

# Workers Compensation Legislation Amendment Act 2012 No 53

[2012-53]



New South Wales

## Status Information

### Currency of version

Historical version for 11 August 2012 to 1 October 2012 (accessed 22 November 2024 at 12:30)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

### Notes—

- **See also**  
[Workers Compensation Legislation Amendment \(Costs\) Bill 2012](#) [Non-government Bill: Mr David Shoebridge, MLC]
- **Note**  
Amending Acts and amending provisions are subject to automatic repeal pursuant to sec 30C of the [Interpretation Act 1987 No 15](#) once the amendments have taken effect.

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

File last modified 13 September 2012

# Workers Compensation Legislation Amendment Act 2012 No 53



New South Wales

## Contents

<b>Long title</b> .....	3
1 Name of Act .....	3
2 Commencement .....	3
<b>Schedule 1 Amendments relating to weekly payments of compensation</b> .....	3
<b>Schedules 2, 3 (Repealed)</b> .....	33
<b>Schedule 4 Amendments relating to medical and related expenses</b> .....	33
<b>Schedules 5-7 (Repealed)</b> .....	34
<b>Schedule 8 Amendments relating to commutation of compensation</b> .....	34
<b>Schedule 9 (Repealed)</b> .....	35
<b>Schedule 10 Amendments relating to WorkCover Independent Review Officer</b> .....	35
<b>Schedule 11 Miscellaneous amendments</b> .....	40
<b>Schedule 12 (Repealed)</b> .....	42

# Workers Compensation Legislation Amendment Act 2012 No 53



New South Wales

An Act to amend the *Workers Compensation Act 1987* and other Acts with respect to the reform of the NSW workers compensation scheme.

## 1 Name of Act

This Act is the *Workers Compensation Legislation Amendment Act 2012*.

## 2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).
- (2) The following provisions of this Act commence on the date of assent:
  - (a) Schedule 2 (Amendments relating to lump sum compensation),
  - (b) Schedule 3 (Amendments relating to damages for nervous shock),
  - (c) Schedule 4 (Amendments relating to medical and related expenses), except Schedule 4 [1],
  - (d) Schedule 5 (Amendments relating to journey claims),
  - (e) Schedule 6 (Amendments relating to heart attack and stroke),
  - (f) Schedule 7 (Amendments relating to disease injuries),
  - (g) Schedule 9 (Amendments relating to insurer licensing and transfer of claims),
  - (h) Schedule 12 (Amendments relating to savings and transitional provisions).

### Note—

Schedule 12 provides for some amendments to have operation on and from 19 June 2012.

## Schedule 1 Amendments relating to weekly payments of

## compensation

### 1.1 Amendment of [Workers Compensation Act 1987 No 70](#)

[1] **Section 22A Further provisions concerning apportionment of liability under section 22**

Omit section 22A (2).

[2] **Part 3, Division 2**

Insert before section 33:

## Subdivision 1 Interpretation

### 32A Definitions

In this Division and in Schedule 3:

**base rate of pay**—see section 44G.

**base rate of pay exclusion**—see section 44G.

**current weekly earnings**—see section 44I.

**current work capacity**, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.

**fair work instrument** means:

- (a) a fair work instrument (other than an FWA order) within the meaning of the [Fair Work Act 2009](#) of the Commonwealth, or
- (b) a transitional instrument within the meaning of the [Fair Work \(Transitional Provisions and Consequential Amendments\) Act 2009](#) of the Commonwealth.

**first entitlement period**, in relation to a claim for compensation in the form of weekly payments made by a worker, means an aggregate period not exceeding 13 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker.

**maximum weekly compensation amount** means the maximum weekly compensation amount under section 34.

**no current work capacity**, in relation to a worker, means 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.

**non-pecuniary benefit**—see section 44F.

**ordinary earnings**—see section 44E.

**ordinary hours of work**—see section 44H.

**pre-injury average weekly earnings**—see section 44C.

**relevant period**—see section 44D.

**second entitlement period**, in relation to a claim for compensation in the form of weekly payments made by a worker, means an aggregate period of 117 weeks (whether or not consecutive) after the expiry of the first entitlement period in respect of which a weekly payment has been paid or is payable to the worker.

**seriously injured worker** means a worker whose injury has resulted in permanent impairment and:

- (a) the degree of permanent impairment has been assessed for the purposes of Division 4 to be more than 30%, or
- (b) the degree of permanent impairment has not been assessed because an approved medical specialist has declined to make an assessment until satisfied that the impairment is permanent and the degree of permanent impairment is fully ascertainable, or
- (c) the insurer is satisfied that the degree of permanent impairment is likely to be more than 30%.

**suitable employment**, in relation to a worker, means employment in work for which the worker is currently suited:

- (a) having regard to:
  - (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
  - (ii) the worker's age, education, skills and work experience, and
  - (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
  - (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
  - (v) such other matters as the WorkCover Guidelines may specify, and

(b) regardless of:

- (i) whether the work or the employment is available, and
- (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
- (iii) the nature of the worker's pre-injury employment, and
- (iv) the worker's place of residence.

**work capacity assessment** means a work capacity assessment under section 44A.

**work capacity decision**—see section 43.

## Subdivision 2 Entitlement to weekly compensation

### [3] Sections 34-44

Omit the sections. Insert instead:

#### 34 Maximum weekly compensation amount

- (1) The maximum weekly compensation amount is \$1,838.70.
- (2) If the amount mentioned in subsection (1):
  - (a) is adjusted by the operation of Division 6, or
  - (b) is adjusted by an amendment of this section,the maximum weekly compensation amount applicable to a worker injured before the date on which the adjustment takes effect is, for any period of incapacity for work occurring on and after that date, to be determined by reference to that amount as so adjusted.
- (3) Such an adjustment does not apply to the extent that the liability to make weekly payments of compensation in respect of any such period of incapacity has been commuted.

#### 35 Factors to determine rate of weekly payments

- (1) For the purposes of the provisions of this Subdivision used to determine the rate of weekly payments payable to an injured worker in respect of a week:

**AWE** means the worker's pre-injury average weekly earnings.

**D** (or a **deductible amount**) means the sum of the value of each non-pecuniary benefit (if any) that is provided by the employer to a worker in respect of that

week (whether or not received by the worker during the relevant period), being a non-pecuniary benefit provided by the employer for the benefit of the worker or a member of the family of the worker.

**E** means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever of the following is the greater amount:

- (a) the amount the worker is able to earn in suitable employment,
- (b) the workers current weekly earnings.

**MAX** means the maximum weekly compensation amount.

- (2) If the determination of an amount for the purpose of determining the rate of weekly payments payable to an injured worker results in an amount that is less than zero, the amount is to be treated as zero.

### **36 Weekly payments in 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:

- (a)  $(AWE \times 95\%) - D$ , or
- (b)  $MAX - D$ ,

whichever is the lesser.

- (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 rate of:

- (a)  $(AWE \times 95\%) - (E + D)$ , or
- (b)  $MAX - (E + D)$ ,

whichever is the lesser.

### **37 Weekly payments in 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:

- (a)  $(AWE \times 80\%) - D$ , or
- (b)  $MAX - D$ ,

whichever is the lesser.

(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 rate of:

(a)  $(AWE \times 95\%) - (E + D)$ , or

(b)  $MAX - (E + D)$ ,

whichever is the lesser.

(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 rate of:

(a)  $(AWE \times 80\%) - (E + D)$ , or

(b)  $MAX - (E + D)$ ,

whichever is the lesser.

### **38 Special requirements for continuation of weekly payments after second entitlement period (after week 130)**

(1) A worker's entitlement to compensation in the form of weekly payments under this Part ceases on the expiry of the second entitlement period unless the worker is entitled to compensation after the second entitlement period under this section.

(2) A worker who is assessed by the insurer as having no current work capacity and likely to continue indefinitely to have no current work capacity is entitled to compensation after the second entitlement period.

(3) A worker who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:

(a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and

(b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week, and

(c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or



work that would increase the worker's current weekly earnings.

- (4) An insurer must, for the purpose of assessing an injured worker's entitlement to weekly payments of compensation after the expiry of the second entitlement period, ensure that a work capacity assessment of the worker is conducted:
- (a) during the last 52 weeks of the second entitlement period, and
  - (b) thereafter at least once every 2 years.

**Note—**

An insurer can conduct a work capacity assessment of a worker at any time. The WorkCover Guidelines can also require a work capacity assessment to be conducted.

- (5) An insurer is not to conduct a work capacity assessment of a seriously injured worker unless the insurer thinks it appropriate to do so and the worker requests it. An insurer can make a work capacity decision about a seriously injured worker without conducting a work capacity assessment.
- (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:
- (a)  $(AWE \times 80\%) - D$ , or
  - (b)  $MAX - D$ ,
- whichever is the lesser.
- (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 rate of:
- (a)  $(AWE \times 80\%) - (E + D)$ , or
  - (b)  $MAX - (E + D)$ ,
- whichever is the lesser.
- (8) A worker's entitlement to compensation under this section may be reassessed at any time.

### **39 Cessation of weekly payments after 5 years**

- (1) Despite any other provision of this Division, a worker has no entitlement to weekly payments of compensation under this Division in respect of an injury after an aggregate period of 260 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker in respect of the injury.

- (2) This section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.

**Note—**

For workers with more than 20% permanent impairment, entitlement to compensation may continue after 260 weeks but entitlement after 260 weeks is still subject to section 38.

- (3) For the purposes of this section, the degree of permanent impairment that results from an injury is to be assessed as provided by section 65 (for an assessment for the purposes of Division 4).

**40 Entitlement after second entitlement period not affected by certain circumstances**

- (1) A worker who receives weekly payments under section 38 does not cease to be entitled to weekly payments under that section by reason only that the worker occasionally, but not during more than 4 weeks in the first period of 12 consecutive weeks immediately after the worker first received weekly payments under that section, or in any subsequent consecutive period of 12 weeks:

- (a) has worked more hours during a week, or
- (b) has worked fewer hours during a week (even if the number of hours worked is less than 15), or
- (c) has received higher current weekly earnings, or
- (d) has received lower current weekly earnings (even if the earnings are less than \$155 per week),

than the hours worked, or the current weekly earnings received, at the time of making the application for payments under section 38.

- (2) A reference in subsection (1) to hours of work does not include hours of leave approved by the employer.

**41 Compensation for incapacity after second entitlement period resulting from surgery**

- (1) An injured worker who suffers incapacity resulting from injury related surgery is entitled to weekly payments of compensation (***special compensation***) as provided by this section in respect of that incapacity when the incapacity occurs after the second entitlement period.
- (2) The special compensation provided for by this section is payable at the rate provided under section 37, as if the period of incapacity in respect of which the special compensation is payable occurred during (not after) the second

entitlement period.

- (3) Special compensation is not payable in respect of any period of incapacity that occurs:
  - (a) during the first 13 consecutive weeks after the end of the second entitlement period, or
  - (b) more than 13 weeks after the surgery concerned, or
  - (c) during any period in respect of which the worker is otherwise entitled to compensation after the second entitlement period (under section 38).
- (4) Surgery is ***injury related*** if it is surgery that the worker undergoes in the course of medical treatment provided to the worker as a result of an injury (the ***initial injury***) received by the worker (being medical treatment for which the insurer has accepted liability under this Part).
- (5) The following requirements must be satisfied for a worker to be eligible for the special compensation provided for by this section:
  - (a) the worker must have received weekly payments of compensation in respect of the initial injury and have had current work capacity prior to suffering the incapacity resulting from the injury related surgery,
  - (b) the worker must have returned to work after the initial injury (whether in self-employment or other employment) for a period of not less than 15 hours per week and have been in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week.
- (6) This section does not limit section 52 (Termination of weekly payments on retiring age).

#### **42 Application by worker to alter amount of weekly payments**

- (1) A worker who is receiving weekly payments of compensation may apply in writing to the insurer for an increase or reduction in the amount of the payments and must specify in the application the reasons for so applying and provide with the application any supporting evidence.
- (2) Within 28 days after receiving an application, the insurer must:
  - (a) approve or reject the application, and
  - (b) give the worker and the employer written notice of its decision, including, in the case of rejection, a statement of the reasons for the decision.

## Subdivision 3 Work capacity

### 43 Work capacity decisions by insurers

- (1) The following decisions of an insurer (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 44 or judicial review by the Supreme Court:
  - (a) a decision about a worker's current work capacity,
  - (b) a decision about what constitutes suitable employment for a worker,
  - (c) a decision about the amount an injured worker is able to earn in suitable employment,
  - (d) a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings,
  - (e) a decision about whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment,
  - (f) any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to in paragraphs (a)-(e).
- (2) The following decisions are not work capacity decisions:
  - (a) a decision to dispute liability for weekly payments of compensation,
  - (b) a decision that can be the subject of a medical dispute under Part 7 of Chapter 7 of the 1998 Act.
- (3) The Commission does not have jurisdiction to determine any dispute about a work capacity decision of an insurer and is not to make a decision in respect of a dispute before the Commission that is inconsistent with a work capacity decision of an insurer.

### 44 Review of work capacity decisions

- (1) An injured worker may refer a work capacity decision of an insurer for review:
  - (a) by the insurer (an **internal review**) in accordance with the WorkCover Guidelines within 30 days after an application for internal review is made by the worker, or
  - (b) by the Authority (as a merit review of the decision), but not until the dispute

has been the subject of internal review by the insurer, or

- (c) to the Independent Review Officer (as a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision), but not until the dispute has been the subject of internal review by the insurer and merit review by the Authority.
- (2) An application for review of a work capacity decision must be made in the form approved by the Authority and specify the grounds on which the review is sought. The worker must notify the insurer in a form approved by the Authority of an application made by the worker for review by the Authority or the Independent Review Officer.
- (3) The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:
- (a) an application for review must be made within 30 days after the worker receives notice in the form approved by the Authority of the insurer's decision on internal review of the decision (when the application is for review by the Authority) or the Authority's decision on a review (when the application is for review by the Independent Review Officer),
  - (b) an application for review by the Authority may be made without an internal review by the insurer if the insurer has failed to conduct an internal review and notify the worker of the decision on the internal review within 30 days after the application for internal review is made,
  - (c) the reviewer may decline to review a decision because the application for review is frivolous or vexatious or because the worker has failed to provide information requested by the reviewer,
  - (d) the worker and the insurer must provide such information as the reviewer may reasonably require and request for the purposes of the review,
  - (e) the reviewer is to notify the insurer and the worker of the findings of the review and may make recommendations to the insurer based on those findings (giving reasons for any such recommendation),
  - (f) the Independent Review Officer must also notify the Authority of the findings of a review and the Authority may make recommendations (giving reasons for any such recommendations) to the insurer based on those findings,
  - (g) recommendations made by the Authority are binding on the insurer and must be given effect to by the insurer,
  - (h) recommendations made by the Independent Review Officer are binding on

the insurer and the Authority.

- (4) A review of a work capacity decision does not operate to stay the decision or otherwise prevent the taking of action based on the decision.
- (5) The Commission is not to make a decision in proceedings concerning a dispute about weekly payments of compensation payable to a worker while a work capacity decision by an insurer about those weekly payments is the subject of a review under this section.
- (6) A legal practitioner acting for a worker is not entitled to be paid or recover any amount for costs incurred in connection with a review under this section of a work capacity decision of an insurer.

#### **44A Work capacity assessment**

- (1) An insurer is to conduct a work capacity assessment of an injured worker when required to do so by this Act or the WorkCover Guidelines and may conduct a work capacity assessment at any other time.
- (2) A **work capacity assessment** is an assessment of an injured worker's current work capacity, conducted in accordance with the WorkCover Guidelines.
- (3) A work capacity assessment is not necessary for the making of a work capacity decision by an insurer.
- (4) An insurer is not to conduct a work capacity assessment of a seriously injured worker unless the insurer thinks it appropriate to do so and the worker requests it.
- (5) An insurer may in accordance with the WorkCover Guidelines require a worker to attend for and participate in any assessment that is reasonably necessary for the purposes of the conduct of a work capacity assessment. Such an assessment can include an examination by a medical practitioner or other health care professional.
- (6) If a worker refuses to attend an assessment under this section or the assessment does not take place because of the worker's failure to properly participate in it, the worker's right to weekly payments is suspended until the assessment has taken place.

#### **44B Evidence as to work capacity**

- (1) A worker must provide to the insurer:
  - (a) certificates of capacity in accordance with this section in respect of the period in respect of which the worker is entitled to weekly payments, and

- (b) a declaration in the form approved by the Authority as to whether or not the worker is engaged in any form of employment or in self-employment or voluntary work for which he or she receives or is entitled to receive payment in money or otherwise or has been so engaged at any time since last providing a certificate under this section.
- (2) If a decision to reject a claim for weekly payments or to terminate weekly payments is set aside, a worker is not required to comply with this section in respect of any period from the date that the decision took effect until the day on which the decision is set aside.
- (3) A certificate of capacity must:
  - (a) be a certificate given by a medical practitioner in a form approved by the Authority, and
  - (b) certify as to the worker's incapacity for work and whether the worker has a current work capacity or has no current work capacity during the period, not exceeding 28 days, stated in the certificate, and
  - (c) specify the expected duration of the worker's incapacity.
- (4) A certificate of capacity may cover a period exceeding 28 days if:
  - (a) the person giving the certificate states in the certificate the special reasons why the certificate covers the longer period, and
  - (b) the insurer is satisfied that, for the special reasons stated, the certificate should be accepted.
- (5) A certificate of capacity is of no effect to the extent that it relates to a period that is more than 90 days before the certificate is provided.
- (6) The insurer may discontinue weekly payments of compensation if the worker fails to comply with a requirement under this section within 7 days after the requirement is communicated to the worker by the insurer.

**Note—**

Section 270 of the 1998 Act also allows an insurer to require medical evidence and authorisations about incapacity for work when weekly payments begin.

## **Subdivision 4 Interpretation**

### **44C Definition—pre-injury average weekly earnings**

- (1) In this Division, ***pre-injury average weekly earnings***, in respect of a relevant period in relation to a worker, means the sum of:

- (a) the average of the worker's ordinary earnings during the relevant period (excluding any week during which the worker did not actually work and was not on paid leave) expressed as a weekly sum, and
  - (b) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).
- (2) If a worker has been continuously employed by the same employer for less than 4 weeks before the injury, **pre-injury average weekly earnings**, in relation to that worker, may be calculated having regard to:
- (a) the average of the worker's ordinary earnings that the worker could reasonably have been expected to have earned in that employment, but for the injury, during the period of 52 weeks after the injury expressed as a weekly sum, and
  - (b) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).
- (3) If a worker:
- (a) was not a full time worker immediately before the injury, and
  - (b) at the time of the injury was seeking full time employment, and
  - (c) had been predominantly a full time worker during the period of 78 weeks immediately before the injury,

**pre-injury average weekly earnings**, in relation to that worker, means the sum of:

- (d) the average of the worker's ordinary earnings while employed during the period of 78 weeks immediately before the injury (excluding any week during which the worker did not actually work and was not on paid leave) (**the qualifying period**), whether or not the employer is the same employer as at the time of the injury expressed as a weekly sum, and
  - (e) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).
- (4) In relation to a worker of a class referred to in Column 2 of an item in Schedule 3, **pre-injury average weekly earnings** means the amount determined in



accordance with Column 3 of that item, expressed as a weekly sum.

- (5) An overtime and shift allowance payment is permitted to be included in the calculation of pre-injury average weekly earnings (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable) if:
- (a) the worker worked paid overtime or carried out work that attracted a shift allowance during the relevant period, and
  - (b) the worker would, but for the worker's injury, have been likely, at any time during that 52 week period, to have worked paid overtime or carried out work that attracted a shift allowance.
- (6) The amount of an overtime and shift allowance payment that is permitted to be included is to be calculated in accordance with the following formula:

$$\frac{A}{B}$$

where:

**A** is the total amount paid or payable to the worker for paid overtime and shift allowances in respect of the relevant period.

**B** is the number of weeks during the relevant period during which the worker worked or was on paid annual leave.

- (7) 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 deemed to be that minimum amount. Different minimum amounts may be prescribed for different classes of workers, including part-time and full-time workers.

#### **44D Definitions applying to pre-injury average weekly earnings—relevant period**

- (1) Subject to this section, a reference to the **relevant period** in relation to pre-injury average weekly earnings of a worker is a reference to:
- (a) in the case of a worker who has been continuously employed by the same employer for the period of 52 weeks immediately before the injury, that period of 52 weeks, or
  - (b) in the case of a worker who has been continuously employed by the same employer for less than 52 weeks immediately before the injury, the period of continuous employment by that employer.
- (2) The relevant period, in relation to pre-injury average weekly earnings of a

worker who, during the 52 weeks immediately before the injury, voluntarily (otherwise than by reason of an incapacity for work resulting from, or materially contributed to by, an injury that entitles the worker to compensation under this Act):

- (a) alters the ordinary hours of work, or
- (b) alters the nature of the work performed by the worker,

and, as a result, the worker's ordinary earnings are reduced, does not include the period before the reduction takes effect.

(3) If, during the period of 52 weeks immediately before the injury, a worker:

- (a) is promoted, or
- (b) is appointed to a different position,

(otherwise than on a temporary basis) and, as a result, the worker's ordinary earnings are increased, the relevant period in relation to the worker begins on the day on which the promotion or appointment takes effect.

#### **44E Definitions applying to pre-injury average weekly earnings—ordinary earnings**

(1) Subject to this section, in relation to pre-injury average weekly earnings, the **ordinary earnings** of a worker in relation to a week during the relevant period are:

- (a) if the worker's base rate of pay is calculated on the basis of ordinary hours worked, the sum of the following amounts:
  - (i) the worker's earnings calculated at that rate for ordinary hours in that week during which the worker worked or was on paid leave,
  - (ii) amounts paid or payable as piece rates or commissions in respect of that week,
  - (iii) the monetary value of non-pecuniary benefits provided in respect of that week, or
- (b) in any other case, the sum of the following amounts:
  - (i) the actual earnings paid or payable to the worker in respect of that week,
  - (ii) amounts paid or payable as piece rates or commissions in respect of that week,
  - (iii) the monetary value of non-pecuniary benefits provided in respect of that week.

- (2) A reference to ordinary earnings does not include a reference to any employer superannuation contribution.

**44F Definition of “non-pecuniary benefits”**

- (1) The following benefits provided in respect of a week to a worker by the employer for the performance of work by the worker are **non-pecuniary benefits** in respect of that week:
- (a) residential accommodation,
  - (b) use of a motor vehicle,
  - (c) health insurance,
  - (d) education fees.
- (2) Any amount that, under the worker’s terms of employment, the employer is required (for the performance of work by the worker) to apply or deal with on behalf of the worker in accordance with the worker’s instructions is also a non-pecuniary benefit but this does not include any amount that is a base rate of pay exclusion.
- (3) Any amount that is excluded from base rate of pay as a base rate of pay exclusion is not a non-pecuniary benefit.
- (4) The monetary value of a non-pecuniary benefit referred to in subsection (1) 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 subsection (5), divided by 52, or
  - (b) in the case of residential accommodation that is not a fringe benefit or is otherwise not subject to fringe benefits tax, the amount that would reasonably be payable for that accommodation, or equivalent accommodation in the same area, in respect of that week if it were let on commercial terms.
- (5) 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.

**44G Definition applying to pre-injury average weekly earnings and current weekly earnings—base rate of pay**

- (1) In relation to pre-injury average weekly earnings and current weekly earnings, a reference to a **base rate of pay** is a reference to the rate of pay payable to a worker for his or her ordinary hours of work but does not include any of the following amounts (referred to in this Division as **base rate of pay exclusions**):
- (a) incentive based payments or bonuses,
  - (b) loadings,
  - (c) monetary allowances,
  - (d) piece rates or commissions,
  - (e) overtime or shift allowances,
  - (f) any separately identifiable amount not referred to in paragraphs (a) to (e).
- (2) In relation to pre-injury average weekly earnings and current weekly earnings, if, at the time of the injury:
- (a) a worker's base rate of pay is prescribed by a fair work instrument that applies to the worker, and
  - (b) the worker's actual rate of pay for ordinary hours is higher than that rate of pay,
- the worker's actual rate of pay is to be taken to be the worker's base rate of pay.

**44H Definition applying to pre-injury average weekly earnings and current weekly earnings—ordinary hours of work**

In relation to pre-injury average weekly earnings and current weekly earnings, the **ordinary hours of work**:

- (a) in the case of a worker to whom a fair work instrument applies are:
  - (i) if the ordinary hours of work in relation to a week are agreed or determined in accordance with a fair work instrument between the worker and the employer—those hours, or
  - (ii) in any other case, the worker's average weekly hours (excluding any week during which the worker did not actually work and was not on paid leave)

during the relevant period, or

- (b) in the case of a worker to whom a fair work instrument does not apply:
  - (i) if the ordinary hours of work are agreed between the worker and the employer, those hours, or
  - (ii) in any other case, the worker's average weekly hours (excluding any week during which the worker did not actually work and was not on paid leave) during the relevant period.

#### **44I Definition—current weekly earnings**

In this Act, **current weekly earnings** of a worker in relation to a week means:

- (a) if the worker's base rate of pay is calculated on the basis of ordinary hours worked, the sum of the following amounts:
  - (i) the worker's earnings calculated at that rate for the ordinary hours worked during that week,
  - (ii) amounts paid or payable for overtime or shift allowances in respect of that week,
  - (iii) amounts paid or payable as piece rates or commissions in respect of that week, or
- (b) in any other case, the worker's actual earnings in respect of that week but not including any amount that is a base rate of pay exclusion unless it is:
  - (i) paid or payable for overtime or shift allowances in respect of that week, or
  - (ii) paid or payable as piece rates or commissions in respect of that week.

#### **[4] Section 52 Termination of weekly payments on retiring age**

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

- (a) receives an injury before reaching the retiring age—a weekly payment of compensation is not to be made in respect of any resulting period of incapacity for work occurring after the date on which that person reaches the retiring age, or

#### **[5] Section 52A Discontinuation of weekly payments for partial incapacity after 2 years**

Omit the section.

#### **[6] Section 54**

Omit the section. Insert instead:

## **54 Notice required before termination or reduction of payment of weekly compensation**

- (1) If a worker has received weekly payments of compensation for a continuous period of at least 12 weeks, the person paying the compensation must not discontinue payment, or reduce the amount, of the compensation without first giving the worker not less than the required period of notice of intention to discontinue payment of the compensation or to reduce the amount of the compensation.

Maximum penalty: 50 penalty units.

- (2) The **required period of notice** for the purposes of this section is:
- (a) when the discontinuation or reduction is 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—3 months, or
  - (b) in any other case—2 weeks for a worker who has been receiving weekly payments of compensation for a continuous period of less than 1 year, or 6 weeks for a worker who has been receiving weekly payments of compensation for a continuous period of 1 year or more.
- (3) If the payment of compensation to a worker is discontinued, or the amount of compensation is reduced, by a person in circumstances involving the commission by that person of an offence under subsection (1), the worker may, whether or not that person has been prosecuted for the offence, recover from the person an amount of compensation that:
- (a) if no period of notice has been given—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—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.
- (4) The notice referred to in this section is to be given to the worker personally or by post and (if the regulations so require) be in such form or contain such information as may be prescribed by the regulations.

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

(6) This section does not apply to a reduction in weekly 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.

**[7] Sections 55, 55A and 56**

Omit the sections.

**[8] Section 79 Definitions**

Omit paragraph (a) of the definition of ***adjustable amount***. Insert instead:

(a) each of the amounts specified in sections 25, 34, 37 and 40, or clause 2 of Part 19H of Schedule 6, without regard to any adjustment under this Division, and

**[9] Section 79, definition of “base index number”**

Insert after paragraph (a) of the definition:

(a1) in respect of an adjustable amount that is the amount specified in section 34 or clause 2 of Part 19H of Schedule 6—the number 240.5, and

**[10] Part 3, Division 6A**

Insert after Division 6 of Part 3:

## **Division 6A Indexation of weekly payments**

### **82A Indexation—weekly payments**

(1) The amount of a weekly payment to a worker under Division 2 in respect of an injury is to be varied on each review date after the day on which the worker became entitled to weekly payments in respect of that injury, by varying the amount of the worker’s pre-injury average weekly earnings for the purposes of the calculation of the amount of the weekly payment in accordance with the formula:

$$A \times \frac{B}{C}$$

where:

**A** is the amount of the worker’s pre-injury average weekly earnings within the

meaning of Division 2 or, if that amount has been varied in accordance with this section, that amount as last so varied.

**B** is:

- (a) the CPI for the December quarter immediately prior to the review date when the review date is 1 April, or
- (b) the CPI for the June quarter immediately prior to the review date when the review date is 1 October.

**C** is:

- (a) the CPI for the June quarter immediately prior to the review date when the review date is 1 April, or
- (b) the CPI for the December quarter immediately prior to the review date when the review date is 1 October.

(2) In this section:

**CPI** means the consumer price index (All Groups Index) for Sydney issued by the Australian Statistician.

**review date** means 1 April and 1 October in each year.

- (3) A variation of an amount of a worker's pre-injury average weekly earnings under this section does not take effect to the extent (if any) to which it increases that amount to more than 100% of the worker's ordinary earnings (calculated in accordance with Division 2) expressed as a weekly sum to which the worker would be entitled if he or she were employed in the same position or positions (if it or they can be identified) as he or she was employed in immediately before the injury, being the position or positions on the basis of which the calculation of the worker's pre-injury average weekly earnings was made.
- (4) The Minister is, on or before each review date, to notify, by order published on the NSW legislation website, the number that equates to the factor  $\frac{B}{C}$  for the purposes of the variation required for that review date under this section.
- (5) A notification published on the NSW legislation website after a review date for the purposes of the variation required for that review date under this section has effect as if published before that review date.

## **82B Indexation of certain amounts—according to average weekly earnings**

- (1) The amount **A** is to be varied, in respect of the financial year beginning on 1 July



2012 and each subsequent financial year, in accordance with the formula:

$$A \times \frac{B}{C}$$

where:

**A** is the amount of \$155 specified in sections 38, 40 and 41 or, if that amount has been varied in accordance with this section, that amount as last so varied.

**B** is the latest average weekly earnings as at 30 May in the preceding financial year of all employees for NSW published by the Australian Statistician in respect of the December quarter of that financial year or, if that is not available, the latest available quarter.

**C** is the average weekly earnings of all employees for NSW as at 30 May in the year preceding the preceding financial year published by the Australian Statistician in respect of the quarter preceding that 30 May corresponding to the quarter referred to above.

- (2) The Minister is to notify, by order published on the NSW legislation website before the start of each financial year, the amount that is to apply for that financial year as the amount specified in sections 38, 40 and 41 as varied in accordance with this section.
- (3) A notification published on the NSW legislation website after the start of a financial year and specifying an amount that is to apply as the amount specified in sections 38, 40 and 41 for that financial year is to apply and has effect for that financial year.

### **82C Indexation—no reduction**

If the variation of an amount specified in section 82A or 82B by operation of that section has the effect of reducing the amount:

- (a) the variation is deemed not to have taken effect, except for the purposes of the application of this section, and
- (b) when the amount is varied and increased by operation of this section in respect of the next or a subsequent financial year, that variation has effect as an increase only to the extent (if any) to which the amount of the increase exceeds the amount of the reduction in respect of a preceding financial year, or that part of such a reduction that has not been set off against a previous increase.

### **82D Indexation—rounding**

Where it is necessary for the purposes of this Division to calculate an amount that

consists of or includes a fraction of a whole number, the amount is deemed to have been calculated in accordance with this section if the calculation is made:

- (a) if the amount is less than \$1,000, to the nearest whole \$1, or
- (b) if the amount is \$1,000 or more, to the nearest whole \$10.

**[11] Section 87EA Preconditions to commutation**

Omit section 87EA (1) (g). Insert instead:

- (g) the injured worker has not had weekly payments of compensation terminated under section 48A of the 1998 Act.

**[12] Section 151I Calculation of past and future loss of earnings**

Omit “section 35” wherever occurring. Insert instead “section 34”.

**[13] Schedule 3**

Insert after Schedule 2:

**Schedule 3 Pre-injury average weekly earnings**

(Section 44C)

Column 1	Column 2	Column 3
Item	Class of worker at time of injury	Calculation of pre-injury average weekly earnings
1	Worker who is: (a) under the age of 21 years, or (b) an apprentice, or	(a) Until the worker attains the age or stage or, but for the injury, would have attained the stage at which the highest rate is payable—the worker’s pre-injury average weekly earnings are the 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.

- (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,
- and who, but for the injury, would have been entitled to increments in earnings at certain ages or stages during the course of employment to become qualified.
- 2 Worker employed by 2 or more employers and who works for one of those employers for at least the ordinary hours fixed in any applicable fair work instrument.
- 3 Worker employed by 2 or more employers who works for one of those employers for at least the prescribed number of hours each week and to whom no fair work instrument is applicable.
- 4 Worker employed by 2 or more employers for at least the ordinary hours fixed in any applicable fair work instrument.
- 5 Worker employed by 2 or more employers who works for one of those employers for at least the ordinary hours fixed in an applicable fair work instrument and works for another of those employers for at least the prescribed number of hours each week.
- (b) On and after the worker attains the age or stage or, but for the injury, would have attained the age or stage at which the highest rate is payable—the worker’s pre-injury average weekly earnings are to be calculated as if, at the time of the injury, the worker were being paid at the highest rate applicable to that age or stage.
- (c) If (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 the maximum weekly compensation amount.
- The worker’s pre-injury average weekly earnings are to be calculated in accordance with Division 2 of Part 3 with reference to the work for the employer for whom the worker works for at least the ordinary hours fixed in the fair work instrument.
- The worker’s pre-injury average weekly earnings are to be calculated in accordance with Division 2 of Part 3 with reference to the work for the employer for whom the worker works for at least the prescribed number of hours.
- The worker’s pre-injury average weekly earnings are to be calculated in accordance with Division 2 of Part 3 with reference to the work which yields the higher weekly ordinary earnings.
- The worker’s pre-injury average weekly earnings are to be calculated in accordance with Division 2 of Part 3 with reference to the work which yields the higher weekly ordinary earnings.

- 6 Worker employed by 2 or more employers for at least the prescribed number of hours each week and to whom no fair work instrument is applicable. The worker's pre-injury average weekly earnings are to be calculated in accordance with Division 2 of Part 3 with reference to the work which yields the higher weekly ordinary earnings.
- 7 Worker employed by 2 or more employers who sustains an injury that results in an incapacity to work for one or more of those employers but not for all those employers. The worker's pre-injury average weekly earnings are to be calculated in accordance with Division 2 of Part 3 with reference to earnings from work with all the employers.
- 8 Worker employed by 2 or more employers in circumstances other than those described in the preceding provisions of this Schedule. The worker's pre-injury average weekly earnings are the worker's average ordinary earnings expressed as an amount per hour for all work carried out by the worker for all employers multiplied by:  
(a) the prescribed number of hours per week, or  
(b) the total of the worker's ordinary hours per week,  
whichever is the lesser.
- 9 Worker who, during the period of 52 weeks immediately before the injury, receives advice in writing from the employer that the worker is to be promoted or otherwise appointed to a new position (otherwise than on a temporary basis) with the effect that the worker's ordinary earnings will be increased but has not been so promoted or appointed. The worker's pre-injury average weekly earnings are to be calculated in accordance with Division 2 of Part 3 with reference to the amount that is the average of the earnings expressed as a weekly sum that the worker could reasonably be expected to have earned after the promotion or appointment had taken effect as if the promotion or appointment had taken effect 52 weeks before the injury.

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

### [1] Chapter 3, Part 1, heading

Insert before section 41:

#### Part 1 **Preliminary**

**[2] Section 42 Definitions**

Insert at the end of the definition of ***injury management plan***:

An injury management plan can provide for the treatment, rehabilitation and retraining to be given or provided to the injured worker.

**[3] Chapter 3, Part 2, heading**

Insert before section 42A:

Part 2 **Obligations of insurers, employers and workers**

**[4] Sections 48 and 48A**

Omit section 48. Insert instead:

**48 Return to work obligations of worker**

- (1) A worker who has current work capacity must, in co-operation with the employer or insurer, make reasonable efforts to return to work in suitable employment or pre-injury employment at the worker's place of employment or at another place of employment.
- (2) For the purposes of this section, a worker is to be treated as making a reasonable effort to return to work in suitable employment or pre-injury employment during any reasonable period in which:
  - (a) the worker is waiting for the commencement of a workplace rehabilitation service that is required to be provided under an injury management plan for the worker, or
  - (b) the worker is waiting for a response to a request for suitable employment or pre-injury employment made by the worker and received by the employer, or
  - (c) if the employer's response is that suitable employment or pre-injury employment will be provided at some time, the worker is waiting for suitable employment or pre-injury employment to commence.

**48A Failure to comply with return to work obligations of worker**

- (1) If a worker does not comply with an obligation of the worker imposed under section 48, the insurer may in accordance with this section:
  - (a) suspend the payment of compensation in the form of weekly payments to the worker, or
  - (b) terminate the payment of compensation in the form of weekly payments to

the worker, or

- (c) cease and determine the entitlement of the worker to compensation in the form of weekly payments in respect of the injury under this Act.
- (2) If the insurer seeks to suspend payments of compensation under subsection (1)
- (a), the insurer must give written notice to the worker stating:
    - (a) the reason for the giving of the notice, and
    - (b) that unless the worker complies with the obligation under section 48 specified in the notice, weekly payments to the worker will be suspended from the date specified in the notice which must be a date at least 14 days after notice is given but no more than 60 days after notice is given, and
    - (c) the consequences of failing to comply as specified in the notice.
- (3) If the worker fails to comply with a written notice under subsection (2), the insurer may suspend the payment of weekly payments to the worker for a period of 28 days after the date specified in the notice referred to in subsection (2) (b).
- (4) If the worker complies with the obligation specified in the notice under subsection (2) during the period that weekly payments are suspended under subsection (3), the insurer must, subject to and in accordance with this Act, resume the payment of weekly payments with effect from the date on which the worker complied with the obligation.
- (5) If subsection (4) applies, the worker forfeits any compensation in the form of weekly payments that would otherwise have been made during the period of suspension until the worker complied with the obligation and that period is included in determining the first or second entitlement period under Division 2 of Part 3 of the 1987 Act.
- (6) If the worker does not comply with the obligation specified in the notice under subsection (2) for the entire period that weekly payments are suspended under subsection (3), the insurer may terminate the payment of compensation in the form of weekly payments to the worker in respect of the injury by written notice stating the reasons for giving the notice.
- (7) If the worker:
- (a) does not comply with the obligation specified in the notice under subsection (2) for the entire period that weekly payments are suspended under subsection (3), and
  - (b) has within the last 12 months prior to the giving of the notice referred to in paragraph (a):

- (i) been issued 2 notices under subsection (2) without a subsequent suspension of weekly payments, or
- (ii) had compensation in the form of weekly payments suspended once under subsection (3),

the insurer may cease and determine the entitlement to compensation in the form of weekly payments in respect of the injury to the worker under this Act by written notice stating the reasons for giving the notice.

**[5] Section 49 Employer must provide suitable work**

Insert at the end of section 49 (1):

Maximum penalty: 50 penalty units.

**[6] Section 57 Compliance by worker**

Omit the section.

**[7] Chapter 3, Part 3**

Insert after section 59:

## **Part 3 Employer improvement notices**

### **59A Authorisation of inspectors**

In this Part:

***inspector*** means a member of staff who is an inspector for the purposes of section 238 (Powers of entry and inspection by officers of Authority).

### **59B Issue of improvement notices**

- (1) This section applies if an inspector reasonably believes that an employer:
  - (a) is contravening a provision of this Chapter, or
  - (b) has contravened a provision of this Chapter in circumstances that make it likely that the contravention will continue or be repeated.
- (2) The inspector may issue an improvement notice requiring the employer to:
  - (a) remedy the contravention, or
  - (b) prevent a likely contravention from occurring, or
  - (c) remedy the things or operations causing the contravention or likely

contravention.

### **59C Contents of improvement notices**

- (1) An improvement notice must state:
  - (a) that the inspector believes the employer:
    - (i) is contravening a provision of this Chapter, or
    - (ii) has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated, and
  - (b) the provision the inspector believes is being, or has been, contravened, and
  - (c) briefly, how the provision is being, or has been, contravened, and
  - (d) the day by which the person is required to remedy the contravention or likely contravention.
- (2) An improvement notice may include directions concerning the measures to be taken to remedy the contravention or prevent the likely contravention, or the matters or activities causing the contravention or likely contravention, to which the notice relates.
- (3) The day stated for compliance with the improvement notice must be reasonable in all the circumstances.

### **59D Compliance with improvement notice**

The person to whom an improvement notice is issued must comply with the notice within the period specified in the notice.

Maximum penalty: 100 penalty units.

### **59E Extension of time for compliance with improvement notices**

- (1) An inspector may, by written notice given to the person, extend the compliance period for an improvement notice issued under this Part.
- (2) However, the inspector may extend the compliance period only if the period has not ended.
- (3) In this section:

***compliance period*** means the period stated in the improvement notice, and includes that period as extended under this section.



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

Insert at the end of section 105 (1):

**Note—**

The Commission does not have jurisdiction to determine any dispute about a work capacity decision of an insurer and is not to make a decision in respect of a dispute before the Commission that is inconsistent with a work capacity decision of an insurer. See section 43 of the 1987 Act.

**[9] Section 270 Obligations of worker to provide authorisations and medical evidence**

Insert at the end of the section:

**Note—**

This section does not limit the obligations of a worker under section 44B (Evidence as to work capacity) of the 1987 Act.

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

Insert after section 297 (1):

(1A) An interim payment direction is not to be made when the dispute concerns 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.

**Schedules 2, 3 (Repealed)**

**Schedule 4 Amendments relating to medical and related expenses**

**Amendment of [Workers Compensation Act 1987 No 70](#)**

**[1] Section 59A**

Insert after section 59:

**59A Limit on payment of compensation**

- (1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided more than 12 months after a claim for compensation in respect of the injury was first made, unless weekly payments of compensation are or have been paid or payable to the worker.
- (2) If weekly payments of compensation are or have been paid or payable to the worker, compensation is not payable under this Division in respect of any

treatment, service or assistance given or provided more than 12 months after the worker ceased to be entitled to weekly payments of compensation.

(3) If a worker becomes entitled to weekly payments of compensation after ceasing to be entitled to compensation under this Division, the worker is once again entitled to compensation under this Division but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker.

(4) This section does not apply to a seriously injured worker (as defined in Division 2).

**[2]-[5] (Repealed)**

**Schedules 5-7 (Repealed)**

**Schedule 8 Amendments relating to commutation of compensation**

**Amendment of [Workers Compensation Act 1987 No 70](#)**

**[1] Section 87EA Preconditions to commutation**

Insert after section 87EA (1):

(1A) Despite subsection (1), a liability in respect of an injury may be commuted to a lump sum under this Division in a particular case if the Authority is satisfied and certifies to the effect that:

(a) the case is of a class that is prescribed by the regulations as a class to which this subsection applies, and

(b) the circumstances of the case satisfy any requirements prescribed by the regulations as requirements that must be satisfied for the purposes of this subsection, and

(c) unless the regulations otherwise provide, the lump sum to which the liability will be commuted is not inadequate and not excessive.

(1B) In considering whether the lump sum to which a liability will be commuted is not inadequate and not excessive, the Authority may have regard to the following matters:

(a) any dispute as to liability to pay compensation under the Workers Compensation Acts,

(b) the injury, the age of the worker, the general health of the worker, and the occupation of the worker at the time of the occurrence of the injury,

- (c) the worker's diminished ability to compete in an open labour market,
- (d) other benefits that the worker may be entitled to from any other source.

**[2] Section 87EA (6)**

Insert after section 87EA (5):

- (6) The WorkCover Guidelines may make provision for the procedure for applying for certification by the Authority under subsection (1) or (1A) and the information and documents to be provided in support of such an application.

**[3] Section 87F Commutation by agreement**

Insert after section 87F (2):

- (2A) Compliance with subsection (2) is not required if the commutation agreement contains a provision in which the employer or insurer certifies that it is satisfied that the worker has waived the right to obtain independent legal advice and independent financial advice before entering into the agreement.
- (2B) The regulations may require the provision of independent financial advice to a worker (at the expense of the insurer) before the worker enters into a commutation agreement and any such requirement applies despite any other provision of this section.

**[4] Section 87H Registration of commutation agreements**

Omit section 87H (2). Insert instead:

- (2) The Registrar must refuse to register a commutation agreement unless satisfied that the Authority has certified as provided by section 87EA (1) or (1A) in respect of the agreement.

**Schedule 9 (Repealed)**

**Schedule 10 Amendments relating to WorkCover Independent Review Officer**

**10.1 Amendment of [Workplace Injury Management and Workers](#)**

## Compensation Act 1998 No 86

[1] (Repealed)

[2] Chapter 2, Part 3

Insert after Part 2 of Chapter 2:

### Part 3 WorkCover Independent Review Officer

#### Division 1 Administrative arrangements

##### 24 Appointment of Independent Review Officer

- (1) The Governor may appoint a WorkCover Independent Review Officer.
- (2) The Independent Review Officer holds office for such term not exceeding 5 years as may be specified in the instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.
- (3) The office of Independent Review Officer is a full-time office and the holder of the office is required to hold it on that basis, except to the extent permitted by the Governor.
- (4) The Independent Review Officer is entitled to be paid:
  - (a) remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*, and
  - (b) such travelling and subsistence allowances as the Minister may from time to time determine.
- (5) The *Public Sector Employment and Management Act 2002* does not apply to the appointment of the Independent Review Officer, and the holder of that office is not, as holder, subject to that Act.
- (6) The staff of the Independent Review Officer are to be employed under Chapter 1A of the *Public Sector Employment and Management Act 2002*.

##### 25 Vacancy in office

- (1) The office of Independent Review Officer becomes vacant if the holder:
  - (a) dies, or
  - (b) completes a term of office and is not re-appointed, or
  - (c) resigns the office by instrument in writing addressed to the Governor, or

- (d) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
  - (e) becomes a mentally incapacitated person, or
  - (f) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or
  - (g) is removed from office under this section.
- (2) The Governor may remove the Independent Review Officer from office:
- (a) for misbehaviour, or
  - (b) for incapacity, or
  - (c) if the Independent Review Officer is absent from duty for a period in excess of his or her leave entitlement as approved by the Governor unless the absence is caused by illness or other unavoidable cause.
- (3) If the office of Independent Review Officer becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.

## **26 Appointment of acting Independent Review Officer**

- (1) The Minister may, from time to time, appoint a person to act in the office of the Independent Review Officer during the illness or absence of the Independent Review Officer or during a vacancy in the office of the Independent Review Officer. The person, while so acting, has all the functions of the Independent Review Officer and is taken to be the Independent Review Officer.
- (2) The Minister may, at any time, remove a person from office as acting Independent Review Officer.
- (3) An acting Independent Review Officer is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine.

## **Division 2 Functions**

### **27 Functions of Independent Review Officer**

The Independent Review Officer has the following functions:

- (a) to deal with complaints made to the Independent Review Officer under this Division,

- (b) to review work capacity decisions of insurers under Division 2 (Weekly compensation by way of income support) of Part 3 of the 1987 Act,
- (c) to inquire into and report to the Minister on such matters arising in connection with the operation of the Workers Compensation Acts as the Independent Review Officer considers appropriate or as may be referred to the Independent Review Officer for inquiry and report by the Minister,
- (d) to encourage the establishment by insurers and employers of complaint resolution processes for complaints arising under the Workers Compensation Acts,
- (e) such other functions as may be conferred on the Independent Review Officer by or under the Workers Compensation Acts or any other Act.

### **27A Complaints about insurers**

- (1) A worker may complain to the Independent Review Officer about any act or omission (including any decision or failure to decide) of an insurer that affects the entitlements, rights or obligations of the worker under the Workers Compensation Acts.
- (2) The Independent Review Officer deals with a complaint by investigating the complaint and reporting to the worker and the insurer on the findings of the investigation, including the reasons for those findings. The Independent Review Officer's findings can include non-binding recommendations for specified action to be taken by the insurer or the worker.
- (3) The Independent Review Officer is to deal with a complaint within a period of 30 days after the complaint is made unless the Independent Review Officer notifies the worker and the insurer within that period that a specified longer period will be required to deal with the complaint.
- (4) The Independent Review Officer may decline to deal with a complaint on the basis that it is frivolous or vexatious or should not be dealt with for such other reason as the Independent Review Officer considers relevant.

### **27B Requirement to provide information**

- (1) The Independent Review Officer may require an insurer or a worker who has applied for review of a work capacity decision of an insurer to provide specified information that the Independent Review Officer reasonably requires for the purposes of the exercise of any function of the Independent Review Officer.
- (2) It is a condition of an insurer's licence that the insurer comply with a request for the provision of information under this section.

- (3) The Independent Review Officer can decline to deal with a complaint if the worker who makes the complaint fails to comply with a request to provide information to the Independent Review Officer.
- (4) The Authority must provide the Independent Review Officer with such information as the Independent Review Officer reasonably requires and requests for the purposes of the exercise of any function of the Independent Review Officer.

### **27C Annual report**

- (1) As soon as practicable after 30 June (but before 31 December) in each year, the Independent Review Officer is to prepare and forward to the Minister a report on his or her activities for the 12 months ending on 30 June in that year.
- (2) The report is to be tabled in Parliament and for that purpose the Minister is to lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after receiving the report.
- (3) The Minister is to give the Authority and insurers an opportunity to comment on the report before it is tabled in Parliament and may include with the report when it is tabled a statement as to the comments of the Authority and insurers.
- (4) The report is to include the following information:
  - (a) the number and type of complaints made and dealt with under this Division during the year,
  - (b) the sources of those complaints,
  - (c) the number and type of complaints that were made during the year but not dealt with,
  - (d) information on the operation of the process for review of work capacity decisions of insurers during the year and any recommendations for legislative or other improvements to that process,
  - (e) such other information as the Independent Review Officer considers appropriate to be included or as the Minister directs to be included.
- (5) Matters included in a report must not identify individual workers.

### **27D Delegation of functions**

The Independent Review Officer may delegate the exercise of any function of the Independent Review Officer (other than this power of delegation) to:

- (a) any member of staff of the Independent Review Officer, or

- (b) any person, or any class of persons, authorised for the purposes of this section by the regulations.

**[3] (Repealed)**

**10.2**

(Repealed)

**Schedule 11 Miscellaneous amendments**

**Amendment of *Workplace Injury Management and Workers Compensation Act 1998 No 86***

**[1] Section 74**

Omit the section. Insert instead:

**74 Insurers to give notice and reasons when liability disputed**

- (1) If an insurer disputes liability in respect of a claim or any aspect of a claim, the insurer must give notice of the dispute to the claimant.
- (2) The notice must contain the following:
  - (a) a concise and readily understandable statement of the reason the insurer disputes liability and of the issues relevant to the decision (indicating, in the case of a claim for compensation, any provision of the workers compensation legislation on which the insurer relies to dispute liability),
  - (b) such other information as the regulations may prescribe.
- (3) The regulations may make provision for the form of and for other information to be included in or to accompany a notice under this section. The regulations may require an insurer to give a copy of a notice under this section to the claimant's employer.
- (4) The regulations may create offences in connection with any failure to comply with this section.

**Note—**

A dispute as to liability to commence weekly payments within the requisite period after a claim for compensation is made must be notified in accordance with this section (see section 93 and the offence arising under section 94).

- (5) Notice is not required to be given under this section with respect to a dispute if notice has been given under section 54 of the 1987 Act with respect to the dispute and that notice contained the statements and information that a notice



under this section is required to contain.

(6) This section does not apply to a dispute based on a work capacity decision of an insurer under Division 2 of Part 3 of the 1987 Act.

**[2] Section 238 Powers of entry and inspection of Authority inspectors**

Omit “authorised officer” wherever occurring. Insert instead “inspector”.

**[3] Section 238A Search warrant**

Omit “An authorised officer under this Act” from section 238A (1).

Insert instead “An inspector”.

**[4] Section 238A (1) and (2) (c)**

Omit “the officer” wherever occurring. Insert instead “the inspector”.

**[5] Section 238A (2)**

Omit “the authorised officer under this Act”. Insert instead “the inspector”.

**[6] Section 238A (4)**

Omit “*authorised officer*”. Insert instead “*inspector*”.

**[7] Section 238AA Power to obtain information, documents and evidence**

Omit “authorised officer” wherever occurring. Insert instead “inspector”.

**[8] Section 238B Protection from incrimination**

Omit “authorised officer” from section 238B (3) (b) wherever occurring.

Insert instead “inspector”.

**[9] Section 238C Inspector may request assistance**

Omit “authorised officer” and “authorised officer’s” wherever occurring.

Insert instead “inspector” and “inspector’s” respectively.

**[10] Section 238C (2)**

Omit “the officer” and “the officer’s” wherever occurring.

Insert instead “the inspector” and “the inspector’s” respectively.

**[11] Sections 341, 342, 343 and 345**

Omit the sections. Insert instead:

### **341 Costs**

- (1) Each party is to bear the party's own costs in or in relation to a claim for compensation.
- (2) The Commission has no power to order the payment of costs to which this Division applies, or to determine by whom, to whom or to what extent costs to which this Division applies are to be paid.

### **Schedule 12 (Repealed)**