



Review of Section 87 of the
Workers Rehabilitation and
Compensation Act 1988 (Tas)

Have your say

The WorkCover Tasmania Board is committed to providing opportunities for community involvement. We are seeking your input on potential changes to section 87 of the *Workers Rehabilitation and Compensation Act 1988* (“the Act”).

Section 87 of the Act provides an age-restriction for weekly compensation payments for persons injured at work. A person who is injured at work 12 months before attaining the pension age is entitled to compensation for loss of earnings for no longer than 12 months from the date of the injury. If that person was injured at work more than 12 months before attaining the pension age, the person’s entitlement to compensation ceases upon that person attaining the pension age.

This Issues Paper outlines the current situation and seeks your views to ensure that any potential changes to section 87 of the Act reflect the needs and priorities of Tasmanian communities.

How to make a submission

The submission period for the section 87 Issues Paper closes on 22 April 2019.

For enquiries regarding this Issues Paper, please contact the WorkCover Tasmania Board on (03) 6166 4600.

Comments responding to questions in the Issues Paper can be sent electronically to:

workcover.tasmaniaboard@justice.tas.gov.au; or sent via mail to:

PO Box 56, Rosny Park, TAS 7018

Email submissions are preferred.

Important information to note

In the absence of a clear indication that a submission is intended to be treated as confidential (or parts of the submission), the Board will treat the submission as public.

If you would like your submission to be treated as confidential, whether in whole or in part, please indicate this in writing at the time of making your submission, clearly identifying the parts of your submission that you want to remain confidential, and the reasons why. In this case, your submission will not be published to the extent of that request.

Background

In 2017, the Tasmanian Parliament amended section 87 of the Act to remove all references to the specific age of 65. Instead, the cessation of all weekly payments is now linked to the pension age which is set under the Commonwealth Social Security Act 1991. The purpose of the amendment was to remove any possible gap between a worker’s compensation entitlements and pension entitlements.

During the legislative process regarding the amendment, Parliament received representations from stakeholders regarding section 87 of the Act that went beyond the scope of the intended reform. The Hon. Guy Barnett, then Minister for Building and Construction, responded to those representations by making a commitment to Parliament to conduct a review of section 87 within the next 2 years.

The matter has now been referred to the WorkCover Tasmania Board to invite submissions and conduct a review.

Workers Rehabilitation and Compensation Act 1988 (the Act)

The objects of the Act are to establish a rehabilitation and compensation scheme for persons injured at work that:

- (a) *Provides for the prompt and effective management of workplace injuries in a manner that promotes and assists the return to work of injured workers as soon as possible; and*
- (b) *Provides fair and appropriate compensation to workers and their dependents for workplace injuries; and*
- (c) *Assists in securing the health, safety and welfare of workers and in reducing the incidence of workplace injuries; and*
- (d) *Provides an effective and economical mechanism for resolving disputes relating to the treatment and management of, and compensation in relation to, workplace injuries; and*
- (e) *Is efficiently and effectively administered; and*
- (f) *Is fair, affordable, efficient and effective.¹*

A worker who is incapacitated (either totally or partially) for work as a result of a work-related injury or disease is entitled to weekly compensation payments.² The maximum period of entitlement for a worker with a whole person impairment (WPI) of 15% or less is 9 years. For a WPI below 20% but above 15% the period is 12 years. For a WPI below 30% but above 20% the period is 20 years. For a WPI of greater than 30%, until the entitlements cease in accordance with section 87 of the Act.³

Section 87 of the Act provides:

- (1) Subject to subsection (2), an entitlement of a worker to weekly payments of compensation under section 69 in relation to an injury in respect of which an employer is liable to pay compensation under this Act ceases –
 - (a) if the injury occurs 12 months or more before the date on which the worker attains the pension age – on the date on which the worker attains the pension age; or
 - (b) if the injury occurs less than 12 months before the date on which the worker attains the pension age – on the date one year after the injury occurs.
- (2) Where the terms and conditions of a worker's employment are such as to permit him or her to continue in that employment beyond the date on which the worker attained the pension age, the worker may refer to the Tribunal for determination the question as to whether or not the provisions of subsection (1) should apply to him.
- (3) In any case referred to it pursuant to subsection (2) , if the Tribunal is satisfied –
 - (a) that the terms of the worker's employment would have entitled him or her to continue in that employment beyond the date on which the worker attained the pension age and the worker, but for the injury referred to in subsection (1) , intended to continue in that employment beyond that age; and
 - (b) that the incapacity of the worker resulting from that injury will continue beyond the date on which he or she attains the pension age– the Tribunal may determine that weekly payments of compensation may be continued beyond the dates mentioned in subsection (1) and shall determine the period for which such payments are to be continued.

The effect of section 87 of the Act is that a worker ceases to be entitled to compensation once they obtain the pension age. There are 2 exceptions:

- If the worker is injured within 12 months of attaining the pension age, the weekly payments will continue for 12 months after the date of the injury; and,
- If the worker's employment would have continued beyond the pension age and the worker intended to continue to work, they can apply to the Worker's Rehabilitation and Compensation Tribunal (the Tribunal) for a determination to extend weekly payments beyond the pension age.

1 Section 2A of the Act.
2 Section 69 of the Act.
3 Section 69B of the Act.

What is the problem?

Age-based discrimination

Because section 87 of the Act treats those approaching the pension age differently in comparison to younger workers, it has been criticised as age-discriminatory.

Section 87(1) directly restricts compensation payments for those who are of pension age or within 12 months of the pension age.

Whilst section 87 (2) & (3) of the Act provide a safeguard for the worker to receive payments beyond the pension age, the worker bears the onus of satisfying the Tribunal of the statutory test. Therefore this safeguard has also been labelled as age-discriminatory.

Population ageing and workplace participation

In 2017, 15% of Australians were aged 65 and over. This has increased from 5% in 1927 and 9% in 1977.⁴ The proportion of Australians aged 65 and over is expected to continue to grow to 22% in 2057, and 25% by 2097⁵.

This greater portion of older Australians is true in Tasmania which, in 2016, had the greatest median age of 42 years, and the highest proportion of people aged over 65 years, of any Australian state or territory.⁶

Greater longevity in Australia also partially equates to greater workforce participation. Of the people aged 65 and over in Australia, the portion who are either looking for work or who are employed is growing. In 2006, 8% of persons aged 65 were employed or looking for work and in 2018 this figure was 13% (17% for men and 10% for women).

In Australia, employment is trending downwards in manual-labour industries, while white collar industries are trending upwards.⁷ This shift may enable older Australians to stay in the workforce for longer and with lower work health and safety risks.

Thus a further criticism of the age-based restriction in Section 87 of the Act is that it does not reflect the contemporary reality of a growing older workforce participation.

What does the data say?

Table 1 shows weekly payments in Tasmania to persons over 65 as a portion of all compensation payments in Tasmania between 2012 and 2018.

This data shows that weekly payments for persons over 65 remain at less than 1% of the total weekly payments of all persons.

Table 1. Weekly payments in Tasmania to persons aged 65 and over

	Weekly payments 65 and over	Total compensation payments 65 and over	Total compensation payments - all persons	Weekly payments 65 and over / all compensation (%)	Total compensation payments 65 and over / all compensation (%)
2012	465,080	1,377,509	135,344,109	0.34%	1.02%
2013	415,451	1,482,880	150,493,445	0.28%	0.99%
2014	376,273	3,558,030	171,250,681	0.22%	2.08%
2015	677,379	5,686,967	158,715,380	0.43%	3.58%
2016	691,892	2,070,519	154,920,716	0.45%	1.34%
2017	774,539	2,625,662	166,669,848	0.46%	1.58%
2018	1,024,102	3,946,081	162,786,800	0.63%	2.42%

4 Australian Bureau of Statistics (ABS) 2014. Australian historical population statistics, 2014

5 Australian Bureau of Statistics (ABS) 2014. Australian historical population statistics, 2014

6 Australian Bureau of Statistics (ABS) 2016. Australian historical population statistics, 2016

7 Australian Bureau of Statistics (ABS) 2017. Labour Force, Australia, Detailed, Quarterly 2017

Table 2 shows the proportion of injuries within the Workers Compensation Scheme that have been sustained by persons aged 65 and over between 2012 and 2018.

Table 2. Injuries (Tasmania)

	Number of injuries 65 years and over	Total injuries	Portion of persons 65 and over in workforce (%)	Portion of injuries of persons 65 and over to total injuries (%)
2012	44	4761	3.70%	0.92%
2013	108	8523	3.39%	1.27%
2014	114	7857	4.42%	1.45%
2015	115	7854	4.32%	1.46%
2016	139	7435	4.61%	1.87%
2017	140	7179	Not available	1.95%
2018	195	7140	Not available	2.73%

Table 3 shows the number of applications made to the Tribunal under section 87 (2) & (3) of the Act to extend the period of entitlements beyond the pension age.

Table 3. Section 87 applications to the Tribunal to extend weekly payments beyond the pension age (Tasmania)

Financial year	2014/2015	2015/2016	2016/2017	2017/2018
Number of applications	10	2	4	9

Of the 9 applications that were lodged in the 2017/18 financial year, 5 were resolved at or after the conciliation conference, 2 were resolved after the 1st letter before conciliation and 2 were in progress.

What happens in other States and Territories?

Each state and territory has their own compensation scheme. Table 4 summarises the compensation schemes in each state regarding age restrictions.

Table 4. Weekly payment schemes by jurisdiction

	Maximum duration of weekly payments	Age-based restriction on weekly payments	Options for redress upon meeting age restriction
TAS*	9 years +	Pension age. Weekly payments available for 52 weeks if injured within 52 weeks of pension age	Workers Rehabilitation and Compensation Tribunal
NT*	5 years	Pension age or “normal retiring age”. Weekly payments available for 104 weeks if injured within 104 weeks of pension age ⁴	None
WA*	Total value of weekly payments limited to prescribed amount	65. Weekly payments available for 52 weeks if injured after 64 ⁵	Employer can extend compensation past 65; arbitration available if employer not satisfied. Only available until age 70.
VIC	No limit	Pension age. Weekly payments available for 130 weeks if injured within 130 weeks of pension age ⁶	None
SA	No limit for “seriously injured worker”. For other injuries, 2 years.	Pension age. Weekly payments available for 104 weeks if injured within 104 weeks of pension age ⁷	None
QLD	5 years ⁸	None	Not applicable
NSW	5 years ⁹	None	Not applicable

*Privately underwritten scheme

Queensland and New South Wales do not have age-based restrictions on compensation entitlements. Both of these jurisdictions limit the duration of weekly payments to 5 years.

Victoria and South Australia do have age-based restrictions. Unlike in Tasmania, in these jurisdictions the worker cannot seek a determination for extending these payments beyond the pension age. However, the worker approaching the pension age has a longer period of entitlements than in Tasmania, of 130 and 104 weeks respectively.

The Northern Territory has an age-based restriction of the pension age or the “normal retiring age”, whichever is higher. The normal retiring age is the age at which workers in the industry or occupation usually retire. Like Victoria and South Australia, there is no avenue to continue weekly payments beyond that age.

In Western Australia, workers compensation payments cease upon turning 65. If the worker’s employer is satisfied that the employee would have continued in employment but for the injury, payments can continue beyond this age. In the case of a dispute, the matter goes to arbitration.

4 Section 65 of the Return To Work Act 1986 (NT)

5 Section 56 of the Workers’ Compensation and Injury Management Act 1981 (WA) subject to Schedule 5.

6 Section 169 of the Workplace Injury Rehabilitation and Compensation Act (VIC)

7 Section 44 of the Return to Work Act 2014 (SA)

8 Section 144A of the Workers’ Compensation and Rehabilitation Act 2003 (Qld)

9 Section 39 of the Workers Compensation Act (NSW)

Potential options

The following is a list of possible options to a potential change to section 87 of the Act.

1. Remove all age restrictions and keep the maximum duration of payments the same;
2. Remove all age restrictions but lower the maximum duration of payments;
3. Keep the age restriction but increase the period before the pension age and subsequent compensation period (For example, if a worker is injured within 5 years of the pension age, they receive compensation for up to 5 years from the date of the injury.)
4. No change required. Keep the option to go to Tribunal under section 87 (2) and (3) of the Act.

These options are not exhaustive and the Board would like to hear from you about any other options you may propose.

Invitation for Submissions

The Board is seeking your input to the review of section 87 of the Act. All members of the public and interested groups are invited to lodge submissions.

Those lodging submissions are encouraged to address the following:

1. What do you think the main benefits that cessation on account of age of entitlement to weekly payments should achieve? (For example, enabling workers not to experience a 'gap' between when their entitlement to weekly payments end and their entitlement to the Age pension may begin.)
2. Do you have any concerns about potential changes to section 87 of the Act?
3. Should age restrictions be removed from compensation entitlements? What do you see as the advantages and risks associated with this? Would removing age-based restrictions still promote the objects of the Act under section 2A? Do you have suggested criteria for weekly payment cessation other than age?
4. The Tasmanian provision presumes that those who reach the pension age (set by the Commonwealth) do not intend to work beyond it. Does this scheme adequately reflect the realities of the labour market for aging workers?
5. If a worker intended to continue in their employment beyond the pension age, and the conditions of their employment would have allowed this to occur, the Workers Rehabilitation and Compensation Tribunal may make a determination that payments will continue for as long as it considers to be appropriate. Do you consider the Tribunal to be an accessible option for mature workers? Does the Tribunal create any barriers for pension age workers seeking a determination? Do you think the onus should rest upon the employer or insurer to satisfy the Tribunal that, but for the injury, the employment would have continued beyond the pension age? (This is the reverse of the injured worker needing to prove that they would have continued working).
6. A list of possible options to a potential change to section 87 of the Act is provided for in the previous section. Is there a particular option/s that you favour? If so, why is this best? Is there a particular option/s that you have concerns with? If so, what is your concern? Do you have other options that you would like the Board to consider?

Please provide any other information you consider may be relevant to the Board's consideration of these issues.

All written submissions must be received by **5:00pm** on **22 April 2019**.

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