



New South Wales

# Workers Compensation Legislation Amendment Bill 2018

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Workers Compensation Act 1987* (**the 1987 Act**) and the *Workplace Injury Management and Workers Compensation Act 1998* (**the 1998 Act**) for the following purposes:

- (a) to reform dispute resolution processes relating to work capacity decisions as follows:
  - (i) by abolishing the existing system review (involving internal review, merit review and procedural review) and restoring the jurisdiction of the Workers Compensation Commission (**the Commission**) to determine disputes,
  - (ii) by consolidating notice requirements to enable insurers to combine notice of liability disputes and the discontinuation or reduction of weekly payments of compensation into a single notice,
- (b) to enable regulations under the 1987 Act and the 1998 Act (**the Workers Compensation Acts**) to provide for circumstances in which medical disputes concerning the degree of permanent impairment resulting from an injury are authorised or required to be determined by the Commission instead of by an approved medical specialist,
- (c) to make changes with respect to the calculation of the pre-injury average weekly earnings of a worker for the purpose of determining the worker's entitlement to weekly payments of compensation,
- (d) to provide for enhanced information collection and sharing powers of the State Insurance Regulatory Authority (**the Authority**) (in line with the powers of the Authority as regulator under the *Motor Accident Injuries Act 2017*) and a scheme for the mandatory notification of contraventions of the Workers Compensation Acts,

- (e) to standardise provisions dealing with the notification of increases in indexation for the purposes of the Workers Compensation Acts by requiring all notifications to be made by the Authority by order published on the NSW legislation website,
- (f) to increase, from 3 to 5, the number of members of the Board of the Authority who may be appointed by the Minister for Finance, Services and Property,
- (g) to prohibit commutation to a lump sum of a liability to pay medical expenses compensation in respect of an injury that satisfies the criteria of a catastrophic injury specified in the Workers Compensation Guidelines,
- (h) to enable an employer to provide information to workers relating to various procedural matters under the Act by publication on a website, or by any other method authorised by regulations, instead of by posting the information at the place of work,
- (i) to make provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

The Bill also makes amendments consequent on the enactment of the *Motor Accident Injuries Act 2017* to align entitlements to compensation and damages under the 1987 Act for workers injured in a motor accident with the entitlements applicable to all other injured workers.

The amendments referred to in paragraphs (a), (c) and (d) implement recommendations in the Report on the First Review of the Workers Compensation Scheme, which is a Report of the Standing Committee on Law and Justice of the Legislative Council, published in March 2017.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act.

## Schedule 1 Amendments relating to dispute resolution

**Schedule 1** makes the amendments referred to in paragraph (a) of the Overview.

**Schedule 1.1 [3]** abolishes the system of review of work capacity decisions by insurers under the 1987 Act (including any decision of an insurer that affects a worker's entitlement to weekly payments of compensation). The existing system involves an initial internal review of the decision by the insurer, followed by merit review by the Authority and procedural review by the Workers Compensation Independent Review Officer (*the WIRO*). **Schedule 1.1 [1] and 1.2 [2]–[4]** make consequential amendments.

**Schedule 1.1 [2]** restores the jurisdiction of the Workers Compensation Commission (*the Commission*) to determine disputes about work capacity decisions. The amendment will enable disputes to be referred to the Commission for determination under the 1998 Act. **Schedule 1.2 [1], [8], [13], [14] and [17]** make consequential amendments.

**Schedule 1.2 [15]** provides that the referral to the Commission of a dispute about a work capacity decision operates to stay the decision, but only if the referral is made before the expiry of the period within which the insurer is required under the Act to give notice of the decision (*the required period of notice*). The Commission may order that the stay ceases to have effect if it considers that a party is unreasonably delaying the dispute proceedings.

**Schedule 1.2 [6]** inserts proposed **Division 3** into Part 2 of Chapter 4 of the 1998 Act. The proposed Division consolidates existing provisions of the Workers Compensation Acts requiring insurers to give notice of decisions disputing liability for a claim and specifying the period of notice that must be given before weekly payments of compensation may be discontinued or reduced. The proposed Division includes the following provisions:

- (a) **Section 76** defines certain terms used for the purposes of the Division, including *internal review* (meaning a review by an insurer of a work capacity decision), *original decision* (meaning a work capacity decision that is the subject of a review by the insurer or dispute

referred for determination by the Commission) and **review decision** (meaning a work capacity decision made as a result of an internal review or a decision of the Commission determining a dispute about a work capacity decision).

- (b) **Section 78** consolidates existing requirements for an insurer to give notice of decisions to dispute liability or to discontinue or reduce weekly payments of compensation. A notice involving both a liability dispute and the discontinuation or reduction of weekly payments of compensation may be combined into a single notice.
- (c) **Section 79** specifies whom the notice is to be given to and what it is to contain. The regulations may make further provision for the form of the notice and the manner in which it is to be given.
- (d) **Section 85** creates an offence for failure to comply with the proposed Division.

**Schedule 1.1 [4] and 1.2 [5]** omit existing provisions of the Workers Compensation Acts dealing with notice requirements. **Schedule 1.2 [7], [9] and [10]** make consequential amendments.

**Schedule 1.2 [12]** inserts proposed **Division 2** into Part 4 of Chapter 7 of the 1998 Act, which provides for internal review of work capacity decisions by insurers at the request of a worker. The review must be conducted, and the worker notified of the result, within 14 days after the request. In addition, the regulations may require insurers to conduct internal reviews of decisions referred to the Commission for dispute determination. **Schedule 1.2 [11] and [16]** make consequential amendments.

**Schedule 1.3** makes consequential amendments to the *Workers Compensation Regulation 2016*.

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

**Schedule 2** makes the amendments referred to in paragraph (b) of the Overview.

**Schedule 2.1 [2]** removes a limitation that prevents the Commission awarding permanent impairment compensation unless the degree of permanent impairment resulting from the injury has been assessed under the 1998 Act by an approved medical specialist.

**Schedule 2.2 [5]** enables the regulations to specify circumstances in which a medical dispute concerning permanent impairment of an injured worker is authorised, required or not permitted to be referred for medical assessment by an approved medical specialist. The Commission will have the jurisdiction to determine a dispute concerning permanent impairment unless the dispute is required by the regulations to be referred for medical assessment. **Schedule 2.2 [1]** makes a related amendment to confirm that the power of the Registrar to refer a medical dispute for medical assessment is subject to the regulations. **Schedule 2.1 [1] and 2.2 [2]–[4]** make other consequential amendments.

**Schedule 2.2 [6]** provides that an assessment of the degree of permanent impairment of an injured worker made by the Commission in determining a dispute is an assessment for the purposes of a provision that prevents more than one assessment being made of the degree of permanent impairment resulting from the injury. **Schedule 2.2 [7] and [8]** make consequential amendments.

**Schedule 2.2 [9]** makes it clear that, on the appeal of a decision about the degree of permanent impairment of an injured worker, the directions given by the Commission when remitting the decision to an Arbitrator of the Commission may include a direction to refer the matter for medical assessment by an approved medical specialist.

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

**Schedule 3** makes the amendments referred to in paragraph (c) of the Overview.

**Schedule 3.1 [5]** substitutes the method for calculating weekly payments of compensation payable to an injured worker during the first 130 weeks of incapacity. The new method is based on factors set out in **proposed new Schedule 3** to the 1987 Act. **Schedule 3.1 [1], [3], [4], [8] and [10]** make consequential amendments.

**Schedule 3.1 [6]** provides for the method of calculating the amount of weekly payments of compensation to which an injured worker is entitled after the second entitlement period. A worker is generally entitled to payments at the rate of 80% of the worker's pre-injury average weekly earnings (less the amount of the worker's current weekly earnings in employment).

**Schedule 3.1 [7]** enables the regulations to provide for the procedures to be followed by insurers in connection with the making of work capacity decisions, including the adjustment of weekly payments as a result of a work capacity decision.

**Schedule 3.1 [2]** gives effect to **proposed new Schedule 3** to the 1987 Act, which defines words and expressions used for the purposes of calculating weekly payments of compensation. **Schedule 3.1 [9]** makes a consequential amendment to remove interpretive provisions made redundant by **proposed new Schedule 3**.

**Schedule 3.1 [11]** inserts **proposed new Schedule 3**, which makes the following significant changes relating to earnings for the purposes of the calculation of weekly payments of compensation:

- (a) **Clause 2** defines *pre-injury average weekly earnings* as the weekly average of the gross pre-injury earnings received by the worker during the period of 52 weeks before the injury for work in any employment in which the worker was engaged at the time of the injury. Regulations may provide for the adjustment of the 52-week period to reflect any change in earnings circumstances of the worker or to align the period with the regular pay period of the worker. The regulations may also specify a minimum amount of pre-injury average weekly earnings that is to apply in respect of a class of worker.
- (b) **Clause 3** establishes a mechanism for a worker and the employer to agree as to the amount of pre-injury average weekly earnings that is to apply for the purposes of the calculation of weekly payments of compensation.
- (c) **Clause 6** defines *earnings* by reference to the actual amount of weekly income of the worker earned in any employment, rather than by reference to ordinary earnings (which currently exclude overtime and shift allowances).

**Schedule 3.2** makes a consequential amendment to the 1998 Act.

## **Schedule 4 Amendments relating to information sharing**

**Schedule 4** makes the amendments referred to in paragraph (d) of the Overview.

**Schedule 4 [2]** inserts **proposed Part 7** into Chapter 2 of the 1998 Act. The proposed Part contains provisions relating to the collection, use and disclosure by the Authority, insurers and relevant insurance or compensation authorities of data relating to policies of insurance, claims for compensation or work injury damages and other related matters under the workers compensation legislation. It includes a provision that authorises the Authority to obtain data from insurers, relevant insurance or compensation authorities, hospitals and government agencies and that authorises the exchange of data between those entities.

The proposed Part also authorises the regulations to establish a scheme for requiring any contravention of the Workers Compensation Acts to be notified to the Authority by insurers and other specified persons having functions under those Acts.

**Schedule 4 [3]** extends the power of the Authority to disclose information obtained in the administration or execution of the 1987 Act or the 1998 Act to enable the Authority to disclose information to the Australian Prudential Regulation Authority or the Australian Securities and Investments Commission.

**Schedule 4 [4]** removes information collection and sharing powers of the Nominal Insurer as a consequence of recent changes in the functions of the Nominal Insurer.

**Schedule 4 [1]** makes a consequential amendment.

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

**Schedule 5** makes the amendments referred to in paragraph (e) of the Overview.

**Schedule 5.1** removes existing requirements to publish by regulation, notice in the Gazette or Ministerial order notification of increases in index numbers and indexed amounts for the purposes of calculating various entitlements to compensation under the Workers Compensation Acts. The increases will instead be notified by the Authority by order published on the NSW legislation website. **Schedule 5.2** makes consequential amendments to the *Workers Compensation Regulation 2016*.

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

**Schedule 6** makes amendments to the *Motor Accident Injuries Act 2017 (the MAI Act)* and the Workers Compensation Acts with respect to entitlements to compensation and damages applicable to workers injured in motor accidents in the course of employment.

**Schedule 6.1 [1]** provides that a worker who has been injured in a motor accident and whose entitlement to medical expenses compensation under the 1987 Act has ceased is not subject to the limitation on entitlement to statutory benefits for treatment and care under the MAI Act in respect of the injury. **Schedule 6.1 [2]** makes a related amendment to remove a limitation on entitlement to statutory benefits for treatment and care under the MAI Act where the claimant has recovered damages from the employer in respect of the injury.

**Schedule 6.1 [4]** extends the time limit for making a claim under the MAI Act for statutory benefits for treatment and care where medical expenses compensation under the 1987 Act has ceased to be payable in respect of the injury. In those circumstances, the injured worker may make the claim within 3 months after the compensation ceases to be payable. The amendment does not affect the time limit in circumstances where there is a full and satisfactory explanation for a delay in making the claim.

**Schedule 6.2 [2]** provides that if a person recovers motor accident damages (in accordance with the MAI Act) in respect of an injury from the employer liable to pay workers compensation, the person ceases to be entitled to any further workers compensation. The amount of weekly payments of compensation, and permanent impairment compensation and pain and suffering compensation (limited to the amount of damages recovered for non-economic loss), is to be deducted from the compensation and paid to the employer or insurer who paid the compensation. **Schedule 6.2 [1]** makes a consequential amendment.

**Schedule 6.2 [5]** provides that the requirement for an injured worker to repay out of motor accident damages (awarded in accordance with the MAI Act) any amount of workers compensation paid in respect of the injury does not apply to medical expenses compensation paid in respect of the injury. The liability of the worker to repay the amount of any permanent impairment compensation and pain and suffering compensation already paid is limited to the amount of damages recovered for non-economic loss. The person who paid the compensation is not entitled to be indemnified (by the person liable to pay the compensation) with respect to any amount of damages that is not required to be repaid by the worker. **Schedule 6.2 [4]** makes a related amendment to insert a note referring to provisions of the 1987 Act and the *Law Reform (Miscellaneous Provisions) Act 1965* relating to contributory negligence.

**Schedule 6.1 [3], 6.2 [3] and 6.3** make law revision amendments.

## **Schedule 7      Miscellaneous amendments**

**Schedule 7.1** makes the amendment referred to in paragraph (f) of the Overview.

**Schedule 7.2** makes the amendment referred to in paragraph (g) of the Overview. The amendment makes the workers compensation scheme consistent with minimum benchmarks set for injured workers to be covered under the National Injury Insurance Scheme, in line with Heads of Agreement entered into between the Commonwealth and NSW Governments in December 2012.

**Schedule 7.3** makes the amendments referred to in paragraph (h) of the Overview. The new notification arrangements apply to information relating to return to work programs, the notification of injuries, the making of claims and the employer's insurance details.

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

**Schedule 8** makes the amendments referred to in paragraph (i) of the Overview.