**ATTACHMENT 2**

**FURTHER INFORMATION**

***Workers Rehabilitation and Compensation Amendment Bill 2022*
(Consultation Draft)**

**Introduction**

This paper provides information on the draft *Workers Rehabilitation and Compensation Amendment Bill 2022* (the Bill). The Bill sets out proposed amendments to the following two sections of the *Workers Rehabilitation and Compensation Act 1988* (the Act):

* Section 27 *Presumption as to cause of certain diseases in relation to fire-fighters*; and
* Section 87 *Cessation on account of age of entitlement to weekly payments*.

The Bill gives effect to the outcomes of two reviews coordinated by the WorkCover Tasmania Board (the Board) at the request of the Minister responsible for the administration of the Act.

**Section 27: Presumptive provisions for firefighters**

**Background**

Section 27 of the Act sets out the provisions whereby, when a fire-fighter who meets relevant criteria is diagnosed with a specified disease (each of which is a type of cancer), it is presumed, in the absence of evidence to the contrary, that fire-fighting was a substantial contributing factor to the disease.

The provisions currently cover three categories of fire-fighters – ‘career fire-fighters’, ‘volunteer fire-fighters’ and ‘occupational fire-fighters’ – each of which is described in section 27.

The diseases covered by the presumption and the period of employment as a fire-fighter (required before the presumption applies to each disease) are set out in Schedule 5 of the Act.

The qualifying period (i.e. the number of years the worker must have worked as a fire-fighter before the presumption applies) varies from five to 25 years, depending on the type of cancer.

Section 28 of the Act (in part) requires the Minister to cause a review of the operation of section 27 to be undertaken and completed as soon as practicable after three years from the completion of the previous review (except in the case of the first review which had to be undertaken after 12 months). The written report of each review must be laid before each House of Parliament.

The most recent review commenced in 2020. It was coordinated by the Board which engaged its actuaries, PricewaterhouseCoopers (PwC) to undertake the review.

Also in 2020, the Department of Police, Fire and Emergency Management (DPFEM) advised the Department of Justice that none of the three categories of fire-fighters described in section 27 of the Act covers firefighters employed in the Bushfire Risk Unit of the Tasmania Fire Service (TSF). These workers perform similar tasks and are exposed to similar risks to other fire-fighters covered under section 27.

Most of these workers are employees under the Tasmanian State Service Award and do not meet the definition of ‘fire-fighter’ in s.27 because they do not meet any of the specific definitions of ‘volunteer fire-fighters’, ‘career fire-fighters’ or ‘occupational fire fighters’ (each of which is also defined in s.27).

In setting out the focus of the 2020 review, the Attorney General and then Minister for Building and Construction instructed the WCTB that it should include an assessment of the cost of covering relevant employees of the Bushfire Risk Unit of the TFS under the provisions of section 27.

**The Board’s findings and recommendations**

The Board’s advice and PwC findings were tabled in the House of Assembly on 22 June 2021 and the Legislative Council on 29 June 2021. The findings are available [here](https://www.parliament.tas.gov.au/ha/tpapers/2021/p2021/HATP25.1_22_06_2021.pdf). The Board made the following recommendation:

Section 27 does not cover employees or members of the Bushfire Risk Unit. Members of this unit perform fire prevention as well as firefighting operations during the fire season. Members are not recognised under section 27, which only applies to fire-fighters, defined by the Act as ‘career fire-fighters’, ‘volunteer fire-fighters’ and occupational fire-fighters’.

There are 52 employees in the Bushfire Risk Unit, 6 of whom are already covered by the current legislation. PwC estimated the cost of covering employees in the Bushfire Risk Unit under section 27 to be an additional $53K per annum, representing an additional 9% of the estimated cost for paid firefighters. PwC noted, however, that the actual experience may be significantly different. Given the estimated small cost and that members of the Bushfire Risk Unit perform similar tasks and are exposed to similar risks to firefighters, section 27 should be amended to include members of the Unit. The Board’s advice is that this would be consistent with the objects of the Act prescribed by section 2A, including providing fair and appropriate compensation to workers and a fair, affordable, efficient and effective rehabilitation and compensation scheme.

The Board recommends that the Act be amended to include coverage of the employees of the Bushfire Risk Unit.

**Outcome**

The Government supports the Board’s recommendation that the Act be amended to cover employees of the Bushfire Risk Unit, who perform similar tasks and are exposed to similar risks to those fire-fighters who are covered.

Coverage would be consistent with the objects of the Act, including providing fair and appropriate compensation to workers and a fair, affordable, efficient and effective rehabilitation and compensation scheme.

**Consultation**

Key stakeholders were consulted in late 2021 on the proposal to amend the definition of occupational fire-fighter to include employees of the Bushfire Risk Unit.

Some stakeholders submitted that such workers are already covered by the existing definition of a career fire-fighter; however, the Government considers they are excluded on the basis that DPFEM does not have a significant role in the management of forests or parks.

**The Bill**

Clause 4 of the Draft Bill sets out the proposed changes to section 27 of the Act. The major change is the substitution of the existing definition of occupational-fire fighter with a new definition that will include coverage of employees of the Bushfire Risk Unit who undertake fire-fighting operations.

Although the intention is to delete and replace the entire definition of occupational-fire fighter, the proposed new provision does not change the status of those workers who are currently covered by the definition. The substantive change to the definition is to add a new group of employees, who are narrowly described to ensure the definition of does not become broader than intended.

**Section 87 Entitlements to Compensation for Older Workers**

**Background**

Section 87 of the *Workers Rehabilitation and Compensation Act 1988* (the Act) provides an age-restriction for weekly compensation payments for persons injured at work.

Prior to 1 January 2018, the age restriction was based on whether the injury, which caused the incapacity to work, occurred:

* on or before the date that the worker turned 64, in which case the entitlement to weekly payments ceased when the injured worker turned 65; or
* after the worker turned 64, in which case in which case the entitlement to weekly payments ceased one year after the date of injury.

In 2017 Parliament passed amendments to section 87 of the Act to remove references to the specific ages of 64 and 65, delivering the now current provisions, which came into effect on 1 January 2018.

The policy intent of amending the pre-2018 provisions was to remove any gap between the age when worker’s weekly compensation payments cease, and the age of entitlement to the age pension.

Since 1 January 2018, a person who is injured at work less than 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 a person was injured at work 12 months or more before attaining the pension age, the person’s entitlement to compensation ceases upon that person attaining the pension age.

An injured worker who would (but for his/her injury) have worked past his or her pension date may apply to the Tasmanian Civil and Administrative Tribunal (the Tribunal) for weekly payments to continue past pension age.

**Review of section 87**

Because older injured workers may be treated differently to younger workers, depending on whether the former have reached their pension age, and when the injury occurred in relation to that age, section 87 of the Act has been criticised for being 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.

In 2017, during Parliamentary consideration of the then proposed amendments to section 87, Parliament received representations from the Council on the Ageing Tasmania (COTA) that age restrictions should be removed from the Act completely, or alternatively, that the age based restrictions for workers approaching the pension age be relaxed. These proposals went beyond the scope of the intended reform, and the then Minister for Building and Construction responded to those representations by making a commitment to a review of section 87 within the next 2 years.

On 31 October 2018, the then Minister referred the matter to the WorkCover Tasmania Board (the Board) for analysis, consultation and advice.

*Consultation and stakeholder views*

On 4 February 2019 COTA met with the Board’s Rehabilitation and Compensation Committee and presented their concerns.

The Board wrote to key stakeholders, called for submissions through regional newspapers, and published an Issues Paper on 25 March 2019 on the WorkCover Tasmania and Department of Justice websites. The comment period closed on 22 April 2019.

Written submissions were received from 14 stakeholders.

Four stakeholders cited concern about the cost of an amendment, and advocated for no change to be made to the Act.

Five stakeholders advocated for age-restrictions to be removed and four other stakeholders suggested an increase to entitlements.

Four of the fourteen submissions supported changes to the law or procedures, in favour of the worker, for section 87 referrals to the Tribunal.

**The Board’s findings and recommendations**

*Options proposed*

In reporting to the responsible Minister (now the Minister for Workplace Safety and Consumer Affairs), the Board presented two options for the Minister’s consideration:

Option 1: Maintain the status quo;

Option 2: Cease entitlements to weekly payments at the pension age if the injury occurred more than two years before the worker attained the pension age. If the injury occurred when the worker was aged two years from the pension age or older, cease entitlements to weekly payments after two years from the date of the injury. The changes are to operate prospectively, and not retrospectively.

*Cost of the proposed options*

The Board engaged PricewaterhouseCoopers (PwC) to provide advice on the potential impacts of the Tasmanian Workers Compensation Scheme of revisions to section 87 of the Act. Under Option 2, the expected financial impact on the premium pool per accident year was estimated at $893,716. The expected impact on the suggested premium rate was an estimated increase of 0.5%.

As Option 1 proposed no change to the legislation, this option would have no impact on the scheme.

*Jurisdictional Analysis*

A jurisdictional comparison found that Tasmania was relatively more generous to older workers than other jurisdictions, in that Tasmania includes the option to seek a determination from the Tribunal to extend payments beyond the restrictions in section 87(1) of the Act. No other state or territory had this option. However, without making an application to the Tribunal, Tasmania was found to have the least generous entitlements for older workers.

In more detail, all jurisdictions except Queensland and Western Australia were found to provide for the cessation of entitlements at pension age or a defined ‘retirement age’. If injury occurs a specified number of weeks (or 2 years, in the case of three jurisdictions) before the pension or retirement age, then payments cease at the expiration of the specified number of weeks or years after the date the incapacity occurred.

Western Australia and Queensland were found to have no age restriction, having, instead, a cap on weekly entitlements (a monetary cap in the case of Western Australia, and a cap based on a specified number of years and/or a monetary limit in Queensland).

*Discriminatory nature*

While the Board found that an age-based restriction on workers compensation payments in section 87 is not unlawful, the majority of stakeholder submissions considered the provisions to be discriminatory.

Although Option 2 maintains an age restriction, and therefore would not fully address this concern, it would reduce the inequality between older and younger workers in terms of entitlements.

**Why not remove the age-based restrictions imposed by section 87?**

Delivery of a workers’ rehabilitation and compensation scheme that is fair, affordable, efficient and effective requires a balanced approach to ensure that the benefits of the scheme do not become unaffordable.

All jurisdictions have some means of limiting costs, whether it is by capping payments (by amount and/or time) or ceasing payments (due to retirement or pension age and the timing of the injury in relation to that age).

Under Tasmania’s current scheme, removing age restrictions from the Act would leave some claims uncapped.

In Tasmania, 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. There is no monetary limit to the total amount received; nor is there a maximum amount for weekly payments. There are, however, ‘step-down’ provisions whereby payments reduce at 27 and 79 weeks. The provisions were established to strike the appropriate balance between incentivising return to work and avoiding undue financial hardship on the worker.

There is also a cap on the duration of weekly payments based on the level of whole person impairment. However, where the whole person impairment is 30% or higher, there is no cap on the length of payment. Therefore, the removal of age restrictions in Tasmania without some other cessation clause will, in some cases of serious injury, impose a liability on an employer conceivably for the term of the worker’s life. This would be a move away from the ‘employability’ model, which is the basis of the current system, towards a ‘lifetime liability’ model.

Such a change would be a policy shift that would go to the objectives and purpose of the scheme. The Tasmanian scheme was not established as a whole-of-life insurance scheme or social security scheme. It operates in the context that there are number of products, including superannuation and the age pension, that provide income to individuals at the end of their working lives. Section 87 allows for the cessation of payments at an age where these other funding sources are potentially available. (Although it is recognised that these may not be available to all former workers, the age pension, in particular, provides a safety-net to those former workers in most need).

While section 87 limits the entitlement of an injured worker’s weekly compensation payments on the basis of age, it takes into account that workers may have planned to work beyond pension age, by allowing the Tribunal to determine (if satisfied of certain matters after application by the injured person) that those payments are to be continued for a period determined by the Tribunal. The Board’s review found that this flexibility was not offered by any other state or territory.

The Board’s proposal to extend the time-frames in section 87(1) will allow more injured workers to receive weekly payments for longer. The flexibility for the Tribunal to extend these payments, on a case by case basis (upon application) will remain. The proposal is affordable and remains within the scope of the existing scheme.

**Outcome**

The Board’s recommendation to adopt Option 2 is supported by the Government.

The Government recognises that a number of stakeholders have raised concerns about the requirement for an injured worker to initiate an application and provide evidence to the Tribunal under section 87(2) in order to receive payments for a longer period. The Government will work with stakeholders to ensure applicants are supported through the process.

**The Draft Bill**

Clause 5 of the Draft Bill delivers the Board’s recommended policy change, and clarifies the intent of the existing provisions. In the interests of clarity, and consistency in the way time is calculated, the changes are worded differently to the Board’s recommendation. Nevertheless, they achieve the same outcome.

The Bill also makes the following clarifications:

*Interpretation of existing section 87(1)*

In recent years there has been some confusion as to whether section 87(1)(b) (as currently drafted) is applicable to workers who are injured after pension age.

Under the pre-2018 version of section 87(1)(b), if a worker was injured after the date of turning 64, his or her entitlement to weekly payments would cease 12 months after the date of injury.

It was the intent that the 2018 amendments to section 87(1) to personalise the specified ages so that 65 would be replaced by the worker’s age of eligibility for the age pension, and 64 would become the age of the worker one year before that date. However, in redrafting section 87(1)(b), the treatment of workers injured after attaining pension age became unclear because ‘*after the date on which the worker attains the age of 64 years*’ became ‘*less than 12 months before the date on which the worker attains the pension age’.*

On 1 July 2020, the Tribunal determined that section 87 did not apply in a particular case of a person who was injured at work at an age older than the person’s pension age – P v Circular Head Livestock Transport Pty Ltd [2020] TASWRCT 24. The Tribunal concluded that the current wording of section 87 does not provide for the cessation of weekly compensation payments to a worker who is injured after he or she reaches pension age.

The proposed amendment will rectify the lack of a specific reference to an injury occurring on or after the date on which the worker attains pension age, by including new subclause (c) to section 87(1) to make the intent clear.

*Consequential amendment and clarification of sections 87(2) and 87(3).*

Subsections (2) and (3) of section 87 have also proved confusing. Their purpose is to allow an application to be made to the Tribunal, and for the Tribunal to determine whether weekly compensation payments should be extended beyond the cessation dates mentioned in subsection (1). However, the information required and matters on which the Tribunal must be satisfied under (2) and (3) do not directly pertain to the decision to be made.

The sections require the Tribunal to be satisfied on whether or not: the terms of the workers employment would have entitled the worker to work beyond pension age; the worker intended to do so; and the injury prevented it. However the Tribunal must be determine whether and for how long payments should be made beyond the date for cessation of payments, and it would be more appropriate for the Tribunal to be satisfied of matters pertaining to this question.

The proposed amendments align the grounds for an application and the basis for the Tribunal’s decision with the matters to be decided, by referring to the cessation date rather than the pension date.