

## Operational Instruction 1.23 – Ongoing Partial Incapacity Benefits Nominal Insurer’s Position

Matter Number	Matter Raised	Nominal Insurer’s Position
<b>Matter numbers 1-33 were raised by Scheme Agents on the initial release for comment on the draft Operational Instruction</b>		
1.	<p>The Nominal Insurer work in collaboration with the WCC to ensure consistency is maintained between practices followed by Agents and decisions made/upheld by Arbitrators. Clear guidelines to be developed in conjunction with the WCC.</p> <p>Anecdotally, in instances where previous operational instructions have been adhered to when applying a change in benefit entitlement, the Workers’ Compensation Commission (WCC) seldom supports the decision, and often, benefits are reinstated. It is suggested that if services provided are consistent with the ODS, then there is assurance that the decision will be upheld at the commission.</p>	<p>The WCC is an independent dispute resolution body where decisions are made independent of any involvement from the Nominal Insurer.</p> <p>The intent of the OI is about applying sound principles in claims management underpinned by a soundly based decision making model. Case Law has been noted when preparing the OI with key principles incorporated.</p> <p>It is important that Scheme Agents take a holistic approach when applying operational instructions as opposed to a process based approach. Analysis conducted on relevant case law where decisions were found in favour of the applicant indicates that Scheme Agents had taken a process, rather than holistic, approach. The OI has been drafted with this approach as a key principle.</p>
2.	<p>The guidelines in the draft OI relating to job seeking requirements are vague- “exhausted” job-seeking services will vary according to Worker’s needs. Request the Nominal Insurer provide clear minimum expectations/ guidelines to outline what the “necessary skills to independently job seek” are, to ensure consistency amongst services engaged by Agents.</p>	<p>Noted. Job seeking services <b>will</b> vary according to Worker’s needs and the case law supports this concern. The key issue is for scheme agents to ensure all reasonable job seeking opportunities have been provided <b>relevant</b> to the Worker’s needs. Setting a minimum standard may be counterproductive in potentially disadvantaging a Worker. Each Worker’s individual circumstances need to be considered.</p>
3.	<p>The guidelines in the draft OI relating to <b>s40A assessment report content</b> and methods are not detailed enough to ensure consistency amongst Scheme Agents.</p>	<p>Noted. There has been additional information included in the OI. The intent is that Agents set clear expectations for the Third Party Service Provider (TPSP) to provide a thoroughly considered and evidence-based report. Scheme Agents need to ensure the Third Party Service Provider conducting the s.40A assessment is suitably qualified.</p>

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		Scheme Agents need to consider all circumstances of the Claim and apply their sound decision making model. The intent of the OI is to mitigate disputes arising. Decisions made by the WCC on disputed s40 matters will be indicative of the Scheme Agent’s approach in the overall management of the case.
4.	<p>The Nominal Insurer give consideration into whether a method is required to demonstrate the Worker has “comprehended” information communicated by the Scheme Agent.</p> <p>This relates to the OI clause on page 4 under <b>Applying s40A assessment</b> which states “...clear evidence available that the Worker was advised <i>and comprehend</i> their Benefit entitlements...”. The evidence can be provided of the advice, but the Agent can provide no guarantees as to the Worker’s comprehension. The Agent will take all reasonable steps to ensure the worker has the opportunity to fully understand and comprehend the ramifications of these decisions.</p>	<p>The intent of the OI is to ensure the Scheme Agent applies sound principles to claims management including plain language communication to the Worker on Benefit entitlements. Scheme Agents need to ensure the communication provided is <b>relevant</b> to the Worker’s needs and the Worker understands the entitlement they are to be paid under, the obligations and potential ramifications. That is, in many circumstances a letter won’t be sufficient and the case manager will have to discuss the issue with the Worker. In some more complex cases, a face-to-face meeting may be required.</p> <p>Case law indicates that the WCC will be looking to see that the Scheme Agent has made reasonable and appropriate efforts to assist the Worker understand the Benefit entitlements and requirements.</p>
5.	The Nominal Insurer to include in the OI a clause on when the Worker fails to meet the requirements of s38.	Agreed. Amendments made to the section 38 part in the OI. Scheme Agents need to ensure appropriate action to manage occurrence of this circumstance.
6.	The Nominal Insurer to clarify position on Scheme Agents utilising a Third Party Service Provider, to conduct the s40A assessment, not previously servicing claim.	Noted. This clause has been removed from the OI. The intent is to ensure impartiality and fairness with the undertaking of a s40A assessment by a Third Party Service Provider who has demonstrated expertise conducting s40A assessments and delivering a quality, considered and objective report. If the Scheme Agent understands the objectivity of the s40A assessment may be compromised by the utilisation of an existing provider then consideration is to be given to the use of an independent Third Party Service Provider. Refer to the definition of Third Party Service Provider in Schedule 14 – Glossary of the

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		Deed.
7.	The Nominal Insurer to clarify position on IME reports being used in the assessment of a Worker's functional ability for the purposes of determining earning capacity.	<p>Please refer to WorkCover's <i>Guidelines to Independent Medical Examinations and Reports</i> on the use of IME reports.</p> <p>The evidence acquired for the s40A assessment must serve the needs of the Scheme Agent for the purpose of assessing the Worker's ability to earn. The position of the Nominal Insurer is the s40A assessment report must be a quality, considered, and objective report. The Scheme Agent needs to be satisfied the IME report is within these parameters and is relevant to the circumstances of the case.</p>
8.	The Nominal Insurer to outline the criteria for “accurate calculation of the Worker’s potential earning capacity”.	<p>Noted. Additional information provided in OI under “Applying s40A assessment”.</p> <p>Scheme Agents need to consider previous case law in establishing what is required when determining what a Worker would be able to earn.</p> <p>Case law establishes that what is required is a weekly average of what a Worker would be able to earn. The approach is to take a broad range of the reasonably accessible labour market open to the Worker, the types of earnings those types of jobs will produce and obtain a weighted average – the jobs that are more readily available weigh high and those that are rarely available weigh low.</p> <p>It would not be considered a proper approach to find a maximum amount that a Worker would be able to earn and base the calculation on that amount. Judge Burke states, “ Just as one swallow doesn’t make a summer, one job doesn’t determine a capacity to earn”. <i>Mangion v Visy Board Pty Ltd (1991) 8 NSWCCR 175.</i></p>
9.	Nominal Insurer to provide further clarity and information to the clause in the draft OI under the heading <b>Applying s40A Assessment</b> which states “the s40A assessment findings are communicated to and agreed with the Nominated Treating Doctor and Worker prior to proceeding to application”.	<p>Noted. This clause has been amended in the OI.</p> <p>The intent of the clause in the OI is to ensure Scheme Agents consider the Nominated Treating Doctor opinion on the Worker’s capacity to perform the jobs identified in the s.40A assessment and apply this evidence in the decision-making. Agreement of the assessment findings by the NTD would be the most favourable outcome.</p>
10.	The Nominal Insurer to outline the legislative tools	The OI “1.14 Discontinue Weekly Payments for Partial Incapacity After Two Years” will be

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	that should be utilised if a Worker does not return a signed copy of the IMP, in the context of the s.52A process where the Worker is partially incapacitated.	rescinded and replaced by OI “Ongoing Partial Incapacity Benefits”. Section 52A has been re-purposed in the OI to take relevant case law into consideration. The relevant section of the OI has been reviewed and updated to bring in line with the rest of the OI. The Scheme Agent should determine whether the Worker’s behaviour is reasonable and if there is evidence the Worker has unreasonably failed to meet the requirements of the IMP. The Agent would need to refer to Chapter 3 of the 1998 Act and specifically to sections 45 and 47. The relevant circumstances of the case need to be considered when assessing Worker compliance to the IMP. An important point is the discussion undertaken with key parties such as the Worker and Nominated Treating Doctor and the evidence relevant for any decision-making and the Scheme Agent must effectively communicate the reasons and the ramifications for the Worker.
11.	Is the intent for <u>all</u> IMPs to be signed and returned by injured workers, or just those relating to S38/partial incapacity?	No, this is not the intention for all IMPs or those relating to s.38/partial incapacity. The Scheme Agent needs to be satisfied that the Worker understands the requirements of the IMP and the key parties are committed to the attainment of the goal. The Scheme Agent must communicate with the Worker to gauge the level of understanding and commitment toward the goal.
12.	In relation to the s52A process from the draft OI issued for comment, the Nominal Insurer to clarify if the information on standard job seeking requirements needs to be sent with all written communication to the Worker, even when correspondence may be non-benefits or RTW related. For example an IME appointment.	Section 52A has been re-purposed and the relevant section of the OI has been reviewed and updated to bring in line with the rest of the OI. The Scheme Agent needs to ensure the requirements of s.38 have been effectively communicated to the Worker and be satisfied the Worker understands the requirements of s.38. The Scheme Agent needs to be satisfied the content of the written communication to the Worker is relevant and timely. For example, based on the relevant circumstances of a case, it may not be relevant to include job-seeking requirements when forwarding correspondence for an IME appointment.
13.	Outline the parameters for application of s52A (1)(C) to ensure consistency amongst information gathered by Agents.	Section 52A has been re-purposed in the OI to take relevant case law into consideration. The Scheme Agent bears the onus of establishing the state of the labour market relating to the Worker. The information contained in the OI under s.52A (1)(C) aims for a consistent approach by Scheme Agents when relying on this section of the 1987 Act.

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14.	Written communication should be considered sufficient evidence of appropriate communication to the worker as opposed to both “verbally and in writing” as stated in the draft OI.	<p>An intention of the OI is to ensure open and transparent communication between relevant parties and importantly build a positive relationship. Agree that written evidence is an important source of evidence, however, the legislation encompassing weekly Benefit entitlements can be quite complex and a key function is providing education and plain language understanding of the Benefit entitlements, requirements and ramifications pursuant to relevant sections of the 1987 Act. The Scheme Agent must identify circumstances that render written communication ineffective, such as with non-English speaking or illiterate Workers, and adopt a strategy that effectively communicates the information.</p> <p>Case law identifies a holistic, tailored communication approach should be taken. <i>Freightcorp v Duncan (2000) NSWCA 309.</i></p>
15.	Workers unless in receipt of a Centrelink benefit can no longer register with the Job Network. This qualifying statement as a condition of job seeking requires review in light of this change within Centrelink.	Noted. This point has been removed from the OI. Further to this point, a Worker can still access the facilities available at Centrelink and receive a Job Seeker I.D.
16.	<p>Clarification is sought regarding the clause in the OI, which states, “information on any future employment prospects which were likely for the worker, but for the injury. For example, the worker may have demonstrated an intention to work extra hours...” (Page 4, under <b>s40A assessment report content</b>).</p> <p>What evidence must a worker provide to substantiate this? How will this evidence be compiled? What standard of proof is required?</p>	<p>Noted. Additional information provided in OI. The intent of this clause is to ensure decision-making considers all relevant evidence when determining what the Worker would have been able to earn if not for the injury (s.40 (2)(a)). For example, a Worker at the time of injury was completing an apprenticeship and would have expected to become a tradesperson on completion but had to cease due to the injury or the Worker had a succession plan with the pre-injury Employer and was progressing to higher paying positions. The Scheme Agent must ensure the intention was likely to result in probable achievement. Compilation of the evidence can be done but not limited to: investigations done by the Rehabilitation provider conducting the s.40A assessment or Scheme Agent discussions with Worker and/or pre-injury employer to compile evidence. Evidence may include:</p> <ul style="list-style-type: none"> <li>• studies undertaken by Worker</li> <li>• performing tasks relevant to chain of advancement</li> </ul>

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		<ul style="list-style-type: none"> <li>a succession plan in place at the time of injury with pre-injury Employer</li> </ul>
17.	What is meant by an exhaustive list of identified job options? (as indicated in the draft OI)	Noted. This clause has been amended in the OI to include “a list of job options in the Worker’s reasonably accessible labour market” as opposed to “exhaustive list”.
18.	When calculating the S40 rate post assessment, does the Scheme Agent average <u>all</u> rates found during the “exhaustive list of identified job options”?	The approach is to take a broad range of the reasonably accessible labour market open to the Worker, the types of earnings those types of jobs will produce and obtain a weighted average – the jobs that are more readily available weigh high and those that are rarely available weigh low. The intention is the decision making to be balanced and reasonable on the job options identified and calculation process.
19.	The draft OI indicates that a new IMP is to be issued when a change in rate occurs. This requirement is supported in general, except for circumstances where the worker transitions from Section 38 to Section 40, purely because of the expiration of the 52 weeks of Section 38 benefits. The existing IMP may well still be appropriate, and require no further amendment. The IMP should still be reviewed and re-issued if no longer appropriate, but there should not be a hard and fast rule to require Scheme Agents to do so.	Noted. The OI has been amended to reflect the establishment and review of an IMP with a change in Benefit entitlement in the first instance. The IMP needs to be relevant when circumstances change and the Agent needs to be satisfied the current IMP is appropriate. In the circumstance where a Worker “transitions” from s38 to s40 where 52 weeks of s38 have expired, the IMP needs to be reviewed against the relevant circumstances of the case and ensure the Worker understands the change in Benefit and the requirements and potential ramifications. The intent of this clause is to ensure alignment with the principles to claims management in the OI such as communication with the Worker on Benefit changes and maintaining regular contact with the Worker. The IMP would formalise the communication process and further inform the Worker of the change in Benefit.
20.	The draft OI requires the Agent to advise the worker in writing, the section under which they are being paid. In some claims, an injured worker can quite regularly transition between total incapacity and partial incapacity (eg be on partial incapacity and then suffer an increase in symptoms, so then total for several days or a week, and then back to partial). Is it the expectation that written communication is issued on every instance of these	It is not anticipated that written correspondence would be required on each Benefit change based on a Worker’s regular fluctuation in fitness for work capacity. The Scheme Agent needs to ensure the Worker understands their rights and obligations and potential ramifications of a Benefit change. The Scheme Agent needs to consider the evidence and relevant circumstances of the case and determine the reasonableness of written communication in every instance of a change in fitness for work status impacting a Benefit change. The evidence pertaining to the Worker’s fitness for work status, in relation to duration and stability of capacity, and the Worker’s level of understanding of the Benefit change will be key elements in the decision making of the reasonableness of written

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	changes in benefit type, or only where the change is likely to be for an extended period of time (i.e. more than a week)?	communication.
21.	On page 8 of the draft OI it states “if there is no suitable employment that the worker can do in the labour market reasonably accessible to them, they may be regarded as totally incapacitated according to the law – section 52A is not applicable because it relates only to payments in respect of partial incapacity”. What if, post injury, the worker moves to an area where there is no suitable employment, but there was suitable employment available in their previous location?	Section 52A has been re-purposed in the OI to take relevant case law into consideration. The Scheme Agent would need to consider the circumstances of the Worker re-locating and a comparison of the reasonably accessible labour markets. The onus lies with the Scheme Agent to determine the reasonably accessible labour market and establish the grounds for discontinuance exists at the “relevant time”. The Scheme Agent needs to factor in their decision making relevant case law such as: <i>Collins v Days Transport Service Pty Ltd</i> (1999) 18 NSWCCR 116. In this case the determination of labour market reasonably accessible to the Worker was where the Worker resided at the time of the determination of proceedings and not the Worker’s residence at the time of injury.
22.	On page 11 of the draft OI, the evidence to support the workers cooperation with RTW attempts is stated to include rehabilitation attendance records for the last 12 months. As a worker is required to be fit for at least 104 weeks of partial incapacity before section 52A can be applied, shouldn’t rehabilitation records for the last 104 weeks be considered?	When considering applying s.52A, the Scheme Agent would need to consider the whole claims approach taken and relevant circumstances of the case to their decision-making process. This would include assessing the relevance of any rehabilitation assistance provided.
23.	On page 16 of the draft OI, it states “Workers and Scheme Agents must enter into a written agreement, to be documented in the IMP, outlining the required job seeking activities for the individual involved.” Participation and co-operation are raised in Section 47 of the 1998 Act. Should the worker not agree with the IMP, despite the sign-off by the NTD and a functional and vocational assessment, does this mean that the IMP cannot be implemented	The Scheme Agent needs to understand the reasons of the Worker not complying with the IMP and consider the relevant evidence when implementing the IMP. If there is evidence the Worker has unreasonably failed to comply with the relevant sections of Chapter 3 of the 1998 Act pertaining to the IMP, the Scheme Agent must effectively communicate the reasons and the ramifications for the Worker. The intention is for key parties to be participating and co-operating towards the RTW goal.

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	if there is no written agreement?	
24.	On page 30 of the draft OI issued, it states under Group D, that in the circumstance where there is the inability to work in Australia due to visa conditions, then the Section 40 rate should be reduced to zero. The recent Court of Appeal decision of Singh v TAJ (Sydney) Pty Ltd provides a precedent that this is not appropriate.	Noted. Section 52A has been re-purposed in the OI to take relevant case law into consideration. In the case of Singh v Taj (Sydney) Pty Ltd (2006) NSWCA 330, the decision is significant in finding that a migrant worker’s visa status should not be taken into consideration when determining an entitlement to s.40 entitlements. The case sets a standard that if a Worker’s visa status does change making it illegal for them to work in Australia, this does not disentitle them to workers compensation Benefits. However, when assessing the case in the context of s52A, the relevant circumstances of the case need to be considered and critical thinking applied to determine the appropriateness of s52A application.
25.	Is there a requirement for the Worker to submit job logs whilst retraining - If an injured worker is training 1 day/week, can they be reasonably expected to seek work on other days?	The submission of job logs would need to be balanced on the circumstances of the case, such as but not limited to: the reasonably accessible labour market would need to be considered i.e. the number of potential job options and the existing transferable skills of the Worker. The Scheme Agent would need to consider a work trial to complement their overall work plan. Scheme Agents need also consider the Worker’s fitness for work capacity when assessing the reasonableness for job seeking. Essentially, if the overall strategy is to return the Worker to employment then the Scheme Agent needs to support and maximise the opportunity for the Worker to return to employment.
26.	Request the Nominal Insurer publish job-seeking activities in other forms to ensure all stakeholders are aware of the scope of potential requests (e.g. on the WCA website). The release of operational instructions is not a viable means of communicating the Nominal Insurer's position in this regard.	Agreed. At the finalisation of the OI, WorkCover will draft information for inclusion on the WorkCover website that sets out the responsibilities of all parties in assisting a worker to obtain new employment.
27.	The Nominal Insurer to provide clarity around the situation where a worker is required to job seek whilst still employed by their primary employer. Experience shows that a number of workers are	Firstly, Scheme Agents must ensure all reasonable RTW opportunities are provided to the Worker to assist in returning to work with the pre-injury Employer. An active rehabilitation program that assists the Worker return to their pre-injury employer should be promoted and included in the Injury Management Plan.

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	reluctant to accept new positions when they expect/desire to return to their first employer. There may also be tax ramifications in this situation.	Based on the evidence, Scheme Agents need to be satisfied the Worker is unable to return to work with the pre-injury Employer and ensure the requirements of section 38 are effectively communicated. Importantly, Scheme Agents need to manage the expectations of the Worker and Employer and communicate a strategy to achieve the best available outcome on the balance of the circumstances. There needs to be an active preparation of the Worker to enter into a different job.
28.	The Nominal Insurer to change the wording of the initial criteria where it states "s40A assessments should only be considered when..." be amended to insert "or" between each of the three major points. Each of these criteria individually constitutes sufficient reason to implement the s.40A assessment.	Agree. The wording will be amended to include "or".
29.	All of the various components of a S40A assessment should be conducted in <u>every</u> case. i.e. All should include a FCE, vocational assessment and labour market analysis.	When making a referral to a Third Party Service provider for a s40A assessment, it is not anticipated that all components of a s40A assessment, such as functional information, vocational information and labour market analysis, would be required in every case. It would depend on the circumstances of the case and previous reports/information on file. In the first instance, the Scheme Agent must review existing information/evidence on file to assist in determining the relevant information required which will deliver a quality, considered and objective s.40 assessment.
30.	There is concern roles that a worker has retrained for/is currently training for cannot be used as comparative roles in a 40A assessment.	The legislation is quite explicit in that a Worker is not to be disadvantaged in the calculation of the s.40 entitlement. Section 40 (4) 1987 Act states, "an injured worker who duly undertakes rehabilitation training under section 38 is not to be disadvantaged under this section by any increase in the amount that the worker would be able to earn merely because of that training ...."
31.	Should the wage information provided for the list of job options identified, provide information on the	Overtime and other benefits should not be included in the s.40 (2)(b) calculation, as these are notional earnings. However, this information (including allowances) can be included in

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	potential for overtime, allowances and other benefits, or should it simply include the base award/AWA/EBA or salary? If so, how is this information to be obtained?	<p>the report in addition to the base award, AWA, EBA or salary to form part of the overall job potential that can be used as a RTW incentive for the Worker.</p> <p>With respect to the treatment of allowances, the relevant authority is the Court of Appeal matter <i>Lismore City Council v Garland</i> 26 NSWLR542. The Garland decision established certain principles to be applied when determining whether allowances should be included or excluded for the purposes of s42 <i>Workers Compensation Act 1987</i>. Those principles are:</p> <ul style="list-style-type: none"> <li>• If an allowance is variable or compensatory in nature to cover a special expense incurred then it should be excluded – typically this includes tool, meal and travel allowances</li> <li>• If an allowance in an award is paid on a fixed hourly basis then it should be included – typically this includes productivity and competency allowances.</li> </ul> <p>The Scheme Agent should apply these principles to Claims individually. This information can be obtained from, but not exclusive to: Third Party Service Provider conducting the s.40A assessment, job search websites and/or canvassing employers.</p>
32.	On page 5 of the draft OI issued states, "a. issue at least two written reminders of job-seeking requirements annually, in accordance with..." - Must these reminders be separate to notices contained within IMPs?	Scheme Agents need to ensure the communication provided is <b>relevant</b> with the Worker’s needs and within the context of the job seeking requirements. The Scheme Agent needs to be satisfied the Worker understands the job-seeking requirements of s.38. The IMP is a useful tool to communicate information and obligations.
33.	In the context of discontinuing weekly Benefits, amendments should be made to the statement included in the draft OI on page 14 under Attachment C: “ <b>Notice requirements under section 54 of intention to discontinue weekly payments</b> ”, which describes a schedule of payments should be included in the s.54 notice which demonstrates that the Worker has received weekly payments of compensation over the period in which they were certified as partially incapacitated	The Scheme Agent must ensure the notice to terminate or reduce weekly Benefits is consistent with the requirements under Part 4 of the <i>WorkCover Guidelines for Claiming Compensation Benefits</i> . Scheme Agents need to ensure consistency in their practices with the requirements outlined in these guidelines.

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<b>Matter numbers 34-51 were raised by Scheme Agents on the second release for comment on the draft Operational Instruction</b>		
34.	An amendment should be considered to the wording of “special <b>initial</b> payment” on page 2 under Section 38 Benefits, as stakeholders may misinterpret this phrase.	Agreed. The wording will be amended to include “Section 38 Benefits are a <b>special payment</b> for partially incapacitated.....”
35.	On page 3 of the OI under the summary of general requirements under section 38A on what constitutes “Seeking suitable employment” (dot point 4), suggest to include a definition as to what constitutes reasonable steps.	<p>Noted. Page 8 of the OI under the sub-heading “<b>Establishment of the Grounds for Discontinuation</b>” Section 52A(1)(a) – dot point 5 – provides further information on what Scheme Agents need to consider.</p> <p>Further to the above, the legislation also provides a definition under section 38A(2)(d) which defines what are “reasonable steps” as:</p> <p style="text-align: center;"><b>38A Determination of whether worker seeking suitable employment</b></p> <p style="text-align: center;"><b>(2) General requirements</b></p> <p style="text-align: center;"><i>The worker is not to be regarded as seeking suitable employment unless:</i></p> <p style="text-align: center;"><i>(d) – the worker is taking reasonable steps to obtain suitable employment from some other person.</i></p> <p><i>Taking reasonable steps to obtain suitable employment includes seeking or receiving rehabilitation training that is reasonably necessary to improve the worker’s employment prospects.</i></p>

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36.	Page 3 refer’s to Scheme Agents ensuring the requirements under S38A (3) are fulfilled, it was raised that in cases WCC arbitrators are finding that the submission of job logs are not enforceable.	Should the provision of Job seeking diaries be a condition of any Workers “Injury Management Plan”, where all parties to the IMP (Worker, NTD, Employer and Scheme Agent) are in agreement that Job seeking diaries are to be completed by the Worker, the Worker then has the obligation to provide these job seeking diaries as agreed in the Injury Management Plan.
37.	Under the heading “Application of section 40A assessment”, suggest the point on discretion to consider, that but for the injury, what would the worker be earning (or capable of earning) in their normal work capacity. Understanding that Workers Compensation is a form of social insurance, Scheme Agents would still contend there are other mechanisms to cater for those that choose voluntarily to move themselves from the labour market and that continued benefits in these cases are not within the scope of the legislation or the Scheme’s intent.	In these instances Scheme Agents need to establish the case if a worker is removing himself or herself voluntarily from the labour market and if there is clear evidence the worker is taking this path, the Scheme Agent can advise the worker on the other mechanisms available.
38.	On page 1 of the OI under the “Principles to be applied to claims management”, suggest that dot point 2 be re-phrased to include the word “Health”.	Agreed. Amendment made to read:  ” <b>Consider the health, social and financial implications for the Worker</b> ”.
39.	Further clarification on dot point 5 under the heading <b>Decision Making</b> on page 2. If an injured Worker is deemed totally incapacitated when there is no suitable labour market available to the worker taking into account their restrictions then in what circumstance does Section 52A (1)(c) apply?  Further information be provided on the following: <ul style="list-style-type: none"> <li>When does the law deem a worker to be totally</li> </ul>	It is noted that the use of the term “deemed totally incapacitated” may not be correct in a general sense though requires consideration in individual cases. Please note that the example provided in the OI has been removed. However, to provide further clarification: Case law indicates that ordinarily two questions need to be considered when it comes to determining whether a partial or total (or any) incapacity exists: what is the relevant labour market, i.e. what work was the worker doing or could reasonably be expected to do; and of that kind of work, what is the worker physically able to do. The second question is the capacity or incapacity “for work”. That is the capacity to do work of a particular kind or kinds and in a context that will produce income (for the worker).

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	incapacitated?	The intention is that it is the assessment of a capacity “for work” having regard to the realities of the labour market in which the worker is engaged.
40.	Suggestion that the following sentence be included to the list of criteria applicable for referral for a section 40A assessment on page 4 of the OI – “When a worker is not ready willing and able to accept an offer of suitable employment from the employer”	Noted. This is actually covered under the heading “Section 38 Benefits” on page 2, and Section 40A Assessment on page 4 in the OI.
41.	Under the heading of “Determining the appropriateness of referral for a Section 40A assessment”, it is suggested that the wording should be re-phrased to read:  “Ensuring all <b>suitable</b> RTW opportunities...”	Noted. The change in wording has been considered and has been amended to: “Ensuring all reasonable Return To Work opportunities ...”, which is consistent with dot point 6 on page 1 of the OI.
42.	Under the heading “Application of section 40A Assessment” on page 5 it states that a weighted average be used when calculating the Section 40 rate. Direction is sought in this regard to ensure consistency in application across the Scheme.  At the time of applying a section 40 reduction, Scheme Agents would assess the worker’s ability to earn and what they would have earned but for the injury. The draft OI states that a S40 report must: “Contain evidence of any future employment prospects, which were likely for the Worker, but for the injury”. Further clarification is sought in regards to this statement and its application, particularly around how future promotion of an injured worker,	Please refer to response in Matter Number 8 of this consultation paper. Scheme Agents need to consider previous case law in establishing what is required when determining what a Worker would be able to earn.  Please refer to response in Matter Number 16 of this consultation paper.

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	but for the injury, is assessed by Scheme Agents.	
43.	The wording of paragraph 2 page 6 of the OI under heading, “Section 52A Discontinuation of Partial Incapacity Weekly Compensation” be amended to: “In situations where an injured worker becomes totally incapacitated following application of section 52A, the Scheme Agent must investigate the down grade in fitness as the worker may have an entitlement to weekly compensation benefits for any subsequent period of total incapacity”.	This has been considered however the wording will remain. The Nominal Insurer would expect the Scheme Agent to follow their decision making and case management process when receiving an updated medical certificate with a downgrade in fitness for work and the correct weekly Benefit entitlement to be paid once established.
44.	Point 1 on page 2 of the OI indicates that Scheme Agents must advise the Worker, both verbally and in writing of any changes to weekly benefits, or when they become certified as partially incapacitated for work.  Suggest the sentence should also include the “Employer” where the injured worker is still employed with the pre-injury employer.	The Worker is of key importance in the education and communication process on their weekly Benefits but in instances where the Worker is still employed by their pre-injury Employer, the Nominal Insurer would expect Scheme Agents to inform the relevant parties involved in this process.  The important point is that effective communication takes place with changes in weekly Benefits with all relevant parties.
45.	Clarification is sought regarding, if a worker is requested to be registered with Centrelink, is the assumption that failure to comply with Centrelink requirements (once registered) could then constitute a failure of the Worker to comply with reasonable job seeking?	Failure to comply with Centrelink requirements (once registered) does not necessarily constitute a failure of a worker to comply with reasonable job seeking as it is merely one reasonable avenue available to injured workers in assisting them job seek.  A person who registers as a Job Seeker with Centrelink is registered as a Job Seeker only and is issued with a Job Seeker I.D number which enables the person to utilise the facilities which are offered by Centrelink including computer, printing, fax and telephone facilities to assist them with their Job Seeking. As the worker is not in receipt of any Centrelink benefits they are not bound by any legislative obligations or requirements with Centrelink.

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46.	<p>In relation to the following clause in the OI, “<b>Note 2:</b> Unreasonably refusing to cooperate is limited in scope to the Employer with whom the Worker sustained their injury, and...” which is on page 9 under Section 52A(1)(a) – The Worker is not suitably employed (within the meaning of Section 43A) and is not seeking suitable employment (as determined in accordance with Section 38A).</p> <p>Note 2 seems to indicate that the cooperation is limited to the employer with whom the injury was sustained. Further, in the legislation, especially s.52 (1)(b), there is no mention of with whom the Worker has rejected an offer of suitable employment. Rather, s.52A (1)(b) refers us back to s.40 (2B) which states “...any person...”</p> <p>Suggest an amendment to Note 2 which broadens the scope to include other employers and provides further guidance/clarification on what constitutes ‘unreasonably refusing to cooperate’ would address this.</p>	<p><b>Note 2</b> is referring particularly to Section 38A (5)(b) which reads: “unreasonably refuses to co-operate in procedures connected with the provision or arrangement of suitable employment or rehabilitation training under the employer’s return-to-work program”. It does not make a general reference such as “an employer”.</p> <p>More particularly “employer” is defined in Section 38(A). The definition reads: <b>employer</b> of a worker who is partially incapacitated for work means the employer liable to pay compensation to the worker in respect of the incapacity or, if there are 2 or more such employers, the employer so liable who last employed the worker.</p> <p>Therefore no amendment can be made to the operational instruction as to do as suggested would be outside the law. It is considered the term “unreasonably refusing to cooperate” is adequately defined.</p>
47.	<p>On page 2 first dot point of the OI that reads, “Advise the worker, both verbally and in writing, the section under which they are now being paid, the period of time...”</p> <p>There are concerns regarding the practical implications of this particularly for claims where the changes are frequent or involves very short periods e.g. 1 day. Is written notification sufficient in such</p>	<p>Please refer to response in Matter Number 20. The intent of the OI is to ensure the Scheme Agent applies sound principles to claims management including plain language communication to the Worker on Benefit entitlements. Scheme Agents need to ensure the communication provided is <b>relevant</b> to the Worker’s needs and the Worker understands the entitlement they are to be paid under, the obligations and potential ramifications. Scheme Agents need to consider the effectiveness of the communication. Case law indicates that the WCC will be looking to see that the Scheme Agent has made reasonable and appropriate efforts to assist the Worker understand the Benefit entitlements and</p>

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	cases?	requirements”.
48.	<p>On page 3 under section 38 Benefits:</p> <ul style="list-style-type: none"> <li>Rehabilitation/Return to Work assistance is provided as soon as it is apparent that the Employer is unable to provide suitable employment or the Worker’s employment has been or is to be terminated.</li> </ul> <p>AND</p> <ul style="list-style-type: none"> <li>If not undertaking retraining or other occupational rehabilitation, evidence of job seeking by the Worker must be reasonable and may include:.....</li> </ul> <p>Suggested these two phrases may be contradictory. If Agents must engage a Rehab Provider do WorkCover envisage that if this is unsuccessful we then disengage the Rehab Provider and proceed with independent job seeking?</p>	<p>The two points from the OI raised are independent of each other, however the issue highlighted has been considered. The wording has been amended in the OI for the first point to read: “Return To Work assistance is provided...”. The intent is for the Scheme Agent to provide Return To Work support immediately to the Worker when there is or potentially will be no suitable employment. The Nominal Insurer would expect Scheme Agents apply the principles of “reasonably necessary” when engaging and/or disengaging Rehabilitation Provider support.</p>
49.	<p>In relation to Third Party service providers conducting section 40A assessments, currently section 40 providers and reports currently do not have set service standards or accreditation of those service providers. Currently in the Scheme there are a variety of service providers from Medical Practitioners to various Allied Health Professionals conducting these assessments.</p> <p>Has WorkCover considered service standards or gazetted fees for this type of service provider, or alternatively including accreditation of such providers is in line with Rehabilitation Providers?</p>	<p>WorkCover at this stage is not considering setting service standards or accreditation arrangements for these providers.</p>

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50.	Clarification is sought regarding a worker’s geographical location at the time of section 40A assessment. There are situations where a claimant relocates after injury to a regional area that has higher unemployment and other barriers such as transport than the area they were residing at time of injury. Is this reasonable that the Agent, Employer (if claim impacts on premium) and the Scheme are impacted by a poor Section 40 outcome by a workers decision to relocate?	Please refer to response in Matter Number 21.
51.	Clarification is sought where discretion may be called upon in the application of section 40 in page 6 of the OI.	Once the calculation in the reduction of the workers earnings are arrived at, section 40(1) requires the exercise to ensure the amount of the reduction is proper in the circumstances. The circumstances in each case must be given appropriate weight. Some circumstances which may be relevant to exercise discretion, but not limited to, include: carer’s responsibilities - where a Worker decides to care for a child rather than offer themselves on the labour market or other supervening illnesses or injuries which are non-work related. The onus is on the Scheme Agent in gathering the relevant evidence and establishing the circumstances of the Worker.

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