



New South Wales

# Workers Compensation Legislation Amendment Act 2018 No 62

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New South Wales

# **Workers Compensation Legislation Amendment Act 2018 No 62**

Act No 62, 2018

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An Act to amend the *Workers Compensation Act 1987* and other Acts with respect to the reform of the NSW workers compensation scheme. [Assented to 26 October 2018]

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Workers Compensation Legislation Amendment Act 2018*.

**2 Commencement**

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsections (2) and (3).
- (2) Schedule 5 (Amendments relating to indexation) commences on 1 December 2018.
- (3) The following provisions of this Act commence on the date of assent:
  - (a) Schedule 4 (Amendments relating to information sharing) (except Schedule 4 [1] and [2], to the extent that it inserts section 40D into the *Workplace Injury Management and Workers Compensation Act 1998*),
  - (b) Schedule 6 (Amendments relating to motor accidents scheme),
  - (c) Schedule 7.1,
  - (d) Schedule 8 (Amendments relating to savings and transitional provisions).

## **Schedule 1 Amendments relating to dispute resolution**

### **1.1 Workers Compensation Act 1987 No 70**

#### **[1] Section 43 Work capacity decisions by insurers**

Omit “(referred to in this Division as work capacity decisions) are final and binding on the parties and not subject to appeal or review except review under section 44BB or judicial review by the Supreme Court” from section 43 (1).

Insert instead “are *work capacity decisions*”.

#### **[2] Section 43 (3)**

Omit the subsection.

#### **[3] Part 3, Division 2, Subdivision 3A Review of work capacity decisions**

Omit the Subdivision.

#### **[4] Section 54 Notice required before termination or reduction of payment of weekly compensation**

Omit the section.

### **1.2 Workplace Injury Management and Workers Compensation Act 1998 No 86**

#### **[1] Section 4 Definitions**

Insert in appropriate order in section 4 (1):

work capacity decision—see section 43 of the 1987 Act.

#### **[2] Section 27 Functions of Independent Review Officer**

Omit section 27 (b).

#### **[3] Section 27B Requirement to provide information**

Omit “or a worker who has applied for review of a work capacity decision of an insurer” from section 27B (1).

#### **[4] Section 27C Annual report**

Omit section 27C (4) (d).

#### **[5] Section 74 Insurers to give notice and reasons when liability disputed**

Omit the section.

**[6] Chapter 4, Part 2, Division 3**

Insert after section 75:

**Division 3 Notification of decisions of insurers**

**Subdivision 1 Preliminary**

**76 Definitions**

In this Division:

*internal review* means a review by an insurer of a work capacity decision under Part 4 of Chapter 7.

*notice of discontinuation or reduction* means a notice required by this Division of an insurer's decision to discontinue payment to a worker of weekly payments of compensation, or to reduce the amount of the compensation.

*original decision* means a work capacity decision that is the subject of an internal review or of a dispute referred for determination by the Commission.

*review decision* means:

- (a) in relation to an original decision that is the subject of an internal review—a work capacity decision made by an insurer as a result of the review, or
- (b) in relation to an original decision that is the subject of a dispute referred for determination by the Commission—a decision of the Commission determining the dispute.

**77 Requirement for refund of weekly payments not affected**

This Division does not affect the operation of section 58 (Refund of weekly payments paid after return to work etc) of the 1987 Act.

**Subdivision 2 General notice requirements**

**78 Insurer to give notice of decisions**

- (1) An insurer must give notice in accordance with this Division of any decision of the insurer:
  - (a) to dispute liability in respect of a claim or any aspect of a claim, or
  - (b) to discontinue payment to a worker of weekly payments of compensation, or reduce the amount of the compensation.
- (2) Notice of a decision of an insurer involving both a liability dispute and a discontinuation or reduction of weekly compensation may be combined into a single notice (subject to any provision of the Workers Compensation Guidelines requiring separate notices to be given).
- (3) The requirement to give notice of a decision to discontinue payment to a worker of weekly payments of compensation does not affect any limitation on weekly payments of compensation under Division 2 of Part 3 of the 1987 Act.

**79 How notice of decision is given**

- (1) A notice required by this Division must be given:
  - (a) to the claimant or worker concerned, and
  - (b) in the case of a notice of a decision to dispute liability—to the worker's employer, if required by the regulations.

- (2) The notice must contain a concise and readily understandable statement of the reason for the insurer's decision and of the issues relevant to the decision.
- (3) In addition, notice of a decision to dispute liability for a claim for compensation must identify any provision of the workers compensation legislation on which the insurer relies to dispute liability.
- (4) The regulations may make provision for:
  - (a) the manner in which a notice under this Division is to be given, and
  - (b) the form of and other information to be included in or to accompany the notice.

### **Subdivision 3 Notice period for discontinuation and reduction of weekly compensation**

#### **80 Required period of notice**

- (1) An insurer must not discontinue payment to a worker of weekly payments of compensation, or reduce the amount of the compensation, unless the required period of notice (commencing when the notice of discontinuation or reduction is given in accordance with this Division) has expired.
- (2) This section applies to a worker only if the worker has received weekly payments for a continuous period of at least 12 weeks.
- (3) The *required period of notice* for a decision made on the basis of any reassessment by the insurer of the entitlement to weekly payments of compensation resulting from a work capacity decision of the insurer is 3 months.

**Note.** See sections 81–83 for the effect of an internal review or determination of a dispute by the Workers Compensation Commission on the required period of notice.
- (4) In any other case, the *required period of notice* is:
  - (a) for a worker who has been receiving weekly payments of compensation for a continuous period of less than 1 year—2 weeks, or
  - (b) for a worker who has been receiving weekly payments of compensation for a continuous period of 1 year or more—6 weeks.
- (5) The required period of notice of the discontinuation or reduction is required to be given in accordance with this Subdivision whether or not the notice also includes notice of a liability dispute.
- (6) Subsection (1) does not apply to a decision of an insurer to discontinue or reduce the amount of weekly payments of compensation as a result only of the application of different rates of compensation after the expiration of earlier periods of incapacity for which higher rates were payable. However, notice of the decision must be given before the expiration of the period of incapacity that results in the discontinuation or reduction.

#### **81 Effect of stay of decision on notice period**

A stay of a decision to discontinue, or reduce an amount of, compensation that is the subject of a dispute referred to the Commission for determination does not operate to extend the required period of notice with respect to the discontinuation or reduction.

## **82 Effect of review decision on notice period**

- (1) In the application of this Subdivision to a discontinuation, or reduction of the amount, of payments of compensation as a result of a review decision (whether or not the review decision is less favourable to the worker than the original decision):
  - (a) no regard is to be had to any period of notice given to the worker in respect of any discontinuation or reduction before the date on which the worker is notified of the review decision, and
  - (b) the required period of notice starts on that date.
- (2) This section does not apply to a discontinuation or reduction as a result of a review decision that affirms an original decision with respect to the discontinuation or reduction.

**Note.** See section 83 for the effect of the affirmation of an original decision on the required period of notice.

## **83 Effect of affirmation of work capacity decision or withdrawal, discontinuance or dismissal of dispute proceedings**

The required period of notice with respect to a discontinuation or reduction of compensation is not affected by:

- (a) a review decision made by an insurer or by the Commission that affirms the original decision of the insurer with respect to the discontinuation or reduction, or
- (b) the withdrawal of a request for internal review of the original decision with respect to the discontinuation or reduction, or
- (c) the withdrawal of the referral to the Commission for determination of a dispute about a work capacity decision, or the discontinuance or dismissal of proceedings before the Commission in relation to the dispute.

## **84 Recovery of weekly payments by worker where notice not given by insurer**

- (1) If an insurer discontinues payment to a worker of weekly payments of compensation, or reduces the amount of the compensation, in contravention of this Subdivision, the worker may recover from the insurer an amount of compensation in accordance with this section.
- (2) This section applies whether or not the insurer has been prosecuted for an offence under this Division involving the contravention.
- (3) The amount of compensation that may be recovered as a result of a failure to give the required period of notice is:
  - (a) if no period of notice has been given—an amount that is equal to the amount of compensation, or additional compensation, that would have been payable during the required period of notice if payment of the compensation had not been discontinued or if the amount of compensation had not been reduced, or
  - (b) if less than the required period of notice has been given—an amount that is equal to the amount of compensation that would have been payable during the balance of the required period of notice if payment of the compensation had not been discontinued or if the amount of the compensation had not been reduced.

## **Subdivision 4 Offences**

### **85 Failure to comply with notice requirement**

An insurer who fails to comply with a requirement of this Division is guilty of an offence.

Maximum penalty: 50 penalty units.

### **[7] Section 93 Claims for weekly compensation—commencement of payments**

Omit “in accordance with section 74” from section 93 (2).

### **[8] Section 105 Jurisdiction of Commission and Compensation Court**

Omit the note to section 105 (1).

### **[9] Sections 271 (1), 274 (1), 279 (1), 281 (2) and 315 (2), notes**

Omit “Section 74” wherever occurring. Insert instead “Section 78”.

### **[10] Section 281 Liability to be accepted and settlement offer made**

Insert “under Division 3 of Part 2 of Chapter 4” after “liability” in section 281 (1) (b).

### **[11] Chapter 7, Part 4, Division 1, heading**

Insert before section 287:

## **Division 1 Preliminary**

### **[12] Chapter 7, Part 4, Division 2**

Omit section 287A. Insert instead:

## **Division 2 Reviews by insurer**

### **287A Request for review**

- (1) A worker may request an insurer to review:
  - (a) a work capacity decision of the insurer that is disputed by the worker, or
  - (b) a claim, or any aspect of a claim, that is disputed by the insurer.
- (2) A request may be made at any time before the dispute is referred for determination by the Commission.
- (3) The insurer must conduct the review, and notify the worker of the decision on the review, within 14 days after the request is made.

Maximum penalty: 50 penalty units.

### **287B Regulations relating to decisions and reviews by insurers**

The regulations may make provision for or with respect to:

- (a) the notification of decisions of insurers, and
- (b) the procedure for conducting internal reviews, and
- (c) requiring insurers to conduct reviews of decisions in respect of which disputes are referred for determination by the Commission under this Part.

**Note.** See section 78 for further requirements relating to the giving of notice of disputes.



### **Division 3 Determination of disputes by Commission**

**[13] Section 289 Restrictions as to when dispute can be referred to Commission**

Insert “(other than a dispute based on a work capacity decision)” after “for weekly payments” in section 289 (1).

**[14] Section 289 (1), note**

Omit “without having disputed liability”.

Insert instead “pursuant to a work capacity decision (without having disputed liability)”.

**[15] Section 289B**

Insert after section 289A:

**289B Stay of disputed work capacity decision**

- (1) The referral of a dispute for determination by the Commission in relation to a work capacity decision to discontinue, or reduce the amount of, weekly payments of compensation operates to stay the decision and prevents the taking of action by an insurer based on the decision while the decision is stayed.
- (2) However, the decision is stayed only if the dispute is referred for determination by the Commission before the expiry of the required period of notice under section 80.
- (3) A stay operates from the time the Registrar accepts the dispute for referral until the proceedings are determined, dismissed or discontinued.
- (4) The Commission may, if it considers that a party to the dispute is unreasonably delaying the proceedings on the dispute, order that the stay ceases to have effect.

**[16] Section 291 Duties of insurer when dispute referred to Commission**

Omit the section.

**[17] Section 297 Directions for interim payment of weekly payments or medical expenses compensation**

Omit section 297 (1A). Insert instead:

- (1A) Section 298 does not apply to a dispute concerning a decision by the insurer to discontinue or reduce weekly payments of compensation on the basis of a work capacity decision under Division 2 of Part 3 of the 1987 Act.

### **1.3 Workers Compensation Regulation 2016**

**[1] Clause 38 Notice of dispute about liability**

Omit “section 74” from clause 38 (1). Insert instead “section 78”.

**[2] Clause 38 (1) (g)**

Omit “or from any”.

Insert instead “, from the Independent Review Officer or from any other”.

**[3] Clause 38 (1), note**

Omit “Section 74” and “indicating”.

Insert instead “Section 79” and “identifying”, respectively.

**[4] Clause 38 (2)**

Omit the subclause.

**[5] Clause 41 Access to certain medical reports and other reports obtained by insurer**

Omit “and reasons under section 74 of the 1998 Act”, “of intention under section 54 of the 1987 Act” and “under section 74 of the 1998 Act, section 54 of the 1987 Act” wherever occurring in clause 41 (2) (a) and (b) and (3).

Insert instead “under Division 3 of Part 2 of Chapter 4 of the 1998 Act”.

**[6] Clause 42 Interim payment direction not presumed to be warranted**

Omit “section 74 of the 1998 Act (Insurers to give notice and reasons when liability disputed)”.

Insert instead “section 78 of the 1998 Act (Insurer to give notice of decisions)”.

**[7] Schedule 5 Penalty notice offences**

Insert in appropriate order in Part 2:

Section 85	500
Section 287A (3)	500

**[8] Schedule 5, Part 3**

Omit the matter relating to clause 38 (2).

## **Schedule 2 Amendments relating to medical assessments for permanent impairment**

### **2.1 Workers Compensation Act 1987 No 70**

**[1] Section 60 Compensation for cost of medical or hospital treatment and rehabilitation etc**

Insert “by an approved medical specialist” after “for assessment” in section 60 (5).

**[2] Section 65 Determination of degree of permanent impairment**

Omit section 65 (3).

### **2.2 Workplace Injury Management and Workers Compensation Act 1998 No 86**

**[1] Section 293 Medical assessment**

Omit “, in accordance with this section,” from section 293 (1).

Insert instead “(subject to the regulations under section 321A (Referral of medical dispute concerning permanent impairment))”.

**[2] Section 293 (2) and (3) (a)**

Omit the provisions.

**[3] Section 321 Referral of medical dispute for assessment**

Insert “(other than a dispute concerning permanent impairment of an injured worker)” after “medical dispute” in section 321 (1).

**[4] Section 321 (3) and (4)**

Omit the subsections.

**[5] Section 321A**

Insert after section 321:

**321A Referral of medical dispute concerning permanent impairment**

- (1) The regulations may make provision for or with respect to:
  - (a) the circumstances in which a medical dispute concerning permanent impairment of an injured worker is authorised, required or not permitted to be referred for assessment under this Part, and
  - (b) the giving of notice of a referral to the parties to the dispute.
- (2) Without limiting subsection (1), the regulations may provide that a medical dispute may not be referred for assessment under this Part if the dispute concerns permanent impairment of an injured worker where liability is in issue and has not been determined by the Commission.
- (3) A medical dispute concerning permanent impairment of an injured worker that is authorised or required by the regulations to be referred for assessment under this Part may be referred by a court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute.

**[6] Section 322A One assessment only of degree of permanent impairment**

Insert after section 322A (1):

- (1A) A reference in subsection (1) to an assessment includes an assessment of the degree of permanent impairment made by the Commission in the course of the determination of a dispute about the degree of the impairment that is not the subject of a referral under this Part.

**[7] Section 322A (3)**

Omit “subject of assessment and a medical assessment certificate under this Part”.

Insert instead:

subject of:

- (a) assessment and a medical assessment certificate under this Part, or  
(b) a determination by the Commission under Part 4.

**[8] Section 322A (4)**

Insert “or 352 (Appeal against decision of Commission constituted by Arbitrator)” after “assessment”.

**[9] Section 352 Appeal against decision of Commission constituted by Arbitrator**

Insert “(including, in the case of a decision about the degree of permanent impairment resulting from an injury, a direction to refer the matter for assessment by an approved medical specialist under Part 7)” after “Commission” in section 352 (7).

## **Schedule 3 Amendments relating to pre-injury average weekly earnings**

### **3.1 Workers Compensation Act 1987 No 70**

#### **[1] Section 32A Definitions**

Omit the definitions of *base rate of pay*, *base rate of pay exclusion*, *current weekly earnings*, *current work capacity*, *no current work capacity*, *non-pecuniary benefit*, *ordinary earnings*, *ordinary hours of work*, *pre-injury average weekly earnings* and *relevant period*.

#### **[2] Section 32A (2)**

Insert at the end of section 32A:

- (2) Words and expressions in this Division that are defined in Schedule 3 have the meanings provided by that Schedule. The regulations may amend Schedule 3.  
**Note.** Definitions include *current work capacity*, *current weekly earnings* and *pre-injury average weekly earnings*.

#### **[3] Section 34 Maximum weekly compensation amount**

Insert before section 34 (1):

- (1AA) A weekly payment of compensation under this Subdivision is not to exceed the maximum weekly compensation amount.

#### **[4] Section 34 (1)**

Omit “maximum weekly compensation amount” from section 34 (1).

Insert instead “*maximum weekly compensation amount*”.

#### **[5] Sections 36 and 37**

Omit sections 35–37. Insert instead:

##### **36 Weekly payments during first entitlement period (first 13 weeks)**

- (1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the first entitlement period is to be at the rate of 95% of the worker’s pre-injury average weekly earnings.
- (2) The weekly payment of compensation to which an injured worker who has current work capacity is entitled during the first entitlement period is to be at the lesser of the following rates:
- (a) 95% of the worker’s pre-injury average weekly earnings, less the worker’s current weekly earnings,
  - (b) the maximum weekly compensation amount, less the worker’s current weekly earnings.

##### **37 Weekly payments during second entitlement period (weeks 14–130)**

- (1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of 80% of the worker’s pre-injury average weekly earnings.
- (2) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for not less than 15 hours per week is entitled during the second entitlement period is to be at the lesser of the following rates:

- (a) 95% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,
  - (b) the maximum weekly compensation amount, less the worker's current weekly earnings.
- (3) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the lesser of the following rates:
- (a) 80% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,
  - (b) the maximum weekly compensation amount, less the worker's current weekly earnings.

**[6] Section 38 Weekly payments after second entitlement period (after week 130)**

Omit section 38 (6) and (7). Insert instead:

- (6) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled under this section after the second entitlement period is to be at the rate of 80% of the worker's pre-injury average weekly earnings.
- (7) The weekly payment of compensation to which an injured worker who has current work capacity is entitled under this section after the second entitlement period is to be at the lesser of the following rates:
  - (a) 80% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,
  - (b) the maximum weekly compensation amount, less the worker's current weekly earnings.

**[7] Section 44BAA**

Insert after section 44B:

**44BAA Regulations**

The regulations may provide for the procedures to be followed by insurers in connection with the making of work capacity decisions, including the adjustment of any amount of weekly payments as a result of a work capacity decision.

**[8] Part 3, Division 2, Subdivision 4, heading**

Omit the heading. Insert instead:

**Subdivision 4 Miscellaneous**

**[9] Sections 44C–44I**

Omit the sections.

**[10] Section 82A Indexation—weekly payments**

Omit section 82A (3).

[11] **Schedule 3**

Omit the Schedule. Insert instead:

**Schedule 3 Earnings for purposes of weekly payments of compensation under Division 2 of Part 3**

(Section 32A)

**1 Application**

The words and expressions defined in this Schedule apply for the purposes of Division 2 of Part 3 of this Act.

**2 Meaning of “pre-injury average weekly earnings”**

- (1) *Pre-injury average weekly earnings*, in relation to an injured worker, means the weekly average of the gross pre-injury earnings received by the worker for work in any employment in which the worker was engaged at the time of the injury.

**Note.** See also clauses 3–5 relating to modifications of pre-injury average weekly earnings by agreement and in relation to apprentices, trainees and persons aged under 21 years.

- (2) Except as provided by this clause (or by regulations made under this clause), in calculating the *pre-injury earnings* received by a worker in employment for the purposes of subclause (1), no regard is to be had to earnings in the employment paid or payable to the worker for work performed before or after the period of 52 weeks ending immediately before the date of the injury (*the relevant earning period*).
- (3) The regulations may provide for the adjustment of the relevant earning period for a worker in employment (including, for example, by extending or reducing the period):
- (a) to take into account any period of unpaid leave or other change in earnings circumstances in the employment, or
  - (b) to align the relevant earning period with any regular interval at which the worker is entitled to receive payment of earnings for work performed in the employment.
- (4) If the amount of a worker’s pre-injury average weekly earnings is less than any minimum amount prescribed by the regulations as applicable to the worker, the amount of the worker’s pre-injury average weekly earnings is taken to be that minimum amount. Different minimum amounts may be prescribed for different classes of workers, including part-time and full-time workers.

**3 Agreements relating to pre-injury average weekly earnings**

- (1) An injured worker and the employer may agree, in accordance with any requirements of the regulations, as to the amount of pre-injury average weekly earnings that is to apply to the worker for the purposes of Division 2 of Part 3 of this Act.
- (2) If a worker enters into an agreement under this clause, the amount of pre-injury average weekly earnings that applies to the worker for the purposes of that Division is, subject to the regulations, the amount so agreed.
- (3) Any decision of the insurer authorised or required by the regulations to be made in relation to an agreement under this clause before the agreement can

take effect is, subject to the regulations, taken not to be a work capacity decision for the purposes of that Division.

#### **4 Pre-injury average weekly earnings for short-term workers**

- (1) If, at the time of the injury, the injured worker had been continuously employed in employment for less than 4 weeks, the *pre-injury average weekly earnings* in relation to the worker may be calculated having regard to the weekly average of the earnings that the worker could reasonably have been expected to have earned in the employment, but for the injury, during the period of 52 weeks after the injury.
- (2) The regulations may make provision for the matters to be taken into account for the purposes of determining the earnings that the worker could reasonably have been expected to have earned in the employment, but for the injury, during the period of 52 weeks after the injury.

#### **5 Pre-injury average weekly earnings of apprentices, trainees and young people**

- (1) This clause applies to an injured worker who, at the time of the injury, is:
  - (a) under the age of 21 years, or
  - (b) an apprentice, or
  - (c) working under a contract of employment under which the worker is required to undergo training, instruction or examination in order to become qualified to carry on an occupation to which the contract of employment relates.
- (2) This clause applies to an injured worker under subclause (1) only if the worker would, but for the injury, have been entitled to increments in earnings at certain ages or stages during the course of employment to become qualified.
- (3) The *pre-injury average weekly earnings*, in relation to an injured worker to whom this clause applies, means:
  - (a) until the day on which the worker attains the age or stage or would, but for the injury, have attained the stage at which the highest rate is payable—the amount of earnings that the worker would have been entitled to receive in respect of a relevant week if the worker had not sustained the injury and had continued in the employment, or
  - (b) on and after the day on which the worker attains the age or stage or would, but for the injury, have attained the age or stage at which the highest rate is payable—the amount of pre-injury average weekly earnings calculated under clause 6 as if, at the time of the injury, the worker were being paid at the highest rate applicable to that age or stage, or
  - (c) if paragraph (a) or (b) applies but there is no rate applicable to a worker who has attained the age of 21 years, the worker's pre-injury average weekly earnings are to be determined in accordance with the regulations.
- (4) The Workers Compensation Guidelines may make provision for the matters to be taken into account for the purposes of determining the weekly earnings that it is likely that a worker would have been entitled to in a week had the injury not occurred and had he or she continued in the employment concerned.



## 6 Meaning of “earnings”

- (1) The *earnings* received by a worker in respect of a week means the amount that is the income of the worker received by the worker for work performed in any employment during the week.
- (2) The *income* of a worker does not include:
  - (a) any minimum amount paid to a superannuation fund or scheme in respect of the week to avoid an individual superannuation guarantee shortfall, within the meaning of the *Superannuation Guarantee (Administration) Act 1992* of the Commonwealth, for the worker, or
  - (b) the monetary value of any non-monetary benefit provided to the worker for the performance of work by the worker, or
  - (c) any payment in respect of loss of earnings under a scheme to which the workers compensation legislation relates or under any other insurance or compensation scheme.
- (3) However, the monetary value of a non-monetary benefit of a worker is to be included as part of the income of the worker for the purposes of the calculation of the weekly payments of compensation payable to the worker if the worker is not entitled to the use of the benefit.
- (4) The Workers Compensation Guidelines may make provision for or with respect to the matters to be taken into account for the purposes of determining whether a benefit has been provided to a worker or whether the worker is entitled to the use of a benefit.

## 7 Monetary value of non-monetary benefits

- (1) The monetary value of a non-monetary benefit in respect of a week is:
  - (a) the value that would be the value as a fringe benefit for the purposes of the *Fringe Benefits Tax Assessment Act 1986* of the Commonwealth, calculated in accordance with subclause (2), divided by 52, or
  - (b) in the case of a non-monetary benefit that is not a fringe benefit or is otherwise not subject to fringe benefits tax, the amount that would reasonably be payable for that benefit (having regard to any matter specified by the Workers Compensation Guidelines).
- (2) Value as a fringe benefit is to be determined in accordance with the formula:

$$TV \times \frac{1}{1 - \text{FBT rate}}$$

where:

*TV* is the value that would be the taxable value of the benefit as a fringe benefit for the purposes of the *Fringe Benefits Tax Assessment Act 1986* of the Commonwealth.

*FBT rate* is the rate of fringe benefits tax imposed by the *Fringe Benefits Tax Assessment Act 1986* of the Commonwealth that applies when the non-pecuniary benefit is provided.

## 8 Meaning of “current weekly earnings”

*Current weekly earnings*, of an injured worker in relation to a week, means whichever of the following is the greater amount:

- (a) the worker’s actual gross earnings in respect of that week,
- (b) the weekly amount that the worker is able to earn in suitable employment.

**9 Meaning of “current work capacity” and “no current work capacity”**

- (1) An injured worker has *current work capacity* if the worker has a present inability arising from the injury such that the worker is able to return to the worker’s pre-injury employment, or is able to return to work in suitable employment, but the weekly amount that the worker has the capacity to earn in any such employment is less than the weekly amount that the worker had the capacity to earn in that employment immediately before the injury.
- (2) An injured worker has *no current work capacity* if the worker has a present inability arising from an injury such that the worker is not able to return to work, either in the worker’s pre-injury employment or in suitable employment.

**3.2 Workplace Injury Management and Workers Compensation Act 1998  
No 86**

**Section 4 Definitions**

Insert in appropriate order in section 4 (1):

*current work capacity*—see Schedule 3 to the 1987 Act.

*no current work capacity*—see Schedule 3 to the 1987 Act.

*suitable employment*—see section 32A of the 1987 Act.

## Schedule 4 Amendments relating to information sharing

### Workplace Injury Management and Workers Compensation Act 1998 No 86

[1] **Section 4 Definitions**

Insert in appropriate order in section 4 (1):

*mandatory notification requirement*—see section 40D.

[2] **Chapter 2, Part 7**

Insert after Part 6 of Chapter 2:

### Part 7 Information collection and sharing

**40A Definitions**

In this Part:

*data* means any facts, statistics, instructions, concepts or other information in a form that is capable of being communicated, analysed or processed (whether by an individual or by a computer or other automated means).

*insurer* means a licensed insurer, a former licensed insurer, a self-insurer or a former self-insurer, and includes a scheme agent.

*relevant insurance or compensation authority* means a relevant authority for the purposes of section 10 of the *State Insurance and Care Governance Act 2015*, and includes authorities of the Commonwealth, the other States and Territories that administer insurance or compensation schemes.

**40B General data gathering, exchange, etc, by Authority, insurers and relevant insurance or compensation authorities**

- (1) The Authority may collect, use and disclose data relating to any of the following:
  - (a) policies of insurance,
  - (b) claims for compensation or for work injury damages,
  - (c) the functions, activities and performance of insurers and employers,
  - (d) the provision of health, legal and other services to injured workers,
  - (e) any matter in respect of which a complaint is made to the Authority or the Independent Review Officer concerning any aspect of the schemes to which the workers compensation legislation relates.
- (2) For that purpose, the Authority may obtain data from insurers, from relevant insurance or compensation authorities, from hospitals, from government agencies and from any other source.
- (3) Data concerning policies of insurance, claims and other related matters under the workers compensation legislation and policies, claims and other related matters under other insurance or compensation schemes is authorised to be exchanged between different parts of the Authority.
- (4) The Authority, the Independent Review Officer and insurers are authorised to exchange data concerning policies of insurance, claims, complaints and other related matters under the workers compensation legislation.
- (5) The Authority and relevant insurance or compensation authorities are authorised to exchange data concerning policies of insurance, claims and other related matters under the workers compensation legislation and policies,

claims and other related matters under other insurance or compensation schemes administered by those authorities.

- (6) This section applies in respect of data that is personal information or health information about an individual despite anything to the contrary in the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*.
- (7) Section 243 does not prevent the disclosure of information in accordance with this section.

#### **40C Data required to be supplied to Authority by insurers**

- (1) The Authority may require an insurer to disclose to the Authority (within the time and in the manner specified by the Authority) data relating to policies of insurance, claims and other related matters under the workers compensation legislation.
- (2) Subsection (1) extends to requiring:
  - (a) data relating to any aspect of a workers compensation insurance scheme under the workers compensation legislation (for example, the setting of premiums, the handling of claims, the cost of providing health, legal and other services to injured workers or the detection and prosecution of fraudulent claims), and
  - (b) data relating to policies or claims generally or to particular policies or claims.

This subsection does not affect the generality of subsection (1) or any other provision of this Act regarding the obtaining of data by the Authority.

- (3) An insurer may be required to disclose data to the Authority under this section that is personal information or health information about an individual despite anything to the contrary in the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*.
- (4) Unless the insurer satisfies the court that it is not within its power to comply with a requirement under this section, an insurer that fails to comply with a requirement under this section is guilty of an offence.  
Maximum penalty: 100 penalty units.

#### **40D Mandatory notification**

- (1) The regulations may make provision for or with respect to requiring a scheme participant to notify the Authority of any contravention of this Act of which the scheme participant becomes aware. Any such requirement is a **mandatory notification requirement**.
- (2) Each of the following is a **scheme participant**:
  - (a) an insurer,
  - (b) any specified person, or person of a specified class, on whom functions are conferred by this Act.
- (3) A mandatory notification requirement may apply in relation to all or any specified class of insurers.
- (4) Without limiting subsection (1), the regulations may:
  - (a) provide for the form and manner in which notification is to be given, and
  - (b) provide for when the notification is to be given, and

- (c) provide for the information required to be notified, and
- (d) provide for any further requirements relating to the notification (such as a requirement to provide further information or answer questions).

**[3] Section 243 Disclosure requirements**

Omit section 243 (2) (c). Insert instead:

- (c) the Australian Prudential Regulation Authority or the Australian Securities and Investments Commission, and

**[4] Section 243A Information gathering and use by Authority and Nominal Insurer**

Omit the section.

## **Schedule 5 Amendments relating to indexation**

### **5.1 Workers Compensation Act 1987 No 70**

**[1] Section 79 Definitions**

Omit “prescribed by the regulations in respect of that date” from paragraph (b) of the definition of *latest index number*.

Insert instead “declared by the Authority in respect of that date by order published on the NSW legislation website”.

**[2] Section 82 Publication of adjusted amounts**

Omit “shall, by notice published in the Gazette, declare” from section 82 (1).

Insert instead “is to declare, by order published on the NSW legislation website,”.

**[3] Section 82 (2)**

Omit “(including a failure that occurred before the commencement of this subsection) to publish the notice”.

Insert instead “to publish the order”.

**[4] Section 82A Indexation—weekly payments**

Omit “Minister is, on or before each review date, to notify, by order published on the NSW legislation website” from section 82A (4).

Insert instead “Authority is to declare, by order published on the NSW legislation website on or before each review date”.

**[5] Section 82A (5)**

Omit “A notification” and “as if published”.

Insert instead “A declaration made by an order” and “as if the order were published”, respectively.

**[6] Section 82B Indexation of certain amounts—according to average weekly earnings**

Omit “Minister is to notify” from section 82B (2). Insert instead “Authority is to declare”.

**[7] Section 82B (3)**

Omit “A notification”. Insert instead “A declaration made by an order”.

**[8] Section 82BA Indexation—compensation amount for workers with highest needs**

Omit “Minister is to notify” from section 82BA (3). Insert instead “Authority is to declare”.

**[9] Section 82BA (4)**

Omit “A notification” and “as if published”.

Insert instead “A declaration made by an order” and “as if the order were published”, respectively.

**[10] Section 82F Indexation—compensation for permanent impairment**

Omit “Minister is to notify” from section 82F (3). Insert instead “Authority is to declare”.

**[11] Section 82F (4)**

Omit “A notification”. Insert instead “A declaration made by an order”.

**5.2 Workers Compensation Regulation 2016**

**[1] Clause 8 Meaning of “latest index number”**

Transfer the clause as clause 41 of Part 8 (with the following heading) of Schedule 8.

**Part 8 Provision consequent on enactment of Workers  
Compensation Legislation Amendment Act 2018**

**[2] Schedule 8, clause 41 (as amended by item [1])**

Insert “(as in force before the commencement of Schedule 5 to the *Workers Compensation Legislation Amendment Act 2018*)” after “1987 Act”.

## **Schedule 6 Amendments relating to motor accidents scheme**

### **6.1 Motor Accident Injuries Act 2017 No 10**

**[1] Section 3.35 No statutory benefits if workers compensation payable**

Insert after section 3.35 (7):

- (8) Nothing in this section affects the entitlement of an injured person to statutory benefits for treatment and care under Division 3.4 in respect of an injury if compensation under Division 3 (Compensation for medical, hospital and rehabilitation expenses etc) of Part 3 of the *Workers Compensation Act 1987* previously payable in respect of the injury has ceased to be payable. The relevant insurer is not entitled to refuse payment of the statutory benefits on the grounds that workers compensation was previously payable under that Division.

**[2] Section 3.40 Effect of recovery of damages on statutory benefits**

Omit “this Part” from section 3.40 (3) (a). Insert instead “Division 3.3”.

**[3] Section 6.13 Time for making of claims for statutory benefits**

Omit “date within” from section 6.13 (1). Insert instead “period within”.

**[4] Section 6.13 (4)**

Insert after section 6.13 (3):

- (4) In addition, a claim for statutory benefits under Division 3.4 in respect of an injury for which compensation under Division 3 (Compensation for medical, hospital and rehabilitation expenses etc) of Part 3 of the *Workers Compensation Act 1987* has been payable may be made within 3 months after the compensation ceases to be payable.

### **6.2 Workers Compensation Act 1987 No 70**

**[1] Section 151A Effect of recovery of damages on compensation**

Omit “or (4)” from section 151A (1). Insert instead “, (4) or (5)”.

**[2] Section 151A (4) and (5)**

Omit section 151A (4). Insert instead:

- (4) If a person recovers motor accident damages (other than damages to which Part 4 of the *Motor Accident Injuries Act 2017* applies) from the employer liable to pay compensation under this Act:
- (a) the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid), and
  - (b) the amount of any compensation already paid in respect of the injury concerned is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the compensation.
- (5) If a person recovers damages to which Part 4 of the *Motor Accident Injuries Act 2017* applies from the employer liable to pay compensation under this Act:



- (a) the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid), and
- (b) the amount of any of the following compensation already paid in respect of the injury concerned is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the compensation:
  - (i) weekly payments of compensation,
  - (ii) permanent impairment compensation and pain and suffering compensation, but limited to the amount of any damages recovered for non-economic loss.

**[3] Section 151E Application—modified common law damages**

Omit “and section 3B of the *Motor Accidents Compensation Act 1999*” from the note to section 151E (2).

Insert instead “, section 3B of the *Motor Accidents Compensation Act 1999* and section 1.10 of the *Motor Accident Injuries Act 2017*”.

**[4] Section 151Z Recovery against both employer and stranger**

Insert after section 151Z (1) (b):

**Note.** See also section 151N of this Act and section 10 of the *Law Reform (Miscellaneous Provisions) Act 1965* in relation to the application of other laws concerning contributory negligence.

**[5] Section 151Z (1A) and (1B)**

Insert after section 151Z (1):

- (1A) In the application of subsection (1) (b) in relation to a worker who recovers motor accident damages to which Part 4 of the *Motor Accident Injuries Act 2017* applies in respect of an injury:
  - (a) the liability of the worker to repay the amount of compensation already paid does not include any amount of compensation already paid under Division 3 (Compensation for medical, hospital and rehabilitation expenses etc) of Part 3 of this Act in respect of the injury concerned, and
  - (b) the liability of the worker to repay the amount of any permanent impairment compensation and pain and suffering compensation already paid is limited to the amount of any damages recovered for non-economic loss.
- (1B) Any amount that is excluded under subsection (1A) from the amount that a worker is liable to repay out of damages is excluded from the indemnity to which a person is entitled under subsection (1) (d).

## **6.3 Workplace Injury Management and Workers Compensation Act 1998 No 86**

### **Section 250 Interpretation**

Omit “and section 3B of the *Motor Accidents Compensation Act 1999*” from the note to the definition of *work injury damages* in section 250 (1).

Insert instead “, section 3B of the *Motor Accidents Compensation Act 1999* and section 1.10 of the *Motor Accident Injuries Act 2017*”.

## Schedule 7 Miscellaneous amendments

### 7.1 State Insurance and Care Governance Act 2015 No 19

#### Section 18 SIRA Board

Omit “up to 3” from section 18 (2) (c). Insert instead “up to 5”.

### 7.2 Workers Compensation Act 1987 No 70

#### Section 87EAA

Insert after section 87E:

#### **87EAA Medical expenses compensation not to be commuted for catastrophic injuries**

- (1) A liability in respect of compensation under Division 3 (Compensation for medical, hospital and rehabilitation expenses etc) of Part 3 of this Act or section 10 of the former Act may not be commuted to a lump sum under this Division unless the Authority is satisfied that, and certifies that it is satisfied that, the injury is not a catastrophic injury.
- (2) An injury is a *catastrophic injury* if it satisfies the criteria specified in the Workers Compensation Guidelines for the purposes of this section.
- (3) This section applies in addition to any other provision of this Division limiting the commutation of a liability.

### 7.3 Workplace Injury Management and Workers Compensation Act 1998 No 86

#### [1] Section 52 Workplace rehabilitation

Omit section 52 (2) (c). Insert instead:

- (c) be in writing, and
- (d) be displayed at places of work, or notified to workers by publishing it on a website or by any other method authorised by the regulations.

#### [2] Section 61 Notice of injury to be given to employer

Insert “(as in force at the time of the injury)” after “section 231” in section 61 (2) (d) (i).

#### [3] Section 231 Notification of summary of Act and insurance details

Omit “There must be kept constantly posted up in some conspicuous place at or near every mine, quarry, factory, workshop, office or shop, and on every ship to which this Act applies, where it may be conveniently read by a person employed there” from section 231 (1).

Insert instead “An employer must ensure that the following information is available at all times to workers of the employer”.

#### [4] Section 231 (1) (a)

Omit “(in the form prescribed by the regulations or approved by the Authority from time to time)”.

#### [5] Section 231 (1) (a)–(c)

Omit “and” wherever lastly occurring.

**[6] Section 231 (2)–(4)**

Omit section 231 (2) and (3). Insert instead:

- (2) The information is to be made available to workers by publishing it on a website or by any other method authorised by the regulations.
- (3) If the information required by this section is made available to workers of the employer but becomes damaged, destroyed or otherwise inaccessible, the employer must renew the information (whether by the same or another method) as soon as practicable.
- (4) The Workers Compensation Guidelines may make provision for or with respect to the form of the information required to be made available.  
Maximum penalty: 20 penalty units.

**[7] Section 254 Notice of injury must be given to employer**

Insert after section 254 (3) (d):

- (e) the employer has contravened section 231,
- (f) the injury has been treated in a first aid room at the place of work,
- (g) if the employer is the owner of a mine—the injury has been reported by or on behalf of the employer to an inspector of mines or an inspector under the *Work Health and Safety Act 2011*.

## **Schedule 8 Amendments relating to savings and transitional provisions**

### **8.1 Motor Accident Injuries Act 2017 No 10**

#### **Schedule 4 Savings, transitional and other provisions**

Insert at the end of the Schedule, with appropriate Part and clause numbering:

### **Part Provisions consequent on enactment of Workers Compensation Legislation Amendment Act 2018**

#### **Definitions**

In this Part:

*2018 amending Act* means the *Workers Compensation Legislation Amendment Act 2018*.

#### **Application of amendments**

An amendment made to this Act by Schedule 6 to the 2018 amending Act extends to:

- (a) a motor accident occurring before the commencement of the amendment (but not before 1 December 2017), and
- (b) a claim for statutory benefits or damages made before the commencement of the amendment (but not before 1 December 2017), and
- (c) statutory benefits or damages paid or payable before the commencement of the amendment in respect of a motor accident occurring on or after 1 December 2017, and
- (d) proceedings pending before a merit reviewer, a medical assessor, a claims assessor or a court immediately before the commencement of the amendment.

### **8.2 Workers Compensation Act 1987 No 70**

#### **[1] Schedule 6 Savings, transitional and other provisions**

Insert after clause 1 (6) of Part 20:

- (7) Without limiting subclauses (1), (2) and (4), regulations made for the purposes of this clause may amend this Schedule to provide for additional or different savings and transitional provisions instead of including the provisions in the regulations.

[2] **Schedule 6**

Insert at the end of the Schedule, with appropriate Part and clause numbering:

**Part Provisions consequent on enactment of Workers Compensation Legislation Amendment Act 2018**

**Definitions**

In this Part:

*2018 amending Act* means the *Workers Compensation Legislation Amendment Act 2018*.

*earnings amendments* means the amendments made by Schedule 3 to the 2018 amending Act.

*existing claim for weekly payments* means a claim for weekly payments made before the commencement of the earnings amendments.

*existing work capacity decision* means a work capacity decision of an insurer made before the commencement of Schedule 1 to the 2018 amending Act.

*work capacity decision amendments* means the amendments made by Schedule 1 to the 2018 amending Act, but only to the extent that the amendments apply to a work capacity decision.

**Application of amendments generally**

- (1) Except as provided by this Part or the regulations, an amendment made by the 2018 amending Act extends to:
  - (a) an injury received before the commencement of the amendment, and
  - (b) a claim for compensation made before the commencement of the amendment, and
  - (c) proceedings pending in the Commission or a court immediately before the commencement of the amendment.
- (2) An amendment made by the 2018 amending Act does not apply to compensation paid or payable in respect of any period before the commencement of the amendment, except as otherwise provided by this Part.

**Application of amendments to other Workers Compensation Acts**

- (1) The following amendments do not apply for the purposes of the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* and a reference in that Act to a provision of the Workers Compensation Acts is a reference to the provision without regard to those amendments:
  - (a) the work capacity decision amendments,
  - (b) the amendments made by Schedules 2 and 3 to the 2018 amending Act.
- (2) The amendments made by Schedules 1–3 and 6 to the 2018 amending Act do not apply for the purposes of the *Workers' Compensation (Dust Diseases) Act 1942* and a reference in that Act to a provision of the Workers Compensation Acts is a reference to the provision without regard to those amendments.

**Application of amendments to police officers, paramedics and firefighters**

The following amendments do not apply to or in respect of an injury received by a police officer, paramedic or firefighter (before or after the commencement of this clause), and the Workers Compensation Acts (and the

regulations under those Acts) apply to and in respect of such an injury as if those amendments had not been enacted:

- (a) the work capacity decision amendments,
- (b) Schedule 3 to the 2018 amending Act.

#### **Application of amendments to coal miners**

- (1) The amendments made by Schedules 1–3 to the 2018 amending Act do not apply to or in respect of an injury received by a coal miner (before or after the commencement of this clause), and the Workers Compensation Acts (and the regulations under those Acts) apply to and in respect of such an injury as if those amendments had not been enacted.
- (2) In this clause:  
*coal miner* means a worker employed in or about a mine.

#### **Work capacity decision disputes**

- (1) Subdivision 3A of Division 2 of Part 3 of the 1987 Act continues to apply to an existing work capacity decision (as if the work capacity decision amendments had not been enacted):
  - (a) during the transitional review period, and
  - (b) if, immediately before the expiry of the transitional review period, the decision is subject to a review under that Subdivision—until the review is finally determined.
- (2) A dispute about an existing work capacity decision that is determined before the expiry of the period during which Subdivision 3A of Division 2 of Part 3 of the 1987 Act applies to the decision is not subject to referral for determination by the Commission after the expiry of that period.
- (3) The work capacity decision amendments do not apply in relation to an existing work capacity decision during the period in which Subdivision 3A of Division 2 of Part 3 of the 1987 Act applies to the decision.
- (4) The *transitional review period* is:
  - (a) the period of 6 months commencing on the day on which Schedule 1.1 [3] to the 2018 amending Act commences, or
  - (b) any other period prescribed by the regulations.

#### **Pre-injury average weekly earnings**

- (1) The earnings amendments do not apply to an injury received by a worker before the commencement of the amendments.
- (2) In the application of section 44C of the 1987 Act (as in force before the commencement of the earnings amendments) to an injury received by a worker before the commencement of the amendments but not before the date of assent to the 2018 amending Act, overtime and shift allowance payments are permitted to be included under that section for the purposes of the calculation of weekly payments payable at any time in respect of the injury (whether during or after the first 52 weeks for which the weekly payments are payable).

#### **Information sharing**

Data collected before the commencement of Part 7 of Chapter 2 of the 1998 Act (as inserted by the 2018 amending Act) is taken to have been collected in accordance with that Part (and may be used or disclosed in accordance with

that Part) if it was collected in a manner that is substantially consistent with that Part.

#### **Notice requirements**

- (1) For the purposes of the referral of a dispute by a claimant for determination by the Commission under Part 4 of Chapter 7 of the 1998 Act, a notice of a dispute, or of the discontinuation or reduction of the amount of weekly payments of compensation, is taken to comply with the requirements of Division 3 of Part 2 of Chapter 4 of the 1998 Act if it complies with the former notice requirements.
- (2) An amendment made by Schedule 1.2 [5] or [6] to the 2018 amending Act does not affect the operation of any stay of a work capacity decision in effect immediately before the commencement of the amendment.
- (3) In this clause:  
*former notice requirements* means section 74 of the 1998 Act, and section 54 of the 1987 Act, as in force immediately before the commencement of Division 3 of Part 2 of Chapter 4 of the 1998 Act (as inserted by the 2018 amending Act).

#### **Commutation**

Section 87EAA of the 1987 Act (as inserted by the 2018 amending Act) extends to a liability for compensation in respect of an injury that is subject to an application for registration of a commutation agreement under Division 9 of Part 3 of that Act made before the commencement of that section, but not before 1 July 2018.

#### **Indexation**

The amendments made by Schedule 5 to the 2018 amending Act do not affect the adjustment of any amount under Division 6 of Part 3 of the 1987 Act in relation to an adjustment date occurring before the commencement of the amendments.

#### **Motor accident compensation**

An amendment made to the 1987 Act or the 1998 Act by Schedule 6 to the 2018 amending Act extends to compensation or damages paid or payable before the commencement of the amendment in respect of a motor accident occurring on or after 1 December 2017.

[Second reading speech made in—

Legislative Council on 19 September 2018

Legislative Assembly on 17 October 2018]