

Workers Compensation Legislation Amendment Act 2018 No 62

[2018-62]



New South Wales

Status Information

Currency of version

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Provisions in force

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

Notes—

- **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

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Workers Compensation Legislation Amendment Act 2018 No 62



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 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, 1.2

(Repealed)

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[5]-[8] (Repealed)

Schedule 2 (Repealed)

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—

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

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.

Schedules 4-6 (Repealed)

Schedule 7 Miscellaneous amendments

7.1-7.3

(Repealed)

Schedule 8 (Repealed)