

## EXPLANATORY STATEMENT

### **Military Rehabilitation and Compensation (Catastrophic Injury or Disease) Determination 2018**

Instrument 2018 No. MRCC66

#### **EMPOWERING PROVISION**

Subsection 213(2) of the *Military Rehabilitation and Compensation Act 2004*.

#### **PURPOSE**

The purpose of this instrument is to prescribe conditions that must be satisfied for the purpose of the definition of ‘catastrophic injury or disease’ in subsection 213(1) of the *Military Rehabilitation and Compensation Act 2004* (‘MRCA’).

The MRCA provides rehabilitation support for members and former members of the Australian Defence Force (ADF) with service on or after 1 July 2004. The MRCA also provides compensation payments for those members and former members, and their dependants.

Subject to sections 214 and 217 of the MRCA, if compensation is payable under the MRCA in respect of a service injury or disease sustained or contracted by a member or former member (that is, a compensable injury or disease), and he or she reasonably requires and obtains household services or attendant care services as a result of that injury or disease, the Commonwealth is liable to pay an amount of compensation.

If the compensable injury or disease is not a ‘catastrophic injury or disease’, the amount per week payable by the Commonwealth is capped under subsection 216(1) of the MRCA at \$491.67 per week for household services and under subsection 219(1) of the MRCA at \$491.67 per week for attendant care services (the monetary cap is indexed annually on 1 July, and the figure of \$491.67 is current for 2018-2019).

If the compensable injury or disease is a ‘catastrophic injury or disease’, there is no monetary cap under subsection 216(2) or 219(2) of the MRCA on the amount of weekly compensation payable for household services or attendant care services.

‘Catastrophic injury or disease’ is defined in subsection 213(1) of the MRCA to mean an injury or disease where the conditions determined in a legislative instrument made under subsection 213(2) are satisfied. Subsection 213(2) of the MRCA allows the Military Rehabilitation and Compensation Commission to make a legislative instrument determining conditions for the purposes of the definition of ‘catastrophic injury or disease’.

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

The conditions specified by this instrument for the definition of ‘catastrophic injury or disease’ under the MRCA are the same as those specified in the corresponding definition

under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*. They are also broadly consistent with the conditions specified as catastrophic injuries or diseases for civilians with coverage under the *Safety, Rehabilitation and Compensation Act 1988* (SRCA).

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

The conditions for the definition of a ‘catastrophic injury or disease’ in this instrument are, as is the case under the SRCA, based on the minimum benchmarks for eligibility for catastrophic traumatic injuries for the workplace accidents stream of the National Injury Insurance Scheme (‘NIIS’). These benchmarks are also equivalent with those contained in 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 or disease’ 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 MRCA.

The two primary modifications are that:

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

There is no requirement for a ‘catastrophic injury or disease’ to have been traumatic because the MRCA does not distinguish between compensable injuries or diseases which were

traumatic injuries or diseases, and compensable injuries or diseases which were not traumatic injuries or diseases.

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

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 or disease in the Australian Capital Territory, New South Wales, Queensland, South Australia and Western Australia.

The 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.

*FIM<sup>TM</sup> credentialed medical or health care professional*

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<sup>TM</sup>. That is because the use of the FIM<sup>TM</sup> 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 or disease’ 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<sup>TM</sup> 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 or disease is a catastrophic brain injury or disease.

## **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<sup>TM</sup> score sheet. The FIM<sup>TM</sup> 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<sup>TM</sup> score sheet is published by AROC. The FIM<sup>TM</sup> 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.ihipa.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 persons for injuries occurring as a result of their employment.

### *Overview*

Under the MRCA, compensation is payable in respect of household services and attendant care services (being services that the person reasonably requires) obtained by a person as a result of a compensable injury or disease.

If that injury or disease is not a ‘catastrophic injury or disease’, the amount per week payable by the Commonwealth is capped at \$491.67 per week (indexed annually on 1 July; figure current for 2018-2019) for each of household services or attendant care services.

If that injury or disease is a ‘catastrophic injury or disease’, there is no monetary cap on the amount of weekly compensation payable for household services or attendant care services.

This instrument specifies the conditions which must be satisfied for an injury or disease to be a ‘catastrophic injury or disease’ for the purposes of the MRCA. Broadly, there are five categories of ‘catastrophic injury or disease’: ‘catastrophic nerve injury or disease’, ‘catastrophic brain injury or disease’, ‘catastrophic amputation injury or disease’, ‘catastrophic burn injury or disease’ and ‘catastrophic blindness injury or disease’.

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](#)

## **Military Rehabilitation and Compensation (Catastrophic Injury or Disease) Determination 2018**

### Section 1

This section provides that the name of the instrument is the the *Military Rehabilitation and Compensation (Catastrophic Injury or Disease) Determination 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 213(2) of the *Military Rehabilitation and Compensation Act 2004*.

### 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 or disease.

### 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 Military Rehabilitation and Compensation Act 2004.

‘disease’ means a disease in respect of which compensation is payable under the Act.

‘FIM<sup>TM</sup> 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 FIM<sup>TM</sup> 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”

‘injury’ means an injury in respect of which compensation is payable under the Act.

‘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 or disease

For the purposes of the definition of catastrophic injury or disease in subsection 213(1) of the Act, an injury or disease is a catastrophic injury or disease if both of the following conditions are satisfied:

- a) the injury or disease results in an impairment assessed by a FIM<sup>TM</sup> credentialed medical or health care professional at a score of 5 or less on any of the items on the FIM<sup>TM</sup> score sheet,
- b) the Commission is satisfied that the injury or disease is one or more of the following:
  - a catastrophic nerve injury or disease
  - a catastrophic brain injury or disease
  - a catastrophic amputation injury or disease
  - a catastrophic burn injury or disease
  - a catastrophic blindness injury or disease.

Each of these terms is defined in this instrument.

If a person's compensable injury or disease improves or resolves so that compensation is no longer payable under the MRCA in respect of the injury or disease, or the injury or disease no longer meets the definition of a 'catastrophic injury or disease', then the person will no longer have a 'catastrophic injury or disease' for the purposes of the MRCA.

### *Example*

A person's compensable injury or disease, which involves 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<sup>TM</sup> score sheet. The person's compensable injury or disease is no longer a 'catastrophic injury or disease' for the purposes of the MRCA.

## Section 7 – Catastrophic nerve injury or disease

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 or disease will be a 'catastrophic nerve injury or disease' 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 or disease 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*

A person’s compensable injury or disease 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 person’s compensable injury or disease is not a ‘catastrophic nerve injury or disease’.

### Section 8 – Catastrophic brain injury or disease

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 or disease be a traumatic brain injury or disease. However, what is required for a ‘catastrophic brain injury or disease’ is that the injury or disease results in an impairment of cognitive, physical or psychosocial functions and

- a) one or more 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 or disease

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

#### *Example*

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

#### Section 10 – Catastrophic burn injury or disease

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 or disease will be a ‘catastrophic burn injury or disease’ if the injury or disease is any of the following full thickness burns:

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

Under paragraph 10(b), a compensable injury or disease will be a ‘catastrophic burn injury or disease’ if the injury or disease is inhalation burns resulting in vital capacity or forced expiratory volume in one second which is less than 50% of that predicted for the person’s age, height and ethnicity.

#### Section 11 – Catastrophic blindness injury or disease

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

A person would have visual acuity of 6/60 if the person 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.