



PURPOSE

This Guide is issued to provide information to WIRO Approved Lawyers about changes to dispute resolution with respect to **work capacity decisions** as a consequence of the *Workers Compensation Legislation Amendment Act 2018* (Amending Act) which received assent on 26 October 2018.

The Amending Act made substantial and significant changes to the **method for resolving disputes** particularly in relation to **work capacity decisions**. It removed both subsection 43(3) and section 44BB of the 1987 Act. They are set out below:

Section 43(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.

Section 44BB(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 stayed.

By repealing section **44BF Legal Costs**, the Amending Act **removed the prohibition** on lawyers being paid or recovering any amount for legal costs for a 'review' of a work capacity decision unless the review was of a prescribed class or there was no fixed maximum cost in the Regulation.

References used in this Guide

Amending Act	<i>Workers Compensation Legislation Amendment Act 2018</i>
Amending Regulation	<i>Workers Compensation Amendment Regulation 2018</i>
1987 Act	<i>Workers Compensation Act 1987</i>
1998 Act	<i>Workplace Injury Management and Workers Compensation Act 1998</i>
ILARS	<i>Independent Legal Assistance and Review Service, administered by WIRO</i>
PIAWE	<i>Pre-injury average weekly earnings</i>
PIAWE Amendments	<i>Schedule 3 of the Amending Act</i>
Regulation	<i>Workers Compensation Regulation 2016</i>
SIRA	State Insurance Regulatory Authority
WCC	<i>Workers Compensation Commission</i>
WIRO	Workers Compensation Independent Review Office

BACKGROUND AND CONTEXT, RELEVANT LEGISLATION AND NEW PROCESSES

BACKGROUND AND CONTEXT

Since the 2012 amendments to the NSW workers compensation legislation the extent of a worker's entitlements to weekly payments is determined by a **work capacity decision** of an insurer (section 43 of the 1987 Act). Significantly, the 2012 reforms introduced a distinction between a **liability dispute** and a **dispute about a work capacity decision**.

The 2012 reforms also provided that the WCC did not have jurisdiction to determine any dispute about a work capacity decision. The WCC was also prohibited from making a decision in relation to a dispute before it that was inconsistent with a work capacity decision of an insurer.

Instead, a new process to resolve a dispute about a work capacity decision was introduced which involved an internal review by the insurer, a merit review by the Authority (originally WorkCover, then SIRA) and a procedural review by WIRO.

Until December 2016 the legislation prohibited a lawyer for a worker from receiving payment for the provision of advice or assistance with respect to work capacity decision reviews.

Following amendment in December 2016, clause 99B of the Regulation provided for maximum costs recoverable to provide legal services to workers in connection with a merit review only.

Following the Legislative Council Standing Committee on Law and Justice's March 2017 Report on the 'First Review of the NSW workers compensation scheme' in which recommendations were made for the government to establish a "one stop shop" forum for resolution of all workers compensation disputes and the development of a single notice for disputes notifications, the Department of Finance, Services and Innovation issued a discussion paper which examined options for reform of the dispute resolution system.

In May 2018, the Minister for Finance, Services and Property, Victor Dominello, announced plans to reform the dispute resolution system. The proposed reforms included legislative change to enable the WCC to undertake all dispute resolution and removing the functions of merit review and procedural review of work capacity decisions from SIRA and WIRO respectively.

The Amending Act received assent on 26 October 2018. Parts of the Amending Act were proclaimed on 26 October 2018. Other parts were proclaimed on 14 December 2018.

AMENDING LEGISLATION AND ANCILLARY REFORMS

The amended legislation operates with respect to work capacity decisions made on or after **1 January 2019**.

The object of the Amending Act was to amend the 1987 Act and the 1998 Act for various purposes which included:

- > reforming dispute resolution processes relating to work capacity decisions as follows:
 - by abolishing the existing system of review (involving internal review, merit review and procedural review) and restoring the jurisdiction of the WCC to determine disputes

- 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
- > Making changes with respect to the calculation of the PIAWE of a worker for the purpose of determining the worker's entitlement to weekly payments of compensation. The PIAWE amendments will apply to **injuries** on and from the date of commencement of the PIAWE amendments.

The Amending Act made **no changes** to the types of decisions which constitute work capacity decisions under section 43 of the 1987 Act.

The Amending Regulation commenced on 1 January 2019 and made provision with respect to the *notification of decisions* of insurers (clause 38) and the *procedure for reviews* by insurers of a work capacity decision under section 287A of the 1998 Act.

In late December 2018, SIRA issued Standards of Practice (formerly referred to as the 'Claims Administration Manual') and issued revised Workers Compensation Guidelines.

WORK CAPACITY DECISIONS

Section 43 of the 1987 Act provides that the following decisions of an insurer **are work capacity decisions**:

- (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).

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.

Insurers can make *work capacity assessments* and *work capacity decisions* when required to do so by the legislation or the Guidelines or at any other time.

The new Guidelines for Claiming Workers Compensation require insurers to undertake a *work capacity assessment* after 10 weeks if weekly benefits are expected to continue past 12 weeks. The Guidelines no longer make reference to a *work capacity decision*, but they do provide requirements for 'a notice' under the legislation.

Work capacity decisions are made regularly by insurers through the 'life' of a claim in relation to any of the issues outlined in section 43 of the 1987 Act and not all are communicated to the

worker. For example, workers are not advised when the decision does not result in any material change to weekly payments.

PRE-INJURY AVERAGE WEEKLY EARNINGS (PIAWE)

Section 43(d) provides that a decision about the amount of an injured worker's PIAWE constitutes a work capacity decision. Presently PIAWE is calculated in accordance with the complex definition in sections 44C – 44I of the 1987 Act and its Schedule 3.

The Amending Act made significant changes with the object of simplifying the definition and the necessary calculations or computations around PIAWE and weekly payments thereby reducing disputation.

Importantly, **for injuries on or after 26 October 2018**, the 52 week 'step down', where PIAWE is recalculated to remove overtime and other allowances, is removed.

The new sections 36 and 37 of the 1987 Act which simplify the determination of weekly payments in the first and second entitlement periods, and the new Schedule 3 which contains the provisions for calculating PIAWE and the elements for determining earnings for the purposes of weekly payments, will apply only with respect to **injuries on or after the date of commencement of the sections** (yet to be proclaimed).

The below 'ready reckoner' is for assistance only. Reference should be made to the legislation and gazetted proclamations.

Part of Act	Date of Injury Before 26 October 2018	Date of Injury between 26 October 2018 and date to appointed by proclamation	Date of Injury on and from date to be appointed by proclamation
ss44D - 44I 1987 Act (factors for PIAWE)	Apply in full	Apply in full	Do not apply, replaced by 'new Schedule 3 under 2018 Amendment Act
s44C 1987 Act (calculation of PIAWE including '52 week step down')	Applies in full	Applies except for 44C(1)(b) and 44C(2)(b) [overtime and shift allowances permitted to be included before and after 52 weeks	Does not apply
Schedule 3, 1987 Act	Applies in full	Applies in full	Replaced by 'new Schedule 3' under 2018 Amendment Act
Schedule 3, 2018 Amendment Act - 'earnings amendments'	Earnings amendments do not apply	Earnings amendments do not apply	Earnings amendments apply

WEEKLY PAYMENTS AND NOTICE PROVISIONS

Weekly payments of compensation are to commence within 7 days after notification of an injury and loss of income ***unless the insurer has a reasonable excuse***.

They are paid on the basis of provisional acceptance of liability for a period of up to 12 weeks determined by the insurer based on the nature of the injury and period of incapacity.

The insurer will have notified a **work capacity decision** to the worker when advising by letter that weekly payments will be made at a certain rate in response to the injury notification or claim. This letter can take various forms with varying levels of detail with respect to how PIAWE was calculated.

PIAWE disputes will nearly always arise at the beginning of the claims process after the insurer advises of the commencement of weekly payments. A worker may not accept the insurer's calculations and require legal advice.

The amending Act introduces **new notice provisions** in the 1998 Act in a new Division 3 of Part 2, Chapter 4.

New Section 78 of the 1998 Act provides that the insurer must *give notice* advising payments of weekly compensation will be reduced or terminated on a certain date due to a work capacity decision (or a decision to dispute liability).

Section 78 (replacing sections 54 and 74) provides:

78 Insurer to give notice of decisions

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

Section 79 provides how a notice of a decision is to be given.

The Amending Regulation amends clause 38 of the Regulation and prescribes the manner in which 'notice of insurer decisions' is to be given and 'the form of and other information to be included in or to accompany the notice'. New clauses 38A and 38B prescribe the manner and form of notices for work injury damages matters and coalminers matters.

Section 80 of the 1998 Act prescribes the period of notice: It requires **three months' notice** if payments are to be reduced or ceased due to a *work capacity decision* but only if the worker has been receiving weekly payments for a **continuous period of at least 12 weeks**.

In any other case, the notice period is 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 if the worker has been receipt of such payments continuously for 1 year or more.

WORK CAPACITY DECISION 'REVIEW' PROCESSES

Internal review and other review processes

New Section 287A of the 1998 Act provides:

287A Request for review

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

Maximum penalty: 50 penalty units.

Note:

- Internal reviews of work capacity decisions are no longer mandatory but optional and available on request of the worker.
- An insurer must conduct the internal review (if requested) and notify its decision within 14 days.
- The internal review **does not operate** to stay the insurer's decision.

An application by the worker to alter the amount of weekly payments pursuant to section 42 of the 1987 Act remains available. The insurer has 28 days in which to approve or reject the application.

New clause 42A of the Regulation provides for how a review under section 287A is to be conducted.

Review decisions

A decision made by an insurer on review is a 'review decision' (new section 76 of the 1998 Act).

New section 82 of the 1998 Act provides that a review decision restarts the required notice period unless the review decision affirms an original decision with respect to the discontinuation or reduction of weekly payments, in which case the section does not apply.

New clause 42B of the Regulation sets out the notice requirements for an insurer's review decision.

Referral of disputes to the WCC

The Amending Act has removed the prohibition on the WCC making a decision in proceedings concerning a dispute about weekly payments of compensation. Any party to a dispute about a claim may refer the dispute to the Registrar for determination by the WCC (section 288 1998 Act).

A dispute cannot be referred for determination by the WCC unless it concerns only matters *previously notified* as disputed (section 289A 1998 Act).

A letter from the insurer advising its PIAWE calculations is not a dispute notice.

Stay of the work capacity decision

The referral of a work capacity decision to the WCC operates to stay the decision and prevents the insurer from taking action based on the decision only if certain requirements are met.

New Section 289B of the 1998 Act provides for a stay of a 'disputed work capacity decision':

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

Note: A work capacity decision is only stayed if:

- the worker has received weekly payments for a continuous period of at least 12 weeks, and
- the decision relates to the *discontinuance* or *reduction* of the amount of weekly payments, and
- the dispute is referred to the WCC before the expiry of the notice period under the new section 80 of the 1998 Act, which is **three months** (plus postal notice allowance).

New **section 81** provides that a stay of a decision to discontinue or reduce an amount of compensation the subject of a dispute referred to the Commission for determination does not operate to extend the required period of notice with respect to the discontinuation or reduction.

The WCC review decision

The nature of the WCC review decision will affect the notice period required before changes are made to the worker's weekly payments.

- If the review decision affirms the original decision the notice period is not affected (section 83 1998 Act).
- In other cases, the required notice period commences on the date of the WCC review decision (section 82 1998 Act).

WCC Process

The WCC has issued e bulletins and guidance material about the expedited assessment process – refer to the WCC website for further and updated information.

The WCC has indicated the following forms are to be used in the circumstances set out below.

Nature of dispute	Form Type
Work capacity decision only	Form 1
Work capacity decision and past medical expenses less than \$9,250.50	Form 1

Work capacity decision and any other liability or quantum of compensation	Form 2
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Lawyers are referred to the [WCC](#) website for updates on its processes, forms, practice directions and guidelines.

LEGAL COSTS

The Amending Act, by removing section 44BF of the 1987 Act, **removed the prohibition** on lawyers being paid or recovering any amount for legal costs for a ‘review’ of a work capacity decision where the work capacity decision **is made on or after 1 January 2019**.

The Amending Regulation removes Part 17, Division 3A of the Regulation relating to maximum legal costs for disputes relating to work capacity decisions.

The ‘prior’ provisions in the Regulation are re-inserted in Schedule 6 of the 1987 Act and apply in respect of work capacity decision reviews during the transitional period.

FUNDING FOR LEGAL PRACTITIONERS

WIRO funds Approved Lawyers (Lawyers) for eligible workers in relation to work done concerning a work capacity decision for which the WCC has jurisdiction to determine the dispute.

WIRO will fund Lawyers for eligible workers to provide advice to injured workers about any aspect of a work capacity decision.

A worker may seek advice from a Lawyer as soon as they receive information about a proposed work capacity decision or a work capacity decision. This may include a section 78 notice where there is a reduction or discontinuance of weekly payments. There is no section 78 notice in the first 12 weeks.

Disclaimer

WIRO reserves the right to change this funding model at any time with notice or to refuse or limit funding at any time in its absolute discretion.

This Guide does not constitute legal advice. This document should be considered as a Guide for approved lawyers when providing advice to workers about a work capacity decision.

WIRO will not and cannot be held accountable for risks associated with the giving of inaccurate or misleading legal advice