

EXPLANATORY STATEMENT

Military Rehabilitation and Compensation Legislative Instruments Omnibus Variation Determination 2022

EMPOWERING PROVISIONS

The Military Rehabilitation and Compensation Commission (the MRCC) has made the *Military Rehabilitation and Compensation Legislative Instruments Omnibus Variation Determination 2022* (the Determination) to:

- vary the *Military Rehabilitation and Compensation Act Education and Training Scheme 2004* under subsection 258(4) of the *Military Rehabilitation and Compensation Act 2004* (the MRCA); and
- amend the *Guide to Determining Impairment and Compensation 2016* under subsection 67(3) of the MRCA.

This instrument also relies on subsection 33(3) of the *Acts Interpretation Act 1901* (AIA). Subsection 33(3) of the AIA provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

PURPOSE

The attached instrument (Instrument 2022 No. MRCC9) is made under the relevant provisions of the MRCA to make the consequential amendments required following the recent commencement of the amendments made by the *Veterans' Affairs Legislation Amendment (Exempting Disability Payments from Income Testing and Other Measures) Act 2021* (the amending Act).

The primary purpose of the amending Act was to exempt certain payments made under the VEA and the MRCA known collectively as Adjusted Disability Pension (ADP) from the social security income test under the *Social Security Act 1991*.

ADP was payable under the VEA as payments of disability pension under Parts II and IV (specifically general rate disability pensions, extreme disablement adjustment, intermediate rate, special rate, temporary special rate under section 25 and payments made under section 27).

ADP was payable under the MRCA as permanent impairment compensation payments and Special Rate Disability Pension.

Because payments of ADP were not exempt from the social security income test, a payment referred to as the Defence Force Income Support Allowance (DFISA) was created in 2004. It provides for a payment of DFISA to be made where a person, due to their ADP being treated as income for the social security income test, has their social security payment reduced (including to a nil rate).

DFISA is calculated on the basis of the difference between the rate of an income support payment payable under the *Social Security Act 1991*, and what the payment would be if ADP were exempt from the assessment.

As ADP is now exempt from the income test under social security law, the amount of income support payment that a person receives has now increased which makes the DFISA payment redundant.

The amending Act repealed the provisions for determining the amount of DFISA payable and the definitions of DFISA and DFISA Bonus from the VEA and made consequential amendments to removes all references to it from other Commonwealth primary legislation.

The amending Act also made amendments to the VEA to replace references to “disability pension” with references to a pension (not being a dependant’s pension) that was payable under Parts II or IV of the VEA.

The variations and amendments to the various legislative instruments set out in the Schedules to the Determination will omit or replace references to “disability pension”.

CONSULTATION

In drafting the amendments made by the amending Act to exempt payments of ADP from the social security income test the Department was required to consult very closely with the Department of Social Services for an extensive period.

Further consultation with other Departments was undertaken for the amendments to the primary legislation of other portfolios to remove references to DFISA.

No external consultation was considered necessary for the consequential internal amendments to Veterans’ Affairs portfolio instruments being made by the Determination as the changes are minor in nature.

RETROSPECTIVITY

None.

DOCUMENTS INCORPORATED-BY-REFERENCE

No.

REGULATORY IMPACT

The Office of Best Practice Regulation (OBPR) was contacted and provided with information concerning the scope of the proposed amendments. It is their advice that the “proposal is unlikely to have a more than minor regulatory impact, and therefore the preparation of a Regulation Impact Statement is not required”. (OBPR22-01975).

HUMAN RIGHTS STATEMENT

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

Overview of the Determination

The purpose of the Determination is amend a number of legislative instruments to make consequential amendments following the commencement of the *Veterans' Affairs Legislation Amendment (Exempting Disability Payments from Income Testing and Other Measures) Act 2021* (the amending Act).

The amending Act exempted, from 1 January 2022, certain payments made under the VEA and the MRCA referred to as Adjusted Disability Pension (ADP) from the social security income test under the *Social Security Act 1991* (SSA).

With payments of ADP previously not being exempt from the social security income test, a payment referred to as the Defence Force Income Support Allowance (DFISA) had been payable under the VEA to those persons in receipt of income support under the SSA .

DFISA had been calculated on the basis of the difference between the rate of an income support payment payable under the SSA, and what the payment would be if ADP were exempt from that assessment.

The amending Act repealed the VEA provisions for determining the amount of DFISA payable and replaced the VEA references to “disability pension” with references to a pension (not being a dependant’s pension) that was payable under Parts II or IV of the VEA.

The Determination amends the legislative instruments set out in the Schedules to the Determination to omit or replace references to “disability pension”.

Human rights implications

These amendments are likely to engage the following human right:

Right to social security

With the commencement of the amending Act on 1 January 2022, payments of social security under the SSA were increased as a consequence of the exemption of ADP from the social security income test.

The amendments to the legislative instruments made by Determination engage the right of everyone to social security as set out in Article 9 of the International Covenant on Economic, Social and Cultural Rights.

The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security scheme must provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least

essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

The amendments are beneficial as payments of ADF by the Department of Veterans' Affairs will no longer be taken into account when assessing a person's entitlement or rate of social security under the social security income test.

While that increase would offset the DFISA payment that the person would otherwise have received the administration of the payments of social security is simplified and streamlined.

Conclusion

The amendments to the legislative instruments made by the Determination do not limit human rights because the total income support entitlements of the eligible persons are not affected by the amendments.

Rule-Maker:

Military Rehabilitation and Compensation Commission

FURTHER EXPLANATION OF NEW PROVISIONS

See: Attachment A

Attachment A**Section [1]**

This section sets out the name of the instrument, the *Military Rehabilitation and Compensation Legislative Instruments Omnibus Variation Determination 2022*.

Section [2]

This section provides that the instrument commences on the day after it is registered.

Section [3]

This section provides that each legislative instrument as specified in a Schedule is amended or varied in accordance with the applicable items in the Schedule.

Schedule 1

This Schedule amends the *Military Rehabilitation and Compensation Act Education and Training Scheme 2004* (the MRCA ETS).

The MRCA ETS sets up a scheme under which education and training may be provided to eligible children of members or former members of the ADF.

Under the MRCA ETS eligible children are provided with educational assistance comprised chiefly of educational allowances. Provision is also made for special assistance and the provision of additional tuition in appropriate cases.

Item 1 repeals the subparagraph 1.2.2 definition of “disability pension”.

Item 2 omits the reference to “disability pension” in paragraph 3A.10.1(1)(e) and replaces it with a reference to “a pension payable under Part II or IV of the VEA at a rate determined under or by reference to Division 4 of Part II of the VEA”.

Paragraph 3A.10.1 is a multiple entitlement exclusion provision which is applicable for the purposes of the Clean Energy Advance payments made under Part 3A of the MRCA ETS.

Paragraph 3A.10.1 provides that a person will not be eligible for a “clean energy advance” under the MRCA ETS if they have already been paid a “clean energy advance” under one of the Acts or legislative instruments listed in subsection (1).

Included in that list is paragraph (e) which refers to payments made under the VEA “other than a clean energy advance in relation to disability pension”.

The reference to “disability pension” in paragraph (e) is replaced with a reference to a “pension payable under Part II or IV of the VEA at a rate determined under or by reference to Division 4 of Part II of the VEA”.

Schedule 2

This Schedule amends the *Guide to Determining Impairment and Compensation 2016* (the Guide).

The Guide sets out the criteria and methodology used to assess the degree of impairment, and thus compensation payable under the MRCA, for entitled persons who have suffered a service related injury or disease.

Item 1 amends the Chapter 25 of the Guide definition of “VEA percentage” to omit the reference to “of disability pension”.

The “VEA percentage” had been defined as the amount of disability pension payable under the VEA for the conditions referred to in Step 1 of the Chapter 25 Method Statement (for calculating the amount permanent impairment compensation payable under the MRCA) at the date of the MRCA claim expressed as a percentage of the General Rate of disability pension payable at that date. The amended definition refers instead to “the amount payable under the VEA for the conditions referred to in Step 1”.

Item 2 omits the Chapter 25 of the Guide definition of “weekly disability pension” as that term is not used in the Guide.

Item 3 replaces the reference in Step 6 of the Method Statement in Chapter 25 of the Guide to “disability pension” with a reference to “pension under Part II or IV of the VEA”.