Workplace Injury Rehabilitation and Compensation Amendment (WorkCover Scheme Modernisation) Bill 2023

Introduction Print

EXPLANATORY MEMORANDUM

Clause Notes

Part 1—Preliminary

Clause 1 sets out the main purpose of the Bill, which is to amend—

- the **Workplace Injury Rehabilitation and Compensation Act 2013**;
    - to insert a definition of ***mental injury***; and
    - to make further provision for the circumstances in which benefits are paid for mental injuries; and
    - to introduce an impairment threshold for assessing eligibility for the payment of benefits beyond a period of 130 weeks; and
    - to provide for a process for the review of the operation of the proposed amendments; and
    - to make other miscellaneous amendments; and
- the **Accident Compensation Act 1985** to introduce an impairment threshold for assessing eligibility for the payment of benefits beyond a period of 130 weeks; and
- the **Occupational Health and Safety Act 2004** in relation to the use of information.

Clause 2 provides that the Bill comes into operation on a day or days to be proclaimed. Subsection (2) provides that if a provision of the Bill does not come into effect before 31 March, it comes into operation on that day.

Clause 3 sets out that in the Bill the **Workplace Injury Rehabilitation and Compensation Act 2013** is called the Principal Act.

Part 2—Amendment of Workplace Injury Rehabilitation and Compensation Act 2013

Division 1—Mental injury amendments

Clause 4 amends section 3(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013** to introduce a definition of ***mental injury***.

Mental injury is defined as an injury which causes significant behavioural, cognitive or psychological dysfunction and is diagnosed by a medical practitioner in accordance with the latest version of the Diagnostic and Statistical Manual of Mental Disorders (DSM).

The definition of ***mental injury*** may extend to the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing mental injury. This is reflected in the amendment made to section 40 of the **Workplace Injury Rehabilitation and Compensation Act 2013** by clause 6.

Clause 5 amends section 39(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013** to provide that where a worker sustains an injury, other than a mental injury, arising out of or in the course of employment, the worker is entitled to compensation in accordance with the Act.

New section 39(1A) (as inserted by clause 5(2)) provides that where a worker sustains a mental injury predominantly arising out of or in the course of employment, the worker is entitled to compensation in accordance with **Workplace Injury Rehabilitation and Compensation Act 2013**.

New section 39(1A) requires that employment must be the predominant cause of mental injury for the worker to be entitled to compensation under the **Workplace Injury Rehabilitation and Compensation Act 2013**. Predominant is not defined in the legislation and is intended to take its ordinary meaning, referring to the strongest or largest contributing factor relative to all other contributing factors.

The requirement to demonstrate that employment was the predominant cause of the mental injury also applies in claims for compensation relating to mental injuries that are a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease.

New section 39(2A) (as inserted by clause 5(3)) provides that despite new section 40(1A) (as inserted by clause 6), a worker is entitled to compensation for a mental injury predominantly caused by traumatic events experienced by the worker that are usual or typical and reasonably expected to occur in the course of the worker's duties.

New section 39(2A) provides an exception to the exclusion at new section 40(1A) which provides that there is no entitlement to compensation where a worker's mental injury is predominantly caused by work related stress or burnout arising from events that are usual or typical and reasonably expected to occur in a worker's employment. Section 39(2A) ensures this exclusion does not apply where a worker's usual duties could be characterised as routinely traumatic or generally involving exposure to trauma.

Traumatic events would be events that are typically emotionally shocking and can cause fear and distress. These events would be reasonably expected to cause psychological harm. Traumatic events in the workplace may involve exposure to, or actual physical, abuse, the threat of physical harm or actual physical harm.

Roles where a worker may be exposed to traumatic events as part of their usual duties would include emergency service personnel and other front-line workers. This new subsection ensures compensation for mental injuries suffered by workers who experience traumatic events as part of their usual or typical duties, provided other requirements in the Act are satisfied.

New section 39(2A) is not intended to provide an exception for any other exclusion relating to mental injury eligibility, including reasonable management action.

Clause 6 amends section 40 of the **Workplace Injury Rehabilitation and Compensation Act 2013** to include further circumstances in which a mental injury is not compensable.

New section 40(1A) provides that where a mental injury, as defined by the new definition inserted in section 3 of the **Workplace Injury Rehabilitation and Compensation Act 2013**, is predominantly caused by work related stress or burnout arising from events that would be considered typical or usual and reasonably expected to occur in the course of the worker's duties, the injury is not eligible for compensation under the **Workplace Injury Rehabilitation and Compensation Act 2013**.

Work-related stress and burnout are not defined and will take their ordinary meaning.

Where work related stress or burnout arising from the worker's usual work activities predominantly causes a mental injury, the worker is not entitled to compensation. Usual or typical work activities may include typical job demands, workload pressures and interpersonal interactions.

Behaviour that constitutes bullying, harassment or discrimination would not be typical or reasonably expected to occur in the usual course of duties and therefore would not be captured under this exclusion.

The operation of new section 40(1A) does not detract from or prevent the operation of any other exclusion under section 40 of the **Workplace Injury Rehabilitation and Compensation Act 2013**, including reasonable management action.

New section 40(2A) provides that there is no entitlement to compensation in respect of a mental injury that is a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing mental injury unless the worker's employment was the predominant cause of the recurrence, aggravation, acceleration, exacerbation or deterioration.

Clause 6(3) amends section 40(3)(c) of the **Workplace Injury Rehabilitation and Compensation Act 2013** to exclude a mental injury described in new section 40(2)(a). Section 40(3)(c) of the **Workplace Injury Rehabilitation and Compensation Act 2013** requires employment to be a significant contributing factor to the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease for the purposes of entitlement to compensation under the Act. Where compensation is sought for the aggravation of a mental injury, workers will be required to demonstrate that employment was the predominant cause. This is consistent with the amendments to section 39.

Clause 7 amends section 46(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013** to include new section 39(1A) for the purpose of describing relevant circumstances considered to be in or out of the course of employment.

Clause 8 inserts new section 64(2) into the **Workplace Injury Rehabilitation and Compensation Act 2013** to clarify that the definition of ***mental injury*** in section 3 does not apply to the assessment of the degree of psychiatric impairment.

This clarification ensures that the process for making eligibility decisions is separate and distinct from the assessment of a worker's psychiatric impairment.

Clause 9 inserts new section 263AA of the **Workplace Injury Rehabilitation and Compensation Act 2013** that provides that the definition of ***mental injury*** in section 3 of the **Workplace Injury Rehabilitation and Compensation Act 2013** does not apply to Division 10 of Part 5 in relation to provisional payments for mental injuries.

This provision is intended to remove any doubt in relation to whether a worker may be entitled to provisional payments under Division 10 of Part 5 in respect of a claimed mental injury. A worker may be entitled to provisional payments regardless of whether the worker's claimed mental injury is ultimately accepted by the Authority or self-insurer.

Division 2—Ongoing eligibility for compensation

Clause 10 amends section 53 of the **Workplace Injury Rehabilitation and Compensation Act 2013** to clarify that Division 4 of Part 2 applies to both Division 2 and Division 5 of Part 5 as well as Part 7, in relation the assessment of a worker's degree of impairment.

These changes ensure the existing process for assessing a worker's degree of impairment under Division 4 of Part 2 of the **Workplace Injury Rehabilitation and Compensation Act 2013** is applied to decisions made under new Subdivision 1A of Division 2 (inserted by clause 16 of this Bill) and Division 5 of Part 5, including the use of the American Medical Association's Guides to the Evaluation of Permanent Impairment (Fourth Edition) (A.M.A Guides).

Clause 11 inserts new section 53A of the **Workplace Injury Rehabilitation and Compensation Act 2013** that provides that an assessment of impairment under Division 4 of Part 2 is taken to be the final assessment of a worker's degree of impairment for any purpose under the Act in respect of the same injury.

A determination of a worker's degree of impairment for the purpose of new Subdivision 1A of Division 2 of Part 5 (inserted by clause 16 of this amending Bill), Division 5 of Part 5 or Part 7 will be the degree of impairment to be used for any other purpose under the Act, other than a claim under new section 164A (inserted by clause 14 of this amending Bill).

This provision is intended to ensure there is a single determination of impairment for the same injury that can be used for all purposes of the Act.

New section 53A(2) further provides that where a worker is assessed for the purposes of section 164A, following surgery relating to an injury for which the worker has received compensation under the Act, that new assessment will be taken to be the final assessment of the degree of impairment of the worker for the purposes of the Act.

Clause 12 inserts new definitions into section 152 of the **Workplace Injury Rehabilitation and Compensation Act 2013**.

A ***compensable injury*** is defined as an injury for which liability has been accepted or established and for which the worker is or has been entitled to weekly payments during the second entitlement period.

An ***impairment determination*** is defined as a determination under new section 167A(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013**.

An ***interim determination*** is defined as a determination under new section 167D(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013**.

An ***ongoing eligibility determination*** is defined as a determination under section 163(1), 164A(2), 165(4) or 175(1) or (2A) of the **Workplace Injury Rehabilitation and Compensation Act 2013** or section 93C(1)(c), 93CAB(2), 93CD(4) or 97(2) or (2AAB) of the **Accident Compensation Act 1985**.

Clause 13 amends section 163 of the **Workplace Injury Rehabilitation and Compensation Act 2013** to provide that a worker's entitlement to weekly payments ceases after the expiry of the second entitlement period unless the Authority or self-insurer determines that the worker has an indefinite incapacity to work and a whole person impairment of more than 20 per cent resulting from one or more compensable injuries, as defined in section 152.

This provision introduces an additional test of whole person impairment to the review of entitlement after the expiry of the second entitlement period (being 130 weeks of receiving weekly payments). In addition to being satisfied the worker has an indefinite incapacity for work, the Authority or self-insurer must also be satisfied that the worker has a whole person impairment of more than 20 per cent.

If a worker does not meet either of these tests, the worker will not be eligible to continue to receive weekly payments after the expiration of the second entitlement period.

An assessment of whole person impairment is an objective assessment of permanent impairment and will complement the more subjective and individual assessment of a worker's future return to work prospects. These tests ensure that ongoing weekly payments continue to be provided to those workers most in need of continued financial support.

Section 163(3) of the **Workplace Injury Rehabilitation and Compensation Act 2013** continues to require that the worker's work capacity be assessed at least once every two years or as often as reasonably necessary to continue to receive weekly payments.

Clause 14 inserts new section 164A into the **Workplace Injury Rehabilitation and Compensation Act 2013** to provide that workers who have ceased to be entitled to weekly payments at the expiry of the second entitlement period and subsequently receive surgery to treat their compensable primary injury are eligible to reapply for weekly payments where their whole person impairment has increased as a result of the surgery and they have an indefinite incapacity for work.

Where the Authority or self-insurer determines that the worker has no capacity for work indefinitely and a whole person impairment of more than 20 per cent as a result of their subsequent surgery, the worker will be entitled to receive weekly payments after the second entitlement period, in accordance with section 163(2).

Subsection (3) provides that workers who satisfy the criteria under section 164(1) to receive 13 weeks of payments following surgery will be entitled to continue to receive weekly payments from 13 weeks after the day on which surgery was performed. In any other case, workers will be eligible to continue to receive weekly payments from the date on which the ongoing eligibility determination in relation to the worker is made.

Clause 15 inserts new section 165(4)(c) of the **Workplace Injury Rehabilitation and Compensation Act 2013**.

Section 165 of the **Workplace Injury Rehabilitation and Compensation Act 2013** allows a worker to apply for compensation in the form of weekly payments after the expiry of the second entitlement period where they have a reduced capacity to work.

A worker will be entitled to continue to receive weekly payments where the worker has returned to work for at least 15 hours per week; earns at least $177 per week (indexed annually); and, because of their injury, is incapable of undertaking further additional employment which would increase their current weekly earnings and is likely to continue indefinitely to be incapable of doing so. Under this section, weekly payments continue until the worker ceases to be eligible or the worker's circumstances change.

New section 165(4)(c) requires a worker to be assessed as having a whole person impairment of more than 20 per cent from their compensable injury to continue to receive weekly payments in circumstances where they have partially returned to work and meet these requirements.

This ensures workers who make a partial return to work are subject to the same tests as those used for determining ongoing entitlement under section 163.

The clause recognises that some workers may have a permanent impairment and residual level of incapacity that prevents them from returning to their pre-injury employment. However, the worker may be able to engage in employment to some extent and should be encouraged to do so.

Clause 16 inserts new Subdivision 1A of Division 2 of Part 5 of the **Workplace Injury Rehabilitation and Compensation Act 2013** which details how the assessment of the degree of impairment for the purpose of determining eligibility for weekly payments after the second entitlement period is to be conducted and managed.

New section 167A(1) provides that, in determining the degree of impairment for the purpose of sections 163(1)(b), 164A(2), 165(4)(c) or 175(1)(b) or (2A)(b) of the **Workplace Injury Rehabilitation and Compensation Act 2013** or sections 93C(1)(c), 93CAB(2), 93CD(4) or 97(2) or (2AAB) of the **Accident Compensation Act 1985**, the Authority or self-insurer may have regard to any impairment assessment obtained under Division 4 of Part 2 of the **Workplace Injury Rehabilitation and Compensation Act 2013**, any relevant medical reports and the applicable A.M.A Guides under section 54 when determining the degree of impairment of a worker.

An impairment assessment previously obtained under Division 4 of Part 2 will be the final assessment under new section 53A for the purposes of this provision.

New section 167A(2) provides that the degree of impairment to be used for the purpose of determining entitlement to weekly payments after the second entitlement period is the greater of the degree of impairment from a worker's physical or psychiatric or psychological compensable injuries. Consistent with the degree of impairment for the purpose of compensation for lump sum impairment benefits, physical and psychological injuries are not combined for the purposes of assessing ongoing entitlement to weekly payments.

Subsection (3) provides that an impairment determination must not relate to more than one compensable injury, unless those injuries arose out of the same event or circumstance.

New section 167A(4) provides that the Authority or self-insurer cannot make a determination in relation to impairment until a worker is at least 18 years old. This is consistent with the approach for assessing permanent impairment under Division 4 of Part 2.

New section 167A(5) provides, for the avoidance of doubt, the Authority or self-insurer is not bound by an assessment of the degree of impairment under Division 4 of Part 2 in determining entitlement after the second entitlement period.

New section 167A(5) mirrors the existing discretion of the Authority and self-insurer at section 201(2), and allows the Authority or self-insurer to adjust or modify a worker's impairment percentage in circumstances where the assessment may not have accurately reflected all relevant factors in a worker's circumstances. This ensures that the Authority or the self-insurer has the responsibility for determining the worker's degree of impairment under the Bill. If a worker disagrees with the modification by the Authority or self-insurer, the worker can refer the dispute to the Medical Panel for a binding determination.

New section 167B provides that the Authority or self-insurer may request a worker attend an assessment of an injury in accordance with Division 4 of Part 2 for the purposes of an impairment assessment.

Subsection (2) requires that the worker must attend an assessment when requested.

Subsection (3) requires the Authority or self-insurer give the worker a written statement of each injury included in the assessment.

New section 167C allows the Authority or self-insurer to determine it is not necessary or practicable to obtain an assessment of an injury in accordance with Division 4 of Part 2 for the purposes of making an impairment determination.

This determination may be made in circumstances where the Authority or self-insurer determines that a determination of entitlement should be made without an examination.
This determination may occur if the Authority or self-insurer is satisfied that there is no reasonable prospect of the worker's whole person impairment being more than 20 per cent, where there is no reasonable prospect of the worker's whole person impairment being 20 per cent or less and this is the case permanently, if the worker resides overseas or where it is not reasonable or practicable for the worker to attend an assessment.

New section 167C(3) provides that in making such a determination, the Authority or self-insurer must have regard to a number of factors, including the medical evidence available, whether the impairment is likely to be permanent, any practical barriers to the worker attending an assessment and whether there will be an indefinite incapacity for work. For example, it may be impractical to arrange an assessment where the worker is overseas.

Importantly, the Authority or self-insurer must have regard to whether determining entitlement without assessing the worker is likely to disadvantage the worker.

New section 167C(4) requires the Authority or self-insurer to give a worker written notice of a determination made under new section 167C. A notice must include a written statement of each injury to which the determination relates.

New section 167D(1) allows the Authority or self-insurer to make an interim determination that a worker is eligible or not eligible to continue to receive weekly payments after the expiry of the second entitlement period in certain circumstances.

New section 167D(2) provides the Authority or self-insurer may make an interim determination where an impairment determination cannot be made because—

- the injury has not stabilised (an injury is not stable if the worker's whole person impairment changes by 3 per cent or more in a twelve month period); or
- the injury is an eligible progressive disease for the purposes of section 51A of the **Workplace Injury Rehabilitation and Compensation Act 2013**; or
- the worker is less than 18 years old; or
- the information required to complete an impairment assessment is not available for any reason.

New section 167D(3) allows for an interim determination to be made that a worker is entitled to continue to receive weekly payments where the Authority or self-insurer is satisfied that the impairment is likely to be permanent, the injury would likely be assessed as a whole person impairment of more than 20 per cent and the worker is likely to have an ongoing incapacity for work.

New section 167D(4) allows for an interim determination to be made that a worker is not entitled to continue to receive weekly payments, where the Authority or self-insurer is satisfied that the impairment is likely to not be permanent, the injury would likely be assessed as a whole person impairment of 20 per cent or less or the worker is likely to have a capacity for work.

New section 167D(5) provides that the Authority or self-insurer may have regard to any medical evidence available when making an interim decision.

New section 167E(1) requires the Authority or self-insurer to give a worker written notice of an interim determination under section 167D. A notice of an interim determination must include a written statement of each injury to which the interim determination relates.

New section 167E(3) provides that an interim determination will apply until either a further interim determination is made or until an ongoing eligibility determination is made in respect of the worker.

New section 167E(4) provides that an interim determination can be reviewed at any time by the Authority or self-insurer. This is to allow for a determination to be reviewed by the Authority or self-insurer where appropriate and necessary, for example where information becomes available which indicates that a worker's injury has stabilised or where a worker attains the age of 18 years.

New section 167F provides that the Authority or self-insurer must give a worker written notice of an ongoing eligibility determination made in respect of the worker. If the worker advises the Authority or self-insurer that the worker disputes the ongoing eligibility determination, the worker must not commence a proceeding in relation the claim, except as provided in section 273(1) or (2) of the **Workplace Injury Rehabilitation and Compensation Act 2013**. This section means that a worker may only dispute the ongoing eligibility determination through conciliation, unless the worker has already commenced proceedings in a court.

The dispute need not be referred for conciliation if a party seeks and obtains leave of the court to add the dispute to other matters already before the court.

This provision ensures that disputes relating to a determination made under new section 167A may proceed to conciliation, including a dispute relating to the degree of impairment arising from a worker's injuries. Section 284 of the **Workplace Injury Rehabilitation and Compensation Act 2013** then provides for a Conciliation Officer to refer a medical question to a Medical Panel. This provision is particularly important in resolving a dispute regarding an aspect of the worker's medical condition. A referral to the Medical Panel ensures a binding and conclusive opinion on questions of medical fact which assists in resolving the dispute.

New section 167G sets out the effects of an ongoing eligibility determination that is made after an interim decision has been made.

New section 167G(1) provides that where an interim determination was made that a worker is entitled to weekly payments after the expiry of the second entitlement period and subsequently makes an ongoing eligibility determination that a worker is not entitled to weekly payments, the Authority or self-insurer must give at least 13 weeks of notice under section 191(1)(b) of the **Workplace Injury Rehabilitation and Compensation Act 2013**.

New section 167G(2) provides that where an interim determination was made that the worker is not entitled to compensation after the expiry of the second entitlement period and this is subsequently affirmed by an ongoing eligibility determination, the Authority or self-insurer is taken to have already given the worker 13 weeks of notice for the purposes of section 191(1)(b).

New section 167G(3) provides that where an interim decision was made to cease a worker's weekly payments and an ongoing eligibility determination is made that the worker is entitled to weekly payments after the second entitlement period, the worker is entitled to receive weekly payments for the period from the date the interim determination took effect until the ongoing eligibility determination took effect.

New section 167G(4) provides that no interest is payable on any amount payable under section 167G(3).

New section 167H provides that where a worker advises the Authority or self-insurer that they dispute an ongoing eligibility determination, and the dispute relates to the degree of impairment of the worker, the Authority or self-insurer must refer the medical question as to the degree of impairment to the Medical Panel under section 302 of the **Workplace Injury Rehabilitation and Compensation Act 2013** within 14 days of being made aware of the dispute.

The Authority is required to refer the medical question to the Medical Panel under this section where the dispute does not require the resolution of any issue other than the degree of impairment to which the ongoing eligibility determination relates. If the worker disputes any other aspect of the ongoing eligibility determination including the statement of injuries or questions of capacity, new section 167F(2) will apply (i.e. the worker must proceed to conciliation).

Where a dispute relates to factual matters, or questions about liability, permanency or capacity questions, as well as the medical question, a referral to conciliation in the first instance will allow these factual matters to be resolved before referring the medical question to the Medical Panel. Where factual issues cannot be resolved by conciliation or a party validly objects to a Medical Panel referral, a Genuine Dispute can then be issued under section 273(1) or (2) to allow court proceedings to be issued.

New section 163H(3) provides that within 60 days of receiving the Medical Panel opinion, the Authority or self-insurer must advise the worker of the opinion and the worker's entitlement to ongoing weekly payments after the expiration of the second entitlement period.

Under new section 167H(4), the worker must within 60 days of receiving notice of the opinion of the Medical Panel, advise the Authority or self-insurer as to whether they accept or dispute the entitlement to compensation. Where the determination relating to entitlement is accepted, the Authority or self-insurer must pay any relevant weekly compensation entitlements to the worker within 14 days.

New section 167I provides that an ongoing eligibility determination for the purposes of new section 167A made by the Authority or self-insurer in relation to new Subdivision 1A does not give rise to an issue estoppel in any proceeding under the **Workplace Injury Rehabilitation and Compensation Act 2013** in respect of the injury.

New section 167J provides that section 208 of the **Workplace Injury Rehabilitation and Compensation Act 2013** applies to an impairment determination or any other determination or opinion as to the degree of a worker's impairment under new Subdivision 1A.

It is not the intent of section 208 to prevent a dispute from proceedings outlined at new sections 167F or 167H.

Section 208 provides that no appeal to a court or tribunal may be made for a determination or opinion as to the degree of permanent impairment of a worker resulting from an injury. Section 208 has the effect of limiting the jurisdiction of the Supreme Court as outlined in section 85 of the **Constitution Act 1975**. New section 167J complements section 208.

This clause ensures that decisions on impairment can only be made by Medical Panels, the most appropriate body to provide an expert opinion on a medical question.

New section 167K allows the Minister to give directions in accordance with section 609 of the **Workplace Injury Rehabilitation and Compensation Act 2013** in relation to the process and procedures for determining entitlements after the expiration of the second entitlement period.

Clause 17 amends section 175 of the **Workplace Injury Rehabilitation and Compensation Act 2013** to provide that where a worker receiving weekly payments ceases to reside in Australia, they will be required to have a whole person impairment of more than 20 per cent to continue to receive weekly payments after the second entitlement period. This is in addition to the existing test of having no work capacity indefinitely, which they are required to meet at the time of leaving Australia.

These amendments ensure that the new impairment threshold test to determine entitlement to weekly payments after the second entitlement period is applied consistently between workers residing outside Australia and workers residing within Australia.

A worker residing outside of Australia will still be required to prove identity and no current work capacity in the prescribed manner and at the prescribed intervals.

Clause 18 replaces section 199(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013** to provide that where liability has been accepted or determined in respect of a prior claim for compensation for an injury, the Authority or a self-insurer may request the worker to attend an independent examination under section 203(1), if it has been at least 18 months after the date of the injury or the worker's impairment is being assessed for the purposes of new Subdivision 1A of Division 2 of Part 5.
The Authority or self-insurer can only make a request under this new section where a prior Division 5 claim for impairment benefits has not been made.

A request under section 199 will have the effect of initiating a Division 5 impairment benefits claim on behalf of the worker.

Clause 19 inserts new section 200(1A) of the **Workplace Injury Rehabilitation and Compensation Act 2013** to provide that the Authority or self-insurer may, in writing, suspend a Division 5 claim if an ongoing eligibility determination is being made.

New section 200(1A)(b) provides that a suspension must occur within 14 days of a Division 5 claim being made and either a request for a worker to attend an assessment under new section 167B(1) being made or a statement of injuries under new section 167B(3) being given to a worker.

This provision is intended to ensure that an ongoing eligibility determination and an impairment benefits claim under Division 5 cannot proceed at the same time.

Clause 19(2) amends section 200(2) of the **Workplace Injury Rehabilitation and Compensation Act 2013** to require the suspension of a Division 5 claim to be lifted within 14 days of giving notice of an ongoing eligibility determination.

Clause 20 amends section 297(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013** to ensure that a direction regarding weekly payments cannot be issued by the conciliation service on a matter relating to a determination of impairment under section 167A. It is not intended that a direction to pay weekly payments could be made on a disputed medical question.

Clause 21 inserts new section 618(3) of the **Workplace Injury Rehabilitation and Compensation Act 2013** to state the intention that section 167J as inserted by clause 16 of the amending Bill is intended to alter or vary section 85 of the **Constitution Act 1975**.

Division 3—Information sharing

Clause 22 inserts new Division 2A into Part 13 of the **Workplace Injury Rehabilitation and Compensation Act 2013** to allow the Authority to use any information collected under the **Workplace Injury Rehabilitation and Compensation Act 2013** or the regulations for the purposes of performing its functions and exercising its powers under any Act administered by the Authority.

New section 551A provides that information collected by the Authority may be used by the Authority to perform its functions and exercise its powers under any Act, if the use of the information is reasonably necessary for the purposes of performing a function or exercising a power conferred on the Authority under that Act or regulations administered by the Authority or is directly related to a function or power conferred on the Authority by that Act or regulations made under that Act administered by the Authority.

Subsection (2) of new section 551A provides that this provision does not affect the operation of the **Health Records Act 2001**, the **Privacy and Data Protection Act 2014** or the **Victorian Data Sharing Act 2017**.

Division 4—Disputes which may be referred to arbitration

Clause 23 inserts a note into section 298(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013** to clarify that section 301C(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013** sets out the matters that can be referred to arbitration.

Matters listed in section 301C(1)(ab) are matters where the dispute relates to matters in respect of whether a claimant is entitled to compensation. These matters cannot be referred to arbitration.

Clause 24 amends section 301C of the **Workplace Injury Rehabilitation and Compensation Act 2013** by inserting new section 301C(1)(ab) to provide that disputes related to whether a worker is entitled to compensation, specifically, whether an injury is an injury for the purposes of the Act and whether the injury occurred in circumstances that give rise to a liability to pay compensation, cannot be referred to arbitration.

New section 301C(2A) provides that disputes related to whether a worker is entitled to compensation, and therefore, cannot be referred to arbitration include disputes as to whether—

- a claimant is a worker;
- the claimant has suffered an injury;

- an injury caused to the claimant is an injury that arose out of, or in the course of, or due to the nature of, the claimant's employment;
- the claimant's employment was a significant contributing factor to an injury caused to the claimant;
- an injury caused to the claimant is a mental injury for which there is no entitlement to compensation;
- an injury caused to the claimant is a disease for which there is no entitlement to compensation; or
- an injury caused to the claimant is a proclaimed disease.

The intention of this amendment is to allow for disputes relating to initial eligibility for compensation be referred for conciliation in the first instance, and if they cannot be resolved, to be issued with a genuine dispute certificate to proceed to court.
This ensures that matters relating to eligibility, including the new requirements introduced by this Bill are interpreted and applied consistently through judicial consideration.

Division 5—Independent review of amendments to scheme

Clause 25 inserts new Division 14A of Part 13 of the **Workplace Injury Rehabilitation and Compensation Act 2013** which provides that the Minister must cause an independent review of the amendments made to the **Workplace Injury Rehabilitation and Compensation Act 2013** by this Bill.

New section 620A provides that an independent review by an expert panel must be commenced on or after 1 January 2027 and before 1 January 2028. The review must be conducted by an expert panel in accordance with the terms set out by the Minister.

The terms of reference for the independent review may include an examination of and recommendations in relation to matters arising from the changes made by the Bill, including the operational and financial impact of the amendments.

New section 620B provides that the Minister must appoint a panel of at least three experts, with experience in one or more of the areas of law, medicine, finance or occupational health and safety to conduct the independent review.

Division 6—Transitional provision

Clause 26 inserts new section 625 of the **Workplace Injury Rehabilitation and compensation Act 2013** which sets out the transitional provisions related to the Bill.

New subsection (1) provides that the definition of ***mental injury*** and amendments to sections 39 and 40 of the **Workplace Injury Rehabilitation and compensation Act 2013** apply to claims made in respect of injuries that occur on or after the commencement of Division 1 of Part 2 of the Bill.

New subsection (2) provides that sections 163, 165 and 175 of the **Workplace Injury Rehabilitation and compensation Act 2013** will continue to apply as in force immediately before the commencement of Division 2 of Part 2 of this amending Bill to a worker who is receiving weekly payments after the second entitlement period before the commencement of that Division. The effect of this provision is that workers already in receipt of weekly payments after the second entitlement period at the time of commencement of the amendment Bill will not be subject to the amendments made by the amending Bill in relation to the assessment of their ongoing entitlement to receive weekly payments.

New subsection (3) provides that section 301C of the **Workplace Injury Rehabilitation and compensation Act 2013** is to operate as in force immediately before the commencement of the Bill in respect of disputes relating to an injury occurring before the commencement of Division 4 of Part 2 of the amending Bill.

Part 3—Amendment of Accident Compensation Act 1985

Clause 27 amends section 93C(1) of the **Accident Compensation Act 1985** to provide that a worker's entitlement to weekly payments ceases after the second entitlement period unless the Authority or self-insurer assesses the worker as having no capacity for work indefinitely or is a pre-12 November 1997 claimant with a serious injury or in the case of a worker whose second entitlement period expires on or after 1 January 2024, the worker has no current work capacity indefinitely and a whole person impairment of more than 20 per cent determined in accordance with Subdivision 1A of Division 2 of Part 5 of the **Workplace Injury Rehabilitation and compensation Act 2013**.

The section ensures that workers with an injury occurring before 1 July 2014 but who reach the expiry of the second entitlement period on or after 1 January 2024 will only be entitled to continue to receive weekly payments where the Authority or self-insurer determine that the worker has an incapacity for work which is likely to continue indefinitely and a whole person impairment of more than 20 per cent.

Section 93C(1)(c) ensures that assessments of entitlement after the second entitlement period for the purpose of this section are conducted in accordance with Subdivision 1A of Division 2 of Part 5 of the **Workplace Injury Rehabilitation and Compensation Act 2013**.

Clause 28 inserts new section 93CAB of the **Accident** C**ompensation Act 1985** to allow workers to apply to the Authority or self-insurer for weekly payments in respect of incapacity and whole person impairment in certain circumstances.

Section 93CAA(1) provides that an application may be made if the worker has not reached retirement age, has an injury which occurred on or after 5 April 2010 for which liability has been accepted and for which the worker had been entitled to weekly payments during the second entitlement period and requires subsequent surgery for the injury for which the Authority or self-insurer has accepted liability and subsequently suffers incapacity and permanent impairment arising from that surgery.

Section 93CAA(1) requires that a worker must not have been in receipt of weekly payments for at least 13 weeks after the expiry period, unless the worker was receiving weekly payments under section 93CD.

Section 93CAA(2) provides that a worker who makes an application under section 93CAA is entitled to weekly payments after the expiration of the second entitlement period if the Authority or self-insurer determines in accordance with Subdivision 1A of Division 2 of Part 5 of the **Workplace Injury Rehabilitation and Compensation Act 2013** that the worker has no current capacity for work and this is likely to continue indefinitely and the worker has a whole person impairment of more than 20 per cent arising from the subsequent surgery.

Section 93CAA(3) provides that workers who satisfy the existing criteria under section 93CA for 13 weeks of payments following surgery, will be entitled to continue to receive weekly payments from 13 weeks after the day on which surgery was performed. In any other case, workers will be eligible to continue to receive weekly payments from the date on which the ongoing eligibility determination in relation to the section is made.

Clause 29 inserts section 93CD(c) of the **Accident Compensation Act 1985** to include a requirement that the worker has a whole person impairment of more than 20 per cent.

Section 93CD of the **Accident Compensation Act 1985** allows a worker to apply for compensation in the form of weekly payments after the expiry of the second entitlement period in certain circumstances.

An application under this section can only be approved if the worker has returned to work for at least 15 hours per week; earns at least $177 together with non-pecuniary benefits within the meaning of section 5AB(1)(d), per week (indexed annually); and, because of their injury, is incapable of undertaking further additional employment which would increase their current weekly earnings and is likely to continue indefinitely to be incapable of doing so. Under this section, payments continue until the worker ceases to be eligible or the worker's circumstances change.

New section 93CD(4)(c) requires a worker to be assessed as having a whole person impairment of more than 20 per cent from their compensable injury to continue to receive weekly payments in circumstances where they have partially returned to work and meet these requirements.

This clause applies the WPI threshold test to section 93CD to ensure that the assessment of eligibility for partial weekly payments where the worker makes a partial return to work is subject to the same tests as those used for entitlement under section 93C.

The clause recognises that some workers may have a permanent impairment and residual level of incapacity that prevents them from returning to their pre-injury employment. However, the worker may be able to engage in employment to some extent and should be encouraged to do so.

Clause 30 amends section 97(2) of the **Accident Compensation Act 1985** to provide that a worker who ceases to reside in Australia and whose second entitlement period expires on or after 1 January 2024 must have a whole person impairment of more than 20 per cent determined in accordance with Subdivision 1A of Division 2 of Part 5 of the **Workplace Injury Rehabilitation and Compensation Act 2013** from one or more compensable injuries to continue to receive weekly payments after the second entitlement period.

The clause also inserts new section 97(2AAB) which provides that a worker who ceases to reside in Australia and is receiving weekly payments and the second entitlement period expires on or after 1 January 2024, the worker's entitlement to weekly payments ceases upon the expiry of the second entitlement period unless the Authority or self-insurer determines in accordance with Subdivision 1A of Division 2 of Part 5 of the **Workplace Injury Rehabilitation and Compensation Act 2013** that the worker has no current work capacity and is likely to continue indefinitely to have no current work capacity and has a whole person impairment of more than 20 per cent.

Part 4—Amendment of Occupational Health and Safety Act 2004

Clause 31 inserts new Division 1A into Part 2 of the **Occupational Health and Safety Act 2004** to allow the Authority to use any information collected under the **Occupational Health and Safety Act 2004** or the regulations for the purposes of performing its functions and exercising its powers under any Act administered by the Authority.

New section 8AA of the **Occupational Health and Safety Act 2004** provides that information collected by the Authority under the **Occupational Health and Safety Act 2004** or the regulations made under that Act may be used by the Authority to perform its functions and exercise its powers under any Act, if the use of the collected information is reasonably necessary for the purposes of performing a function or exercising a power conferred on the Authority under that Act or regulations made under that Act; or is directly related to a function or power conferred on the Authority under that Act or the regulations made under that Act.

New subsection (2) of new section 8AA provides that this provision does not affect the operation of the **Health Records Act 2001**, the **Privacy and Data Protection Act 2014** or the **Victorian Data Sharing Act 2017**.

Part 5—Repeal of this Act

Clause 32 provides that this amending Bill is repealed on 31 March 2025. However, amendments made by this amending Bill will remain in force, as per section 15(1) of the **Interpretation of Legislation Act 1984**.