

## EXPLANATORY STATEMENT

### *Seafarers Rehabilitation and Compensation Act 1992*

Issued by the Minister for Small and Family Business, the Workplace and Deregulation

#### **Seafarers Rehabilitation and Compensation (Catastrophic Injury) Rules 2018**

The *Seafarers Rehabilitation and Compensation Act 1992* ('Seafarers Act') provides rehabilitation support for employees in a defined part of the Australian maritime industry. The Seafarers Act also provides workers' compensation for those employees and their dependants.

Subject to sections 43 and 43A of the Seafarers Act, if compensation is payable under the Seafarers Act in respect of an injury suffered by an employee (that is, a compensable injury), and the employee reasonably requires and obtains household services or attendant care services as a result of that injury, the employer is liable to pay an amount of compensation.

If the compensable injury is not a 'catastrophic injury', subject to section 43 of the Seafarers Act:

- the amount per week payable by the employer is capped at \$473.25 per week for household services and \$473.25 per week for attendant care services (the monetary cap is indexed annually on 1 July, and the figure of \$473.25 is current for 2018-2019)
- compensation for household services is not payable in the first 28 days after the date of injury, unless the employer determines otherwise in a particular case on the ground of financial hardship or the need to provide for adequate supervision of dependent children.

If the compensable injury is a 'catastrophic injury', subject to section 43A of the Seafarers Act:

- there is no monetary cap on the amount of weekly compensation payable for household services or attendant care services
- compensation for household services is payable in the first 28 days after the date of injury.

'Catastrophic injury' is defined in section 3 of the Seafarers Act to mean an injury where the conditions specified in the legislative rules are satisfied. Paragraph 144(1)(a) of the Seafarers Act allows the Minister to make rules prescribing matters required or permitted by the Seafarers Act to be prescribed by the legislative rules.

This instrument specifies the conditions for the definition of 'catastrophic injury'. An explanation of each section of the instrument is included in Attachment A.

#### **National Injury Insurance Scheme minimum benchmarks**

The conditions for the definition of a 'catastrophic injury' in this instrument are based on the minimum benchmarks for eligibility for catastrophic traumatic injuries for the workplace accidents stream of the National Injury Insurance Scheme ('NIIS'). The minimum benchmarks are also the minimum benchmarks for the motor vehicle accidents stream of the NIIS.

The NIIS minimum benchmarks for eligibility for catastrophic traumatic injuries are:

1. Spinal cord injury — based on evidence of a permanent neurological deficit (principally paraplegia and quadriplegia).
2. Traumatic brain injury — based on evidence of a significant brain injury which results in permanent impairments of cognitive, physical and/or psychosocial functions. A defined period of post traumatic amnesia plus a Functional Independence Measure (FIM) at five or less, or two points less than the age appropriate norm (or equivalent where other assessment tools are used), would be required.

3. Multiple amputations of the upper and/or lower extremities or single amputations involving forequarter amputation or shoulder disarticulation, hindquarter amputation, hip disarticulation or “short” transfemoral amputation involving the loss of 65% or more of the length of the femur.

4. Burns — full thickness burns greater than 40 per cent of the total body surface area (or greater than 30 per cent in children under 16 years) or full thickness burns to the hands face or genital area, or inhalation burns causing long-term respiratory impairment, plus a FIM score at five or less, or two points less than the age norm (or equivalent where other assessment tools are used).

5. Permanent traumatic blindness, based on the legal definition of blindness.

Whilst the conditions for the definition of a ‘catastrophic injury’ in this instrument are based on the NIS minimum benchmarks, the conditions have been modified where it has been appropriate or necessary to do so in order for the conditions to operate within the existing framework of the Seafarers Act.

The two primary modifications are that:

- the injury does not need to have been traumatic
- the injury (or the impairment resulting from the injury) does not need to be permanent.

There is no requirement for a ‘catastrophic injury’ to have been traumatic because the Seafarers Act does not distinguish between compensable injuries which were traumatic injuries, and compensable injuries which were not traumatic injuries.

There is no requirement that a ‘catastrophic injury’, or the impairment resulting from that injury, be permanent because an employee who has a catastrophic injury (such as a catastrophic brain injury) is likely to require the same level of household services or attendant care services during the period the employee has that catastrophic injury, regardless of whether the catastrophic injury is temporary or permanent.

### **Functional Independence Measure**

The Functional Independence Measure (‘FIM<sup>TM</sup>’) is a basic indicator of severity of functional limitation that uses a 7-point ordinal scale for each of 18 activities of daily living. The scale provides for the classification of individuals by their ability to carry out an activity independently, compared with their need for assistance from another person or a device. If the person needs help, the scale assesses the degree of that need.

FIM<sup>TM</sup> is widely used in Australia and internationally by medical and health professionals, including doctors, nurses and allied health professionals. It is also used in assessing injured persons for the purposes of entry into motor accident and lifetime care schemes for persons with a catastrophic injury in the Australian Capital Territory, New South Wales, Queensland, South Australia and Western Australia.

The territory licence in Australia for the use of the FIM<sup>TM</sup> is held by the Australasian Rehabilitation Outcomes Centre (‘AROC’). AROC was established by the Australasian Faculty of Rehabilitation Medicine of the Royal Australasian College of Physicians in 2002.

A FIM<sup>TM</sup> assessment must be carried out by a person who has been trained in the use of the FIM<sup>TM</sup>, has passed the relevant FIM<sup>TM</sup> credentialing examination and is credentialed at the time of the assessment. To be credentialed, a person must complete and pass a credentialing examination, which is available from AROC. Further information is available at:  
<https://ahsri.uow.edu.au/aroc/training/index.html>.

Where the NIIS minimum benchmarks refer to 'other assessment tools', this instrument only refers to the FIM™. That is because the use of the FIM™ has been widely adopted in Australia. In addition, the use of several different assessment tools could lead to inconsistent outcomes.

### **Consultation**

The Department of Jobs and Small Business consulted with Professor Ian Cameron in the development of this instrument. Professor Cameron is a Consultant Physician in Rehabilitation Medicine and has the Chair in Rehabilitation Medicine, Sydney Medical School, at the University of Sydney. He is a clinician researcher and holds a National Health and Medical Research Council Practitioner Fellowship.

The Department also consulted with the Maritime Union of Australia, Maritime Industry Australia Limited, the Australian Maritime Officer Union, the Australian Institute of Marine Professionals and Engineers, the Australian Mines and Metal Association and the Seacare Authority during the development of this instrument. These stakeholders were provided with a draft of this instrument and invited to provide written feedback or comments. Further correspondence was entered into where required, and appropriate amendments were made to the draft instrument as a result of the consultation process.

### **Regulation Impact Statement**

The Office of Best Practice Regulation advised that a RIS did not need to be prepared [OBPR ID 22080].

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

## Attachment A

### **Section 1 – Name**

The name of this instrument is the *Seafarers Rehabilitation and Compensation (Catastrophic Injury) Rules 2018*.

### **Section 2 – Commencement**

This instrument commences the day after it is registered on the Federal Register of Legislation.

### **Section 3 – Authority**

This instrument is made under section 144 of the Seafarers Act.

### **Section 4 – Application**

The definition of ‘catastrophic injury’ will apply to an injury suffered by an employee whether the injury was suffered before, on, or after the commencement of this instrument.

### **Section 5 – Definitions**

For the purposes of this instrument:

- ‘Act’ means the *Seafarers Rehabilitation and Compensation Act 1992*
- ‘injury’ means an injury for which compensation is payable under the Seafarers Act (that is, a compensable injury).

### **Section 6 – Conditions of a catastrophic injury**

A compensable injury is a ‘catastrophic injury’ if it is one or more of the following:

- a ‘catastrophic spinal cord injury’
- a ‘catastrophic brain injury’
- a ‘catastrophic amputation injury’
- a ‘catastrophic burn injury’
- a ‘catastrophic blindness injury’.

Each of these terms is defined in this instrument.

The terms ‘catastrophic brain injury’ and ‘catastrophic burn injury’ require a FIM™ assessment.

If an employee’s compensable injury improves or resolves so that compensation is no longer payable under the Seafarers Act in respect of the injury, or the injury no longer meets the definition of a ‘catastrophic injury’, then the employee will no longer have a ‘catastrophic injury’ for the purposes of the Seafarers Act.

#### **Example 1:**

An employee’s compensable injury, which is full thickness burns to the face, improves or resolves so that it no longer results in impairment assessed at a score of 5 or less on any items on the FIM™ scoring sheet at Schedule 1. The employee’s compensable injury is no longer a ‘catastrophic injury’ for the purposes of the Seafarers Act.

#### **Example 2:**

An employee’s compensable injury, which is a brachial plexus avulsion injury, results in no residual functioning in the upper extremity. At this point in time, the employee’s compensable injury is a ‘catastrophic injury’ for the purposes of the Seafarers Act. The employee then undergoes medical

treatment which restores some functioning (but not normal functioning) in the upper extremity. The employee's compensable injury is no longer a 'catastrophic injury' for the purposes of the Seafarers Act.

### **Section 7 – Catastrophic spinal cord injury**

Section 7 of this instrument is based on the NIIS minimum benchmark for spinal cord injury. The NIIS minimum benchmark for spinal cord injury requires 'evidence of a permanent neurological deficit (principally paraplegia and quadriplegia)'. Apart from the requirement for permanence, section 7 is equivalent to the NIIS minimum benchmark for spinal cord injury.

For the purposes of section 7, a compensable injury will be a 'catastrophic spinal cord injury' if it is a lesion of the spinal cord or cauda equina which results in sensory deficit, motor deficit, bladder dysfunction or bowel dysfunction.

The term lesion has its ordinary meaning. A lesion can include an abnormal change in an organ or tissue. For the purposes of section 7, there is no requirement that the lesion be caused by trauma, or that the deficit or dysfunction be permanent. However, an injury other than a lesion of the spinal cord or cauda equina will not be a 'catastrophic spinal cord injury', even if it results in sensory deficit, motor deficit, bladder dysfunction or bowel dysfunction.

#### **Example 3:**

An employee's compensable injury results in sciatic nerve irritation or sciatica. The sciatic nerve emerges from the spinal cord but does not constitute part of the spinal cord (or cauda equina). Therefore, the employee's compensable injury is not a 'catastrophic spinal cord injury'.

#### **Example 4:**

An employee's compensable injury is an intervertebral disc lesion that impinges on the spinal cord. This is not a 'catastrophic spinal cord injury' unless: the impingement results in a lesion of the spinal cord; the spinal cord lesion is a compensable injury; and the spinal cord lesion results in sensory deficit, motor deficit, bladder dysfunction or bowel dysfunction.

### **Section 8 – Catastrophic brain injury**

Section 8 of this instrument is based on the NIIS minimum benchmark for traumatic brain injury.

For the purposes of section 8, there is no requirement that the brain injury be a traumatic brain injury. Instead, what is required for a 'catastrophic brain injury' is a compensable brain injury which results in all of the following:

- impairment of cognitive, physical or psychosocial functions
- impairment assessed at a score of 5 or less on any of the items of the FIM™ score sheet at Schedule 1
- either or both of a period of post traumatic amnesia of at least 7 days or a significant brain imaging abnormality.

The specified period of post traumatic amnesia is at least 7 days because this is the duration of post traumatic amnesia that is associated with increased long-term loss of functioning.

Some serious brain injuries, such as penetration injuries, may not result in a period of post traumatic amnesia of at least 7 days. However, these injuries will result in a significant brain imaging abnormality.

## **Section 9 – Catastrophic amputation injury**

Section 9 of this instrument is based on the NIS minimum benchmark for multiple amputations of the upper and/or lower extremities and single amputations involving forequarter amputation or shoulder disarticulation, hindquarter amputation, hip disarticulation or ‘short’ transfemoral amputation involving the loss of 65% or more of the length of the femur.

An injury is a ‘catastrophic amputation injury’ if it meets the conditions set out in paragraph 9(1)(a), paragraph 9(1)(b) or subsection 9(2). Paragraph 9(1)(a) deals with ‘single amputations’ in the NIS minimum benchmarks. Paragraph 9(1)(b) and subsection 9(2) deal with ‘multiple amputations’ in the NIS minimum benchmarks.

For the purposes of this instrument, an amputation is not limited to surgical removal of a limb or part. An amputation may include the loss of a limb as a result of a compensable injury.

### ***Single injury***

Paragraph 9(1)(a) sets out the conditions for when a single injury which results in a specified amputation, or for when a single specified plexus avulsion injury, will be a ‘catastrophic amputation injury’.

Under paragraph 9(1)(a), a ‘catastrophic amputation injury’ is a compensable injury which results in any of the following:

- forequarter amputation
- shoulder disarticulation (that is, amputation of an upper limb through the shoulder joint)
- hindquarter amputation
- hip disarticulation (that is, amputation of a lower limb through the hip joint)
- an amputation involving the loss of 65% or more of the length of the femur.

The definition of a ‘catastrophic amputation injury’ in paragraph 9(1)(a) includes a compensable brachial plexus avulsion injury resulting in no residual functioning in the upper extremity (that is, the arm), and a compensable lumbar plexus avulsion injury resulting in no residual function in the lower extremity (that is, the leg), as these injuries result in the equivalent impairment of a forequarter amputation or a hindquarter amputation, respectively.

Paragraph 9(1)(b) sets out the conditions for when a single injury which results in two or more specified losses will be a ‘catastrophic amputation injury’.

Under paragraph 9(1)(b), a ‘catastrophic amputation injury’ is a compensable injury which results in the loss of at least two of the following:

- 50% or more of the length of the tibia of the left leg
- 50% or more of the length of the tibia of the right leg
- the thumb of the left hand at or above the first metacarpophalangeal joint
- the thumb of the right hand at or above the first metacarpophalangeal joint.

The definition of a ‘catastrophic amputation injury’ in paragraph 9(1)(b) includes a compensable injury which results in a loss greater than 50% of the length of the tibia, or the loss of the thumb above the first metacarpophalangeal joint. For example, loss of the leg at the femur or loss of the whole hand is a loss of a kind specified in paragraph 9(1)(b).

An amputation or disarticulation specified in paragraph 9(1)(a) is also a loss of a kind specified in paragraph 9(1)(b).

**Example 5:**

An employee's compensable injury is necrotising fasciitis. As a result of the injury, the employee's left leg is amputated at the knee, and the employee's left hand is amputated at the wrist. As the one injury (that is, necrotising fasciitis) resulted in the loss of the employee's left leg at the knee and the loss of the employee's left hand, the necrotising fasciitis is a 'catastrophic amputation injury' for the purposes of the Seafarers Act.

**Multiple injuries**

Subsection 9(2) sets out the conditions for when the later of two compensable injuries resulting in a specified amputation, specified plexus avulsion injury or a specified loss will be a 'catastrophic amputation injury'.

Under subsection 9(2), an injury will be a 'catastrophic amputation injury' if it is a compensable injury which results in any one of the losses specified in paragraph 9(1)(b) but only if both of the following are true:

- the employee suffered a prior compensable injury (the 'earlier injury') to a different limb or limbs
- the earlier injury either is a 'catastrophic amputation injury' (because the earlier injury satisfies the conditions for a 'catastrophic amputation injury' in subsection 9(1)) or results in any one of the losses specified in paragraph 9(1)(b).

Subsection 9(3) provides that, for the avoidance of doubt, the earlier injury is not a 'catastrophic amputation injury' merely because it satisfies the conditions in paragraph 9(2)(c)(ii). For the earlier injury to be a 'catastrophic amputation injury', the earlier injury must satisfy the conditions for a 'catastrophic amputation injury' in subsection 9(1) or 9(2).

**Example 6A:**

An employee's compensable injury results in the loss of 50% of the length of the tibia of the left leg. The employee then suffers another compensable injury which results in the loss of the employee's left hand. Only the injury that occurred later (in this example, the loss of the employee's left hand) is a 'catastrophic amputation injury' for the purposes of the Seafarers Act.

If the employee reasonably requires and obtains household services or attendant care services as a result of the left hand injury, the employee would be entitled to an amount of compensation per week subject to section 43A of the Seafarers Act. If the employee reasonably requires and obtains household services or attendant care services as a result of the left leg injury, the employee would be entitled to an amount of compensation per week subject to section 43 of the Seafarers Act.

**Example 6B:**

Following on from Example 6A, if Seacare Scheme Employer Y was liable in respect of the left leg injury, and Seacare Scheme Employer Z was liable in respect of the left hand injury:

- as the left leg injury is not a 'catastrophic injury', Seacare Scheme Employer Y is liable to pay compensation in respect of household services or attendant care services obtained as a result of the leg injury pursuant to section 43 of the Seafarers Act; and
- as the left hand injury is a 'catastrophic injury', Seacare Scheme Employer Z is liable to pay compensation in respect of household services or attendant care services obtained as a result of the left hand injury pursuant to section 43A of the Seafarers Act.

**Example 6C:**

Following on from Examples 6A and 6B, if the employee obtains the same household services or attendant care services for both the left leg and left hand injuries, it may be possible to apportion the cost of the services to each compensable injury (for example, if the nature, extent or cost of services obtained for the first injury increased following the second injury). If it is not possible to apportion

the cost of services for each compensable injury, the employee should not be worse off because of the financial cap in section 43 of the Seafarers Act.

**Example 7:**

An employee suffers three compensable injuries in the following sequence: (1) an injury which results in the loss of the thumb of the right hand at the first metacarpophalangeal joint; (2) an injury which results in the loss of 50% of the length of the tibia of the left leg; and (3) an injury which results in the loss of 50% of the length of the tibia of the right leg.

Both the left leg injury and the right leg injury would be a ‘catastrophic amputation injury’ and the employee would be entitled to an amount of compensation per week in respect of those injuries subject to section 43A of the Seafarers Act. However, the right hand injury is not a ‘catastrophic amputation injury’ as there was no earlier injury which satisfied the conditions set out in subsection 9(1) or 9(2). Therefore, the employee would be entitled to an amount of compensation per week in respect of the right hand injury subject to section 43 of the Seafarers Act.

**Example 8:**

An employee’s compensable injury results in the loss of the thumb of the left hand at the first metacarpophalangeal joint. The employee has previously suffered a compensable injury which resulted in a right forequarter amputation. Each injury is a ‘catastrophic amputation injury’ for the purposes of the Seafarers Act.

**Example 9:**

An employee suffers a compensable injury, being a right brachial plexus avulsion injury, which results in no residual functioning in the right upper extremity. The employee later suffers a second compensable injury which results in the loss of the right hand. Only the right brachial plexus avulsion injury is a ‘catastrophic amputation injury’ for the purposes of the Seafarers Act.

## **Section 10 – Catastrophic burn injury**

Section 10 of this instrument is based on the NIIS minimum benchmark for burns, but there is no requirement that respiratory impairment from an inhalation burn be long term or permanent.

For the purposes of subsection 10(a), a compensable injury will be a ‘catastrophic burn injury’ if it results in a score of 5 or less on any of the items on the FIM™ score sheet at Schedule 1, and the injury is any of the following full thickness burns:

- greater than 40% of the total body surface area (for an employee aged 16 years or above at the time of the injury)
- greater than 30% of the total body surface area (for an employee aged under 16 years at the time of the injury)
- to the hands, face or genital area.

For the purposes of subsection 10(b), a compensable injury will be a ‘catastrophic burn injury’ if it results in a score of 5 or less on any of the items on the FIM™ score sheet at Schedule 1, and the injury is inhalation burns resulting in vital capacity or forced expiratory volume in one second which is less than 50% of that predicted for the employee’s age, height and ethnicity.

## **Section 11 – Catastrophic blindness injury**

Section 11 of this instrument is based on the NIIS minimum benchmark for legal blindness, but does not require the blindness to be permanent, or to have been the result of trauma.

For the purposes of section 11, a compensable injury is a ‘catastrophic blindness injury’ if it results in one or more of the following:



- visual acuity after correction by suitable lenses of less than 6/60 in both eyes
- constriction to within 10 degrees of fixation in the better eye irrespective of corrected visual acuity
- a combination of visual defects resulting in the same degree of visual impairment as that specified in the above points.

The definition of 'catastrophic blindness injury' is based on the criteria for legal blindness for the purposes of the *Social Security Act 1991* (Cth).

An employee would have visual acuity of 6/60 if the employee is only able to see at a distance of 6 metres a symbol which a person with normal vision could see at a distance of 60 metres. A widely used method of measuring visual acuity is the Snellen Scale (also known as the Snellen Chart), which depicts letters or symbols in decreasing size.

### **Schedule 1 – FIM™ score sheet**

This FIM™ score sheet is widely used across Australia by medical and health professionals, including doctors, nurses and allied health professionals.

A FIM™ assessment must be carried out by a person who has been trained in the use of the FIM™, has passed the relevant FIM™ credentialing examination and is credentialed at the time of the assessment. To be credentialed, a person must complete and pass a credentialing examination, which is available from AROC.

## Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

### Seafarers Rehabilitation and Compensation (Catastrophic Injury) Rules 2018

This legislative instrument is compatible with the human rights and freedoms recognised or declared by the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the legislative instrument

Under the *Seafarers Rehabilitation and Compensation Act 1992* ('Seafarers Act'), compensation is payable in respect of household services and attendant care services (being services that the employee reasonably requires) obtained by an employee as a result of a compensable injury.

If that injury is not a 'catastrophic injury', the amount per week payable by the employer is capped at \$473.25 per week (indexed annually on 1 July; figure current for 2018-2019) for each of household services or attendant care services.

If that injury is a 'catastrophic injury', there is no monetary cap on the amount of weekly compensation payable for household services or attendant care services, and the employee will not be subject to a 28-day waiting period before compensation for household services is payable.

This instrument specifies the conditions which must be satisfied for an injury to be a 'catastrophic injury' for the purposes of the Seafarers Act. Broadly, there are five categories of 'catastrophic injury': 'catastrophic spinal cord injury', 'catastrophic brain injury', 'catastrophic amputation injury', 'catastrophic burn injury' and 'catastrophic blindness injury'.

These conditions are based on the catastrophic injury minimum benchmarks established by the National Injury Insurance Scheme.

#### Human rights implications

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* provides for the right of everyone to social security, including social insurance. General Comment 19 by the Committee on Economic, Social and Cultural Rights elaborates on Article 9, stating that the 'States parties should ... ensure the protection of workers who are injured in the course of employment or other productive work'.<sup>1</sup> Workers' compensation is analogous to social insurance in that it provides payment of wages and medical costs to employees for injuries occurring as a result of their employment.

This instrument ensures employees with a 'catastrophic injury' who require a higher level of support in respect of household services and attendant care services are not subject to a monetary cap or waiting period in respect of those services.

#### Conclusion

This legislative instrument is compatible with human rights.

**The Hon Craig Laundry MP**

Minister for Small and Family Business, the Workplace and Deregulation

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art. 9)*, U.N. Doc E/C.12/GC/19 (2008), [17].