

Australian Capital Territory

# Motor Accident Injuries (Income Replacement Benefit) Guidelines 2021

Disallowable instrument DI2021–280

made under the

**Motor Accident Injuries Act 2019, section 487 (MAI guidelines)**

---

**1 Name of instrument**

This instrument is the *Motor Accident Injuries (Income Replacement Benefit) Guidelines 2021*.

**2 Commencement**

This instrument commences on the 7<sup>th</sup> day after its notification.

**3 Guidelines**

I make the guidelines attached to this instrument.

**4 Revocation**

The *Motor Accident Injuries (Income Replacement Benefit) Guidelines 2019* (DI2019-243) is revoked.

Lisa Holmes

MAI Commissioner  
MAI Commission

9 December 2021

# Income Replacement Benefit Guidelines

## Contents

<b>1. INTRODUCTION</b>	<b>1</b>
<b>2. STATUTORY FRAMEWORK</b>	<b>1</b>
<b>3. PAID WORK (Section 78)</b>	<b>1</b>
<b>4. CAPABLE OF BEING IN PAID WORK (Section 79)</b>	<b>2</b>
<b>5. PRE-INJURY WEEKLY INCOME OR PRE-INJURY EARNING CAPACITY (Section 88)</b>	<b>3</b>
<b>6. CALCULATING INCOME REPLACEMENT PAYMENTS FOR CONCURRENT APPLICATIONS (Section 487)</b>	<b>10</b>
<b>7. PAYMENT OF INCREMENTS FOR AN APPRENTICE, TRAINEE OR YOUNG PERSON (Section 99)</b>	<b>12</b>
<b>8. MAKING A DECISION ABOUT AN INJURED PERSON'S POST- INJURY EARNING CAPACITY (Section 100)</b>	<b>13</b>
<b>9. EXCEPTIONAL CIRCUMSTANCES FOR BACK-PAYING LATE APPPLICATIONS (Section 101)</b>	<b>14</b>
<b>10. INTERIM WEEKLY PAYMENTS (Section 103)</b>	<b>15</b>
<b>11. FITNESS FOR WORK CERTIFICATES (Section 104)</b>	<b>15</b>
<b>12. CONDUCT OF MEDICAL AND OTHER EXAMINATIONS (Section 105)</b>	<b>17</b>

## 1. INTRODUCTION

The income replacement benefit guidelines (guidelines) are part of the MAI guidelines made under section 487 of the *Motor Accident Injuries Act 2019* (MAI Act). The purpose of the guidelines is to provide advice about payments to compensate people for income lost through being unable to work, or through working at a reduced capacity, because of an injury as a result of a motor accident.

Specifically, this material is designed to advise insurers as to their obligations to pay income replacement benefits including making decisions about whether a person is entitled to these benefits, when payment of these benefits should start, reduce or stop, and how to work out the amount of a benefit payment.

## 2. STATUTORY FRAMEWORK

Part 2.4 of the MAI Act provides for an entitlement to income replacement benefits to persons injured in a motor accident, if the person was over 15 years of age and either in paid work, or capable of being in paid work, on the date of the motor vehicle accident.

The legislative framework for income replacement benefits includes:

- the MAI Act;
- the Motor Accident Injuries Regulation 2019 (the Regulation); and
- these Guidelines.

## 3. PAID WORK (Section 78)

These Guidelines make provision for what is, or is not taken to be, paid work for the purposes of Part 2.4 of the MAI Act.

### 3.1 What is taken to be paid work

**3.1.1** Paid work includes work as a *common law employee* and includes employees on paid leave at the date of an accident.

**3.1.2** A person is also taken to be in paid work, as an employee, on the date of an accident if the person is:

- a party to a contract that is wholly or principally for the labour of that person, where the person paid under the contract must perform the work personally and is not paid to achieve a result;
- a member of a legislative body however described including a local council;
- a party to a contract for the person to be paid to perform, write or present, or to participate in the performance or presentation of any media, music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills; a person who is appointed, holds, or performs the duties of an office or

position under the constitution, or under any law, including that of an overseas jurisdiction; or

- a person who is otherwise in the service of a government body, including an overseas government body, including as a member of a defence force, police force or a diplomatic mission; and
- a person entitled to payments for the performance of duties as a director of a corporation or other incorporated body.

**3.1.3** A person would also be taken to be in paid work if they are self-employed on the date of an accident. A person is self-employed if they carry on a business and provide personal services such as labour, knowledge or skills to that business. A person may carry on a business as a sole proprietor, through a partnership, a trust or a company.

## **3.2 What is not taken to be paid work**

**3.2.1** A person is not self-employed if the nature and extent of their activities does not amount to carrying on a business. For example, a person receiving some income from a hobby farm, eBay trading, or from irregular contracted tasks. A person carrying on a business would need to have retained appropriate records for that business, for example tax returns or business activity statements.

**3.2.2** A person undertaking work of a voluntary nature, and receiving some recompense for expenses incurred, and minor benefits in relation to their work, is not to be taken to be in paid work.

## **4. CAPABLE OF BEING IN PAID WORK (Section 79)**

These Guidelines make provision for matters to be taken into account in determining whether an injured person is capable, or not capable of being, in paid work for the purposes of part 2.4 of the MAI Act.

Under section 79 of the MAI Act a person with a recent work history, or a person on unpaid leave or workers compensation or a person with a prospective work arrangement is capable of being in paid work on the date of an accident.

### **4.1 Capable of being in paid work—recent work history**

**4.1.1** A person that works on a casual or seasonal basis, or has a broken work pattern, may not be in paid work on the date of a motor accident. Under section 79 of the MAI Act they will still be considered as capable of being in paid work on the date of an accident if they worked at least 260 hours in the 52 weeks (work test) prior to a motor accident.

**4.1.2** In deciding whether a person satisfies the work test an insurer is to base their decision on information obtained about a person's work history and count all paid work undertaken as an employee.

**4.1.3** For a person that was an employee this could include information from a personal injuries application, payslips, a PAYG payment summary, tax return or a

written employment or service contract. An insurer may also contact an employer, if authorised in a personal injuries application or subsequently, or rely on a signed declaration from an injured person or an employer, in accordance with paragraph 5.3.1 of these guidelines, to confirm a person's work history. If a person did any work as a self-employed person, they would need to show from their business records, they were carrying on a business at the time the work was undertaken.

#### **4.2 Capable of being in paid work - new work or business arrangement**

**4.2.1** A person will be capable of being in paid work if they entered into a new work or business arrangement prior to the motor accident. An insurer must be provided with bona fide evidence to determine a person entered into a binding work or business arrangement prior to the motor accident.

**4.2.2** For a new employment arrangement, this is to include a written contract from an employer showing a start date, any finish date, conditions of employment and the proposed remuneration under the arrangement. The contract is to be for ongoing or fixed term employment and not casual employment and must have been accepted by the person prior to the motor accident.

**4.2.3** For a person purchasing a business this is to include a purchase contract or a franchise agreement for the business entered into prior to the motor accident. For a person starting a new business evidence is to include a binding contract entered into prior to the accident, to purchase or lease premises or assets, goods and chattels, or for service or supply arrangements, necessary to conduct the business.

#### **4.3 Capable of being in paid work - unpaid leave**

For a person on unpaid leave, the person will be anticipated to return to paid work on the date the leave ends, or on an earlier date if they can show an arrangement to return to work on an earlier date was in place prior to the accident.

#### **4.4 Not capable of being in paid work - unpaid leave**

A person on unpaid leave is to be taken as not capable of being in paid work if they have moved away from the location of their employment and cannot demonstrate they intended to return to the location of their employment at the end of their unpaid leave.

### **5. PRE-INJURY WEEKLY INCOME OR PRE-INJURY EARNING CAPACITY (Section 88)**

These guidelines make provision in relation to matters to be taken into account when working out a person's pre-injury weekly income or pre-injury earning capacity.

An insurer needs to work out a person's pre-injury income being a person's pre-injury weekly income or pre-injury earning capacity to calculate the amount of income replacement benefits the person is entitled to receive.

## **5.1 Pre-injury weekly income or pre-injury earning capacity – employee**

**5.1.1** When working out a person’s pre-injury income as an employee an insurer will need to be provided with bona fide evidence of the person’s gross income and employment arrangements over a period of up to 52 weeks before an accident, or for a person on unpaid leave, up to 52 weeks prior to the leave commencing. The following primary evidence is to be treated as bona fide evidence:

- a payslip issued in accordance with the *Fair Work Act 2009* (Cwlth)
- a PAYG summary or tax return
- a contract for employment or services
- a document evidencing an appointment to a public service, elected or statutory position or a directorship with an incorporated body
- a certified copy or extract of a record of wages and employment, retained in accordance with *Fair Work Act 2009* from an employer
- a contract for salary packaging arrangements.

**5.1.2** If primary evidence of a person’s gross income over a given period is not available, an insurer may rely on two sources of secondary evidence, or a primary and secondary source of evidence.

**5.1.3** The following secondary sources of evidence can also be used as bona fide evidence:

- a signed declaration from an employer, external administrator or service provider including the dates, hours and amount of wages paid to the employee
- a copy of a bank statement showing regular wage payments
- a signed declaration from the injured person confirming an employment arrangement including the dates, hours and amount of wages received from a stated employer and verifying the information is true and correct
- a copy of a claim for unpaid wages.

**5.1.4** If a person is an ongoing employee or a fixed term contractor an insurer may estimate their pre-injury weekly income over the calculation period, based on their last PAYG summary or their annual salary (pro-rata for a part-time employee) set out in their employment contract, an award or agreement at the time of the accident. An estimate may also be made if a person is stood down by their employer in response to a public health emergency at the date of the accident, as the person was still in paid work. The estimated amount is to be used to calculate the person’s pre-injury weekly income unless the person is able to substantiate (through the provision of other evidence such as payslips) that their actual gross income over the calculation period was higher.

**5.1.5** If a person is a casual worker (had paid work for at least 260 hours in the 52 weeks immediately before the date of the motor accident), an insurer is to obtain evidence of the pay they received for this work. Under section 83 of the MAI Act a casual worker’s pre-injury weekly income can be worked out in two ways based on their pay, and it is the higher of the average weekly amount that is paid to the person.

**5.1.6** For a casual worker that was in paid work for at least 260 hours in the 52 weeks prior to the accident and worked those 260 hours in the 13 weeks immediately before the accident, pre-injury weekly income is to be worked out under paragraph 83(1)(b) of the MAI Act unless the worker can substantiate that their actual gross income over the 52 weeks prior to the accident results in higher pre-injury weekly income.

**5.1.7** When obtaining evidence about a casual worker's pay, an insurer should request only enough evidence from an injured person or their employer for a reasonable estimate of the person's pre-injury weekly income over the calculation period to be made. For example, an estimate could be made using a person's year to date earnings on the last payslip they received before the accident or their most recent PAYG payment summary, for each of their employers, together with a statement about the person's work history prior to the accident. A casual worker that does not agree with an estimate may provide further evidence to substantiate their actual gross income over the full calculation period, such as individual payslips covering the full calculation period.

**Example 5.1 – Working out pre-injury weekly income for an ongoing employee**

Charlie is an ongoing employee (i.e. permanent) with the Australian Public Service. Charlie suffers serious spinal and head injuries in a motor accident on 1 November 2021 and submits her application within 13 weeks of her accident. On the date of the accident Charlie was with the Department of Industry, Innovation and Science. The Department emails a signed letter to the insurer confirming that Charlie:

- has been a full-time employee of the Department since 15 January 2015;
- at the date of the accident Charlie held an APS level 6 position, at the second pay increment;
- Charlie's annual salary as at the date of the accident was \$88,590;*ojn*
- Charlie was not being paid any additional allowances (e.g. a first aid allowance)

Charlie also provides a copy of her last payslip prior to the accident, which contains information that reconciles with her employer's letter.

On the basis of the evidence the insurer works out her pre-injury weekly income:

$$\frac{\$88,590 \times \left(\frac{364}{365}\right)^*}{52} = \$1,698.99.$$

Charlie chooses to accept the insurer's calculation. Her income replacement payment for up to the first 13 weeks from the accident will be \$1,614.04 before tax, being 95 percent of Charlie's pre-injury weekly income.

\* Use 364/366 in the formula for any 52 week period prior to an accident that includes a leap day.

**5.2 Pre-injury weekly income or pre-injury earning capacity – Self-employed persons**

**5.2.1** An insurer will need to work out the net income a self-employed person derives, or will derive, from the personal services (labour, skills or knowledge) the person provides, or will provide, to a business to calculate the person's pre-injury weekly

income or pre-injury earning capacity. Alternatively, if as a result of an injured person's injuries their business engages someone to perform their work, then the injured person may elect in writing to use the cost of the substituted labour as their pre-injury weekly income.

**5.2.2** Under the net business income method an insurer will need to determine the net income a self-employed person derives from a business by taking into account:

- the income and deductions for the business in the last tax return lodged in respect of the business prior to the accident or in more recent financial records or projections, and
- the personal services the injured person provided, or proposes to provide, to the business.

**5.2.3** An insurer is to base their calculation of net income of a self-employed person using the net income figure in the last tax return of the business. An insurer should use the 12 month period for the tax return to determine the person's pre-injury weekly income, rather than the 52 week period immediately prior to an accident.

**5.2.4** If a tax return has not been lodged, or there has been a significant improvement in profitability of the business, a weekly income figure is to be calculated using recent financial statements, accounting records and business activity statements for the business, or in the case of a newly purchased business, from previous accounting and tax records for the business. If a person is starting a new business, including through the purchase of a franchise, the insurer is to base the calculation on financial projections for the business prepared prior to the accident. The insurer can have regard to the fact that these may be projections.

**5.2.5** The net income of a business must be adjusted so it reflects the share of the net income of the business attributed to the personal services the injured person provides or will provide to a business. Any income or deductions that do not relate to the provision of personal services to the business, will either need to be deducted from, or added back to, the net income of the business. This may include any interest, rent (and associated deductions) and dividends received, and capital gains outside the normal course of the business. The adjusted net income of the business may then need to be apportioned so it reflects the share of the gross income of the business attributed to the personal services the injured person has provided to the business. A pre-injury weekly income or earning capacity amount is then to be calculated from the injured person's share of the adjusted net income for the given period.

**5.2.6** A self-employed person must make all necessary financial and taxation records available to an insurer for these purposes in a suitable form to facilitate the insurer's assessment. As these records are normal business activities, any cost incurred to prepare or make them available to an insurer are costs of the self-employed person.



**5.2.7** The substituted labour method can be used if an injured person’s business engages someone to perform the personal services they provided to the business before the accident. Under this method the weekly cost of this labour can, with the agreement of the injured person, be used as a proxy for the pre-injury weekly income amount of the injured person. The cost of this labour should reflect current labour market rates in the geographical location and may include on-costs such as superannuation and workers compensation premiums.

**Example 5.2 - Working out pre-injury weekly income for a self-employed person – net business income method**

Joe fractures his ribs and right arm in a motor accident on 1 December 2020 and submits his application within 13 weeks of the accident. His insurer accepts a certificate of fitness from his doctor certifying he is unable to work, as a floor sander and polisher, for 12 weeks following the accident.

Joe operates “Shiny Floors” a floor sanding and polishing business as a sole proprietor. Joe personally does all the floor sanding and polishing for the business, does not employ or contract anyone else in the business and does not do any other work outside of the business.

Joe’s most recent tax return for the 2019-2020 income year shows the following business income from Shiny Floors:

<b>Total business income</b>	<b>\$95,000</b>
<b>Expenses</b>	
Motor vehicle expenses	\$4,000
Depreciation expenses	\$1,000
All other expenses	\$7,000
<b>Net income from business</b>	<b>\$83,000</b>

Joe’s pre-injury weekly income is worked out as  $83,000 \times \left(\frac{364}{365}\right)^* \div 52 = \$1591.78$ .

365

Joe will receive 95 percent of this amount as an income replacement payment for 12 weeks following the accident.

\* Use 364/366 in the formula for any income tax year that includes a leap day.

### **Example 5.3 - Working out pre-injury weekly income of a self-employed person-substituted labour method**

Fred and Barbara Green run the Misty Mountain Organic Café and Bed and Breakfast. The business and the café building, and the two bed and breakfast units are owned by Misty Mountain Pty Ltd as trustee of the Green Family Trust. Fred and Barbara are joint shareholders in Misty Mountain Pty Ltd, and the sole beneficiaries of the Green Family Trust. The trust structure is used to equally split all profits from the business between Fred and Barbara. Neither Fred nor Barbara draw a wage from the business.

The café is open 6 days a week on Tuesdays through to Sundays from 8am to 3pm. Fred and Barbara employ a casual cleaner to service the bed and breakfast units. Fred, a qualified chef, prepares all café meals. Fred is always assisted by one casually employed waiter/barista. Barbara also works in the front of the café on most weekends, and occasionally on weekdays when a waiter is unavailable. She also attends to bed and breakfast bookings, does the banking and accounts for the business and tender to the café's herb and vegetable garden.

Barbara is hit by a car while riding her bicycle and suffers a broken collar bone and some minor lacerations to her arms. As a result of the injuries she is unable to work in the cafe for thirteen weeks following the accident and requires some additional assistance from Fred to perform banking and gardening tasks for the business. As a result of Barbara's injuries Misty Mountain Pty Ltd employs an additional casual waiter to work for a total of 14 hours a week, over the busy weekend period.

Barbara elects to use the substituted labour method to work out her pre-injury weekly income rather than supply the tax and accounting records for the business. The cost of employing the waiter, including superannuation and additional workers compensation premiums, is \$420 per week.

This amount is then treated as a substitute amount for Barbara's pre-injury weekly income with Barbara receiving 95 per cent of this amount for the 13 weeks following the accident. Fred and Barbara will still be able to split the net income from the business through the family trust, but the income of the business will be reduced through their higher wage costs during the 13 week period.

If Barbara did not elect to use the substitution method, she would need to provide the last tax return submitted by the trustee (Misty Mountain Pty Ltd for the Green Family Trust) and supporting accounting records to the insurer. Barbara would be entitled to an income replacement payment based on the proportion of personal services she contributed to the running of the business. For example, based on the above information an insurer may determine Barbara contributed one third of the personal services to the business, while Fred contributed two thirds of the personal services. Using the net business income method Barbara's pre-injury weekly income would be based on one third of the adjusted net income of the business. In making this calculation the insurer would need to adjust the net business income from the tax return by deducting from this amount the net rent received by the business from the bed and breakfast units.

### **5.3 Pre-injury weekly income or pre-injury earning capacity – Students**

**5.3.1** When making a decision about a student’s pre-injury earning capacity, an insurer is to have regard to:

- the course of study being undertaken;
- pre-accident academic results;
- published wage data for new graduates;
- previous work experience;
- Australian Bureau of Statistics (ABS) data for age and industry;
- the individual circumstances of the applicant; and
- any other relevant circumstances.

**5.3.2** An insurer must pay income replacement payments, calculated using a student’s pre- injury earning capacity from the next working day after the student would have otherwise received their results confirming completion of their course. This will be considered to be the date the student was anticipated to start work with an employer.

### **5.4 Pre-injury weekly income or pre-injury earning capacity - dual qualification**

**5.4.1** A person that has both pre-injury weekly income and pre-injury earning capacity will be able to receive income payments based on their pre-injury weekly income until the point in time they are eligible to receive a higher payment based on their pre-injury earning capacity.

**5.4.2** For example a full-time student that submits their application within 13 weeks of the accident and satisfies the 260 hour work test, will be able to receive income replacement payments, based on their pre-injury weekly income before an accident, from the date of the accident until the point in time they would have completed their studies. At this point they can receive weekly income payments, based on their pre- injury earning capacity, if these payments are higher than their pre-injury weekly income.

### **5.5 Pre-injury income for a low-income earner superannuation component**

**5.5.1** A person that has pre-injury income that is more than \$100 AWE indexed but less than \$800 AWE indexed entitlement to income replacement benefit may include a superannuation component. This component will only be payable if superannuation contributions were paid or payable by an employer on behalf of the injured person at any time during the 52 weeks prior to the motor accident. For these purposes an insurer may rely on a payslip, a superannuation fund statement, or a receipt number and copy of a report lodged with the Australian Taxation Office for unpaid superannuation contributions.

**5.5.2** Section 96 of the MAI Act includes an example of how to work out an income replacement factor for a person entitled to a low-income earner superannuation component. The formula for this factor is  $N = 1 + SG/100$ , where SG is the superannuation guarantee charge number for the year in which the superannuation contributions were paid or payable.

**5.5.3** The 52 week period prior to the motor accident may overlap two financial years. In working out an income replacement factor an insurer should use the superannuation charge number for the financial year during the 52 weeks prior to the motor accident in which superannuation was last paid or payable by an employer for the person. The income replacement factor should then remain constant throughout the period a person is entitled to income replacement payments. The factor in the formula will not vary because of changes to the superannuation guarantee charge number for subsequent financial years, or because of the indexing of a person's pre-injury income, or a person's post-injury earning capacity.

## **6. CALCULATING INCOME REPLACEMENT PAYMENTS FOR CONCURRENT APPLICATIONS (Section 487)**

**6.1.1** These guidelines make provision for determining income replacement benefit payment amounts for concurrent personal injuries applications under the MAI Scheme. The issue of concurrent applications occurs when a person is injured in two or more motor accidents and applies for income replacement benefits for each motor accident.

**6.1.2** An injured person must inform an MAI insurer (the '*second insurer*') they have an active application under the MAI Scheme with another insurer (the '*first insurer*'). The injured person must also inform the second insurer if they are receiving income replacement benefits from the first insurer.

**6.1.3** The first insurer is to provide its weekly calculation for income replacement benefits in accordance with section 96 or 97 of the MAI Act to the second insurer. The second insurer then does a calculation in accordance with section 96 or 97 of the MAI Act and is to subtract the amount calculated by the first insurer from the calculated amount to be paid by the second insurer. This is to mitigate the double counting of historic income in working out the pre-injury weekly income of the injured person.

**6.1.4** The first and second insurer may accept the one fitness for work certificate if the certificate contains information to assess the impact of the injuries from each motor accident.

### **Example 6.1 - Working out income replacement weekly payment amounts for concurrent applications - Partial return to work at time of accident.**

Alex is injured in a motor accident on 4 June 2021, and misses paid work as a result of his injuries. He applies for income replacement benefits and his insurer assesses his pre-injury income before the accident at \$2,200. He returns to work at a reduced capacity 12 weeks after the accident, with a fitness for work certificate covering him for 4 weeks. His post-injury earning capacity is assessed at \$1,500.

Alex is injured in a second motor accident on 3<sup>rd</sup> of September 2021. As a result of this accident, he is assessed as being unfit to work for an initial period of 4 weeks. This period overlaps with a 3 week period covered by his certificate from the earlier accident.

Alex's pre-injury income after the second accident is assessed at \$1,750. This is lower than his pre-injury income from the first accident as he missed 12 weeks of paid work during the 52 weeks before the second accident.

For the week commencing 3 September 2021, the first insurer works out the weekly amount of Alex's income replacement payments using the formula in section 97 of the MAI Act as:

$$(\$2,200 - \$1,500) \times 0.8 = \$560$$

The first insurer then advises the second insurer of the calculation amount.

The second insurer then works out the amount of Alex's income replacement payments for the week commencing 3 September 2021 using the formula in section 96 of the MAI Act as:

$$(\$1,750 - 0) \times 0.95 = \$1662.50$$

On receiving details of Alex's entitlements for the week commencing 3 September from the first insurer, the second insurer then reduces Alex's entitlement under section 96 by \$560, leaving Alex with a net entitlement for the second accident of \$1,102.50 for the week. Each insurer agrees to separately pay Alex their respective entitlement components. On expiry of Alex's fitness for work certificate (for injuries from the first accident) on 24 September 2021, Alex will then be entitled to a payment of \$1,662.50 for that week from the second insurer and payments from the first insurer will cease unless a new fitness for work certificate is provided.

**Example 6.2 - Working out income replacement weekly payment amounts for concurrent applications - Applicant unfit to work at time of accident.**

This example modifies the example 6.1, so at the time of the second accident, Alex had a fitness a fitness for work showing that he was unfit to work until 24 September 2021. His pre-injury income calculated by the second insurer is \$1,700 (based on Alex missing 13 weeks of work during the 52 weeks before the second accident).

For the week commencing 3 September 2021, the first insurer works out the weekly amount of Alex's income replacement payments using the formula in section 97 of the MAI Act as:

$$(\$2,200 - 0) \times 0.8 = \$1760$$

The second insurer then works out the amount of Alex's income replacement payments for the week commencing 3 September 2021 using the formula in section 96 of the MAI Act as:

$$(\$1,700 - 0) \times 0.95 = \$1,615$$

On receiving details of Alex's entitlements for the week commencing 3 September from the first insurer, the second insurer reduces Alex's entitlement for the accident under section 96 to zero. On 24 September 2021 Alex's fitness for work certificate from the first accident expires and his doctor confirms that while Alex is still unfit work, this is solely attributed to the impact of his injuries from the second accident. From this time Alex will then be entitled to a payment of \$1615 from the second insurer and payments from the first insurer will cease.

**Example 6.3 - Working out income replacement weekly payment amounts for concurrent applications- Applicant would have been able to return to work at a reduced capacity if second accident had not occurred**

This example modifies example 6.2, on the basis that on 24 September 2021 Alex's doctor qualifies his fitness for work certificate by stating that Alex would have been able to return to work on 24 September 2021, for reduced hours, if the second accident had not occurred. On this basis, Alex's payments for the week commencing 24 September 2021 will need to be recalculated.

The first insurer will need to determine Alex's post-injury earning capacity on the basis that the second accident had not occurred. If this is assessed at \$1,500 then the first insurer would work out Alex's entitlement amount for the week commencing 24 September 2021 using the formula in section 97 of the MAI Act as:

$$(\$2,200 - \$1,500) \times 0.8 = \$560$$

The amount of \$560 would now be paid by the first insurer to Alex. On receiving details of this new amount, the second insurer would then pay Alex an amount of \$1,055 being the amount worked out under section 96 of the MAI Act of \$1,615 less \$560.

**6.1.5** Insurers may agree to a cost sharing agreement for income replacement payments that is independent of the entitlement amounts paid for each accident. If no agreement is in effect, insurers are to ensure the injured person is not impacted and receives their entitlement.

**7. PAYMENT OF INCREMENTS FOR AN APPRENTICE, TRAINEE OR YOUNG PERSON (Section 99)**

These guidelines make provision for matters to be taken into account in determining the pre-injury weekly income of an apprentice, trainee or a young person, by taking into account any increments, that satisfy the circumstances in paragraph 99(1)(b) of the MAI Act, the injured person was likely to be entitled to if the motor accident had not happened and they had continued in their employment.

**7.1 Calculating an increment**

**7.1.1** In making a decision about the pre-injury weekly income of an apprentice, trainee, or young person, their pre-injury income is to be determined based on the percentage increase of a pay increment, set out in an award, contract or agreement, that applies or would have applied on the increment date. The percentage pay increment is to be rounded to three decimal places, and then multiplied by the person's pre-injury weekly income immediately prior to the increment date.

**7.1.2** An increment is only to be payable for an apprentice, trainee or young person, that was in ongoing employment at the date of an accident. To simplify the increment calculation, the percentage increment is to be applied to all of the apprentice, trainee or junior person's pre-injury weekly income, regardless of the source of that income.

### **Example 7.1 - Resetting pre-injury income for an increment**

Sarah was employed as a Permanent Retail Employee Level 1 under the General Retail Industry Award, when she was injured in a motor accident on the 1 February 2020. At the time of the accident Sarah's pre-injury weekly income was calculated at \$550. Sarah turned 19 on 10 February 2020, and if she had been able to continue in her employment would have received a pay increment on that date. On 10 February 2020 the hourly rate for a Permanent Retail Employee Level 1 was \$14.55 for an 18 year old and \$16.63 for a 19 year old. Sarah's pre-injury weekly income on 10 February 2020 would be reset as follows:

Percentage pay increment:

$$= ((16.63-14.55) \div 14.55) \times 100\%$$

$$= 14.296\%$$

Sarah's pre-injury weekly earnings are then:

$$= \$550 \times (1.14296)$$

$$= \$628.63$$

**7.1.3** A pre-injury weekly income amount, including a reset pre-injury weekly income amount, for an apprentice, junior, or trainee, must still be AWE adjusted on each adjustment day, under the AWE adjustment rules in the MAI Act.

## **8. MAKING A DECISION ABOUT AN INJURED PERSON'S POST- INJURY EARNING CAPACITY (Section 100)**

These guidelines make provision for matters to be taken into account and procedures to be put in place when determining a person's post-injury earning capacity.

The MAI Act enables an insurer to make a decision about an injured person's post- injury earning capacity, including for the purpose of assessing the person's fitness for work as a result of their injury. A person's income replacement benefits may be reduced or stopped if they have post-injury earning capacity.

### **8.1 Procedures for making decisions about post-injury earning capacity**

**8.1.1** An insurer is to develop and follow procedures for making decisions about an injured person's post-injury earning capacity. These procedures must comply with the insurer's statutory duties in the MAI Act and be made available if requested by an injured person or their representative. Any decision about post-injury earning capacity is to be communicated to an injured person in writing and in plain English. An insurer must give an injured person procedural fairness when they make a decision about the person's post-injury earning capacity. This must include:

- giving the person a fair opportunity to give information to the insurer to consider in making a decision;
- ensuring the decision maker is not, or is not perceived to be biased to an outcome; and
- providing the person with all the information the insurer has considered, regardless of whether that information supports the decision or not.

## **8.2 Matters to be taken into account in making a decision about post-injury earning capacity**

**8.2.1** In making a decision about an injured person’s post-injury earning capacity an insurer is to take the following matters into account:

- a person’s fitness for work having regard to matters in subsection 100(2) of the MAI Act being:
  - the nature of a person’s injury and the likely process of recovery;
  - their treatment and care needs including the likelihood that treatment and care will enhance earning capacity and any temporary incapacity that may result from treatment and care;
  - any income from employment after a motor accident; and
  - any fitness for work certificates a person provided.
- the nature of the person’s pre-injury employment
- the person’s age, education, training and work experience
- rehabilitation and vocational training provided to the person
- the person’s place of residence at the time of the motor accident
- the length of time the person has been seeking employment
- the availability of suitable work near the person’s place of residence; and
- any other relevant circumstances.

**8.2.2** The definition of post-injury earning capacity is set out in section 93 of the Act. Note, the definition does not require a person to undertake any paid work, but rather only paid work which they are reasonably suited because of their education, training and experience. This paid work may not necessarily be the same job or occupation the person was in prior to the accident.

## **9. EXCEPTIONAL CIRCUMSTANCES FOR BACK-PAYING LATE APPLICATIONS (Section 101)**

These guidelines make provision for the kinds of circumstances that may be exceptional circumstances, for the back payment of income replacement benefits to a start date earlier than 28 days before the date of a late application.

### **9.1 Exceptional circumstances**

If a late application is made for defined benefits an insurer is to back-pay income replacement payments to the date of an accident, or the date that a person was anticipated to return to, or start work, in the following exceptional circumstances:



- The late application is for a person who died from injuries from the motor accident at a date after the motor accident.
- The late application is for an injured person that was hospitalised for at least 4 weeks during the initial application period.
- A close relative, spouse or child of the injured person died in the motor accident or from injuries from the motor accident, or was hospitalised for at least 4 weeks during the initial application period.
- The delay in making a complete application is a direct result of errors or mistakes made by an MAI insurer in relation to handling an application from the injured person during the initial application period.

## **10. INTERIM WEEKLY PAYMENTS (Section 103)**

These guidelines make provision for interim weekly payments.

An insurer is to pay an interim weekly amount to an injured person if the insurer is satisfied the person is entitled to income replacement benefits under section 89 of the MAI Act and has asked an injured person for additional information to calculate the amount of an income replacement benefit. The payments must be made as soon as practicable after the insurer accepts liability for a personal injuries application.

### **10.1 Period for an Interim payment**

**10.1.1** An interim weekly payment is to be payable for the period starting on the date of a motor accident, or a later date if a person was anticipated to start or return to work and ending on the date of the earlier of the events set out in subsection 103(2) of the MAI Act.

**10.1.2** An insurer, on receiving additional information to decide the amount of an income replacement benefit to which a person is entitled, must as soon as practicable back-pay any outstanding income replacement benefits.

### **10.2 Amount of an interim payment**

The interim weekly payment is to be paid at the prescribed minimum amount, or at a lower amount, if an injured person requests a lower amount be paid.

## **11. FITNESS FOR WORK CERTIFICATES (Section 104)**

These guidelines make provision for fitness for work certificates and work declarations.

A fitness for work certificate or work declaration must be given to the insurer to cover any period for which income replacement benefits are payable.

## **11.1 Form and contents of a certificate or declaration**

**11.1.1** A fitness for work certificate and work declaration is to be in writing, and may be given to the insurer by electronic means, by personal delivery or by post. The certificate and declaration can be given using a form provided on the MAI Commission's website, or another form provided the form includes all information required under these guidelines.

**11.1.2** A fitness for work certificate is to state:

- the date of the motor accident
- the nature of the person's injuries covered by the certificate;
- the pre-injury work the person did;
- whether a person is fit for their pre-injury work;
- if a person is fit for some of their pre-injury work, the period they are fit to do this work, the nature of the duties they can perform, and how many hours work they can perform; and
- if a person is not fit for their pre-injury work, the period they are unfit to do this work.

**11.1.3** If a person is not fit for work or only fit for some of their pre-injury work the certificate should also include an anticipated timeframe for recovery, ie. the person will be able to resume their full pre-injury hours and duties. Comments should also be given on any factors impacting on the person's recovery. The certificate should also include details of any treatment likely to be required during the currency of the certificate.

**11.1.4** A work declaration is to state whether the person has engaged in any form of paid work since the last fitness for work certificate was provided that has not yet been declared to the insurer. If so, the declaration must provide details about the paid work the person did. The declaration must also include a statement that all information provided in the declaration is true and correct.

## **11.2 Who may give a fitness for work certificate**

A fitness for work certificate must be given by a registered medical practitioner, which is either a treating practitioner of the person, or a member of a treating medical practice of the person, nominated for the ongoing management of a person's treatment and recovery.

## **11.3 Period to which a fitness for work certificate may apply**

A fitness for work certificate is to only cover a prospective period of up to 1 month, from the date a medical practitioner last saw or examined the injured person, unless the person giving the certificate states reasons why the certificate should cover a longer period, and the insurer is satisfied the certificate for the longer period should be accepted.

#### **11.4 When a fitness for work certification or work declaration must be given**

An insurer must obtain a fitness for work certificate prior to paying income replacement payments. This certificate can be given with the medical report accompanying a defined benefit application. A fitness for work certificate and a work declaration must be given to an insurer before the expiry of any period that is covered by an earlier fitness for work certificate.

#### **11.5 Consequences of failing to give a fitness for work certificate or work declaration**

**11.5.1** An insurer may suspend income replacement payments if a fitness for work certificate covering a period of at least 28 days expires (long dated certificate) after five business days from the expiry of the certificate. For a work declaration that is required as part of a fitness work certificate, an insurer may also suspend income replacement payments immediately if the declaration is not given within five business days after the expiry of the certificate. An insurer may notify a person about an expired certificate or missing work declaration by telephone, by email or other electronic means.

**11.5.2** An insurer may suspend benefits immediately if the fitness for work certificate covering a period of less than 28 day expires, or if a work declaration covering the period in the certificate is not given before the expiry of the certificate.

**11.5.3** An insurer is not to suspend payments if there is a delay in obtaining a fitness for work certificate from a registered medical practitioner and the insurer has agreed to an extension with the injured person for the provision of a certificate prior to the expiry date of a certificate. If a fitness for work certificate is not provided by an agreed extension date then the insurer may suspend income replacement payments from the extension date.

### **12. CONDUCT OF MEDICAL AND OTHER EXAMINATIONS (Section 105)**

These guidelines make provision for the conduct of a medical or other examination to assess a person's fitness for work at the request of an insurer. An injured person that fails to comply with a reasonable request without a reasonable excuse to undergo a medical or other examination to assess their fitness for work may have their benefit payments suspended.

#### **12.1 Circumstances that an insurer may ask for a medical or other examination of a person's fitness for work**

**12.1.1** An insurer may ask for a medical or other examination to assess an injured person's fitness for work:

- if a fitness for work certificate or work declaration is not consistent with the nature of a person's injuries, treatments being undertaken or the injured person's likely process of recovery;
- if an insurer requires additional medical or vocational information in relation to a person's injuries covered by a fitness for work certificate;

- to make a decision about a person’s post-injury earning capacity, or
- to resolve a dispute about a person’s post-injury earning capacity.

**12.1.2** To minimise the frequency of medical and other appointments for an injured person an insurer should, if appropriate, first request additional medical information from a treating practitioner, and vocational information from an injured person, prior to asking for an examination of an injured person’s fitness for work. An examination, where practicable, should occur close to the injured person’s jurisdiction/location. Where a public health emergency declaration is in place for the ACT (or another jurisdiction where the injured person resides, or the health practitioner is located) an insurer should consider whether it is essential for the person to physically attend the examination. In these circumstances, the insurer should explore other avenues for conducting the examination, such as through a telehealth appointment or a desk top review of existing medical reports or vocational reports.

## **12.2 The conduct of the examination**

**12.2.1** A medical or other examination of an injured person’s fitness for work is to be conducted by a health practitioner selected by an insurer. The health practitioner should be appropriately qualified and have the expertise to conduct the examination sought. If the examination is for the purpose of resolving a dispute between the insurer and the injured person, an insurer should, prior to preparing a referral, consult the injured person about the health practitioner to conduct the examination and the issues to be referred to the practitioner. For example, the practitioner could provide an assessment of alternative types of work or duties the injured person is fit to perform.

**12.2.2** To ensure an independent and impartial assessment of a person’s fitness for work an examination should generally not be conducted by an existing treating health practitioner of the injured person.

**12.2.3** An insurer should prepare a referral to the health practitioner setting out the scope of the examination and any medical or vocational questions to be answered from the assessment.

**12.2.4** An injured person should be given at least 10 calendar days’ notice of the examination, including the reasons for the examination, a copy of the insurer’s referral to the health practitioner, and details of the appointment. An insurer should consult with an injured person when arranging an appointment and take into account the person’s work, personal and caring commitments and their residential area. An insurer should also ensure that any special needs such as accessibility, cultural or language needs are accommodated at the appointment.

**12.2.5** If the injured person is required to physically attend an examination during a public health emergency, then an insurer should take reasonable steps for the examination to be conducted at business premises within the ACT (for any injured person that resides in the ACT or surrounds) or otherwise within the jurisdiction where the injured person resides. In

arranging any appointment an injured person should also be informed of the procedures and policies the health practitioner has in place to minimise any risks from the health emergency.

**12.2.6** An insurer is to meet the cost of the examination including any reasonable and necessary travel expenses for the person, and a parent or carer, to attend the examination.

### **12.3 Information a health practitioner may ask an injured person in relation to an examination**

A health practitioner conducting the assessment may ask an injured person to provide specific information in the person's possession that is relevant to the examination and any other information the health practitioner reasonably requires for the examination. This could include medical records such as medical images and vocational information, including information about a person's education, vocational training and work history. If the health practitioner asks for information to be provided before an examination, the information should be provided to the practitioner at least 3 calendar days prior to the examination.

### **12.4 Information a health practitioner may ask an insurer in relation to an examination**

A health practitioner conducting the examination may ask an insurer to provide all information in the insurer's possession that is relevant to the examination, and any other information the health practitioner reasonably requires for the examination. The information is to be given to the practitioner at least 5 calendar days prior to the examination.