



SECTION 39 GUIDE INFORMATION FOR WIRO APPROVED LAWYERS

PURPOSE

This Guide has been issued to provide further information to lawyers for injured workers about the impact of the 260 week limit on weekly payments contained within section 39 of the *Workers Compensation Act 1987* (“1987 Act”).

This is not legal advice. This document should be considered only as a Guide for lawyers to consider when providing advice to workers on the impact and effect of section 39.

BACKGROUND

Since the end of 2017 several thousand workers have been impacted by the operation of section 39. Their weekly payments of compensation have ceased.

The first ‘cohort’ of workers’ (approximately 1,900) had weekly benefits cease from 26 September 2017 to end of 2017. They were workers who were injured on or after 1 October 2012 who had been in receipt of continuous weekly payments since the date of injury.

A second ‘cohort’ of workers (approximately 1,800) lost their benefits on or shortly after 26 December 2017. These were workers who were in the main ‘existing recipients’¹ of weekly compensation or workers injured before 1 October 2012. (For all workers injured before 1 October 2012 their ‘count’ of weeks commenced 1 January 2013).

A further 3,000 workers were expected to lose weekly benefits by June 2018.

On an ongoing basis WIRO has estimated that approximately 80 to 100 workers are affected by the operation of section 39 each month.

The *Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016* which purported to make further transitional arrangements in respect of the application of section 39 only applied to *existing recipients*.

INSURER COMMUNICATION

Workers imminently affected by the 260 week cessation generally receive a series of letters with the first advising them of the following:

- The injury date and relevant claim number under which their entitlement to ongoing weekly compensation will be affected
- The number of weeks they have received weekly compensation payments to the date of the letter
- The degree of permanent impairment asserted and relied upon by the insurer

¹ Schedule 6, *Workers Compensation Act 1987*, Part 19H, Division 1, Clause 1 - Definitions: **existing recipient of weekly payments** means an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments

- Whether the insurer proposes to cease weekly payments and the approximate date when their weekly payments will cease
- Whether payments will continue because the insurer has confirmed that the permanent impairment threshold has been reached or the worker has been assessed² as having a permanent impairment greater than 20%
- Whether the insurer is of the opinion that the worker's injury is not capable of assessment because permanent impairment is not ascertainable ('not MMI')
- Where the worker can get assistance.

There are various 'versions' of the letters communicating cessation of weekly benefits. Each letter has to be carefully read to ensure that it provides sufficient information to permit a worker to obtain advice about their rights and entitlements.

GRANTS OF FUNDING FOR LEGAL ADVICE

In 2016 WIRO introduced funding for WIRO Approved Lawyers (Lawyers) to advise their clients as to their rights and entitlements concerning the potential cessation of weekly payments..

WIRO acknowledges that this is a particularly complex area of the law and the effect on workers is dramatic. The advice that Lawyers provide to their clients is therefore of great importance.

What to take into account when considering provision of legal advice to workers on the effect of section 39

Below is an outline of the relevant legislative provisions that Lawyers should consider when providing advice:

1. Section 39, 1987 Act

39 Cessation of weekly payments after 260 weeks

- (1) *Despite any other provision of this Division, a worker has no entitlement to weekly payments of compensation under this Division in respect of an injury after an aggregate period of 260 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker in respect of the injury*
- (2) *This section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.*

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

² Assessed in this context refers to assessment under Part 7, Chapter 7 of the 1998 Act

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

****Clause 4, Part 1, Schedule 8, Workers Compensation Regulation 2016**

5 year limit on weekly payments

For the purposes of the application of section 39 (Cessation of weekly payments after 5 years) of the 1987 Act, as substituted by the 2012 amending Act, in respect of a claim made before 1 October 2012, no regard is to be had to any weekly payment of compensation paid or payable to the worker before 1 January 2013 (for the purpose of determining the aggregate period in respect of which a weekly payment has been paid or is payable to the worker).

Note. Section 39 limits the payment of weekly payments of compensation to a period of 5 years. This clause ensures that for claims made before 1 October 2012, weekly payments made before 1 January 2013 will not be counted towards the 5 years.

2. Section 65 of the 1987 Act

65 Determination of degree of permanent impairment

- (1) *For the purposes of this Division, the degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical Assessment) of Chapter 7 of the 1998 Act.*
- (2) *If a worker receives more than one injury arising out of the same incident, those injuries are together to be treated as one injury for the purposes of this Division.*

Note. The injuries are to be compensated together, not as separate injuries. Section 322 of the 1998 Act requires the impairments that result from those injuries to be assessed together. Physical injuries and psychological/psychiatric injuries are not assessed together. See section 65A.

- (3) *If there is a dispute about the degree of permanent impairment of an injured worker, the Commission may not award permanent impairment compensation unless the degree of permanent impairment has been assessed by an approved medical specialist.*

3. Part 7 (Medical Assessment) of Chapter 7 of the Workplace Injury Management and Workers Compensation Act 1998 (“1998 Act”)

319 Definitions

medical dispute *means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim:*

- (a) *the worker’s condition (including the worker’s prognosis, the aetiology of the condition, and the treatment proposed or provided),*
- (b) *the worker’s fitness for employment,*
- (c) *the degree of permanent impairment of the worker as a result of an injury,*
- (d) *whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,*

- (e) *the nature and extent of loss of hearing suffered by a worker,*
- (f) *whether impairment is permanent,*
- (g) *whether the degree of permanent impairment of the injured worker is fully ascertainable.*

322 Assessment of impairment

- (1) *The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.*
- (2) *Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.*
- (3) *Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker.*

***Note.** Section 65A of the 1987 Act provides for impairment arising from psychological/psychiatric injuries to be assessed separately from impairment arising from physical injury.*

- (4) *An approved medical specialist may decline to make an assessment of the degree of permanent impairment of an injured worker until the approved medical specialist is satisfied that the impairment is permanent and that the degree of permanent impairment is fully ascertainable. Proceedings before a court or the Commission may be adjourned until the assessment is made.*

322A One assessment only of degree of permanent impairment

- (1) *Only one assessment may be made of the degree of permanent impairment of an injured worker.*
- (2) *The medical assessment certificate that is given in connection with that assessment is the only medical assessment certificate that can be used in connection with any further or subsequent medical dispute about the degree of permanent impairment of the worker as a result of the injury concerned (whether the subsequent or further dispute is in connection with a claim for permanent impairment compensation, the commutation of a liability for compensation or a claim for work injury damages).*
- (3) *Accordingly, a medical dispute about the degree of permanent impairment of a worker as a result of an injury cannot be referred for, or be the subject of, assessment if a medical dispute about that matter has already been the subject of assessment and a medical assessment certificate under this Part.*
- (4) *This section does not affect the operation of section 327 (Appeal against medical assessment).*

325 Medical assessment certificate

- (1) *The approved medical specialist to whom a medical dispute is referred is to give a certificate (a medical assessment certificate) as to the matters referred for assessment.*

- (2) *A medical assessment certificate is to be in a form approved by the Registrar and is to:*
 - (a) *set out details of the matters referred for assessment, and*
 - (b) *certify as to the approved medical specialist's assessment with respect to those matters, and*
 - (c) *set out the approved medical specialist's reasons for that assessment, and*
 - (d) *set out the facts on which that assessment is based.*
- (3) *If the Registrar is satisfied that a medical assessment certificate contains an obvious error, the Registrar may issue, or approve of the approved medical specialist issuing, a replacement medical assessment certificate to correct the error.*
- (4) *An approved medical specialist is competent to give evidence as to matters in a certificate given by the specialist under this section, but may not be compelled to give evidence.*

4. Schedule 8, Part 2A, Workers Compensation Regulation 2016 - Special provisions for existing recipients of weekly payments

28B Application and operation of Part

- (1) *This Part takes effect on and from 1 October 2012.*
- (2) *This Part applies to an injured worker who is an existing recipient of weekly payments.*

28C 5 year limit on weekly payments

Section 39 of the 1987 Act (as substituted by the 2012 amending Act) does not apply to an injured worker if the worker's injury has resulted in permanent impairment and:

- (a) *an assessment of the degree of permanent impairment for the purposes of the Workers Compensation Acts is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or*
- (b) *the insurer is satisfied that the degree of permanent impairment is likely to be more than 20% (whether or not the degree of permanent impairment has previously been assessed).*

28D Further permanent impairment assessments

- (1) *This clause applies to an injured worker if the degree of permanent impairment resulting from the worker's injury is or has been assessed for the purposes of the Workers Compensation Acts.*
- (2) *Section 322A of the 1998 Act does not operate to prevent a further assessment being made of the degree of permanent impairment resulting from the worker's injury for the purposes of Part 3 of the 1987 Act.*
- (3) *However, only one further assessment may be made of the degree of permanent impairment resulting from the worker's injury.*

PROVISION OF LEGAL ADVICE TO WORKERS AFFECTED BY SECTION 39

While other benefits may be available, it is necessary to provide advice about the impact and effect on your client of section 39 and any potential remedies.

Practical suggestions for the giving of legal advice:

The *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, Part 2, rule 7 provides "A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement".

WIRO makes the following practical suggestions to Lawyers:

1. Ensure that you are provided with or obtain instructions that inform you:
 - (a) Whether the date of injury was *before* or *on or after* 1 October 2012
 - (b) Whether the worker is an '*existing recipient*' (You should not assume this)
 - (c) That the 260 week count of weekly payments is accurate
 - (d) The identity of the insurer where there may be two injuries with different employers
 - (e) Whether the worker has obtained a Medical Assessment Certificate ("MAC") as to the degree of permanent impairment arising from the 'injury'.
2. Ensure that the worker understands that if they wish to pursue an entitlement to continued weekly payments that there is only one opportunity after 1 October 2012 to have the degree of permanent impairment assessed during their lifetime and that there may not be an opportunity to have the degree of permanent impairment reassessed.
3. Consider that any MAC as to the degree of permanent impairment so obtained may also be binding on the worker's entitlement to medical and treatment expenses in addition to any potential further entitlement to lump sum compensation.
4. Confirm that there may be an opportunity to challenge the MAC by way of an Appeal to a Medical Appeal Panel.

WIRO Funding Policy

Lawyers are referred to the WIRO Funding Policy and the ILARS Grant Amount Guide for information about the funding available to provide workers with legal advice and assistance with respect to the operation and effect of section 39.

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WIRO will not and can not be held accountable for risks associated with the giving of inaccurate or misleading legal advice by an Approved Lawyer.