Practitioners will be aware that a wide-ranging series of amendments to the WorkCover legislation were passed by Parliament in June 2008. Those amendments are being phased in over time from July 2008 to July 2010. As many of the changes are very important they will have a significant effect on lawyers who practice in this jurisdiction. This article focuses on the amendments dealing with entitlements to weekly payments.

The previously existing section 35 was repealed and replaced with a new section 35. Sections 35A-C were also introduced. These provisions came into operation on or after 1 July 2008, although initially only for injuries occurring after 1 July 2008. As from 1 April 2009 however they also apply for claims involving injuries suffered on or before 30 June 2008.

Workers’ entitlements to weekly payments for the first 2½ years are now broken up into what are called three entitlement periods: the first entitlement period (section 35(8)(a)); the second entitlement period (section 35(8)(b)) and the third entitlement period (section 35(8)(c)). The first two entitlement periods run for aggregate periods of 13 weeks each (whether consecutive or not). For the first entitlement period a worker is entitled to 100% of his or her notional weekly earnings (section 35A(1)), while the worker is entitled to 90% of his or her notional weekly earnings during the second entitlement period (section 35A(2)).

The third entitlement period runs for an aggregate period of 104 weeks (whether consecutive or not) once the second entitlement period concludes at week 26. In other words it runs until week 130. During the third entitlement period a worker is entitled to 80% of his or her notional weekly earnings if he or she has no current work capacity and 80% of the difference between his or her notional weekly earnings if the worker has current work capacity (section 35A(3)). The terms “no current work capacity” and “current work capacity” are both defined in the definition section of the Act (section 3).

As the first three entitlement periods are aggregate, each can potentially run much longer than their notional stated times. The actual period will vary depending on the facts in each case.
Each of the entitlement periods specified in section 35(8) state that the relevant period is a period in respect of which a worker has an incapacity for work and is entitled to the payment of compensation under the Act on account of that incapacity. As such, both an incapacity for work and an entitlement to compensation are required before an entitlement period can commence or continue. As "compensation" is specifically defined in section 3 to include any monetary benefit payable under the Act, it would appear that a payment of medical expenses under section 32 could support the continuation of one of the entitlement periods in a case where a worker is not receiving compensation in the form of income maintenance, even though the worker might be at work full-time (presumably on modified duties).

If this analysis is correct, how is the aggregate section 35(8) period to be calculated in such circumstances? If we assume for example that a worker has a weekly physiotherapy visit out of work hours for say two months and does not receive any income maintenance during this period, does the meeting of the cost of each of these attendances amount to a payment of compensation such that it adds to the entitlement period for an additional eight weeks (or for some other period, and if so what)? No doubt this is an issue that will ultimately need to be decided by the Full Supreme Court.

What happens at the end of the third entitlement period? Section 35B(1) provides that subject to section 35C, a worker’s weekly entitlement to weekly payments ceases at the end of the third entitlement period unless the worker has no current work capacity and is likely to continue indefinitely to have no current work capacity.

However, in cases where workers are about to come to the end of their third entitlement period, section 35B(4) provides that their weekly payments cannot be discontinued unless they have been assessed as having no current work capacity and likely to continue indefinitely to have no current work capacity. Section 35B(6) also provides that a worker’s weekly payments cannot be discontinued unless he or she has been given at least 13 weeks notice in writing of the proposed discontinuance and the notice cannot be given until after the section 35B(4) assessment has been undertaken (section 35B(7)).

One of the issues that will arise in these cases – which will not be uncommon – is whether the word "indefinitely" in section 35B(2) means "permanently" or some other shorter period, and if so what?

Putting this important threshold issue to one side, not all workers will have no current work capacity at the end of the third entitlement period at 130 weeks. How are these to be dealt with? Section 35C(1) allows such workers to apply to the Corporation for a determination that their weekly payments not cease at the end of the third entitlement period. Under section 35C(2) the Corporation can determine that the weekly payments not cease if it is satisfied that the worker is in employment and is likely to continue indefinitely to be incapable of undertaking further or additional employment or work to increase the worker’s current weekly earnings because of the compensable disability. The Corporation cannot however refuse to make a determination for the continuation of weekly payments without first referring the issue for the opinion of a Medical Panel. As such, there is likely to be formal involvement of the Medical Panel as part of the section 35C assessment process.

On the other hand, it is expected that the section 35B process of assessing whether a worker has no current work capacity (which is likely to continue indefinitely), will be undertaken on a more informal basis, with EML obtaining a report(s) from the worker’s treating doctor(s). There is no statutory requirement to have a worker assessed by a Medical Panel as part of the section 35B(1) assessment. If a worker wishes to challenge what he or she considers to be an adverse determination, the worker can do so by lodging a Notice of Dispute in the usual way in the Workers Compensation Tribunal. It seems likely that in this event the Medical Panel will become involved as part of the dispute process.

As we understand it at this stage, no workers have received notifications from EML advising them that they are to be the subject of work capacity reviews under section 35B, however this now cannot be too far away.

For any queries about this, or other Risk Management Services offered by Law Claims, please contact the PI Risk Manager, Gianna Di Stefano on 8410 7677.