Recent reforms in workers compensation NSW

Roshana May
Newcastle 10 May 2019
<table>
<thead>
<tr>
<th>Prepared by</th>
<th>Version date</th>
<th>Version #</th>
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<tbody>
<tr>
<td>Roshana May</td>
<td>8 March 2019</td>
<td>ALA NSW State Conference Paper</td>
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<tr>
<td>Roshana May</td>
<td>15 April 2019</td>
<td>WIRO Seminar Ballina Paper</td>
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<tr>
<td>This version</td>
<td>6 May 2019</td>
<td>WIRO Seminar Newcastle Paper</td>
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WORKERS COMPENSATION SYSTEM REFORMS 2018

Overview

The Workers Compensation Legislation Amendment Act 2018 (‘the Amendment Act’) was passed by the NSW Parliament on 17 October 2018 and received assent on 26 October 2018.

The Amendment Act consists of the eight schedules which effect changes in the following areas:

Schedule 1  Dispute resolution relating to work capacity decisions (‘WCDs’).
Schedule 2  Medical assessment of permanent impairment.
Schedule 3  Calculation of pre-injury average weekly earnings (‘PIAWE’).
Schedule 4  Information sharing.
Schedule 5  Indexation.
Schedule 6  Motor accident scheme.
Schedule 7  Miscellaneous provisions which include changes to commutations and the provision of information by employers to workers about various procedural matters.
Schedule 8  Savings and transitional provisions.

The Workers Compensation Amendment Regulation 2018 was gazetted on 14 December 2018 to support the provisions of the legislation commencing on 1 January 2019. It makes amendments to the Workers Compensation Regulation 2016.

Commencement

The Amendment Act received assent on 26 October 2018.

The following parts of the Amendment Act commenced on 26 October 2018:

- 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)
- Schedule 6 - Amendments relating to motor accidents scheme
- Schedule 7.1 - Miscellaneous Amendments to the State Insurance and Care Governance Act 2015
- Schedule 8 - Amendments relating to savings and transitional provisions.

The following parts commenced on 1 December 2018:

- Schedule 5 – Amendments relating to indexation

The following parts commenced on 1 January 2019:

- Schedules 1.1, 1.2 and 1.3 [5] – [8]
- Schedule 2
- Schedules 4 [1] and [2] (to the extent that it inserts 40D into the 1998 Act)
• Schedules 7.2 and 7.3

The following parts have not commenced and are awaiting proclamation:
• Schedule 3 - Amendments relating to PIAWE

The **Workers Compensation Amendment Regulation 2018 (Amending Regulation)** was gazetted on 14 December 2018 and took effect from 1 January 2019.

**Objects of the Legislation & Regulation**

The object of the Amendment Act 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, 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,

(f) 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,

(g) 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
recent reforms in workers compensation

(h) to make provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

The object of the Amending Regulation is to amend the *Workers Compensation Regulation 2016* (WCR 2016) to make provision with respect to the following matters as a consequence of the enactment of the Amendment Act:

(a) the notification of decisions of insurers and the procedure for reviews by insurers of work capacity decisions and claims,
(b) prescribing the use of mobile device applications as a method by which an employer may notify workers of return-to-work programs,
(c) costs recoverable for legal services provided to an insurer or a claimant in connection with a work capacity decision,
(d) other minor related matters.

**The Important changes**

Some of the more important changes are summarised below:

1. **Dispute Resolution relating to work capacity decisions**
   > The stated objective is to simplify the dispute resolution process by effectively creating the Workers Compensation Commission (‘WCC’) as a ‘one-stop’ shop for resolving both liability disputes and disputes about work capacity decisions (WCDs).
   > The amendments apply to WCDs made on or after 1 January 2019.
   > The existing system of review (internal review by the insurer, merit review by SIRA and procedural review by WIRO) is abolished for WCDs made on or after 1 January 2019.
   > The existing system of review for WCDs made before 1 January 2019 remains for the duration of the transitional period (6 months from 1 January 2019 or longer period as defined by regulation). Legal costs are preserved under the 1987 Act savings and transitional provisions in Schedule 6, Part 19L clause 6A(2)
   > The WCC has jurisdiction to determine WCD disputes where the WCD was made on or after 1 January 2019. It is expected that the WCC will have full jurisdiction at the expiry of a 6 month transitional period however, where a pre -1 January 2019 WCD has commenced or undergone the existing review process it is unable to be re-agitated in the WCC (where no new WCD has been made).
   > A worker retains the option of applying to the insurer for an internal review of a WCD under a modified s287A of the 1998 Act, however, an internal review is no longer mandatory. A worker may proceed directly to the WCC in order to resolve a dispute about a WCD.
   > If an internal review of a WCD is sought, the insurer must conduct the review and notify the worker of the outcome within 14 days. A penalty applies for failure to provide a response.
> Pursuant to Clause 42B of the *Workers Compensation Regulation 2016* (‘WCR’) the notice of review decision must:

  o Be in writing.
  o Contain the information referred to in Clause 38(1) of the WCR (the same information required for a dispute notice under new s78).
  o Contain a concise and readily understandable statement of the reasons for the insurer's decision and the issues relevant to the decision and
  o Identify any provisions relied upon in making the (review) decision.

> A stay on the decision will apply where a dispute about a WCD is referred to the WCC for a determination before the expiry of the required period of notice (only where a period of notice applies). This prevents the insurer taking action on the WCD until such time as the proceedings are determined, dismissed or discontinued.

> If the worker seeks a review by the insurer and the insurer affirms the WCD, there is no change to the required period of notice.

> If the worker seeks a review by the insurer and the review decision is different, the required period of notice commences from the date the review decision is made and communicated to the worker.

> If a worker applies to the WCC for a review of the WCD, the Registrar may deal with the dispute by way of an expedited assessment. In that event, a teleconference will take place within 14 days and a decision will be made within 14 days after the teleconference.

> If a matter is referred by the WCC down the ‘expedited assessment’ pathway, the result will be an Interim Payment Direction (IPD). An IPD is not in the nature of a new WCD. An IPD is a decision of the Registrar and can only be appealed to the Supreme Court for administrative review. The limitations of a general IPD do not apply to an IPD made in respect of a WCD dispute

> If the WCC determines that the WCD dispute is not suitable for an expedited assessment, the matter may be referred for determination by an arbitrator at conciliation/arbitration. In this pathway, the arbitrator can make a determination of the WCC which can be appealed to the President of the WCC.

> There is nothing in the legislation that says that a decision or determination of the WCC is a new WCD.

> The WCC has issued e bulletin 81 and Practice Direction 15 about procedures and practice in the WCC concerning WCD disputes.

> Legal costs are payable for post - 1 January 2019 WCD disputes in the WCC. WIRO will fund worker's legal costs for WCDs that can be disputed in the WCC. A funding guide has been issued by WIRO.

### 2. *Notices*

> Section 54 1987 Act and section 74 1998 Act Notices are now replaced by a section 78 1998 Act Notice.
Section 78(2), 1998 Act enables an insurer to issue a single dispute notice in respect of a decision to dispute liability and a decision to discontinue or reduce weekly payments made to a worker. The Guidelines may make provision for a form of single notice. No Guideline has been made to this effect to date.

Notices must be given to the worker and the employer and must contain ‘a readily understandable statement of the reasons for the insurer’s decision’.

The Regulation provides for the manner in which a notice is given and the form or other information to be included in a notice.

The content of a notice is provided for in new clause 38 of the WCR 2016. New notice provisions are created for insurer decisions in coalminer matters and work injury damages matters.

The period of notice to discontinue or reduce weekly payments is provided for in s80 of the 1998 Act.

The required period of notice for a WCD is 3 months only where the worker has been in receipt of weekly payments for a period of at least 12 continuous weeks. The postal rule continues to apply and now stands at 7 working days, not 4.

SIRA has issued an approved Form of Decision Notice Summary for use in all notices under s78 from 1 January 2019. The Form is misleading in that it does not distinguish between notices issued to exempt workers and non-exempt workers.

### 3. Medical Assessment of Permanent Impairment

Schedule 2 of the Amendment Act commenced on 1 January 2019.

Section 65(3) of the Workers Compensation Act 1987 (‘1987 Act’), which provided that all permanent impairment disputes are to be referred to an approved medical specialist (‘AMS’) prior to the WCC awarding permanent impairment compensation, has been removed.

An arbitrator may now make a decision with regard to permanent impairment without proceeding to AMS assessment.

Decisions made by arbitrators with regard to permanent impairment are deemed to be binding assessments for the purposes of s322A of the 1998 Act (which provides that only one assessment may be made of the degree of permanent impairment of an injured worker).

The determination by the arbitrator has the status of a MAC and that it is also the one medical assessment certificate referred to in s 322A(2).

The WCR may make provisions with respect to the circumstances in which a medical dispute concerning permanent impairment of an injured worker is authorised, permitted or, conversely, not permitted to be referred to an AMS.

The Registrar of the WCC recently indicated that (subject to the Regulations) if the medical dispute raises a threshold issue (eg for the purposes of a work injury damages claim or determining if the worker is a worker with ‘high needs’ or ‘highest needs’), it is likely that the dispute will be referred to an AMS.
The WCC has issued e bulletin 83 which states:

Permanent impairment disputes

Permanent impairment disputes can now be determined by an Arbitrator without the need for a medical assessment by an Approved Medical Specialist. In addition to disputes regarding liability for permanent impairment, quantum only permanent impairment disputes will be referred to an Arbitrator for an initial teleconference where:

• there has been a failure to determine by the insurer;
• the claim by the worker, and the offer by the insurer, do not cross a threshold, that is:

<table>
<thead>
<tr>
<th>Worker’s claim</th>
<th>Insurer’s counter offer</th>
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<tbody>
<tr>
<td>11% to 14%</td>
<td>11% to 13%</td>
</tr>
<tr>
<td>15% to 20%</td>
<td>15% to 19%</td>
</tr>
<tr>
<td>21% to 30%</td>
<td>21% to 29%</td>
</tr>
<tr>
<td>31% or more</td>
<td>31% or more, but less than the quantum claimed</td>
</tr>
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</table>

Arbitrators may refer medical disputes to Approved Medical Specialists for assessment

4. Calculation of PIAWE and weekly payments

These provisions (contained in Schedule 3) have not yet commenced. They will commence on a date to be appointed by proclamation in respect of injuries occurring on or after that date.

The amendments replace sections 44D - 44I 1987 Act with a new Schedule 3 to the 1987 Act which makes significant changes to the calculation of pre-injury average weekly earnings (PIAWE).

PIAWE is defined as the weekly average of the gross pre-injury earnings received by the worker during the period of 52 weeks before the injury in any employment in which the worker was engaged, at the time of the injury.

The Regulations are expected to provide for the adjustment of the 52 week period to reflect any change in earning circumstances of the worker or to align the period with the regular pay periods of the worker.

The Regulations may also specify a minimum amount of PIAWE that is to apply in respect of a class of worker.

There is provision for the making of a PIAWE Agreement between workers and employers. There is however some perceived difficulty in determining how this can effectively work in practice given that effectively there is 7 days immediately after injury in which that agreement can be reached.

For those injured on or after 26 October 2018, overtime and shift allowances are no longer excluded from PIAWE after 52 weeks of weekly compensation payments.

There will be 4 legacy systems forever maintainable by insurers as a consequence of the pre-injury average weekly earnings amendments:

• Coalminers’ calculations of average weekly earnings
• Exempt workers’ computation of average weekly earnings
• Non-exempt workers injured before 26 October 2018 (noting that those injured after that date and before the commencement of Schedule 3 will not have the 52 week step down)
• Non-exempt workers injured after the date of proclamation of Schedule 3.

> The calculation of weekly payments is simplified by reference to the new PIAWE computation in the first and second entitlement period.

5. **Information Sharing**

> Provisions relating to information sharing and mandatory reports, contained in Schedule 4, commenced on 26 October 2018.

> The object is to enable SIRA to improve data collection and its capacity to monitor the Scheme.

> SIRA, WIRO and insurers are authorised to exchange data concerning policies of insurance, claims, complaints and other related matters under the Workers Compensation Legislation. The provisions also authorise the passing of regulations which impose mandatory reporting obligations on insurers with respect to breaches of the Workers Compensation Legislation.

> The information sharing provisions have not been effected by any regulation to date.

> Other provisions authorise SIRA to disclose information to APRA or ASIC.

6. **Indexation**

> Schedule 5 commenced on 1 December 2018.

> The existing requirement to publish indexation changes by regulation, notice in the Government Gazette or Ministerial order is removed. SIRA will instead notify indexation changes by order published on the NSW legislation website.

7. **Motor Accident Claims**

> Schedule 6 commenced on 26 October 2018, the date of assent. However, the amendments extend to compensation or damages paid or payable before the commencement of the amendments in respect of a motor accident occurring on or after 1 December 2017.

> A worker who receives workers compensation benefits as well as damages under the Motor Accident Injuries Act 2017 (‘the MAIA Act’) for the same injury is only required to repay to the workers compensation insurer the amount of weekly payments received. The worker does not need to repay from the damages amounts paid by the workers compensation insurer for medical or related treatment expenses (including rehabilitation and care).

> A worker who recovers damages under the MAIA Act as well as permanent impairment compensation under s66 of the WCA 1987 only needs to repay the s66 sum to the workers compensation insurer if the worker has also recovered damages for non-economic loss under the MAIA Act.

> Workers injured in a motor vehicle accident who are entitled to receive workers compensation benefits maintain an entitlement to reasonable and necessary (not ‘reasonably necessary’)
medical, treatment and care expenses from the CTP insurer should workers compensation entitlements cease.

> The provisions only affect those who have NSW work injuries under the NSW WC Scheme.

8. **Miscellaneous Amendments**

> Schedule 7 contains miscellaneous amendments which commenced on **26 October 2018**.

> The number of members appointed to the Board of SIRA may be increased from 3 to 5. New Board members have been appointed, being The Hon Judge Greg Keating, former president of the WCC and Rod Stowe former NSW Fair Trading Commissioner.

> An employer may provide information to workers relating to various procedural matters under the Workers Compensation Legislation by publication on a website or any other method authorised by regulation, instead of posting the information at the place of work.

> The **commutation** of a liability to pay *medical expenses* compensation in respect of a ‘catastrophic injury’ specified in the Workers Compensation Guidelines is prohibited. In accordance with Part 9 of the Guidelines, an injury is a ‘catastrophic injury’ if it meets the criteria for one or more of the kinds of injuries specified below:

- Spinal cord injury (an acute traumatic lesion of the neural elements of the spinal cord or cauda equina).
- Brain injury.
- Certain types of amputations.
- Burns (full thickness burns to greater than 40% of the total body surface area) and
- Permanent blindness.

9. **Savings and Transitional Provisions**

> Schedule 8 contains savings and transitional provisions which commenced on **26 October 2018**.

> The provisions govern the application of the 2018 amendments to current and existing claims.

> The amendments in Schedules 1-3 do not apply to coalminers, volunteer firefighters and emergency rescue personnel.

> The amendments in Schedule 2 do apply to ‘exempt workers’ i.e. police officers, paramedics and firefighters, however Schedules 1 and 3 do not.

> Except as otherwise provided in the Schedule or regulations, the amendments extend to injuries received before the commencement of the amendment, claims for compensation made before the amendments and proceedings pending in the WCC immediately before the commencement of the amendments. However, the amendments do not apply to compensation paid or payable in respect of any period before the commencement of the amendments.

> In relation to existing WCDs, the previous provisions concerning review and the jurisdiction of the WCC continue to apply during a ‘transitional review period’ (6 months from
commencement) or, if subject to review, immediately before the expiration of the transitional review period until the review is finally determined.

OTHER RELEVANT CHANGES & DEVELOPMENTS

Workers compensation guidelines

The Workers Compensation Guidelines were gazetted on 21 December 2018 and apply to all claims from 1 January 2019 irrespective of when the claim was made.

The Guidelines replace the following:

1. Guidelines for claiming workers compensation dated 1 August 2016

They apply to all ‘matters’ except coalminer, dust diseases and claims made under the Workers Compensation (Bush Fire, Emergency and rescue Services) Act 1987. The guidelines DO apply to exempt matters except where expressly and clearly marked.

The Guidelines contain the following parts:

- Part 1: Initial notification of an injury
- Part 2: Provisional liability
- Part 3: Making a claim
- Part 4: Compensation for medical, hospital, and rehabilitation expenses
- Part 5: Work capacity
- Part 6: Injury management consultants
- Part 7: Independent medical examinations and reports
- Part 8: Lump sum compensation
- Part 9: Commutation of compensation

Notes

- The exemptions from pre-approval for medical and treatment have not changed except for format.
- Note Part 3 regarding Independent Medical Examinations (IMEs). An IME is not a medico-legal assessor. An independent medical examination (IME) is an assessment conducted by an appropriately qualified and experienced medical practitioner to help resolve an issue in injury or claims management. S119 1998 Act defines an independent medical examination as occurring at the request of the employer (insurer).
- Part 8 dealing with Lump Sum compensation does not overtly state that impairment can be negotiated between the worker and insurer. The requirements for a s66(4) 1987 Act Complying Agreement should be noted:
> the date of injury or deemed date of injury from which the impairment is agreed to result
> the percentage of permanent impairment or permanent injury, including the injuries described in the Table of Disabilities for permanent injuries, for which compensation is being paid
> the percentage allowed for any pre-existing condition or abnormality
> the medical report(s) used to assess/agree this percentage
> the compensation payable (percentage and monetary value)
> the date of agreement
> certification that the insurer is satisfied the worker has obtained independent legal advice or has waived the right to do so.

**Workers Compensation Commission Rules**

The WCC has made some amendments to its Rules to give effect to the legislative amendments. The rule changes were gazetted on 18 January 2019 and take effect from 10 January 2019. They are:

<table>
<thead>
<tr>
<th>Rule</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>1.4 (1)</td>
<td>Add a definition of “decision notice” Add: “decision notice” means a notice issued under section 78 or 287A of the 1998 Act, and includes a notice issued under section 74 and 54 of the 1998 Act as in force immediately before 1 January 2019.”</td>
</tr>
<tr>
<td>9.1 (1)</td>
<td>Delete Rule 9.1 (1) and replace with the following: “(1) This Part applies to proceedings that are commenced by application for expedited assessment, and matters that are referred under s 292 of the 1998 Act for expedited assessment. (2) This Part is to be read in accordance with any relevant Workers Compensation Guideline and Practice Direction.”</td>
</tr>
<tr>
<td>9.2 (1)</td>
<td>Insert after rule 9.2 (1) (e): &quot;(f) a work capacity decision made by an insurer under s 43 of the 1987 Act,”</td>
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<td>9.3</td>
<td>Delete Rule 9.3(1)- (8) and replace with the following: “(1) If a dispute is determined under section 297 of the 1998 Act, an interim payment direction must be issued to the parties as soon as practicable after the determination of the dispute. (2) A brief statement of reasons is to be attached to the interim payment direction setting out the Registrar’s reasons for the direction. (3) For the avoidance of doubt, a reference to the Registrar includes a reference to the Commission.”</td>
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</tbody>
</table>
Delete rule 11.1(9) and replace with the following:

“(9) Without leave of the Commission, the failure of a worker to notify of an injury as required by the Workers Compensation Acts may not be raised as an issue in the reply by the party joined if that issue has not been included in a decision notice given in accordance with the 1998 Act by the party joined.”

Delete rule 17.5 (2) and replace with the following:

“(2) Without leave of the Commission, the failure of a worker to notify of an injury as and when required by the Workers Compensation Acts may not be raised as an issue in the pre-filing defence served by the defendant if that issue has not been included in the decision notice given in accordance with the 1998 Act.”

A further amendment was gazetted on 15 February 2019.

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The Workers Compensation Commission website has been relaunched and now contains information about the Commission’s processes and practices in a new format.

**Standards of Practice**

SIRA commenced consultation on a Claims Administration Manual (CAM) in 2017. In late 2018 the CAM, which had been resisted by insurers and critiqued for its heavy-handed punitive approach, morphed in a set of Standards and was gazetted as such in the last week of December 2018.

The objective in developing the Standards and revised Guidelines was:

…“to improve workers compensation system outcomes. By ensuring clear, consistent, accessible and enforceable expectations are set for all insurers, SIRA will guide insurer conduct and claims management.”

Through the Standards, SIRA will hold insurers accountable for the delivery of a high standard of service to workers and their families, carers, employers and other system stakeholders.

‘The Standards require insurers to apply principles across a range of processes and procedures in claims handling and administration. The principles and expectations target activities where it is known that insurer processes or procedures are impacting the worker claims experience. They may also seek to provide clarity where there is confusion or inconsistency among insurers, leading to inequitable compensation outcomes for workers and employers. They are not a comprehensive suite of claims practices.’

**Standard of practice principles**

There are 31 Standard of practice principles which set out intended outcomes from insurer claims administration. They apply from 1 January 2019.
<table>
<thead>
<tr>
<th>Standard</th>
<th>Principle</th>
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<tbody>
<tr>
<td><strong>Standard 1:</strong> Worker consent</td>
<td>The confidentiality of workers’ personal and health information will be respected at all times and workers’ personal and health information will be dealt with only in accordance with their consent.</td>
</tr>
<tr>
<td><strong>Standard 2:</strong> Worker access to personal information</td>
<td>Workers will be provided with convenient and timely access to their personal and health information in accordance with relevant privacy and workers compensation laws.</td>
</tr>
<tr>
<td><strong>Standard 3:</strong> Initial liability decisions – general, provisional, reasonable excuse or full liability</td>
<td>Liability decisions will be informed by careful consideration of all available information and proactive consultation with the worker and employer.</td>
</tr>
<tr>
<td><strong>Standard 4:</strong> Liability for medical or related treatment</td>
<td>Liability decisions will be informed by careful consideration of all available information and proactive consultation with relevant stakeholders.</td>
</tr>
<tr>
<td><strong>Standard 5:</strong> Recurrence or aggravation of a previous workplace injury</td>
<td>All available evidence will be considered to determine whether an injury is the recurrence of a previous injury or a new injury, and all reasonable support will be provided to the worker in either case.</td>
</tr>
<tr>
<td><strong>Standard 6:</strong> Recoveries</td>
<td>Claims will be screened early to determine whether any third-party recoveries are to be pursued.</td>
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<tr>
<td><strong>Standard 7:</strong> Interim pre-injury average weekly earnings calculation</td>
<td>Weekly payments to workers will commence as soon as possible, and workers will not be disadvantaged because the insurer has not been able to obtain all information required to calculate PIAWE.</td>
</tr>
<tr>
<td><strong>Standard 8:</strong> Insurer making weekly payments</td>
<td>The rights and responsibilities of all parties will be respected in circumstances where weekly payments will be made by the insurer.</td>
</tr>
<tr>
<td><strong>Standard 9:</strong> Reduction in payments of compensation</td>
<td>Workers will be provided with notice in advance prior to a statutory step-down in their weekly payments.</td>
</tr>
<tr>
<td><strong>Standard 10:</strong> Payment of invoices and reimbursements</td>
<td>Workers and providers will receive prompt payment of invoices and reimbursements for medical, hospital and rehabilitation services.</td>
</tr>
<tr>
<td><strong>Standard 11:</strong> Changes in capacity</td>
<td>A worker’s work capacity will be re-assessed promptly upon receipt of new information indicating a change in work capacity.</td>
</tr>
<tr>
<td><strong>Standard 12:</strong> Injury management plans</td>
<td>Injury management planning will be undertaken in a timely and proactive manner to support workers’ treatment, rehabilitation and return to work.</td>
</tr>
<tr>
<td><strong>Standard 13:</strong> Additional or consequential medical conditions</td>
<td>Prompt action will be taken to assess and address any additional or consequential medical condition identified on a certificate of capacity.</td>
</tr>
<tr>
<td><strong>Standard 14:</strong> Referral to an injury management consultant</td>
<td>Injury management consultants will be engaged to assist workers identified as at risk of delayed recovery and in circumstances where a specific issue has been identified.</td>
</tr>
<tr>
<td>Standard 15: Approval and payment of medical, hospital and rehabilitation services</td>
<td>Prompt consideration will be given to approving medical, hospital and rehabilitation services and payment will be made as soon as practicable after services are invoiced.</td>
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<tr>
<td>Standard 16: Case conferencing</td>
<td>Case conferences will be conducted in a manner that promotes return to work and respects the worker’s right to confidential medical consultations.</td>
</tr>
<tr>
<td>Standard 17: Section 39 notification</td>
<td>Workers affected by the 260-week limit to weekly payments will be provided with appropriate notice prior to the cessation of weekly payments.</td>
</tr>
<tr>
<td>Standard 18: Retiring age notification</td>
<td>Workers affected by the 12-month limit to weekly payments after a worker reaches retirement age will be provided with appropriate notice prior to the cessation of weekly payments.</td>
</tr>
<tr>
<td>Standard 19: Section 59A notification</td>
<td>Workers whose medical benefits are due to cease will be provided with appropriate notice prior to the cessation of those benefits.</td>
</tr>
<tr>
<td>Standard 20: Permanent impairment assessment reports</td>
<td>Permanent impairment assessment reports will be objectively evaluated to ensure correct and consistent assessment for the determination of entitlements.</td>
</tr>
<tr>
<td>Standard 21: Negotiation on degree of permanent impairment</td>
<td>Where appropriate, parties will be encouraged to consider negotiating and agreeing the degree of permanent impairment.</td>
</tr>
<tr>
<td>Standard 22: Insurer participation in disputes and mediations</td>
<td>All parties will participate in Commission teleconferences, conciliations/arbitrations and mediations in good faith and with a view to achieving the timely and effective resolution of disputes.</td>
</tr>
<tr>
<td>Standard 23: Recovery of overpayments due to insurer error</td>
<td>Risks relating to overpayment or duplication of payments to workers will be mitigated to the greatest extent practicable while ensuring efficient management of claims, and overpayments will be managed in a fair and transparent manner.</td>
</tr>
<tr>
<td>Standard 24: Factual investigations</td>
<td>Factual investigations will only be used when necessary and will always be undertaken in a fair and ethical manner.</td>
</tr>
<tr>
<td>Standard 25: Surveillance</td>
<td>Decisions to engage surveillance services will be based on firm evidence; surveillance will be conducted in an ethical manner; and information obtained through surveillance will be used and stored appropriately.</td>
</tr>
<tr>
<td>Standard 26: Arrangement for payments to Medicare Australia</td>
<td>Due care will be given in the management of claims to mitigate risks arising from the interaction between Medicare and the workers compensation scheme.</td>
</tr>
<tr>
<td>Standard 27: Notification and recovery of Centrelink benefits from lump sum payments</td>
<td>The implications of lump sum payments for Centrelink benefits, including possible repayments to Centrelink or temporary preclusion from Centrelink benefits, will be proactively managed to minimise impacts on workers.</td>
</tr>
<tr>
<td>Standard 28: Interpreter services</td>
<td>Workers will have access to qualified and culturally-appropriate interpreter services in the worker’s nominated language.</td>
</tr>
<tr>
<td>Standard 29: Cross-border provisions</td>
<td>Workers who work in more than one State or Territory will be promptly assessed under cross-border arrangements for their correct entitlements.</td>
</tr>
</tbody>
</table>
Standard 30: Closing a claim
All relevant stakeholders will be notified prior to the closure of a claim.

Standard 31: Death claims
Death claims will be managed with empathy and respect, and liability decisions and payment of entitlements in relation to death claims will be prioritised and not unnecessarily delayed.

The Postal Rule - Interpretation Act 1987

The postal rule was amended by the enactment of the Justice Legislation Amendment Act (No 3) 2018 on 28 November 2018.

Whereas previously the postal rule allowed 4 working days, it now provides for 7 working days to effect postal delivery.

76 Service by post

(1) If an Act or instrument authorises or requires any document to be served by post (whether the word “serve”, “give” or “send” or any other word is used), service of the document:

(a) may be effected by properly addressing, prepaying and posting a letter containing the document, and

(b) in Australia or in an external Territory—is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected on the seventh working day after the letter was posted, and

(c) in another place—is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected at the time when the letter would have been delivered in the ordinary course of post.

(2) In this section:

working day means a day that is not:

(a) a Saturday or Sunday, or

(b) a public holiday or a bank holiday in the place to which the letter was addressed.

The Workers Compensation Acts contain no provision for electronic delivery or other service of documents and so the postal rule must be applied in all cases where ‘service’ is required. Seven (7) business days can extend to almost two (2) calendar weeks where there are public holidays back to back eg Easter, Christmas Day and New Year. This applies to service on the insurer, not just by an insurer.

Standing Committee on Law and Justice ‘2018 review of the Workers Compensation Scheme’

The Standing Committee on Law and Justice (SCLJ) announced their biannual review of the scheme on 1 May 2013, three days before the Government announced proposed changes to the workers compensation dispute resolution system resulting from the Department of Finance review.
The Committee resolved that the review focus on:

> the feasibility of a consolidated personal injury tribunal for Compulsory Third Party and workers compensation dispute resolution, as per recommendation 16 of the committee’s first review of the workers compensation scheme, including where such a tribunal should be located and what legislative changes are required

> recommending a preferred model to the NSW Government.

The committee received 21 submissions and held three public hearings at Parliament House in Sydney.

The report was published on 14 February 2019 and contains 5 recommendations. The Committee said in its foreword:

“The committee received evidence about the similarities between the workers compensation and CTP systems, highlighting how a single jurisdiction may provide certainty, efficiency and better streamlining of decision making for claimants.

Some stakeholders sought reassurance that a consolidated approach would not dilute the expertise that is particular to each jurisdiction. There were also views about the need for the proposed tribunal to be independent, with a judicial head and an appeal mechanism, and the need for transparency of decisions and access to legal advice and representation for claimants. There was general consensus that the Workers Compensation Commission was an appropriate vehicle for this jurisdiction, and that it could successfully operate with two streams of expertise.

On this basis, the committee has recommended that the NSW Government consolidate the workers compensation scheme and CTP insurance schemes dispute resolution systems into a single personal injury tribunal, by expanding the jurisdiction of the Workers Compensation Commission, but retaining two streams of expertise.”

The Recommendations

Recommendation 1

That the NSW Government consolidate the workers compensation scheme and CTP insurance scheme dispute resolution systems into a single personal injury tribunal, by expanding the jurisdiction of the Workers Compensation Commission, but retaining two streams of expertise.

Recommendation 2

That the NSW Government ensure that if a single personal injury tribunal is established, as outlined in recommendation 1, it:

- be independent and judicial
- have statutorily appointed presiding officers
- provide a judicial appeal mechanism
- publish its decisions
- allow claimants to have access to legal representation.
Recommendation 3

That the NSW Government preserve the Workers Compensation Independent Review Office and Independent Legal Assistance and Review Service in the workers compensation scheme, and expand its services to claimants in CTP insurance scheme disputes.

Recommendation 4

That the NSW Government assist injured workers who have lost, or will lose, their weekly entitlements under section 39 of the Workers Compensation Act 1987 to transition quickly to the disability support pension, where eligible, and investigate other support mechanisms for those ineligible for these payments.

Recommendation 5

That the State Insurance Regulatory Authority give consideration to resolving legislative ambiguities including issues of back-pay following resumption of weekly payments, pre-existing psychological injury, assessment of permanent impairment and aggregating impairments, as part of the Workers Compensation Dispute Resolution Reform Steering Committee Review, and in ongoing consultation with the Workers Compensation Independent Review Office.

Participant’s evidence

Review participants called for any proposed tribunal to be independent. Some participants were emphatic in their message that the regulator, SIRA, should have no role in the dispute resolution process:

- ‘The scheme regulator should have no access to, and no influence over, the decision makers’.
- ‘Permitting SIRA to engage in dispute resolution would far exceed its legislative role and remit and is fundamentally inconsistent with its role as a regulator’ and ‘would be antithetical to the fundamental notion that such a forum should be structurally, functionally and institutionally independent from the scheme regulator’.
- ‘It is imperative that the regulator should play no part in the dispute decision-making process. We feel there is an inherent conflict of interest in this … [T]he regulator must focus on the sole task of regulating the industry’.
- ‘SIRA should not be performing this [dispute resolution] function, as the conflict of interest between such a function and SIRA’s other roles make that allocation entirely inappropriate’.
- ‘The regulator makes the rules, they are perhaps there to oversee breaches of those rules, set up the framework, but there should be an independent tribunal determining what could be one of the most important things in a person’s life’.
- ‘Simply put, SIRA is a regulator. It should be confined to that important activity’

The Committee appeared to reflect on the desire for there to be “legislated entitlement for individuals to have an opportunity to have appropriate legal advice and representation at all stage of the dispute process”. They commented:

“Ideally, any such consolidated personal injury tribunal should be independent and judicial, with statutorily appointed presiding officers, a judicial appeal mechanism and access to justice and legal representation for claimants.”
What’s on the horizon?

Review of SIRA and icare:

Under s 27 of the State Insurance and Care Governance Act 2015 “As soon as practicable after the commencement of this section and the commencement of the first session of each Parliament, a committee of the Legislative Council is to be designated by resolution of the Legislative Council as the designated committee for the purposes of this section.”

The Standing Committee on Law and Justice last conducted a review of the Act in 2017.

In addition, s 32 of the Act provides that the Minister must review the Act to “determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives” as soon as possible after 5 years from the date of assent (2020) and must table a report to Parliament within 12 months at the expiry of the 5 year period.

Independent tribunal:

It is understood that the Government (elected 24 March 2019) is moving forward with a single independent tribunal for insurance claims, currently referred to as the ‘personal injury tribunal’.

SIRA has convened and expert advisory sub-committee titled the ‘Dispute Resolution Advisory Committee’ to “advise the SIRA Board on matters relating to dispute resolution services for injured people and insurers, across a range of personal injury compensation schemes, with each Committee Member bringing unique knowledge and experience”, chaired by Dr Graeme Innes. Members of the Committee are Andrew Stone SC, Professor Tanya Sourdin, The Hon. Greg Keating and Dr Innes.

References


Roshana May
Director Independent Legal Assistance & Review Service (ILARS)
Workers Compensation Independent Review Office