

EXPLANATORY STATEMENT

Safety, Rehabilitation and Compensation (Defence-related Claims) (Catastrophic Injury) Rules 2018

Instrument 2018 No. MRCC65

EMPOWERING PROVISION

Subsection 122A(1) of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*.

PURPOSE

The purpose of this instrument is to prescribe conditions that must be satisfied for the purpose of the definition of ‘catastrophic injury’ in subsection 4(1) of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (‘DRCA’).

The DRCA provides rehabilitation support for employees who are defined under section 5 as members of the Defence Forces (“employee”). The DRCA also provides compensation payments for those employees and their dependants.

Subject to sections 29 and 29A of the DRCA, if compensation is payable under the DRCA 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 Commonwealth is liable to pay an amount of compensation.

If the compensable injury is not a ‘catastrophic injury’, under section 29 of the DRCA:

- the amount per week payable by the Commonwealth 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); and
- compensation for household services is not payable in the first 28 days after the date of injury, unless the Military Rehabilitation and Compensation Commission (“Commission”) 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’, under section 29A of the DRCA:

- there is no monetary cap on the amount of weekly compensation payable for household services or attendant care services; and
- there is nothing which prevents compensation for household services and attendant care services being payable in the first 28 days after the date of injury.

‘Catastrophic injury’ is defined in subsection 4(1) of the DRCA to mean an injury where the conditions specified in the legislative rules are satisfied. Subsection 122A(1) of the DRCA allows the Commission to make rules prescribing matters required or permitted by the DRCA to be prescribed by the legislative rules.

This is the first instrument to be made under the DRCA specifying the conditions for the definition of ‘catastrophic injury’.

The conditions specified by this instrument for the definition of ‘catastrophic injury’ under the DRCA are the same as those specified in the corresponding definition under the *Military Rehabilitation and Compensation Act 2004* (MRCA). They are also broadly consistent with the conditions specified as catastrophic injuries for civilians with coverage under the *Safety, Rehabilitation and Compensation Act 1988* (SRCA).

The DRCA, which is a re-enacted version of the SRCA, was created by the *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Act 2017*. The DRCA commenced on 12 October 2017, with modifications to limit coverage under the Act to members of the Defence Force with conditions attributable to service prior to 1 July 2004 (the commencement date of the MRCA) and their dependants. Prior to 12 October 2017, employees who were members of the Australian Defence Force with conditions linked to service before 1 July 2004 were covered by the SRCA.

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 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 Functional Independence Measure 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 NIIS 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 DRCA.

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 DRCA 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 formally categorised as temporary or permanent.

Functional Independence Measure

The Functional Independence Measure (‘FIMTM’) 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 higher the score, the more independent the patient is in performing the activity. 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.

FIMTM 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 licence in Australia for the use of the FIMTM 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.

FIMTM credentialed medical or health care professional

A FIMTM assessment must be carried out by a person who has been trained in the use of the FIMTM, has passed the relevant FIMTM 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 FIMTM. That is because the use of the FIMTM has been widely adopted in Australia. In addition, the use of several different assessment tools could lead to inconsistent outcomes.

It is a condition for the definition of a ‘catastrophic injury’ in this instrument that the injury results in an impairment assessed at a score of five or less on any of the items on the FIM™ score sheet, see paragraph 6(a) of this instrument.

Standardised Mini-Mental State Examination

The Standardised Mini-Mental State Examination (SMMSE) is the most common cognitive screening and assessment tool used in clinical practice, and is a well validated measure of impairments associated with diseases of the brain. The Standardised Mini-Mental State Examination (SMMSE) tool is used in section 8 of this instrument as one of the measures for determining whether an injury is a catastrophic brain injury.

CONSULTATION

Section 17 of the *Legislation Act 2003* requires a rule-maker to be satisfied, before making a legislative instrument that any consultation the rule-maker considered appropriate and reasonably practicable, has been undertaken.

External consultation has taken place with the Department of Jobs and Small Business, and Comcare. There has been consultation within the Department of Veterans’ Affairs with the Chief Health Officer/Principal Medical Adviser, the Senior Medical Adviser and the Eligibility and Payments Policy Branch.

In these circumstances it is considered that the requirements of section 17 of the *Legislation Act 2003* have been met.

RETROSPECTIVITY

None.

DOCUMENTS INCORPORATED BY REFERENCE

This instrument incorporates, by reference, the FIM™ score sheet. The FIM™ score sheet that is incorporated by reference is the version of the document in the form in which it exists on the day of commencement of this instrument. The FIM™ score sheet is published by AROC. The FIM™ score sheet is freely available online at:

<https://ahsri.uow.edu.au/aroc/whatisfim/index.html> by opening the page and clicking on the excel diagram under the heading “AN-SNAP Calculator With Benchmarks”.

This instrument incorporates, by reference, the Standardised Mini-Mental State Examination (SMMSE) tool. The Standardised Mini-Mental State Examination (SMMSE) tool that is incorporated by reference is the version of the document in the form in which it exists on the day of commencement of this instrument. The Standardised Mini-Mental State Examination (SMMSE) tool is published by the Independent Hospital Pricing Authority. The incorporated document is freely available online at: <https://www.ihoa.gov.au/what-we-do/standardised-mini-mental-state-examination-smmse> by opening the page and clicking on the heading ‘Standard Mini-Mental Examination (SMMSE) tool’.

REGULATORY IMPACT

None.

HUMAN RIGHTS STATEMENT

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

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’. Compensation payments are analogous to social insurance in that they provide payment of wages and medical costs to employees for injuries occurring as a result of their employment.

Overview

Under the DRCA, 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 Commission 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 DRCA. Broadly, there are five categories of ‘catastrophic injury’: ‘catastrophic nerve 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.

Conclusion

The attached instrument engages positively with the Right to Social Security, and is considered to be human rights compatible.

Military Rehabilitation and Compensation Commission
Rule-Maker

FURTHER EXPLANATION OF PROVISIONS

See: Attachment A

Attachment A

Safety, Rehabilitation and Compensation (Defence-related Claims) (Catastrophic Injury) Rules 2018

Section 1

This section provides that the name of the instrument is the *Safety, Rehabilitation and Compensation (Defence-related Claims) (Catastrophic Injury) Rules 2018*.

Section 2

This is the commencement provision and provides that the instrument is to commence on the day after it is registered on the Federal Register of Legislation.

Section 3

This section sets out the empowering provision in the primary legislation that authorises the making of this instrument, that is, subsection 122A(1) of the DRCA.

Section 4

This section is a purpose provision. The purpose of the instrument is to prescribe conditions that must be satisfied for the definition of catastrophic injury.

Section 5

This is the interpretation section. It defines terms that are used in the instrument. For the purposes of this instrument:

- ‘Act’ means the *Safety, Rehabilitation and Compensation (Defence-related Claims) 1988*.
- ‘employee’ has the same meaning as in the Act.
- ‘FIMTM score sheet’ is the Functional Independence Measure score sheet which is a basic indicator of severity of functional limitation, being the version of the document in the form in which it exists on the day of commencement of this instrument, and which is published by the Australasian Rehabilitation Outcomes Centre. The FIMTM score sheet is freely available online at: <https://ahsri.uow.edu.au/arc/whatisfim/index.html> by opening the page and clicking on the excel diagram under the heading “AN-SNAP Calculator With Benchmarks”.
- ‘injury’ means an injury in respect of which compensation is payable under the Act. The note to the definition of ‘injury’ confirms that under the Act an injury includes a disease.
- ‘Standardised Mini-Mental State Examination (SMMSE) tool’ is a common cognitive screening or assessment tool used in clinical practices, being the version of the document in the form in which it exists on the day of commencement of this instrument, and which is published by the Independent Hospital Pricing Authority. The document is freely

available online at: <https://www.ihpa.gov.au/what-we-do/standardised-mini-mental-state-examination-smmse> by opening the page and clicking on the heading “Standard Mini-Mental Examination (SMMSE) tool.

Section 6 – Conditions of a catastrophic injury

For the purposes of the definition of catastrophic injury in subsection 4(1) of the Act, an injury is a catastrophic injury if both of the following conditions are satisfied:

- a) the injury results in an impairment assessed by a FIMTM credentialed medical or health care professional at a score of 5 or less on any of the items on the FIMTM score sheet,
- b) the Commission is satisfied that the injury is one or more of the following:
 - a catastrophic nerve 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.

If an employee’s compensable injury improves or resolves so that compensation is no longer payable under the DRCA 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 DRCA.

Example

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 FIMTM score sheet. The employee’s compensable injury is no longer a ‘catastrophic injury’ for the purposes of the DRCA.

Section 7 – Catastrophic nerve 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)’. Section 7 is largely equivalent to the NIIS minimum benchmark for neurological injury with the exception that there is no requirement for permanence.

For the purposes of section 7, a compensable injury will be a ‘catastrophic nerve injury’ if it is a lesion of the spinal cord, cauda equina, brachial plexus, lumbosacral plexus, cervical plexus or coccygeal plexus 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, cauda equina, brachial plexus, lumbosacral plexus, cervical

plexus or coccygeal plexus will not be a ‘catastrophic nerve injury’, even if it results in sensory deficit, motor deficit, bladder dysfunction or bowel dysfunction.

Example

An employee’s compensable injury results in damage to the femoral nerve in the upper thigh. Although the femoral nerve emerges from the lower spine and via the lumbosacral plexus, it does not constitute part of these structures. Therefore, the employee’s compensable injury is not a ‘catastrophic nerve injury’.

Section 8 – Catastrophic brain injury

Section 8 of this instrument is based on the NIS 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. However, what is required for a ‘catastrophic brain injury’ is that the injury results in an impairment of cognitive, physical or psychosocial functions and

- a) one of the following:
 - a period of post traumatic amnesia of at least 7 days,
 - a significant brain imaging abnormality,
 - a score for the Standardised Mini-Mental State Examination (SMMSE) tool of less than 25, or
- b) damage to the brain similar in effect and severity to that set out in one of the dot points in a) above.

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.

The threshold score of less than 25 for the Standardised Mini-Mental State Examination (SMMSE) tool is used for the Pharmaceutical Benefits Scheme approval of access to some medications for dementia and is correlated with poorer psycho-social functioning.

Section 9 – Catastrophic amputation injury

Paragraph 9(a) sets out the conditions for when an injury which results in a specified amputation will be a ‘catastrophic amputation injury’. Under that paragraph, a ‘catastrophic amputation injury’ is a compensable injury which results in one or more 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.

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

No distinction is made in paragraphs 9(a) and (b) between single and multiple injuries.

Example

An employee’s compensable injury is necrotising fasciitis. As a result of the injury, the employee’s left leg is amputated at the knee. The necrotising fasciitis is a ‘catastrophic amputation injury’ for the purposes of the MRCA.

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.

Under paragraph 10(a), a compensable injury will be a ‘catastrophic burn injury’ if 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.

Under paragraph 10(b), a compensable injury will be a ‘catastrophic burn injury’ if 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.

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

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

The definition of ‘catastrophic blindness injury’ is based on the criteria for legal blindness for the purposes of the *Social Security Act 1991*.

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.