADF Cadets program is aimed at youth between the ages of 12 ½ and 20 and is conducted in a military context in Defence locations, schools and other community settings. ADF Cadets participate in a range of activities designed to encourage self-confidence, leadership and team building skills. The individual Cadet Organisations conduct activities that reflect the focus of their parent service. ANC Cadets learn seamanship skills including navigation, marine sciences and how to sail. AAC Cadets learn about field craft, map reading, compass navigation, people management and bush survival skills. AAFC Cadets learn about aircraft, aviation, how to fly a glider and powered aircraft and parachuting. Currently, there are approximately 27,000 Cadets and Staff in over 480 ADF Cadet units in every State and Territory of Australia.

Defence Service Chiefs appoint suitable adult volunteers as ADF Cadet Officers of Cadets (OOCs) and Instructors of Cadets (IOCs) to supervise and control the training program for, and the activities of ADF Cadets. A person may not be appointed an OOC unless they have attained 19

years of age. A person may not be appointed an IOC unless they have attained 18 years of age. Properly appointed OOCs and IOCs are paid a Cadet Force Allowance based upon the equivalent service rank.

Cadets are not members of the "Defence Force" as defined in section 5 of the Act, however some Officers and Instructors may also be serving as Reservists or as members of the Permanent Forces at other times.

Division 1 Interpretation for Part 2

Regulation 4 Interpretation - in this Part a reference to a person who is in casual work means a person who is employed on a casual or irregular basis; and is 16 years or over.

Division 2 Working out compensation for serving cadets

Regulation 5 This regulation is made for the purposes of section 116 of the Act. It applies to working out normal and actual earnings of cadets engaged in paid civilian work at the time of incapacity.

If the cadet is incapacitated for work, was injured during a period of cadet service, was engaged in paid civilian work at the time of the incapacity and is not a person who is unable to continue full-time studies or enter the workforce as a result of the incapacity, the civilian component of the cadet's normal earnings will be assessed on the basis of that paid civilian work. If the cadet is a remunerated cadet (an OOC or an IOC) or also a member of the Permanent Forces or the Reserves, then any cadet pay or ADF pay earned by the cadet will also be taken into account as part of the cadet's normal earnings.

If the cadet was in paid civilian work which was casual work and has turned 16, the civilian component of the cadet's normal earnings will be determined by the Commission having regard to the cadet's qualifications, skills and expertise if he or she satisfies the criteria for Regulation 6.

If the assessment of normal earnings under Regulation 5 was less than the federal minimum wage applicable to the person, the normal earnings will be adjusted to the federal minimum wage in accordance with section 179 of the Act.

Actual earnings will also be assessed having regard to any civilian, cadet or ADF pay actually earned by the cadet.

Example: Ben, a cadet aged 17 works 4 days per week in part-time employment and earns \$125 per day. Because of an injury sustained while performing cadet duty, Ben is only able to work 2 days per week in his part-time employment. Ben's normal earnings for the week are \$500 (which is greater than the applicable federal minimum wage). His actual earnings are \$250 per week. The compensation for incapacity paid to Ben for the week is \$250.

Regulation 6 This regulation is made for the purposes of section 116 of the Act. It applies to working out normal and actual earnings of cadets who were only engaged in casual work, or not engaged in civilian work, at the time of incapacity.

If the cadet is incapacitated for work, was a cadet at the time the injury was sustained, was only engaged in casual work or not engaged in civilian work at the time of the incapacity, is 16 or over, is unable to continue full-time studies or enter the workforce as a result of the incapacity, and has undertaken a rehabilitation program, the civilian component of the cadet's normal earnings is an amount determined by the Commission, having regard to the cadet's qualifications, skills and experience.

In any other circumstances, the civilian component of normal earnings will be nil but may be adjusted under section 179 of the Act to accord with the applicable federal minimum wage.

If the cadet is a remunerated cadet (an OOC or an IOC) or also a member of the Permanent Forces or the Reserves, then any cadet pay or ADF pay earned by the cadet will also be taken into account as part of the cadet's normal earnings.

Actual earnings are assessed by working out the amount of the cadet's actual earnings from civilian, cadet and ADF employment accordingly.

The Commission's power to determine the civilian component having regard to the cadet's qualifications, skills and experience provides flexibility to ensure that appropriate incapacity compensation is assessed on a case by case basis.

Example: Jane, a cadet with the Australian Army Cadets aged 18, suffers a serious injury during cadet training and is unable to continue full-time studies in year 11 or enter the workforce. Jane has undertaken a rehabilitation program. Jane has no paid civilian work at the time of the incapacity. Jane has always aspired to join the Army upon finishing school. The Commission having regard to her qualifications, skills and experience assesses Jane's normal earnings as being equivalent to a person undertaking recruitment training in the Army.

Division 3 Working out compensation for former cadets

Regulation 7 This regulation is made for the purposes of section 175 of the Act. It applies to working out normal and actual earnings of former cadets who were engaged in paid civilian employment before last ceasing to be members of the Defence Force.

Regulation 7 is similar to Regulation 5. However, because it relates to a former cadet, the assessment of normal earnings is up to the time that the former cadet last ceased to be a member of the Defence Force. If the amount assessed is less than the federal minimum wage an adjustment can be made under section 179 of the Act.

Regulation 8 This regulation is made for the purposes of section 175 of the Act. It applies to working out normal and actual earnings of former cadets who were not engaged in paid civilian work, or only engaged in casual work, before last ceasing to be members of the Defence Force.

Regulation 8 is similar to Regulation 6. However, as with Regulation 7, the assessment of normal and actual earnings is up to the time that the former cadet last ceased to be a member of the Defence Force. If the amount assessed is less than the federal minimum wage an adjustment can be made under section 179 of the Act.

Division 4 Working out compensation for parts of weeks

Regulation 9 This regulation is made for the purposes of paragraph (b) of the definition of 'number of days' in subsection 196(3) of the Act. It applies for working out compensation for parts of a week for cadets.

If the cadet is engaged in paid employment, the number of days is the number of days the cadet normally works in a week. In any other circumstances it is 5 days.

Division 5 Modification of Chapter 2 in relation to cadets

Regulation 10 This regulation is made for the purposes of subsection 439(1) of the Act. It refers to Schedule 1 of the proposed Regulations that set out the relevant modifications of Chapter 2 of the Act. Regulation 10 of the proposed Regulations provides that Schedule 1 makes modifications of Chapter 2 of the Act in relation to cadets.

The modifications relate to some of the exclusionary provisions contained in Part 4 of Chapter 2 of the Act. If these provisions apply, they operate to prevent the Commission from accepting liability for an injury, disease or death even if it is determined to be a service injury, disease or death. The operation of these provisions has serious consequences for a person claiming under the Act, as they cannot receive compensation under the Act. The modifications are made to take account of the age of some cadets.

Part 3 Matters relating to declared members

A declared member is defined in section 5 of the Act to mean a person to whom a determination under section 8 of the Act applies. Declared members include persons who hold honorary ranks in the Australian Defence Force, persons who are on Career Transition Assistance (CTA) under an arrangement made by the Australian Defence Force and members of approved philanthropic organisations serving the Defence Force. A declared member who is undertaking CTA may be a Permanent Forces member or a continuous full-time Reservist who has not been discharged or a Permanent Forces member or continuous full-time Reservist who has been discharged who is undertaking CTA.

Division 1 Working out compensation for declared members

Regulation 11 This regulation is made for the purposes of section 116 of the Act. It applies to working out normal and actual earnings for declared members engaged in paid civilian work at the time of the incapacity who are not undertaking career transition assistance.

If a declared member, who is not undertaking CTA, is incapacitated for work, was a declared member at the time the injury was sustained and was engaged in paid civilian work at the time of the incapacity, the normal earnings will only have a civilian component and will be assessed on the basis of that civilian work. If the amount assessed is less than the federal minimum wage an adjustment can be made under section 179 of the Act.

Actual earnings will be assessed on the basis of any pay actually received from that civilian work.

Regulation 12 This regulation is made for the purposes of section 116 of the Act. It applies to working out normal and actual earnings for declared members not engaged in civilian employment at time of incapacity and not undertaking career transition assistance.

If the declared member was not engaged in civilian work at the time of the incapacity, is 16 or over, is unable to continue full-time studies or enter the workforce as a result of the incapacity, and has undertaken a rehabilitation program, the declared member's normal earnings is an amount determined by the Commission, having regard to the declared member's qualifications, skills and experience. If the amount assessed is less than the federal minimum wage an adjustment can be made under section 179 of the Act.

Actual earnings are assessed by working out by treating the member as an incapacitated Reservist mentioned in section 94 of the Act and working out the amount that would be the member's actual civilian earnings if the member were an incapacitated Reservist.

Regulation 13 This regulation is made for the purposes of section 116 of the Act. It applies to working out normal and actual earnings of a declared member undertaking career transition assistance.

If the declared member is a person who has not been discharged from the Permanent Forces, but was undertaking a period of CTA at the time of injury and incapacity, the member's normal earnings for a week is the amount worked out by treating the member as if he or she were:

(a) a Permanent Forces member of continuous full-time reservist mentioned in section 91 of the Act; and

(b) incapacitated for service.

If the amount assessed is less than the federal minimum wage an adjustment can be made under section 179 of the Act.

The actual earnings for a week is the amount worked out by treating the member as if he or she were:

(a) a Permanent Forces member or continuous full-time reservist mentioned in section 92 of the Act; and

(b) incapacitated for service.

Division 2 Working out compensation for former declared members

Regulation 14 This regulation is made for the purposes of section 175 of the Act. It applies to working out normal and actual earnings for a former declared member who was engaged in paid civilian work before last ceasing to be a member of the Defence Force, who has not undertaken career transition assistance.

Regulation 14 is similar to Regulation 11. However, because it relates to a former member, the assessment of normal earnings is taken up to the time that the former declared member last ceased to be a member of the Defence Force. If the amount assessed is less than the federal minimum wage an adjustment can be made under section 179 of the Act.

Regulation 15 This regulation is made for the purposes of section 175 of the Act. Regulation 15 is similar to Regulation 12. However, as with Regulation 14, the assessment of normal earnings is taken up to the time that the former declared member last ceased to be a member of the Defence Force. If the amount assessed is less than the federal minimum wage an adjustment can be made under section 179 of the Act.

Regulation 16 This regulation is made for the purposes of section 175 of the Act. It applies to working out normal and actual earnings of an incapacitated former declared member who undertook career transition assistance.

In the case of a former declared member who was undertaking a period of Career Transition Assistance at the time of injury, the member's normal earnings for a week is the amount worked out by treating the member as if he or she were a Permanent Force member immediately before last ceasing to be a member of the Defence Force. The normal earnings will be calculated using the former declared member's earnings as a member of the Permanent Force using the provisions at Section 141 of the Act. If the amount assessed is less than the federal minimum wage an adjustment can be made under section 179 of the Act.

Actual earnings will be calculated using Section 129 of the Act.

Division 3 Working out compensation for parts of weeks

Division 3 of Part 2 of the proposed Regulations concerns working out compensation for parts of weeks.

Section 196 applies to working out the amount of compensation the Commonwealth is liable to pay under Part 3 or 4 of Chapter 4 of the Act if a person is only entitled to compensation for part of a week and not a whole week.

Regulation 17 This regulation is made for the purposes of paragraph (b) of the definition of *number of days* in subsection 196(3) of the Act. It applies for working out compensation for parts of a week for declared members.

If the member is on CTA, the number of days is 5. For other declared members engaged in paid employment the number of days is the number of days that the member normally works in a week. In any other circumstances it is 5 days.

Part 4 Review by the Board of original determinations

Regulation 18 This regulation is made under paragraph 440(b) of the Act in respect of the application of the *Veterans' Entitlements Regulations* for the purposes of section 353 of the Act. Regulation 18 modifies relevant terminology in regulations 9, 9AD, 9AE, 9AF, 9AG, 9AH, 9AI, 9AJ, 9AK, 9AL and Schedule 1, Form 3 so that the regulations and form can be applied for the purposes of a review by the Board under Part 4 of Chapter 8 of the Act.

Schedule 1 Section 32 of the Act prevents the Commission from accepting liability for injuries, diseases or deaths resulting from the person's serious default or wilful act or a serious breach of discipline. Item 1 modifies this section so that it does not apply to a serious default or wilful act of a cadet under the age of 16.

Section 34 of the Act prevents the Commission from accepting liability if the person made a wilful and false representation, in connection with his or her defence service or proposed defence service. Item 2 modifies this section so that it does not apply to a wilful and false representation of a cadet under 16.

Section 35 of the Act makes a number of exclusions relating to travel. Subsection 35(3) applies where there has been a substantial delay commencing the journey. Subsection 35(4) is similar to subsection 35(3) and applies to routes that are not reasonably direct. Subsection 35(5) applies to substantial interruptions to journeys. Item 3 provides that subsections (3), (4) and (5) do not apply to a cadet who at the time of the injury, disease, death, aggravation or material contribution was under 18 and under the supervision of a parent of the cadet, or a responsible adult.