Defence Determination 1998/3

I, BRUCE VINCENT FENN CLARK, Assistant Secretary, Workplace Relations Branch, Australian Government Employment Group, Department of Workplace Relations and Small Business, acting under a delegation made by the Minister for Workplace Relations and Small Business under section 58E of the Defence Act 1903, make the following Determination under section 58B of that Act.


B.V. CLARK
Assistant Secretary
Workplace Relations Branch
Australian Government Employment Group
Department of Workplace Relations and Small Business
Part 1—Preliminary

1.1 Citation

This Determination may be cited as *Defence Determination 1998/3*.

*Note*: This Determination commences on the date on which it is made: see *Defence Act 1903*, subsection 58B (4).

1.2 Purpose of the Determination

The purpose of this Determination is to provide for additional compensation in relation to members who suffer an injury resulting in death or severe impairment and in respect of which compensation is payable under the *Safety, Rehabilitation and Compensation Act 1988*.

1.3 Definitions

In this Determination, unless the contrary intention appears:

“**ADB**” means an additional death benefit mentioned in clause 2.1;

“**basic amount**” means an amount mentioned in subclause 3.2 (1);

“**Commonwealth authority**” has the same meaning as in section 4 of the SRC Act;

“**compensation**” means SRC compensation, State compensation or State workers’ compensation;

“**dependent child**”, in relation to a member, means a child of the member who is wholly or partly dependent on the member for economic support and is either:

(a) under 16; or

(b) 16 or more but under 25, being a child who:

(i) is in full-time education at a school, college, university or other educational institution; and

(ii) is not ordinarily in employment or working on his or her own account;

“**dependent child amount**” means an amount mentioned in subclause 2.2 (3) or subclause 3.2 (2);

“**impairment**” has the same meaning as in section 4 of the SRC Act;
“interim payment amount” means an amount mentioned in subclause 3.4 (3);

“member” includes a cadet;

“non-economic loss” has the same meaning as in section 4 of the SRC Act;

“permanent” has the same meaning as in section 4 of the SRC Act;

“severe injury” means an injury to the brain or spinal cord of a person resulting in quadriplegia, paraplegia, hemiplegia, an organic brain syndrome or chronic blindness, or a condition of similar effect;

“SIA” means a severe injury adjustment mentioned in clause 3.1;

“spouse” includes a person who was a member’s spouse immediately before the member’s death;

“spouse amount” means an amount mentioned in subclause 2.2 (1);

“SRC compensation” means compensation payable under subsection 17 (3) or (4), or section 24 or 27, of the SRC Act;

“State compensation” has the same meaning as in section 119 of the SRC Act;

“State workers’ compensation” has the same meaning as in section 118 of the SRC Act;

“the Act” means the Defence Act 1903;

“the SRC Act” means the Safety, Rehabilitation and Compensation Act 1988.

Note:

1. The terms “member” and “the Secretary” are defined by section 4 of the Act. Section 58A of the Act also defines “member”, for section 58B of the Act, as including a person who has ceased to be a member, whether by reason of death or otherwise.

2. Defence Determination 1991/45 defines other terms that are used in this Determination, including, in particular, “spouse” and “child”.

1.4 Some aspects of dependency

(1) A child of a member is taken to have been wholly or partly dependent on a member at a time if the child would have been so dependent at that time but for an incapacity of the member as the result of an injury.
(2) A child of a member who, immediately before the occurrence of an event, lived with the member is taken to have been wholly dependent on the member at the time of the occurrence of that event.

(3) A child of a member who was born alive after the member’s death is taken to have been born immediately before the member’s death and to have been wholly dependent on the member at the time of the member’s death.

(4) A child of a member who was conceived before the time of an assessment of the member’s SRC compensation mentioned in subclause 3.2 (2), and was born alive after that time, is taken to have been born immediately before that time and to have been wholly dependent on the member at that time.

(5) In deciding whether a child is or was dependent on a member at a time, none of the following amounts payable for the child under the Social Security Act 1991 are to be taken into account:
   (a) family allowance;
   (b) family allowance supplement;
   (c) child disability allowance;
   (d) double orphan pension.

1.5 Damages or compensation recovered or received for the benefit of dependants

(1) A reference in this Determination to SIA, ADB, compensation or damages paid or payable to a dependant includes a reference to SIA, ADB, compensation or damages paid or payable to a person other than the dependant for the benefit of the dependant.

(2) A reference in this Determination to compensation or damages received or recovered by a dependant includes a reference to compensation or damages received or recovered by a person other than the dependant for the benefit of the dependant.
Part 2—Additional Death Benefit

2.1 Entitlement to an additional death benefit

(1) An additional death benefit is payable in relation to a member under this Part if:
   (a) as a result of an injury suffered, the member died, or dies, on or after 10 June 1997; and
   (b) the member is survived by a spouse, or 1 or more dependent children, or both a spouse and 1 or more dependent children; and
   (c) SRC compensation in respect of the injury is payable to, or for the benefit of, the spouse or 1 or more dependent children.

(2) The ADB in relation to a member is the total of the amounts payable in relation to the member under this Part.

(3) The ADB is payable in addition to any SRC compensation that is payable in relation to the member.

2.2 Calculation of the ADB

(1) If the deceased member is survived by a spouse, an amount of ADB is payable in relation to the member in accordance with subclause (2).

(2) For subclause (1), the amount is:

\[ \$200,000 - A \]

where \( A \) is the maximum amount of SRC compensation payable under subsection 17 (3) of the SRC Act in respect of the injury.

(3) In addition to the spouse amount (if any), an amount of $50,000 is payable for each person who was a dependent child of the member at the time of the member’s death.

Note: The dollar amounts in this clause are indexed. See clause 6.2.
2.3 To whom is the ADB payable

(1) The ADB is payable to the spouse.

(2) However, subclause (3) or (4) applies if a dependent child amount is payable for a child and:

(a) the deceased member is not survived by a spouse; or

(b) the spouse does not have primary responsibility for the daily care of the child.

(3) If the child is under 18, the dependent child amount is payable to a person who has primary responsibility for the daily care of the child.

(4) If the child is 18 or over, the dependent child amount is payable to the child.
Part 3—Severe Injury Adjustment

3.1 Entitlement to a severe injury adjustment

(1) A severe injury adjustment is payable in relation to a member under this Part if the member:
   (a) on or after 10 June 1997 suffered, or suffers, a severe injury in respect of which SRC compensation is payable; and
   (b) the degree of permanent impairment of the member as a result of the injury is finally determined, under section 24 of the SRC Act, to be not less than 80%.

(2) The SIA in relation to a member is the total of the amounts payable in relation to the member under this Part.

(3) The SIA is payable in addition to any SRC compensation that is payable in relation to the member in respect of the injury.

(4) The SIA is payable whether or not the member makes a request, under section 43 of the SRC Act, that the SRC compensation in respect of the injury not be paid to, or for the benefit of, the member.

(5) The SIA is payable whether or not the member elects, under section 45 of the SRC Act, to begin proceedings in relation to damages.

3.2 Calculation of the SIA

(1) The basic amount of SIA in relation to a member is:

\[
\text{SIA} = 200,000 - A
\]

where \( A \) is the total amount of SRC compensation payable (or that would be payable but for a request under section 43 of the SRC Act or an election under section 45 of that Act) to the member in respect of the injury.

(2) An amount of $50,000 is payable, in addition to the basic amount, for each person who was a dependent child of the member at the time of the assessment of the member’s SRC compensation under section 24 of the SRC Act.

*Note:* The dollar amounts in this clause are indexed. See clause 6.2.
3.3 To whom is the SIA payable

(1) The SIA in relation to a member is payable to the member.

(2) However, if a dependent child amount is payable for a child and the member does not have primary responsibility for the daily care of the child, the dependent child amount is payable to a person who has primary responsibility for the daily care of the child.

3.4 Interim payment of SIA

(1) This clause applies if, under section 25 of the SRC Act:
   (a) an interim payment of SRC compensation is made to the member in respect of the injury; and
   (b) the amount has been assessed on an interim determination that the degree of permanent impairment of the member is not less than 80%.

(2) An interim payment of SIA is payable to the member.

(3) The interim payment amount is:

\[
\$200,000 - B
\]

where \( B \) is the maximum total amount of SRC compensation payable (or that would be payable but for a request under section 43 of the SRC Act or an election under section 45 of that Act) to the member in respect of the injury.

Note: The dollar amounts in this clause are indexed. See clause 6.2.

(4) When, under section 24 of the SRC Act, the degree of permanent impairment of the member as a result of the injury is finally determined, there is payable to the member an amount of SIA equal to the difference (if any) between the basic amount and the interim payment amount.
Part 4—Avoidance of double benefits

4.1 Notice of proceedings against a third party

(1) This clause applies if:
   (a) SIA or ADB is payable (or would be payable but for this Part) in relation to a member in respect of an injury; and
   (b) the injury happened in circumstances that appear to create a legal liability in a person (other than the Commonwealth, a Commonwealth authority or an employee of the Commonwealth) to pay damages in respect of the injury; and
   (c) after the commencement of this Determination, the member or a dependant begins proceedings to recover damages from the person.

(2) The member or dependant (as the case requires) must notify the Secretary in writing of the proceedings not later than 7 days after the day on which the member or dependant begins the proceedings.

4.2 SIA or ADB not payable if damages are recovered

(1) This clause applies if:
   (a) apart from this clause, SIA or ADB would be payable to a member or a dependant in respect of an injury suffered by the member; and
   (b) the member or dependant recovered, or recovers, damages in respect of the injury.

(2) If the member or dependant recovers damages after the commencement of this Determination, the member or dependant (as the case requires) must notify the Secretary in writing, within 28 days after the day on which the damages are recovered, of the recovery of the damages and the amount of damages.

(3) If SIA or ADB was paid to the member or dependant before the damages are recovered, the member or dependant (as the case requires) must repay to the Commonwealth an amount equal to the amount (if any) of SIA or ADB that, when added to the amount of SRC compensation (if any) paid to the member or dependant, does not exceed the amount of the damages.

(4) SIA or ADB is not payable to the member or dependant after the date on which the member or dependant recovered, or recovers, the damages.

(5) Subclause (3) does not apply if the damages were recovered in proceedings instituted by the member under section 45 of the SRC Act, or by way of a settlement of the proceedings.
(6) Subclause (4) does not apply if the damages were recovered:
(a) as a result of proceedings begun by the member after making an
election under section 45 of the Act; or
(b) as a result of proceedings begun or taken over by the Commonwealth
against a person (other than the Commonwealth, a Commonwealth
authority or an employee of the Commonwealth); or
(c) in a settlement of those proceedings.

(7) If a member or a dependant satisfies the Secretary that a part of the damages
recovered by the member or dependant was not in respect of death,
permanent impairment or non-economic loss as a result of the injury, this
clause has effect in relation to that member or dependant (as the case
requires) as if the amount of the damages recovered by the member or
dependant were an amount equal to so much (if any) of the damages as was
in respect of death, permanent impairment or non-economic loss as a result
of the injury.

(8) In this clause, “damages” does not include an amount of damages paid to
the Commonwealth under section 76 of the Veterans’ Entitlements Act 1986.

4.3 No double benefit if State workers’ compensation is received

(1) This clause applies if:
(a) apart from this clause, SIA or ADB would be payable in relation to a
member or dependant in respect of an injury suffered by the member;
and
(b) the member or dependant received, or receives, State workers’
compensation in respect of the injury.

(2) SIA or ADB is not payable in relation to the member or dependant in respect
of the injury.

(3) If SIA or ADB is paid to the member or dependant before the State workers’
compensation is received, the member or dependant (as the case requires)
must pay back to the Commonwealth an amount equal to the amount of SIA
or ADB so paid.

4.4 No double benefit if State compensation is received

(1) This clause applies if:
(a) apart from this clause, SIA or ADB would be payable in relation to a
member or a dependant in respect of an injury suffered by the member;
and
(b) the member or dependant received, or receives, State compensation in
respect of the injury.
(2) The amount of SIA or ADB payable in relation to the member or dependant in respect of the injury is so much (if any) of the amount that would be payable but for this clause as, when added to the amount (if any) of SRC compensation determined in respect of the injury in relation to the member or dependant, exceeds the amount of State compensation.

(3) If SIA or ADB is paid to the member or dependant before the State compensation is received, the member or dependant (as the case requires) must repay to the Commonwealth an amount equal to the amount (if any) of the SIA or ADB that, when added to the amount of SRC compensation (if any) determined in respect of the injury in relation to the member or dependant, does not exceed the amount of State compensation.

(4) If a member or dependant satisfies the Secretary that a part of the State compensation received by the member or dependant was not in respect of death, permanent impairment or non-economic loss as a result of the injury, this clause has effect in relation to that member or dependant (as the case requires) as if the amount of the State compensation received by the member or dependant were an amount equal to so much of the State compensation as was in respect of death, permanent impairment or non-economic loss as a result of the injury.

4.5 Statutory declaration as to State workers’ compensation etc

The Secretary may require a member or dependant to give to the Secretary a statutory declaration stating whether any damages, State workers’ compensation or State compensation has been paid to, or for the benefit of, the member or dependant for an injury for which, apart from clause 4.2, 4.3 or 4.4, SIA or ADB would be payable.

4.6 Reduction of SIA or ADB if similar compensation received before commencement

Nothing in this Part requires the repayment to the Commonwealth of an amount of compensation of the same kind as SIA or ADB received by a person from the Commonwealth before the commencement of this Determination in respect of an injury for which SIA or ADB is payable under this Determination, but the amount of SIA or ADB that would, apart from this clause, be payable to the person under this Determination, is to be reduced by the amount of compensation of that kind already received.

4.7 Recovery of SIA or ADB that is repayable

The Commonwealth may recover, as a debt due to the Commonwealth in a court of competent jurisdiction, an amount of SIA or ADB repayable to the Commonwealth under clause 4.2, 4.3 or 4.4.
Part 5—Authorisation of payment and review of decisions

5.1 Payment of SIA or ADB

(1) The Secretary may authorise the payment to a person of an amount of SIA or ADB payable under this determination in relation to a member.

(2) Without limiting the discretion of the Secretary under subclause (1), the Secretary may refuse to authorise a payment to a person if the person has:
   (a) failed, without reasonable excuse, to notify the Secretary under clause 4.1 of proceedings mentioned in that clause; or
   (b) refused, or failed without reasonable excuse, to give a statutory declaration under clause 4.5.

(3) If an amount is payable to a person who is under a legal disability, the Secretary may authorise the payment of the amount to 1 or more trustees appointed by the Secretary to act on behalf of the person, instead of authorising payment to the person.

(4) An amount paid to a trustee under subclause (3):
   (a) is to be held by the trustee on trust for the benefit of the person in accordance with any directions of the Secretary; and
   (b) is taken, for the purposes of this Determination (except this clause), to have been paid to the person.

5.2 Notice of decisions

(1) The Secretary must give notice of a decision to authorise, or not to authorise, a payment of an amount of SIA or ADB in relation to a member.

(2) The notice must be given to each person who is, to the Secretary’s knowledge, one of the member’s family.

*Note*: As to who is one of a member’s family, see clause 3A.1 of Defence Determination 1991/45.

(3) The notice must have with it a statement by the Secretary of the Secretary’s reasons for making the decision.
(4) The notice must include a statement to the effect that, if dissatisfied with the decision, the person may:
   (a) in the case of notice of a decision (other than a decision made by the Secretary under clause 5.3 confirming or varying an earlier reviewable decision of the Secretary)—request reconsideration of the decision under clause 5.3; and
   (b) in the case of notice of a decision made by the Secretary under clause 5.3 confirming or varying an earlier reviewable decision of the Secretary—apply to the Administrative Appeals Tribunal for review of the decision so confirmed or varied.

(5) Failure to comply with subclause (4) in relation to a decision does not affect the validity of the decision.

5.3 Reconsideration of decisions

(1) A person who is dissatisfied with a decision of the Secretary (other than a decision made under this clause) may, by notice in writing to the Secretary, request the Secretary to reconsider the decision.

(2) The notice must be given to the Secretary within:
   (a) 30 days after the day on which the person first receives notice of the decision; or
   (b) any further period that the Secretary allows.

(3) The person must set out in the notice the reasons for the request.

(4) The Secretary must reconsider the decision and may:
   (a) confirm the decision; or
   (b) vary or revoke the decision.

5.4 Review by Tribunal of reconsidered decisions

An application may be made to the Administrative Appeals Tribunal for review of a decision of the Secretary to confirm or vary a decision under subclause 5.3 (4).
Part 6—General

6.1 Reimbursement of cost of financial advice

(1) If a person is paid an amount of SIA or ADB under this Determination and obtains professional financial advice about the investment of that amount, the person is entitled to reimbursement of the cost of that advice up to a maximum of $1,000.

(2) For subclause (1), an amount that is made up of an interim payment and a final payment is to be taken as one amount.

Note: the dollar amounts in this clause are indexed. See clause 6.2.

6.2 Indexation of amounts

Section 13 of the SRC Act applies to the dollar amounts specified in clauses 2.2, 3.2, 3.4 and 6.1 as if:

(a) those amounts were relevant amounts mentioned in subsection 13 (1) of that Act; and

(b) references in that section to the SRC Act were references to this Determination.

6.3 Exercise of powers by Secretary

In this Determination, a reference to the Secretary includes a reference to another person authorised by the Secretary for the purpose of the provision in which the reference occurs.
EXPLANATORY STATEMENT

Defence Determination 1998/3

Defence Act 1903

This Determination may be cited as Defence Determination 1998/3.

Benefits available under this Determination are payable in respect of an injury or death which occurred on or after 10 June 1997, being the date on which the Government agreed to the additional lump sum payments of compensation. There is no prejudicial effect on any person (other than the Commonwealth) in allowing payment of benefits in respect of an entitlement arising on or after 10 June 1997.

The purpose of this Determination is to provide a lump sum benefit payable in respect of members who suffer severe injury or an injury resulting in death. The lump sum is additional to amounts of compensation determined under the Safety, Rehabilitation and Compensation Act 1988 (SRC Act) in respect of the permanent impairment or death of a member.

The Determination was drafted by the Office of Legislative Drafting, Attorney-General's Department.

Clause 1.3 of the Determination includes definitions.

The definition of “severe injury” reflects the definition suggested by the Department of Defence in its inquiry into military compensation arrangements for the Australian Defence Force.

“SRC compensation” is defined to exclude weekly payments and medical costs, which are not predictable. It includes compensation determined under the SRC Act in respect of permanent impairment and death.

Part 2 of this Determination provides for the payment of an “additional death benefit” where, as a result of an injury suffered, a member dies on or after 10 June 1997. Subclause 2.1(1) restricts the payment of compensation to situations where SRC compensation is payable and where the member is survived by a spouse or 1 or more dependant child. Subclause 2.2 provides a formula for determining the amount of benefit payable by subtracting SRC compensation from a maximum amount of additional death benefit. The formula is structured to prevent receipt of double compensation. Subclause 2.3 provides that in certain cases the dependant child amount will be payable directly to the child, or to a person with primary responsibility for the daily care of the child.

Subclause 3.1 of Part 3 of this Determination provides for payment of a “severe injury adjustment” in relation to a member injured on or after 10 June 1997 where SRC
compensation would be payable for the injury and where the degree of permanent impairment resulting from the injury has been determined under the SRC Act as 80% or greater. Subclause 3.2 provides a formula for determining the amount of benefit payable by subtracting SRC compensation from a total amount of severe injury adjustment. The SRC compensation is deemed to include an amount determined but not payable so as to provide a mechanism for assessing payment of the benefit where a person has elected to seek common law damages for non-economic loss as an alternative to receiving a statutory amount for permanent impairment under section 27 of the SRC Act, or where they have elected to stop receiving SRC payments under section 43 of that Act in order to receive veteran’s entitlements. Subclause 3.4 provides for interim payment of the severe injury adjustment.

Subclause 4.2 of Part 4 of this Determination is intended to prevent a person from receiving benefits under this Determination where they have received common law damages in respect of the death, permanent impairment or non-economic loss of a member. Damages for non-economic loss proceedings initiated under section 45 of the SRC Act are not to be taken into account for this purpose as they are broadly commensurate with the section 27 compensation which is deemed to have been payable for the purposes of calculating the severe injury adjustment under this Determination. Subclauses 4.3 and 4.4 provide that benefits payable under this Determination will only be payable where the sum of compensation received under State law is less than the maximum which would otherwise be payable under this Determination. This prevents a double benefit from being paid where compensation under State law is paid in respect of a member’s injury.

Subclause 4.6 provides that the retrospective operation of this Determination does not affect compensation paid by the Commonwealth in respect of a member prior to the commencement of the Determination. In such cases, the amount of benefit payable under this Determination is to be reduced by the amount of compensation already received.

Part 5 of this Determination deals with authorisation for payment and review. Subclause 5.1 provides that the Secretary may authorise or refuse to authorise the payment of benefits under this Determination. This discretion is intended to permit the Secretary to authorise payment under the scheme in flexible circumstances as contemplated by the Determination. The use of the discretion should also operate to prevent a double award of benefits under this Determination where other compensation has already been received in respect of permanent impairment or death for an amount greater than that which can be awarded under this Determination.

Subclause 5.2 provides that notice of a decision in respect of benefits under this Determination should be given to the spouse and dependant children of a member. The notice requirement will serve to inform the dependants of a member of the assessment of benefits relevant to their support, or to alert them to a possible entitlement.

Subclauses 5.3 and 5.4 provide for both internal review and review by the Administrative Appeals Tribunal of the exercise of the Secretary’s discretion. This will operate as a
safeguard against an unreasonable exercise of the Secretary’s discretion by providing for merit review of the Secretary’s decision.

Part 6 of this Determination reimburses up to $1 000 of the cost of financial advice regarding the investment of lump sums paid under this determination. It also provides for indexation of amounts consistent with the SRC Act.

Authority: Section 58B of the Defence Act 1903