

EXPLANATORY STATEMENT

Military Rehabilitation and Compensation (Subsection 204A(2) Amount) Instrument 2023

Empowering provision

Subsection 204A(2) of the *Military Rehabilitation and Compensation Act 2004* (the *Act*).

Purpose

The *Military Rehabilitation and Compensation (Subsection 204A(2) Amount) Instrument 2023* (the ***Instrument***) sets out the formula for working out the amount of overpayment where a person has received a lump sum compensation payment under section 138 of the Act and later chooses to receive a Special Rate Disability Pension (***SRDP***).

An overpayment would occur in these circumstances because the lump sum compensation payment and the SRDP essentially cover the same incapacity of a person. If the person receives both types of compensation, he or she would be receiving a double-payment.

Accordingly, the Act deems an amount of the lump sum compensation payment to be an amount that should not have been paid to the person, and provides that this amount is to be worked out in accordance with a legislative instrument. The Instrument sets out the method for working out the amount of overpayment.

The method uses a formula to calculate the portion of the lump sum received under section 138 of the Act that the person is entitled to, given they have chosen to receive SRDP. It does this by taking the period of entitlement from the day after the person made a choice to receive a lump sum payment under section 138 to the day before they chose to receive SRDP. This portion is referred to in the instrument as the ***entitled amount***. The entitled amount is then deducted from the overall lump sum compensation payment and the amount remaining is the amount of the overpayment.

The amount of overpayment is recoverable under section 415 of the Act. The amount is also recoverable under section 1228 of the *Social Security Act 1991* and section 205 of the *Veterans' Entitlements Act 1986* as deductions from payments under those Acts.

The Determination repeals and replaces the *Military Rehabilitation and Compensation Act (Section 204A(2) amount) Instrument 2013*. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative character 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.

Explanation of provisions

Section 1 states the name of the Instrument.

Section 2 provides that the Instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 sets out the authority for making the Instrument. It provides that the Instrument is made under subsection 204(2) of the Act.

Section 4 defines the expression *Act* to mean the *Military Rehabilitation and Compensation Act 2004*. A note explains that certain expressions used in the Instrument are defined in the Act, such as the expression *Special Rate Disability Pension*.

Section 5 is a standard provision used in instruments that amend or repeal other instruments. It provides that Schedule 1 has the effect that the instrument specified in Schedule 1 is repealed as set out in Schedule 1.

Section 6 sets out the method for working out the portion of the lump sum payment that should not have been paid for the purposes of section 204 of the Act (the *overpayment amount*).

Section 6 provides two steps for working out the overpayment amount. Step 1 is to work out the entitled amount using the formula in section 7. Step 2 is to subtract the entitled amount from the full lump sum paid to the person under section 138 of the Act. The remaining amount is the overpayment amount.

Section 7 provides the formula for working out the entitled amount for section 6. The formula is similar to that used to calculate the original lump sum in section 138 of the Act, but is based on an eligibility period from the day after the person made a choice to receive a lump sum payment to the day before they chose to receive SRDP.

Schedule 1—Repeals

Item 1 repeals the *Military Rehabilitation and Compensation Act (Section 204A(2) amount) Instrument 2013* as it is being replaced by the Instrument.

Consultation

The instrument replaces an existing instrument. It specifies the same method as in that instrument to precisely calculate the amount of the overpayment in a way that is consistent with the relevant Act provisions. This ensures the correct amount is recoverable and avoids unintended double-payments. As such, the instrument is still fit for purpose, and as only minor editorial changes were made, further consultation was not considered to be necessary.

Regulatory Impact Analysis

The Determination is not regulatory in nature, will not impact on business activity and there will be no additional compliance costs. The Determination will have no, or minimal, competition impacts.

Statement of Compatibility with Human Rights

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

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The Instrument 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*. The Instrument engages, and is compatible with, the right to social security under article 9 of the International Covenant on Economic Social and Cultural Rights (ICESCR), the right to just and favourable conditions of work under article 7 of the ICESCR, and the right to an adequate standard of living under article 11 of the ICESCR.

The right to social security in article 9 of the ICESCR requires a social security system be established and that a country must, within its maximum available resources, ensure access to a social security scheme that provides 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 right to an adequate standard of living in article 11 of the ICESCR relates to an adequate standard of living for every person and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The right to work in article 7 of ICESCR includes a right to just and favourable conditions of employment, including that workers are provided with safe and healthy working conditions.

The instrument forms part of a process provided for by the *Military Rehabilitation and Compensation Act 2004* that ensures a person does not receive unintended double compensation for the same incapacity. This may occur where a person accepts a lump sum as compensation for an incapacity under the Act, then later accepts a disability pension for the same incapacity. The Act provides that a portion of the lump sum payment, worked out in accordance with a legislative instrument, is taken to be an amount that should not have been paid. The Act also provides for this amount to be recoverable.

The instrument sets out the method for working out the portion of the lump sum that is recoverable, based on a period of entitlement from the day after the person made a choice to receive a lump sum payment under section 138 of the Act to the day before they chose to receive SRDP. This portion is deducted from the lump sum amount, and the remainder is the amount that the Act provides is taken to be an amount that should not have been paid. The instrument therefore limits the overpayment amount to that which would otherwise represent a double payment of compensation for the same incapacity.

The instrument forms part of the legislative framework providing lump sum payments and pensions as compensation for veterans who suffer from an injury or disease in connection with their service. The framework therefore promotes the right to social security, the right to just and favourable conditions of work, and the right to an adequate standard of living. However by specifying the amount recoverable as an overpayment, the instrument also limits those rights. This limitation is necessary and proportionate. The method for calculating the overpayment, as set out in the instrument, is reasonable, proportionate and the least restrictive alternative. It forms part of a process provided for by the Act to prevent unintended double payments of compensation, and therefore protects public revenue. The method for specifying the overpayment amount is reasonable and proportionate as it represents the amount that would constitute a double payment for the same incapacity. This also ensures an equitable approach to the payment of compensation. The portion of the previous benefit that was paid in relation to the period before the pension became payable is not affected and is not recoverable. The instrument therefore balances the three rights set out above with the resources of the community. In addition, the instrument replicates the requirements in the instrument it repeals and replaces, with only minor editorial changes but no substantive changes. It therefore does not constitute a backwards or retrogressive step in relation to the rights.

CONCLUSION

The instrument is compatible with the right to social security, the right to an adequate standard of living and the right to work in the ISESCR. The method it provides for working out the amount of overpayment where a person is compensated in two different ways for the same injury is proportionate.

**The Military Rehabilitation and Compensation Commission
Rule-Maker**