WORKERS REHABILITATION AND COMPENSATION AMENDMENT BILL 2009

CLAUSE NOTES[1]

Clause 1 **Short title**

This clause provides that the short title of the amending legislation is the *Workers Rehabilitation and Compensation Amendment Act 2009*.

Clause 2 **Commencement**

This clause provides that the amendments are to commence on a date to be proclaimed. It is expected that this will be 1 July 2010. The delay in the commencement date is necessary to:

- allow insurers to factor the legislative amendments into their premium calculations; and
- provide some lead time to enable employers to budget for any premium increases that may flow from the changes.

Clause 3 **Principal Act**

This clause provides that the Principal Act referred to in this Bill is the *Workers Rehabilitation and Compensation Act 1988* (the Act).

Clause 4 **Long title amended**

This clause amends the long title to clarify that the Act also has an injury prevention focus.

This amendment is necessary to make the long

[1] In these clause notes:
RTWIMM means the WorkCover Tasmania Board's Return to Work and Injury Management Model
Clayton report means The Review of the Tasmanian Workers Compensation System by Alan Clayton (September 2007)

title consistent with new objects section (section 2A) inserted by clause 5. *(refer to the clause note for clause 5 below).*

Clause 5 **Section 2A inserted**

This clause inserts a new provision (section 2A) to establish a set of objects for the Act in relation to the workers rehabilitation and compensation scheme. These objects are intended to be aspirational in nature and include:

- providing for the prompt and effective management of workplace injuries to promote and assist return to work of injured workers as soon as possible;
- providing fair and appropriate compensation to injured workers and their dependants;
- assisting in securing the health, safety and welfare of workers and in reducing the incidence of workplace injuries;
- providing an effective and economical mechanism for resolving disputes;
- providing a scheme which is fair and affordable and efficiently and effectively administered.

Clause 6 **Section 3 amended (Interpretation)**

This clause inserts the following new definitions in section 3 of the Act – the interpretation provision:

"primary treating medical practitioner" – this is a new term referring to the medical practitioner chosen by the worker to be the worker's primary treating medical practitioner in accordance with section 143G(1).

"workplace injury" – This is a new term that is used in various sections to make it clear that an injury means an injury for which the employer is or may be liable.

"workplace rehabilitation provider" – This is a new term that describes a person, which may be an organisation, that is accredited under section 77C to provide workplace rehabilitation services.

"workplace rehabilitation services" - This is a new term that describes a range of services that can only be provided for the purposes of the Act by a person accredited by the Board under section 77C. These include:

- initial workplace rehabilitation assessment;
- functional capacity assessment;
- workplace assessment;
- job analysis;
- advice concerning job modification;
- rehabilitation counselling;
- vocational assessment;
- advice or assistance in relation to job seeking;
- advice or assistance in arranging vocational re-education or training;
- any other service that is prescribed by the regulations.

Clause 7 **Section 10 amended (Functions of Board)**

This clause makes a minor amendment to section 10(f) of the Act.

Section 10 sets out the functions of the WorkCover Tasmania Board (the Board).

Under the existing section 10(f), the Board has the function of promoting and supporting the effective injury management of injured workers.

Under this amendment, this function has simply been re-worded to reflect the proposed new Part XI to be inserted in the Act relating to injury management (refer to the clause note for clause 47 below).

The proposed section 10(f) will provide that the Board is to promote and support the principles of the proposed new Part XI.

Clause 8 **Section 22 amended (Record of Tribunal)**

This clause makes a minor, administrative amendment to section 22(1)(d) of the Act to reflect that the Workers Rehabilitation and Compensation Tribunal (the Tribunal) no longer records proceedings on tape but uses electronic recordings instead.

(Refer also to clause note for clause 13 below)

Clause 9 **Section 33A inserted**

This clause inserts a new provision – section 33A.

This proposed new provision arises from the Board's Return to Work and Injury Management Model (RTWIMM) and is intended to facilitate an injured worker in making a claim for workers compensation.

It imposes a requirement on an employer to provide an injured worker with a notice within 14 days of being informed by the worker that he or she has suffered an injury at work.

The notice is to be prescribed in the Regulations to ensure accuracy and consistency, and will provide information about making a claim for workers compensation, including the time limits within which a claim must be made.

Clause 10 **Section 36 amended (Employer to forward accident report and claim)**

This clause amends section 36 of the Act by inserting three new subsections – subsection (1A), subsection (4) and subsection (5).

These proposed new subsections are intended to encourage timeliness of claims reporting by employers. Research indicates that long lag times between claim lodgment and reporting to the insurer results in poor return to work outcomes and higher costs to the workers compensation scheme (*Reference - Timeliness of Claims Reporting, by the Workers Rehabilitation and Compensation Section, Workplace Standards Tasmania (released 27 August 2002))*

Early reporting of claims is a key element of the RTWIMM and is also raised as an important issue in the Clayton report. The earlier the insurer becomes aware of a claim for workers compensation, the sooner it can commence injury management processes to assist the worker's recovery and return to work.

The amendments made by this clause seek to encourage early reporting of claims by placing a financial impost on employers who do not report within the required period.

Under the proposed new subsection (1A), an employer must notify its insurer of a claim within 48 hours of receiving it. There is no requirement as to how this notification is to occur which allows flexibility, i.e., notification could be by telephone, facsimile or electronic mail.

The proposed new subsection (4) provides that if an employer does not make the notification within 48 hours, the employer's insurer is not liable to indemnify the employer for any weekly payments the employer is liable to pay to the injured worker for the "relevant period", i.e., the employer cannot recover those costs from the insurer.

The proposed new subsection (5) clarifies that the "relevant period" begins at the end of the 48 hour period referred to in subsection (1A)

and ends on the day on which the employer notifies the insurer of the claim.

It should be noted that under section 97(1A) of the Act, an employer cannot insure against liability for the first weekly payment and $200 of any other benefits payable under the Act. This is commonly known as the employer excess. The 'penalty' to be imposed by the proposed new section 36(4) is additional to the employer excess.

For example, Worker A is injured at 4.30pm on a Thursday, attends a medical practitioner that day and remains off work on the Friday. The following Monday, he attends work to fill in a workers compensation claim and provides a certificate from his medical practitioner certifying him to be totally incapacitated for one week. His employer does not notify the insurer of the claim until 72 hours later. In addition to the employer excess under section 97(1A) (the first weekly payment), the employer is also liable to pay one additional day of weekly compensation under the proposed new section 36(4) and (5) as the insurer was notified 24 hours late. The insurer is not liable to indemnify the employer for this additional day of weekly compensation.

Clause 11 **Section 38 amended (Effect of failure to make claim)**

This clause amends section 38 as a consequence of the requirements in the proposed new section 33A *(refer to clause note above for clause 9)*.

Section 38 provides that a worker's failure to make a claim within the prescribed time limits (in most cases - 6 months from the date of injury) does not affect the validity of the claim if it was due to mistake, absence from the State or other reasonable cause. Under this amendment, the worker will have reasonable

cause if the employer did not comply with the proposed new section 33A.

Clause 12 **Section 39 substituted**

This clause replaces section 39 of the Act with a proposed new provision.

The existing section 39 relates to agreements to settle. Under this Bill, the provision relating to agreements to settle has been amended substantially and moved to Part X Division 1 (Concurrent rights to compensation and damages) (see clause note on clause 44 below – proposed new section 132A).

The proposed new section 39 originates from the RTWIMM and is intended to encourage greater communication between the employer/insurer and the worker and to provide the worker with information at an early stage about the status of his or her workers compensation claim.

Under the current system, an employer has 84 days within which to dispute a claim. There is no obligation to let the worker know what is going on within this 84-day period. This means that an injured worker could be waiting for a relatively long period after lodging a claim (up to 12 weeks) before finding out what is happening with the claim. This can be very stressful for the worker.

The proposed new section 39 addresses this issue by requiring the employer or insurer to provide the worker with a written notice within 28 days of receiving the claim. The notice is to include whether a decision has been made in relation to liability for the claim, and if not, the reasons why the decision has not been made and the steps that the employer or insurer intends taking before making the decision. This will ensure that the worker has some indication at a reasonably early stage of

what is happening with his or her claim.

Clause 13 **Section 56 amended (Provisions relating to evidence and production of documents)**

This clause makes a number of minor, administrative amendments to section 56.

Subsections (2), (3), and (4) are amended to reflect that the Tribunal no longer records proceedings on tape, but instead makes electronic recordings.

In addition, subsection (4) is amended to change the time period that the Tribunal must keep recordings of proceedings. Under the current provision, recordings are to be kept for 6 years. The amended subsection will require recordings to be kept for a period of 12 months or such longer period as determined by the Tribunal. This is in line with the corresponding requirements in the Supreme Court (Supreme Court Rules, Rule 591).

Clause 14 **Section 67 amended (Amount of compensation in case of death)**

This clause is intended to increase the maximum amount of lump sum compensation payable to dependents of a deceased worker.

The proposed amendments will implement a Clayton report recommendation that the maximum lump be increased to $250,000.

The current maximum is 369 units which is equal to $223,824.33. A unit is the amount represented by the 'Basic salary'. The Basic salary is indexed annually according to percentage movement in the average weekly ordinary full-time earnings of adults in Tasmania as published by the Australian Statistician.

Based on the 2009 Basic salary of $606.57, to

increase the maximum lump sum payment to $250,000, the number of units needs to be increased to 415 units.

Subsection (1) is amended to reflect that an employer may be liable for a lump sum not exceeding 415 units where a worker dies as a result of an injury.

Subsection 2(a) is amended to increase the lump sum payable to a wholly dependant spouse or wholly dependent caring partner from 369 units to 415 units.

Subsection 2(c) is amended to increase the lump sum payable to a wholly dependent child or children where there is no dependent spouse or caring partner. The lump sum is to be 415 units.

Subsection (3) provides for the payment of a lump sum, not exceeding the maximum that reflects the degree of dependency of the dependent of the deceased worker. The amendment increases the maximum to 415 units.

Clause 15 **Section 67A amended (Weekly payments in case of death)**

This clause makes a number of amendments to section 67A of the Act in relation to weekly payments to dependents.

Section 67A provides for the payment of weekly payments to a spouse or caring partner and to a dependent child.

Under this clause, subsection (1)(b) is amended to increase the weekly payment payable to a dependent child from $60.65 (10% of Basic Salary) to $90.98 (15% Basic salary). This amendment will implement Clayton report recommendation No 14.

Subsection 2 provides for the payment of weekly payments to a dependent spouse or caring partner for a period of 2 years following the death of a worker. The payments are reduced or subject to a 'step down' after certain periods and are aligned with weekly payments paid to injured workers under section 69B of the Act. Subsection (2) is being amended as a consequence of proposed changes to section 69B *(Refer to the clause note for clause 17 below)*

Subsection (2)(a) is amended to move the first step-down from 13 weeks after the death of the worker to 26 weeks after the death.

Subsection (2)(b) is amended to reduce the size of the first step-down to 90% of normal weekly earnings rather than 85%.

Subsection (2)(b) is also amended to reflect that the step-down is to apply from 26 weeks after death rather than 13 weeks.

Therefore, under these amendments, the spouse or caring partner of a deceased worker will receive 100% of the deceased worker's normal weekly earnings for the first 26 weeks following the death of the worker, 90% of normal weekly earnings from weeks 27 to 78, and then 80% from week 79 to 2 years.

Clause 16 **Section 69 amended (Amount of compensation in case of incapacity)**

This clause amends section 69(3) to clarify the application of the provision.

Section 69(3) provides for the indexation of weekly payments.

The Act provides a number of methods of calculating a worker's weekly payment to address different circumstances and to ensure that a fair rate can be determined.

Under this clause, section 69(3) is amended to remove any doubt that the subsection applies no matter what method was used to determine the weekly payment. In all cases a worker's weekly payment is to be increased or decreased by the percentage change in the ordinary hourly rate of pay that the worker is entitled to under the worker's contract of employment or industrial instrument.

Clause 17 **Section 69B amended (Period for which benefits are payable)**

This clause makes a number of amendments to section 69B to change the level of weekly payments and extend the period of entitlement for workers with serious injury.

The amendments are as follows:

Subsection (1)(a) is amended to move the first step-down from 13 weeks of incapacity for work to 26 weeks of incapacity. Note - the period of incapacity includes both total and partial incapacity.

Subsection (1)(b) is amended to reduce the size of the first step-down to 90% (or to 95% if subsection (2) applies) of the weekly payment rather than 85%.

Subsection (1)(b) is also amended to reflect that the first step-down is to apply after 26 weeks of incapacity rather than 13 weeks.

Subsection (1)(c) is replaced by a new subsection that makes two changes to the current arrangements. Under the proposed new paragraph (c), a worker who is incapacitated for more than 78 weeks is subject to a step-down to 80% of the weekly payment unless section 69(2) applies. Where subsection (2) applies *(refer to the clause note for subsection (2) below)* the weekly payment is reduced to

85%.

The proposed new paragraph (c) also provides for the extension of weekly payments beyond 9 years where a worker has a whole person impairment of greater than 15%. Currently, entitlement to weekly payment ceases at 9 years after the date of the initial incapacity. The extension of the period of entitlement based on the level of impairment was one of three options proposed in the Clayton report as a means of providing longer term income support to seriously injured workers. Under this clause, the amended periods of entitlement are as follows:

- a worker with an impairment of at least 15% but less than 20% is entitled to weekly payments for up to 12 years of incapacity;
- a worker with an impairment of at least 20% but less than 30% - up to 20 years
- a worker with an impairment of 30% or above - the entitlement continues until the worker reaches the age restrictions imposed by section 87 (i.e. for most workers this would be age 65 however section 87 provides for an extension beyond this age in some circumstances).

Subsection (2) is replaced by a new subsection to provide the circumstances in which a worker becomes entitled to a higher rate of weekly payment. The intention is that where a worker is able to return to some form of work but his or her employer is unable or unwilling to provide alternative duties then the worker should not suffer the full extent of the step-down that would otherwise apply after 26 weeks and 78 weeks of incapacity. If these circumstances apply the step-down is discounted by 50%, i.e., instead of "stepping-down" to 90% after 26 weeks, the worker will step-down to 95%, and instead of "stepping down" to 80% after 78 weeks, the worker will step-down to 85%.

A new subsection (subsection (2A)) is inserted to provide an additional return to work incentive. Under this proposed new subsection a worker's weekly payment is not subject to the step-downs in subsection (1)(b) or (c) during any period the worker has returned to work for 50% or more of the workers normal weekly hours.

Three new subsections (subsections (2B),(2C) and (2D)) are inserted to specify how a workers 'normal weekly hours' are calculated.

The proposed new subsection (2B) provides that where a worker has been employed for more than 14 days before becoming incapacitated, the worker's normal weekly hours are the worker's average hours per week worked with that employer.

The proposed new subsection (2C) provides that where a worker has been employed for 14 days or less, the worker's normal weekly hours are the hours the worker agreed to work in the pay period in which the incapacity occurred or the hours the worker was rostered to perform in that period, whichever is greater.

The proposed new subsection (2D) provides that any hours of overtime or excess hours are not to be taken into account in calculating normal weekly hours unless the overtime meets the criteria specified in the subsection. For example, where overtime was irregular it will not be included in the calculation.

A new subsection (subsection (2E)) - is inserted to clarify that the periods of entitlement specified in subsection 1(c) are qualified by the age restriction imposed by section 87 of the Act.

Clause 18 **Section 70 amended (Computation of normal weekly earnings)**

This clause rectifies an anomaly in section 70(2)(d) by replacing an erroneous reference to paragraph (c) (which no longer exists) with the correct reference – paragraph (b).

Clause 19 **Section 71 amended (Compensation for permanent impairment)**

This clause amends section 71 to increase the maximum lump sum for permanent impairment to approximately $250,000 and to provide lump sum compensation where an injury results in the loss of a foetus.

Subsection (1)(b) sets out the formula used to calculate the amount of lump sum compensation payable for different levels of impairment. This clause amends the formula to increase the maximum lump sum to $250,000 as recommended in the Clayton report.

Subsection (1)(c) provides that the maximum lump sum paid where a workers level of whole person impairment is equal to or above 70% is 369 units. A unit is equal to the basic salary which is indexed annually according to percentage movement in the average weekly ordinary full-time earnings of adults in Tasmania as published by the Australian Statistician.

Based on the 2009 Basic salary of $606.57 the new maximum is represented by 415 units. Subsection (1)(c) is amended to make this increase.

A new subsection (subsection (3)) is inserted to deem a loss of a foetus to be equal to a whole person impairment of 20%. A foetus is defined as a conceptus beyond the sixteenth week of development. The provision is also intended to apply in respect of meeting the impairment threshold for making a claim at

common law. *(Refer to the clause note for clause 45 below)*

A new subsection (subsection (4)) is inserted to clarify that the impairment taken to result from a loss of a foetus is in addition to any other impairment that may have resulted from the injury.

Clause 20 **Section 72 amended (Assessment of degree of impairment)**

This clause amends section 72(2)(d) of the Act to clarify that any impairment resulting from a previous injury, including a non-work injury or disease, is not be included in the assessment of the impairment resulting from the injury.

Clause 21 **Section 74 amended (Interpretation of Division 2 of Part VI)**

This clause amends section 74 of the Act by including two new definitions.

Section 74 defines the range of medical and other services that an employer may be required to pay for in relation to a claim for compensation.

Under this clause section 74 is amended to:

- insert a definition of "household services" to make it clear that a worker may be entitled to the payment of reasonable costs of domestic services where these services are necessary for the proper running of the worker's home;
- clarify that the definition of rehabilitation service includes 'workplace rehabilitation services' inserted in section 3. (refer to the clause note for clause 6 above); and
- insert a definition of 'road accident rescue services' to enable the cost of these services to be met by the scheme. Until recently, vehicle rescue was

performed by the Tasmanian Ambulance Service and the cost met under the definition of 'ambulance service'. Vehicle rescue is now performed by the Tas Fire Service and State Emergency Service, so no longer falls within the scope of 'ambulance service'.

Clause 22 **Section 75 amended (Additional compensation for medical and other services)**

This clause makes a number of amendments to section 75 of the Act.

Section 75 provides for the payment by an employer of the reasonable expenses necessarily incurred for medical and other services.

The amendments are as follows:

A new subsection has been inserted (subsection (1A)) to clarify that an employer is liable to pay the cost of medical and other services where the employer has accepted liability for the injury, or has been determined by the Tribunal to be liable, or is required to pay an expense on a provisional basis under section 77AB.

Subsection (1) is amended to clarify that an employer is liable to pay medical and related expenses if any of the paragraphs of section (1A) apply.

Subsection (1)(a) is amended by inserting 'household services' and 'road accident rescue services' in the list of services for which an employer is liable to pay reasonable expenses as compensation.

Subsection (1)(b) is replaced with a new subsection to:

(i) provide for the payment of the

reasonable costs of a worker's burial or cremation, The costs are not to exceed the amount prescribed in the regulations.

(ii) implement a Clayton report recommendation that the Act provide for the payment of counselling services provided to members of the deceased worker's family. The costs must be reasonable and not exceed the amount prescribed in the regulations. Note – "member of the family" is defined in section 3. The services must be provided by 'counselling professionals' as defined in subsection (10) of this section.

Subsection 2 is replaced with a new subsection (2) and three other new subsections (subsections (2AA), (2AB) and (2AC)) are inserted. The policy intent behind these new provisions is to link a worker's entitlement to medical and other expenses to the period the worker is entitled to receive weekly payments.

Under existing arrangements, all injured workers are entitled to the payment of reasonable medical and other expenses for up to 10 years. The proposed amendments limit a worker's entitlement to 12 months after his/her entitlement to weekly payments has been terminated. This arrangement recognises that treatment may continue for a period after a worker ceases to be incapacitated for work. The amendments also allow the Tribunal to approve the payment of expenses after a worker's entitlement has expired in certain circumstances.

The proposed new subsection 2 provides that a workers entitlement to medical and related services ceases 52 weeks after the lawful termination of weekly payments unless the

Tribunal makes a determination under section (2AB). Lawful termination means a termination under section 86, section 88 or other order of the Tribunal.

The proposed new subsection (2AA) provides that where a worker's injury has not caused any incapacity the worker's entitlement to medical and other expenses ceases 52 weeks from the date the claim was made unless the Tribunal makes a determination under section (2AB).

The proposed new subsection (2AB) enables the Tribunal to make a determination that a worker is entitled to compensation for an expense or type of expense after the worker's period of entitlement has ceased. The Tribunal may only make a determination if the worker's circumstances satisfy any of the criteria in subsection (2AC).

The proposed new subsection (2AC) provides that the Tribunal may only determine that an expense is to be met if the worker has returned to work and requires surgery or other services to remain at work; or the service is related to a prosthesis; or the service is to ensure that a worker's ability to undertake necessary activities of daily life do not deteriorate.

Subsection (3) is amended to allow the Tribunal to determine any question about whether a worker requires household services. Subsection (3) currently allows the Tribunal to consider the need for constant attendance services.

Subsection (10) currently provides a definition of 'medical treatment' It is replaced with a new subsection (10) to include definitions of other terms introduced by this clause as follows:

- A definition of 'counselling professionals'

is inserted to identify the persons able to provide 'counselling services'.

- A definition of 'counselling services' is inserted to clarify that the services are to assist a person to cope with the death of a worker. Under subsection (1)(b) the payment of counseling services is limited to a member of the deceased workers family.
- A definition of 'medical treatment' is provided to clarify that it is not restricted to actual treatment but includes any attendance, examination, test and analysis.

Clause 23 **Section 76 amended (Additional compensation for travelling expenses)**

This clause makes a minor amendment to section 76(3) to update the reference to the Award.

Section 76(3) currently refers to "the General Conditions of Service Award". This award has been superseded by the Tasmanian State Service Award.

Section 76(3) is amended to reflect this change in award. It also provides for any future award, agreement or determination that may replace the Tasmanian State Service Award, which will alleviate the need to make any amendment if the award changes again in the future.

Clause 24 **Section 76A inserted**

This clause inserts a new section to require workers and employers to forward accounts for expenses within 7 days of receipt. The amendment arises from the RTWIMM and is intended to improve decision making and avoid the late payment of accounts.

Clause 25

Section 77AA amended (Employer to pay claim or refer it to Tribunal)

This clause amends section 77AA of the Act in relation to claims for medical and other expenses.

Under section 77AA an employer who receives a claim for an expense must within 28 days either pay that expense or notify the worker and the service provider that the expense is disputed.

One of the main purposes of this clause, is to remove doubt about the relationship between section 77AA and section 81A. Section 81A provides a period of 84 days in which an employer must make a decision about liability to pay weekly payments or to pay expenses of the type referred to in section 77AA. The different timeframes (i.e., 28 days under section 77AA and 84 days under section 81A) has caused uncertainty about whether an employer must comply with section 77AA before any decision had been made under section 81A.

To address this uncertainty, a new subsection (subsection (1AA)) has been inserted to clarify that the obligations imposed by subsection (1) only apply where an employer has accepted liability to pay compensation; is taken to have accepted liability under section 81AB; or the Tribunal has determined that the employer is liable to pay compensation.

This clause also makes minor changes to subsections (1) and (4). The first amendment links subsection (1) with the new subsection (1AA) The second amendment simply changes the words 'Division 2 of Part VI' to 'this Division' in subsections (1)and (4). It is unnecessary to give the exact citation to Division 2 of Part VI because all of the matters being addressed reside in the same Division.

Clause 26 **Sections 77AB and 77AC inserted**

This clause inserts two new sections to provide for the payment of expenses up to a total of $5000 where the employer has not accepted liability or the Tribunal has not determined the employer to be liable.

This is intended to implement a key element of the RTWIMM to facilitate early intervention. 'Without prejudice' payment of these expenses will enable injured workers to have immediate access to medical treatment and rehabilitation.

The proposed new Section 77AB contains the following provisions:

Subsection (1) clarifies that the section applies:

(i). where an employer has not accepted liability or has not been taken to have accepted liability; or

(ii). where the employer has not been determined to be liable; and

(iii). if the Tribunal has not made an order under section 81A(3) that an employer is not to pay weekly payments or expenses; and

(iv). the amount of the claim, including any amounts already paid, is not more than $5000.

Subsection (2) requires an employer to, within 28 days of receiving a claim, pay the expense or if the expense is considered unnecessary or unreasonable, to notify the worker and service provider and refer it to the Tribunal.

Subsection (3) provides that the payment of an expense is not to be taken as an admission of liability.

Subsection (4) provides that any expense paid by an employer under this section is not recoverable from the worker (unless the Tribunal has made an order under section

77AC(5)) and is recoverable from the employer's insurer except for the amount payable by the employer as an insurance excess under section 97(1A) and (1B) and any amount the employer is entitled to recover from the worker by order made under section 77AC(5).

The proposed new section 77AC outlines how the Tribunal will deal with a dispute about a claim for an expense made under section 77AB.

Subsection (1) requires an employer to lodge all evidentiary material with the referral.

Subsection (2) directs that if an employer fails to lodge any evidence that evidence cannot be used unless the Tribunal allows.

Subsection (3) outlines the test to be applied by the Tribunal to determine if an expense should be paid. An expense is to be paid if the Tribunal is not satisfied that there is a reasonably arguable case that the expense is unnecessary or unreasonable.

Subsection (4) places the onus on the employer to prove that an expense is unnecessary or unreasonable.

Subsection (5) provides for the recovery of a payment if the Tribunal is satisfied that the worker's claim was fraudulent.

Clause 27 **Section 77A amended (Provision of certain services)**

This clause amends section 77A to provide for the accreditation of workplace rehabilitation providers in line with the national approval framework for workplace rehabilitation providers.

Under this amendment (which inserts two new subsections - (4) and (5)) a person (called a "provider") is not to provide workplace

rehabilitation services for the purposes of the Act unless the provider has been accredited by the Board as a workplace rehabilitation provider. The term "workplace rehabilitation services" is to be defined in section 3 of the Act *(refer to the clause note for clause 6 above)*.

Under the proposed new subsection (5) the accreditation requirement does not apply to a person who is engaged or employed by an accredited workplace rehabilitation provider. This means that an organisation supplying workplace rehabilitation services must be accredited, however, the employees or contractors engaged by the organisation do not have to be. This is consistent with the national approval framework endorsed by the Heads of Workers Compensation Authorities earlier this year which is based on approval (accreditation) of organisations rather than individuals.

It is expected that the Board's accreditation conditions will require accredited organisations to ensure that their employees and contractors have the appropriate qualifications, skills and experience to provide workplace rehabilitation services.

A provider working as a sole trader would have to be accredited by the Board.

Clause 28 **Section 77B amended (Application for accreditation)**

This clause makes a minor amendment to section 77B to reflect the amendments made to section 77A in relation to the accreditation of workplace rehabilitation providers *(refer to the clause note for clause 27 above)*.

Clause 29 **Section 77C amended (Grant, &c., of accreditation)**

This clause amends section 77C as a consequence of the amendments made to

section 77A in relation to the accreditation of workplace rehabilitation providers *(refer to the clause note for clause 27 above)*.

The first amendment inserts a new paragraph in subsection (2) (paragraph (ab)) to provide that the Board is not to grant accreditation to a medical practitioner or person unless satisfied that that medical practitioner or person has fulfilled any prescribed requirements. This allows for the possibility that there may be some accreditation requirements specified in the regulations, e.g., relating to qualifications, training etc.

The second amendment inserts a new subsection (subsection (3)) which allows the Board to grant accreditation subject to the conditions or restrictions it thinks fit. For example, this would allow the Board to impose conditions on accredited workplace rehabilitation providers to ensure that their employees have the necessary qualifications to deliver workplace rehabilitation services.

Clause 30 **Section 77D substituted**

This clause replaces section 77D with a proposed new provision.

The existing section 77D provides that an accreditation remains in force for such period as the Board determines (unless it is sooner revoked or suspended under section 77F).

The proposed new section 77D provides that the maximum period of accreditation for workplace rehabilitation providers is three years (or a shorter period specified by the Board). For all other types of accreditation, the Board is to determine the period of accreditation.

In all cases, accreditation remains in force for the period granted, unless it is sooner revoked

or suspended under section 77F.

Clause 31 **Section 77F amended (Revocation or suspension of accreditation)**

This clause amends section 77F to allow the Board to suspend or revoke an accreditation where an accredited medical practitioner or an accredited person has failed to comply with the principles set out in the proposed new section 139(2) (relating to injury management).

The intention of this amendment is to reinforce compliance with and commitment to the proposed injury management provisions.

Clause 32 **Section 81AA amended (Payments not admission of liability)**

This clause makes a minor amendment to section 81AA(1)(d) as a consequence of amendments made by this Bill to section 36 *(refer to the clause note for clause 10 above)*.

Section 81AA(1)(d) allows an employer to recover weekly payments (including without prejudice payments) it makes to a worker from its insurer except for the amount that the insurer cannot insure against under section 97(1A) – the first weekly payment and $200 compensation for other services (this is known as the employer excess).

Under this amendment, the employer also cannot recover weekly payments paid in accordance with the new section 36(4). If this amendment is not made, section 81AA(1)(d) will conflict with section 36(4). Section 36(4) penalises an employer who does not report a claim within 48 hours of receiving it by providing that the insurer does not have to indemnify the employer for weekly payments payable up to the date the claim is reported.

Clause 33 **Section 81AC inserted**

This clause inserts a new provision (section 81AC) to allow the Tribunal to make orders where an employer is deemed to have accepted liability under section 81AB.

When an employer receives a claim for workers compensation, the employer has 84 days in which to dispute liability for the claim under section 81A.

Section 81AB provides that if the employer does not dispute liability in accordance with section 81A, i.e., if 84 days passes and the employer has not served a notice on the worker disputing liability under section 81A, then the employer is taken to have accepted liability for the claim.

The Act is currently silent on what the Tribunal can do once an employer is taken to have accepted liability under section 81AB.

The proposed new section 81AC makes it clear that if an employer is taken to be liable under section 81AB, the Tribunal can make orders requiring the employer to make weekly payments of compensation to the worker from a specified date and/or to pay for medical and other expenses in relation to the injury

Clause 34 **Section 85 repealed**

This clause repeals section 85 of the Act.

Section 85 makes provision for medical examinations and reports. Under this Bill, these matters are provided for in the proposed new Division 1A of Part VII.

(Refer to the clause note for clause 37 below).

Clause 35

Section 86 amended (Cases in which employer may terminate or reduce payments)

This clause amends section 86(1) of the Act as a consequence of amendments to other parts of the Act.

The most significant amendment is the omission of paragraph (d). Under this paragraph, an employer can, by written notice, terminate or reduce a worker's weekly payments where the worker has failed or refused to participate in a rehabilitation program or suitable alternative duties recommended by his employer.

This paragraph is to be removed because it conflicts with other provisions introduced by this Bill. Under the proposed new Part XI (Injury management) *(refer to the clause notes for clause 47 below)*, the employer or injury management coordinator can notify the Tribunal if the worker fails to comply with a return to work plan or injury management plan (which would include any suitable alternative duties the worker is to undertake). On dealing with a notification, the Tribunal can make various orders *(refer to the clause note for clause 47 – section 143Q below)* including:

- an order requiring the worker to attend work in accordance with the worker's return to work plan or injury management plan;
- an order requiring the worker to undertake specified rehabilitation or retraining or forego part or all of the weekly payments or compensation for services he/she would otherwise be entitled to;
- an order varying a return to work plan or injury management plan;
- an order suspending weekly payments for a specified period.

This clause also makes a minor amendment to paragraph (e) of subsection (1) by changing the reference to section 69B(2) so that it refers to section 69B(2E) instead. This is necessary as a consequence of amendments made to section 69B by clause 17 *(refer to clause note for clause 17 above)*.

Clause 36 **Section 89 repealed**

This clause repeals section 89 of the Act.

Section 89 allows for redemption of weekly payments by way of a lump sum payment where the worker's injury is stable and stationary and 12 months has elapsed since the date the claim was lodged.

This provision has never been used due to its taxation implications (income tax would be payable on a redemption under section 89 given that it is clearly a lump sum payment of income) and is therefore redundant.

Clause 37 **Part VII, Division 1A inserted**

This clause inserts a new Division in Part VII of the Act (Division 1A – Medical examinations and independent medical reviews).

This new Division implements elements of the RTWIMM aimed at reducing inconvenience, stress and delays by clarifying the process for seeking medical reviews. It also incorporates aspects of the current section 85 which is to be repealed under clause 34 of this Bill *(refer to the clause note for clause 34 above)*.

The proposed new Division 1A includes the following provisions.

Section 90A (Workers may be required to submit to independent medical reviews)

This provision sets out the circumstances in which a worker can be required to submit to an independent medical review.

An independent medical review is defined as a review carried out by a medical practitioner (who has not been chosen by the worker) who has expertise in field relating to the worker's injury. The review can include:

- one or more examinations of the worker; and
- a review of any diagnostic test results or other medical records in relation to the worker.

Under this provision, and employer or insurer can require a worker to submit to an independent medical review if the employer or insurer has:

- discussed the matter with the worker's primary treating medical practitioner; and
- informed the worker as to the reasons why the review is to be done.

A worker is obliged to submit to an independent medical review provided:

- the review is at a reasonable time and place (e.g., it may not be reasonable to expect a worker based in Burnie to attend a review scheduled for 8.30am in Hobart in the middle of winter.);
- the worker has received reasonable notice in writing of the review

or the worker can refer the matter to the Tribunal (this reference must be made within 30 days).

To ensure that an independent medical reviewer has access to all relevant reports and records in relation to the worker's injury, section 90A includes a provision (in subsection (4)(a)(ii)) that the worker is taken to have consented to the provision of those medical

reports or records to the independent medical reviewer.

In relation to the frequency of independent medical reviews, a worker cannot be required to submit to more than one review every three months (under the current provisions in section 85 and the Workers Rehabilitation and Compensation Regulations 2001 (regulation 21) the frequency is no more than once every two weeks). There is an exception to this where the injury is multi-factorial, requiring examination by different medical specialists.

Section 90A also carries over a provision from the existing section 85, which requires a worker to undergo treatment recommended by a medical practitioner provided by the employer.

Under section 90A(7), a worker must submit to any treatment that an independent medical reviewer specifies will shorten or terminate the period of incapacity of the worker. However, if, after discussing the matter with his/her primary treating medical practitioner, the worker disagrees with the recommended treatment, the worker can seek a second opinion (which is to be paid for by the employer or insurer). If the second opinion agrees with the treatment recommended by the independent medical reviewer, the worker must undergo treatment.

Under the proposed new section 90C, the employer can refer the matter to the Tribunal if the worker refuses to undergo the treatment. Where the matter has been referred to the Tribunal, the worker's right to compensation and to take any proceedings under the Act is suspended until the Tribunal has determined the issue. The suspension does not apply if the treatment refused by the worker is surgical treatment (given factors such as the seriousness and risks of surgical

treatment and religious or cultural reasons for refusing surgery).

Section 90B (Reports in relation to reviews)

This provision specifies the requirements for preparing and providing reports in relation to independent medical reviews and examinations conducted under section 90A.

Copies of all reports are required to be provided to the worker's primary treating medical practitioner and injury management coordinator. The purpose of this is to ensure that the primary treating medical practitioner and injury management coordinator have the benefit of those reports in planning and coordinating medical treatment and rehabilitation and return to work processes.

Independent medical reviewers and medical practitioners who examine the worker in accordance with section 90A(7)(b) must not provide copies of reports directly to the worker. It is up to the primary treating medical practitioner to provide copies of any such reports to the worker.

Section 90C (Disagreements &c. about reviews)

This section allows an employer or insurer to refer a matter to the Tribunal in the following circumstances:

- where the worker refuses, without reasonable excuse, to submit to an independent medical review; or examination;
- where the worker obstructs an independent medical review or examination;
- where the worker refuses to undertake or submit to any treatment required under section 90A(7).

Upon referral to the Tribunal, the worker's right to compensation and to take any proceedings under the Act is suspended until the matter is determined by the Tribunal (with the exception of surgical treatment – as discussed above under section 90A). The Tribunal can subsequently specify whether compensation is to be paid for all or part of the period of suspension.

In determining whether an independent medical review or examination should be conducted, section 90C(5) provides that the Tribunal must have regard to the following matters:

- whether the reviewer has the appropriate expertise to properly assess the worker's injury;
- whether, in the circumstances, an excessive number of reviews or examinations have been conducted in respect of the worker;
- whether the worker has previously made a complaint (on reasonable grounds) about the conduct of the proposed reviewer;
- the location and timing of the review; and
- any other matter the Tribunal thinks fit.

Section 90C also allows referral to the Tribunal where the parties are unable to agree on:

- whether, and to what extent the worker's incapacity is due to the worker's injury; or
- the worker's condition or fitness for employment.

Section 90D (Reliance on medical reports)

This section carries over important provisions from the existing section 85(3) and (3A) in relation to disclosure/discovery of medical

reports.

Under this provision, a worker or an employer cannot use a report as evidence in respect of a claim for compensation (i.e., in Tribunal or court proceedings), unless the report has been served on the other party. To prevent parties from getting around this requirement by seeking evidence from a medical practitioner other than by written report (e.g., verbal evidence), the provision also prevents the admission of evidence from a medical practitioner where a report has not been served.

Clause 38 **Section 97 amended (Obligation of employers to insure)**

This clause amends section 97 by inserting a new subsection (subsection (6A)).

The purpose of this new subsection is to implement one of the strategies of the RTWIMM – that an employer with more than 50 workers is to provide its insurer with an indication of generic alternative duties potentially available at the employer's workplace.

Under the proposed new subsection (6A) this is to be done in the form of a list provided to the insurer on acceptance or renewal of a policy of workers compensation insurance.

Clause 39 **Section 101 amended (Granting, &c., of licences)**

This clause amends section 101(2) by inserting a new paragraph (paragraph (fa)) which provides that the Board is not to grant a licence to an insurer unless it is satisfied that the insurer is capable of complying with the proposed new Part XI (Injury Management) and any regulations or guidelines for the purposes of that Part.

The intention of this new paragraph is to reinforce insurer compliance with and commitment to the proposed injury management provisions.

Clause 40 **Section 105 amended (Granting, &c., of permits)**

This clause amends section 105(2)(bb) to clarify that in deciding whether to grant a self-insurer permit to an employer, the Board must take into consideration the employer's capacity to comply with the proposed new Part XI (Injury management) and any regulations or guidelines for the purposes of that Part.

The intention of this amendment is to reinforce self-insurer compliance with and commitment to the proposed injury management provisions.

Clause 41 **Section 127A amended (Nominal Insurer Fund)**

This clause makes a minor amendment to section 127A of the Act as a consequence of the insertion of the proposed new section 127C *(refer to the clause note for clause 43 below)*.

Clause 42 **Section 127B amended (Nominal Insurer Special Account)**

This clause makes a minor amendment to section 127B of the Act as a consequence of the insertion of the proposed new section 127C (*refer to the clause note for clause 43 below)*.

Clause 43 **Section 127C inserted**

This clause inserts a new provision (section 127C) to enable the Minister to give directions to the Nominal Insurer in relation to the Nominal Insurer Fund or Special Account.

This amendment has arisen from the Nominal Insurer's concern that it is holding funds in the Special Account in excess of the amount required to meet the legislative purpose for which they were collected, i.e., to meet the HIH liability. This is due to a higher than expected return from the liquidation of HIH.

Under this provision, the Minister's powers of direction are restricted given that it would not be appropriate for the Minister to direct the Nominal Insurer on certain matters such as the acceptance or management of individual claims.

The Minister can only make a direction where he or she has received a written request from the Nominal Insurer for directions in relation to excess funds in the Nominal Insurer Fund or Special Account. The Minister can then make one of the following directions which the Nominal Insurer must comply with:

- A direction to the Nominal Insurer to retain part or all of the excess funds in the Nominal Insurer Fund or Special Account; or
- A direction to the Nominal Insurer to pay all or part of the excess funds for purposes related to:
  - the provision of rehabilitation and compensation to injured workers; or
  - the promotion of workplace safety; or
  - the objects of the Act

To ensure transparency, the Nominal Insurer is required to publish directions received in its annual report, and the Minister is to table any direction made in both Houses of Parliament within 10 sitting days of making the direction.

Clause 44 **Section 132A inserted**

This clause inserts a new provision – section 132A, in respect of settlements by agreement of entitlements to compensation.

The existing section 39 of the Act provides for:

- the circumstances in which a claim for compensation can be settled by agreement, i.e.,:
  - the injury is stable and stationary; and
  - 12 months has elapsed since the date the claim was lodged; and
- the circumstances in which the Tribunal can review an agreement, i.e.,:
  - the agreement is inequitable; or
  - a party to was forced to enter the agreement against his or her will or without legal capacity; or
  - the Tribunal is of the opinion that for any other reason the agreement should be set aside.

Under this Bill, the existing section 39 is removed and instead the proposed new section 132A is inserted to provide for settlements. Section 132A has been developed taking account of provisions in the RTWIMM and recommendations made in the Clayton report.

Rather than referring to the settlement of a claim for compensation, the proposed new section 132A refers to the settlement of a worker's outstanding entitlements to compensation. This clarifies that the requirements under section 132A only apply where the worker is settling his or her total statutory entitlements (i.e., his/her overall claim) rather than an individual claim made during the course of the workers compensation claim, e.g., a claim for payment of a medical expense.

A settlement of the worker's outstanding entitlements can only be made if the worker agrees that all further claims to compensation are extinguished. This means that a settlement under section 132A in relation to an injury is a 'once and for all' settlement and the worker

cannot subsequently make any further claims for workers compensation in respect of that particular injury.

It is important to note that any agreement to settle that does not comply with the requirements of section 132A is void (section 132A(2)).

One of the main purposes of the proposed new section 132A is to ensure that all reasonable attempts at rehabilitation and return to work have occurred before a settlement is made and the worker is left to his or her own devices in terms of future rehabilitation and employment. To this end, the Clayton report recommended that all settlements be subject to the scrutiny of the Tribunal, regardless of the time elapsed since the claim was made. A less restrictive approach is taken in the RTWIMM which requires Tribunal scrutiny of settlements made within 2 years. The RTWIMM approach has been adopted by section 132A which requires Tribunal approval of settlements made within 2 years from the date the claim for compensation was made.

The proposed new section 132A(6)(a)(i) allows the Tribunal to approve a proposed agreement to settle made within 2 years if it is satisfied that all reasonable steps have been taken to enable the worker to be rehabilitated, retrained or to return to work; or that the worker has returned to work. However, there are also two other sets of circumstances in which the Tribunal can approve a settlement without being satisfied in relation to return to work etc.

The first is where the Tribunal has determined under section 81A that there is a reasonably arguable case for disputing liability (section 132A(6)(b)). In these circumstances, the Tribunal can approve a proposed agreement to settle if it is satisfied that the agreement is in

the best interests of the worker. This is intended to apply to cases where there is a dispute about liability for a claim and a settlement is made to finalise the issue rather than continuing with potentially costly and time consuming proceedings. Generally these types of settlements occur in relation to relatively minor injuries and involve small lump sum payments.

The second is where the Tribunal is satisfied that special circumstances in relation to the worker make the worker's rehabilitation, retraining or return to work impracticable (section 132A(6)(c)). Again, in such a case, the Tribunal can approve a proposed agreement to settle if satisfied it is in the best interests of the worker. This is intended to cover situations where the worker suffers a severe injury or a terminal illness.

In addition to the matters specified above, to approve a proposed agreement, the Tribunal must be satisfied that:

- the worker has received appropriate professional advice in relation to the proposed agreement to settle. This will depend upon the circumstances. In some cases it may be appropriate for the worker to receive legal advice only. In other cases, particularly where the settlement involves a large sum of money, it may be appropriate for the worker to receive professional financial advice as well as legal advice. Any legal or financial advice received by the worker in relation to the proposed agreement to settle is to be paid for by the employer or the insurer (section 132A(7)(a)); and
- the worker's entitlement to lump sum compensation for permanent impairment (under section 71) has been considered (section 132A(7)(b)).

Agreements to settle made more than 2 years after the date the claim was made do not require Tribunal approval.

However, as per the existing section 39, the agreement can subsequently be referred to the Tribunal for review (section 132A(9)). The Tribunal can set aside an agreement if it is of the opinion that:

- a party entered the agreement under duress (section 132A(11)(a));
- the worker has not received appropriate advice (section 132A(11)(b); or
- a party was induced to enter the agreement by a misrepresentation by another party (or its agent) as to a material fact (section 132A(11)(c)).

If the Tribunal sets aside an agreement, it must make an order relating to the repayment of any money paid under the agreement or, alternatively, the application of the money towards any future entitlements of the worker (section 132A(12)(b)).

The Tribunal is to order that the employer or insurer is to pay for the costs of an application made under section 132A (i.e., an application to have a proposed agreement approved or an application referring an agreement to the Tribunal for review), unless the worker referred the agreement and the Tribunal is satisfied that the referral was frivolous or vexatious (section 132A(13)).

Clause 45 **Sections 138AB, 138ABA and 138AC substituted**

This clause repeals sections 138AB, 138ABA and 138AC and replaces them with one new provision – the proposed new section 138AB.

This amendment has a number of purposes:

- to reduce the threshold for access to

common law damages from 30% whole person impairment (WPI) to 20% WPI;

- to make it clear that a worker cannot obtain common law damages, either through court award or by settlement, unless the 20%WPI threshold is met;
- to remove the election requirements currently imposed by the existing section 138AB.

The proposed new section 138AB imposes a new threshold on access to common law – 20%WPI. This is substantially lower than the current threshold of 30% WPI and is expected to lead to an increase the number of seriously injured workers who can access common law damages.

Under the proposed new section 138AB(3), the threshold requirement for access to common law is met if:

- the Tribunal has been provided with a statement from a medical practitioner certifying that the degree of impairment resulting from the worker's injury is not less than 20%WPI (note – assessment of impairment is to be carried out in accordance with sections 72 and 73 of the Act); and
- the Tribunal has determined that the degree of impairment resulting from the worker's injury is not less than 20%WPI. (Note – in accordance with section 57 of the Act, the employer would be afforded an opportunity to be heard and provide evidence in relation to this issue); **or**
- the worker's workplace injury involves the loss of a foetus (that the worker has carried for at least 16 weeks past conception). (Note – under proposed amendments to section 71, the loss of such a foetus is deemed to be a permanent impairment of 20% WPI *(refer to clause note for clause 19 above))*; and

- the Tribunal has been provided with a statement signed by a medical practitioner certifying that the worker's injury involves the loss of a foetus (that is 16+ weeks old).

Unless the threshold requirements set out above are met:

- a settlement by agreement of a claim for damages for an injury for which compensation is payable under the Act is void (section 138AB(1)); and
- a person may not commence proceedings for an award of damages for an injury for which compensation is payable under the Act (section 138AB(2)).

The clear intention is that a worker will have no access to common law damages unless the 20% threshold is met.

Where there is any question about the degree of impairment, the Tribunal can refer that question to a medical panel (section 138AB(6)).

The Tribunal is to keep a record of medical statements, determinations and other matters which may be prescribed by regulations (section 138AB(7)).

In addition to inserting a new section 138AB, this clause also repeals sections 138ABA and 138AC. These provisions will no longer be required given the changes to the common law damages threshold and the removal of the election requirement.

It should be noted that under the proposed transitional provisions *(refer to the clause note for clause 50)* these amendments will not apply to claims for injuries which occurred prior to the commencement of the amendments made by this Bill. This means that the existing sections 138AB, 138ABA and 138AC will

continue to apply in relation to claims for injuries suffered prior to the commencement date.

Clause 46 **Section 138AD amended (No damages if claim settled by agreement)**

This clause amends section 138AD to reflect that the provision relating to settlements by agreement has been moved from section 39 to the proposed new section 132A *(refer to the clause notes for clauses 12 and 44 above)*.

The proposed new section 138AD provides that a worker is not entitled to damages if the worker has settled his/her outstanding entitlements to compensation in accordance with section 132A. This is no different in terms of policy settings and intent to the existing section 138AD which provides that a worker is not entitled to damages in respect of an injury if the worker's claim has been settled by agreement under section 39.

The clear intention is that a settlement of the worker's outstanding entitlements to compensation in respect of an injury is a 'once and for all' settlement which extinguishes any further claims to compensation or damages for that injury.

Clause 47 **Part XI substituted**

This is one of the most significant clauses in the Bill. It removes the existing Part XI of the Act relating to rehabilitation and replaces it with a new Part XI called "Injury Management". This new Part is aimed at providing legislative support to the RTWIMM.

The RTWIMM was developed by the Board in consultation with key stakeholders. It provides a framework for improving and streamlining the management of workplace injury and illness

with a view to delivering better health and return to work outcomes for injured workers with lower costs to employer and the workers compensation system.

The proposed new Part XI includes the following provisions.

Division 1 – Application, purpose and interpretation.

Section 139 (Purpose and principles of Part)

The object of this section is to clearly state upfront what the purpose of the injury management provisions are and the principles on which they are based. This is intended to facilitate greater understanding of and commitment to the injury management process.

The purpose of Part XI is to establish a system that ensures, as far as practicable, that workers recover as soon as possible from workplace injuries and return to work in a timely and safe manner.

The principles set out in subsection (2) are based on the seven high level principles underpinning the RTWIMM. These principles highlight the importance of:

- all parties working together to achieve the goals of injury management – the injured worker's recovery and return to work;
- early intervention;
- maintaining the relationship between the employer and the injured worker;
- transparent, effective and efficient injury management processes;
- access to information and assistance;
- ensuring that processes and services are of a high standard and that decisions

made are in the best interests of the injured worker;
- timely and effective resolution of disputes.

Section 140 (Application of Part)

This section supports a key principle of the RTWIMM, which is that injury management should commence as soon as possible following an injury. Evidence indicates that early intervention is essential to maximise the prospect of recovery and return to work *(reference : Productivity Commission National Workers Compensation and OHS Frameworks (released in June 2004), pp 191 – 194)*

This section encourages early intervention by providing that the injury management provisions apply even where there is a dispute as to the employer's liability for a claim (section 140(1). This means that once a worker lodges a claim for workers compensation, the employer, insurer and worker must immediately carry out any requirements sets out in Part XI, e.g., preparing and implementing return to work and injury management plans, assigning the worker to injury management coordinators and/or return to work coordinators as appropriate, identifying suitable alternative duties etc.

Part XI ceases to apply where:
- there has been an agreement to settle (under the proposed new sections 132A or 138AB);
- the Tribunal has found that there is a reasonably arguable case for disputing liability and made orders under section 81A(3)(c) or (d); or
- the Tribunal or a court has determined that the employer is not liable for the claim.

Section 141 (Interpretation)

This section defines a number of terms that are commonly used in Part XI. Other terms used in Part XI, such as "injury management", "primary treating medical practitioner" and "workplace rehabilitation provider" are also used elsewhere in the Act and have therefore been included in the main interpretation provision of the Act – section 3.

Division 2 – Injury Management Programs

Division 2 contains a number of provisions in relation to injury management programs. An injury management program is a preemptive set of documented policies and procedures for managing workplace injuries. Under this Division, all employers are to have an injury management program in place. This is intended to foster employer and insurer commitment to injury management before any injuries occur.

Section 142 (Injury management programs to be complied with)

This provision allows the Board to issue guidelines specifying the mandatory and recommended content to be included in injury management programs (section 142(1)).

Under section 142, insurers and employers are required to ensure that there is an approved injury management program in place in respect of each employer and to comply with the relevant program. There are penalties for both failure to ensure there is a program and failure to comply with the program. Injury management programs must be reviewed every 12 months.

For monitoring and compliance purposes, the Board can require an employer or insurer to review and report on an injury management program.

Section 143 (Approval of injury management programs)

This section sets out the development and approval processes for injury management programs.

In accordance with this provision:

- Insurers can develop injury management programs to apply to their employer clients;
- Employers that have a policy of workers compensation through a licensed insurer can either use an injury management program developed by their licensed insurer or can choose to develop their own injury management program (in consultation with and with the approval of their insurer);
- A self-insured employer must develop its own injury management program;
- The Agencies of the Crown must develop their own injury management programs (it is possible that a number of Agencies could all adopt the same injury management program).

It is expected that licensed insurers will develop standard injury management programs that they provide for the use of their employer clients.

Injury management programs that have been developed by licensed insurers, self-insurers or the Agencies of the Crown must be submitted to the Board for approval. Programs developed by insured employers, must be submitted to the licensed insurer for approval.

Programs cannot be approved unless they include any mandatory content specified in guidelines issued by the Board under section 142.

Amendments to approved injury management

programs must be submitted to the Board or the insurer (depending on which one approved the program). The Board or insurer can disallow the amendment within 60 days by notice in writing.

Division 3 – Injury management and return to work coordinators and plans

Division 3 requires injury management coordination and planning in respect of more serious workplace injuries. This is intended to facilitate effective communication between the parties and ensure that the injury management process is properly planned and runs smoothly.

Section 143A (Employer to notify insurer of workplace injury)

This section is intended to facilitate prompt commencement of the injury management process following a workplace injury. Research suggests that the first 24 to 48 hours following an injury are the most critical *(reference: National Workers Compensation and OHS Frameworks, Productivity Commission (released June 2004))*

Under this section, an employer, who has a policy of workers compensation insurance with a licensed insurer, must notify its insurer within 48 hours of becoming aware that one of its employers has suffered a workplace injury that:

- results in or is likely to result in the worker suffering an incapacity for work; or
- is required to be reported under the employer's injury management program.

There is a penalty of up to 10 penalty units for failing to notify the insurer within 48 hours.

The means of notifying the insurer is to be in accordance with the employer's injury management program. It is envisaged that this

would include instant means of notification such as telephone, facsimile and electronic mail.

Section 143B (Injury management coordinator to be appointed)

This provision introduces a key role in the injury management process – the injury management coordinator.

The injury management coordinator is a person appointed by either the insurer or employer to coordinate and oversee the entire injury management process in relation to more serious workplace injuries. This new role is intended to provide one contact or liaison point for all parties.

Under this section, the following parties must appoint injury management coordinators:

- licensed insurers;
- self insurers;
- agencies of the Crown; and
- employers who have developed their own injury management programs in accordance with section 143.

These injury management coordinators do not have to be employed in house by the insurer or employer, although in some cases (particularly with insurers) they may well be. It is possible that an insurer or employer could contract out that role.

To be appointed to the role of injury management coordinator, a person must have successfully completed any training approved by the Board or, alternatively, the Board must be satisfied that the person has completed training or obtained a qualification that is equivalent to the Board's approved training (section 143B(5)).

A worker who suffers a "significant injury" is to be assigned to an injury management

coordinator as soon as practicable. A "significant injury" is a workplace injury that is likely to result in the worker being totally or partially incapacitated for work for more than 5 working days.

Section 143C (Responsibilities of injury management coordinator)

This provision sets out the responsibilities of an injury management coordinator. It is important to note that the injury management coordinator does not have to personally undertake the actions/activities, but must ensure that they are carried out.

The injury management coordinator is responsible for ensuring that:

- contact is made with the worker, the employer, and the worker's primary treating medical practitioner as soon as practicable;
- return to work plans and injury management plans are developed and implemented;
- arrangements are made for the rehabilitation of the worker;
- workplace rehabilitation providers are appointed where appropriate;
- the work capacity of the injured worker is regularly reviewed;
- options for retraining or redeployment are investigated and arranged as appropriate;
- the management of the worker's injury involves the relevant and appropriate persons including, the worker, employer, primary treating medical practitioner, return to work coordinators, supervisors, workplace rehabilitation providers and allied health professionals;
- information on injury management is provided to the worker and the employer;

- medical information is collated and relevant documentation maintained; and
- attempts are made to resolve disputes about injury management.

Section 143C(2)(l) is a catch-all provision allowing for other responsibilities to be prescribed in the regulations.

Section 143D (Return to work coordinator may be required to be appointed)

The purpose of this provision is to ensure that a worker employed by a large employer (with 50 or more workers) has workplace based support and assistance in returning to work.

Under this section, an employer with more than 50 workers must appoint a return to work coordinator (there is a penalty for not doing so) (section 143D(1)). To be appointed, a person must have successfully completed any training approved by the Board or, alternatively, the Board must be satisfied that the person has completed training or obtained a qualification that is equivalent to the Board's approved training (section 143D(2)).

The employer is to assign an injured worker to the return to work coordinator as soon as practicable after becoming aware that the worker has suffered a significant injury (section 143D(3) (refer to clause note in relation to section 143B above in relation to the meaning of "significant injury"). The return to work coordinator that the worker is assigned to is to be familiar with the worker's workplace, management and staff (section 143D(4)).

A return to work coordinator has the following functions/responsibilities (section 143D(5)):

- to assist with return to work planning and the implementation of return to work plans and injury management

plans;

- to monitor the worker's progress;
- to assist the worker to perform his/her duties in a safe and appropriate manner;
- to reassure and encourage the worker; and
- to encourage and foster a good relationship and effective communication between the worker, the employer and the insurer.

Section 143E (Return to work and injury management plans)

The object of this section is to ensure that all aspects of the injury management process, i.e., treatment, rehabilitation and return to work, are properly planned (in cases of significant injuries).

There are two types of plans for managing a significant workplace injury – return to work plans and injury management plans.

A return to work plan is required where a worker is likely to be totally or partially incapacitated for a period of more than 5 working days but less than 28 working days.

An injury management plan is more complex than a return to work plan. It is required where a worker is likely to be totally or partially incapacitated for 28 working days or more.

The injury management coordinator has the function ensuring that these plans are prepared as appropriate (section 143E(1)).

This section sets out a number of requirements in relation to return to work plans and injury management plans:

- they must be prepared before the expiration of 5 days after the required period of incapacity, i.e., for a return to

work plan, the plan must be prepared within 10 working days (5 + 5) after the worker becomes incapacitated, for an injury management plan, it must be prepared within 33 working days (28 + 5) after the worker becomes incapacitated (section 143E(1);

- they must be prepared in consultation with appropriate parties including the worker, the employer, the primary treating medical practitioner, the insurer, the workplace rehabilitation provider and the injury management coordinator (section 143E(2)); and
- they must be regularly reviewed in consultation with the parties mentioned above (section 143E(5)).

A plan (and any amendment to a plan) can only take effect if the worker and the employer consent to the plan (or amendment) (section 143E(3)). If a worker or an employer refuse to give consent to a plan, the injury management coordinator can notify the Tribunal (section 143E(4)) (which would then deal with the matter in accordance with section 143Q – refer to clause note below).

A plan will only be effective if both parties – the worker and the employer perform the required activities or actions specified in the plan. To this end, section 143E(7) allows the worker or employer to notify the Tribunal if a worker or employer does not take all reasonable steps to comply with a plan.

Again, to ensure that the injury management planning process commences as soon as possible following an injury, section 143E(8) makes it clear that preparing, consenting to or implementing a plan is not to be taken to be an admission of liability. Where the Tribunal has found that there is a reasonably arguable case for disputing liability and makes an order under section 81A(3)(c) or (d), there is no

requirement to prepare a plan (the requirement may be reinstated if the Tribunal or a court subsequently determines that the employer is liable for the workplace injury) (section 143E(6)).

Section 143F (Work capacity of injured workers to be regularly reviewed)

This provision is targeted at cases of long term incapacity. It is intended to ensure that return to work and rehabilitation processes remain up to date and appropriate by requiring regular review and modification as necessary.

Under section 143F(1)Where a worker is incapacitated for 6 months or more, the injury management coordinator must ensure that the worker's capacity to work is reviewed, consider whether the injury management plan should be modified and consider retraining and redeployment options. This is to occur regularly every 6 months until the worker's claim is finalised.

Section 143F(2) provides that if there is medical evidence indicating that it is highly unlikely that the worker will ever return to his/her pre-injury employment, the injury management coordinator must ensure that appropriate options for retraining or redeploying the worker (including to another workplace) are reviewed, assessed, considered and implemented.

Division 4 – Medical treatment

This Division recognises the vital role that the worker's primary treating medical practitioner (usually his/her general practitioner) plays in the injury management process, e.g., having ongoing contact with and providing support to the injured worker, providing important medical information (certification of incapacity, work restrictions, recommended treatment

etc), and facilitating cooperation between the injured worker, the employer and the insurer *(reference: The RTWIMM and Report on the Review of Workers Compensation in Tasmania (February 2004) by Bob Rutherford, p69).*

Section 143G (Primary treating medical practitioners)

Under this section, a worker is to choose a primary treating medical practitioner (the worker cannot be forced to choose a medical practitioner nominated by the employer or insurer, e.g., a "company doctor" (section 143G(2)). The worker must notify the employer of the name of his/her primary treating medical practitioner as soon as practicable after suffering a workplace injury (section 143G(1)). The worker must also notify his/her employer where he/she changes primary treating medical practitioners (section 143G(3)). If the worker does not make the necessary notifications, the employer or insurer can notify the Tribunal (which is to deal with the matter in accordance with section 143Q – refer to clause note below). Where the worker changes primary treatment medical practitioners, he/she must authorize the previous primary treating medical practitioner to release relevant records to the new primary treating medical practitioner (section 143G(3)(b)).

A primary treating medical practitioner has the following functions (section 143G(4)):

- to provide workers compensation medical certificates;
- to diagnose the worker's injury;
- to provide primary medical care;
- to coordinate medical treatment, including referring the worker to relevant specialists;
- to monitor, review and advise on the worker's condition and treatment;

- to advise on suitability of and restrictions in relation to work duties;
- to participate in developing return to work plans and injury management plans.

Section 143H (Issue of certificates)

The workers compensation medical certificate is an important tool in the injury management process. A certificate is required as part of a workers compensation claim and usually provides the first indication of a worker's incapacity and any medical restrictions the worker may have performing alternative duties.

This section is intended to improve the efficacy and relevance of certificates by requiring that certification be regularly reviewed by the medical practitioner. This addresses past concerns that workers have been certified as totally incapacitated for work for long periods at a time, making it difficult to implement return to work and injury management plans.

Under section 143H(1), a medical practitioner is not to certify total incapacity for more than 14 days unless he/she provides reasons substantiating a longer period and a review date. If the medical practitioner is of the opinion that a worker is unlikely to return to his/her pre-injury hours and/or duties (either for a specified period or indefinitely), the medical practitioner must state this opinion, and the reasons on which it is based, on the certificate (section 143H(2)).

It is important to note that if the above requirements are not fulfilled, they do not affect the validity of the worker's claim for compensation (section 143H(3)).

Section 1431 (Employer to be notified of certified incapacity and given medical

certificate)

This provision encourages an injured worker to let his or her employer know what is happening as soon as possible by requiring the worker to:

- notify the employer of his/her certified incapacity; and
- provide the employer with a copy of the certificate.

Section 143J (Worker's obligation of full disclosure to medical practitioners chosen by worker)

This section places a clear obligation on the worker to fully disclose information that is relevant to the diagnosis or treatment of the injury to any treating medical practitioner.

Full disclosure is essential to allow appropriate diagnoses and decisions about treatment and injury management to be made. In recognition of this, a worker can be prosecuted and receive a penalty for breaching this provision.

Section 143K (Medical advisory and mentoring service)

This provision allows the Board to establish a medical advisory and mentoring service to provide guidance and advice to medical practitioners on:

- the application of evidence-based medical treatment guidelines;
- identifying appropriate treatment options;
- identifying the work capacity of an injured worker, including whether the worker can undertake suitable alternative duties;
- issuing workers compensation medical certificates and medical reports;
- obtaining second opinions on diagnosis or treatment; and

- the workers compensation scheme.

Medical practitioners nominated to be part of the medical advisory and mentoring service are to be paid from the Workers Rehabilitation and Compensation Fund. The Board is to determine the amount they are to be paid (section 143K(3)).

Division 5 – Obligations relating to the return to work of an injured worker

This Division is focused on facilitating the return to work of an injured worker. Research indicates that return to work improves a worker's prospects of a successful recovery from an injury. Unemployment can itself contribute to poor health outcomes *(reference: Productivity Commission National Workers Compensation and OHS Frameworks (released in June 2004), p194)*

Section 143L (Injured worker's position to be held open for worker)

This section, together with section 143M below, is aimed at providing the worker with an opportunity to return to work with his pre-injury employer. Where possible, it is preferable for a worker to return to his/her pre-injury workplace, as this is familiar to the injured worker and allows him or her to have access to existing social networks (*reference: the RTWIMM)*.

Under section 143L(1), an employer is required to make the worker's pre-injury employment available to him or her for a period of 12 months from the date the worker becomes incapacitated, i.e., the employer must "hold the job open" for 12 months. This is a very significant obligation and accordingly, there is a heavy penalty of up to 100 penalty units for breaching this requirement.

There are two exceptions to this requirement to hold the job open (section 143L(2)):

- where there is medical evidence indicating that it is highly improbably that the worker will be able to perform his/her pre-injury employment; and
- where the work for which the worker was employed is no longer required to be performed.

If the employer is relying on one of the two above exceptions, he/she must notify the insurer (if there is an insurer) and the worker of the reasons why (section 143L(3)).

Note – this section is a modification of the existing section 138A.

Section 143M (Employer to provide suitable duties after injury)

This section requires an employer to provide an injured worker, who is not able to return to his/her pre-injury employment, with suitable alternative duties (section 143M(1)). As with section 143L above, this is a key component of the injury management process and a breach of this requirement is subject to a heavy penalty of up to 100 penalty units.

Suitable alternative duties are defined as duties to which the worker is suited having regard to the following (section 143M(5)):

- the nature of the worker's incapacity and pre-injury employment;
- the worker's age, education, skills and work experience;
- the worker's place of residence;
- any suitable duties for which the worker has had rehabilitation training;
- any other relevant circumstances.

The definition of suitable alternative duties

specifically excludes duties that are merely token in nature or do not involve meaningful work, and duties which are demeaning to the worker given the worker's pre-injury employment, age, education, skills and work experience (sections 143M(5)(f) and (g)).

In identifying suitable alternative duties for an injured worker, an employer must consult with the worker and must take account of any medical advice or restrictions. The duties must also comply with the worker's return to work plan or injury management plan (section 143M(2)).

There is an exception to the requirement to provide suitable alternative duties where it is unreasonable or impracticable for the employer to do so (section 143M(3)). An employer who relies upon this exception must provide the worker with written reasons as to why it is unreasonable or impractical to provide suitable alternative duties (section 143M(4)).

Note – this section is a modification of the existing section 138B.

Section 143N (Workers to participate in return to work process)

This section is intended to reinforce return to work processes by placing clear obligations on the worker to participate.

A worker is obliged to comply with the requirements of a return to work plan or injury management plan unless he/she cannot do so due to his/her workplace injuries or for any other reasonable cause (section 143N(1) and (2)).

If the worker cannot comply with the plan, he/she must, as soon as practicable, seek medical advice and undergo treatment to enable him/her to comply with the plan

(section 143N(3)(a)). The worker must also let the employer and injury management coordinator know what is happening (section 143N(3)(b)).

This section also requires a worker who is working reduced hours in accordance with a return to work plan or injury management plan, to attempt to arrange medical appointments outside of working hours (section 143N(4)).

Where a worker fails to comply with one of these requirements, the employer can notify the Tribunal (which would then deal with the matter in accordance with section 143Q below) (section 143N(5)).

Section 143O (Workplace rehabilitation providers)

Under proposed amendments to section 77A a person can only provide workplace rehabilitation services if that person has been accredited by the Board as a workplace rehabilitation provider *(refer to the clause note for clause 27 above)*. "Workplace rehabilitation services" is to be defined in section 3 of the Act *(refer to the clause note for clause 6 above)* and includes specialist services such as:

- initial workplace rehabilitation assessment;
- functional capacity assessment;
- workplace assessment;
- job analysis;
- advice concerning job modification;
- rehabilitation counselling;
- vocational assessment;
- advice and assistance in relation to job seeking or arranging vocational re-education or training.

This provision enables the Board to issue guidelines for the referral of workers to workplace rehabilitation providers (section

143O(1)). Where there is a dispute regarding the referral of a worker to a workplace rehabilitation provider, a party to the dispute can notify the Tribunal (which is to deal with the issue in accordance with section 143Q below) (section 143O(2)).

Division 6 – Miscellaneous

A key principle specified in the proposed new section 139 (refer to clause note above) is that issues relating to injury management should be resolved as soon as practicable and with such assistance as may be necessary so as to ensure effective injury management. The provisions in this Division are intended to support that principle.

Section 143P (Disputes about injury management)

As a preliminary step, this section requires an employer or insurer to provide the worker with written reasons for any significant decision (section 143P(1)). It may help avoid misunderstandings if the worker is aware of the reasons why a decision has been made.

If there is a dispute, the procedure is to be as follows:

- the employer is to notify the injury management coordinator as soon as practicable (section 143P(2));
- the injury management coordinator is to attempt to resolve the dispute by either informal mediation or discussing the issue individually with the parties (section 143P(3);
- if the dispute is not resolved to a party's satisfaction, that party may notify the Tribunal (section 143P(4)).

Section 143Q (Powers of Tribunal in respect of matters under this Part)

This section specifies the Tribunal's procedures and powers when it is notified of a matter (a dispute) under this Part.

In the first instance, the Chief Commissioner of the Tribunal is to refer the matter to a State Service employee (expected to be a conciliator) who is to provide informal assistance to the parties to resolve the matter (section 143Q(3) and (4)). If the State Service employee is of the opinion that the matter cannot be resolved, the matter is take to have been referred the matter to the Tribunal (section 143Q(6)) (the referral is then to be dealt with in the same manner as a section 42 referral).

Under this section, the Tribunal can make the following orders (section 143Q(7)):

- an order requiring the worker to attend work in accordance with a return to work plan or injury management plan;
- an order requiring an employer to provide suitable alternative duties;
- an order suspending weekly payments for a specified period;
- an order increasing weekly payments for a specified period;
- an order requiring a worker to undergo specified treatment or forego part or all of the weekly payments or compensation for services he/she would otherwise be entitled to;
- an order requiring the worker to undergo an independent medical review or examination or forego part or all of the weekly payments or compensation for services he/she would otherwise be entitled to;
- an order requiring the worker to undertake specified rehabilitation or retraining or forego part or all of the weekly payments or compensation for services he/she would otherwise be

entitled to;

- an order varying a return to work plan or injury management plan.

The Tribunal also has a catch-all power to make any other order it thinks fit.

Clause 48 **Section 145 amended (Establishment of Workers Rehabilitation and Compensation Fund)**

This clause amends section 145 of the Act.

Section 145 establishes the Workers Rehabilitation and Compensation Fund which is a Fund managed by the WorkCover Board.

The Fund is intended to provide all the money required by the Board to discharge its functions under section 10 of the Act. The Board's functions include activities directed at the prevention of workplace injury and illness.

The Fund also provides all money required for the administration of the Act. This includes operating expenses of the Tribunal and other Departmental functions associated with reviewing, monitoring and amending the Act.

Subsection (3) also provides for the payment of money for other purposes including for purposes associated with workers compensation, occupational health and safety or rehabilitation as may be prescribed. No expenses have been prescribed.

This clause amends subsection (3) to replace the ability to prescribe certain expenses with an ability for the Minister to determine that certain expenses be met from the Fund. This provides a more immediate and flexible approach that enables the Fund to meet specific once off expenses as well recurrent expenses as long as they are expenses associated with workers compensation, occupational health and

safety or rehabilitation.

Clause 49 **Section 158 amended (Maintenance of secrecy)**

This clause amends section 158 to provide for the disclosure of information for purposes that may not have been envisaged when the current section was drafted. The trend towards national harmonisation and co-operation has identified a need for regulators to be able to share information on a regular basis. Disclosure of information is also required to facilitate research and statistical analysis and for law enforcement purposes.

Clause 50 **Section 164A inserted**

This clause inserts a new section to clarify that the amendments introduced by this Bill, with the exception of section 143L, section 143M and section 164A do not apply to any claim for an injury suffered before the commencement date.

Sections 143L and 143M are existing requirements that are carried over in the new PART XI – Injury Management.

Clause 51 **Repeal**

This is a standard clause which provides for the repeal of the Amendment Act 90 days after the amendments commence (they will be consolidated into the Act).