

Accident Compensation Act 1985

Ministerial Directions under section 104A

I, Robert Graham Cameron, Minister for WorkCover, hereby issue the attached Ministerial Directions under section 104A of the *Accident Compensation Act 1985*.

Bob Cameron MP

Minister for WorkCover

Date: 20 June 2002

MINISTERIAL DIRECTIONS

SECTIONS 98 AND 98A COMPENSATION CLAIMS

1. **Introduction**

These are Directions for procedures for the determination of claims for compensation under Sections 98 and 98A of the *Accident Compensation Act 1985* ("the Act") and are made pursuant to Sections 104A and 20C of the Act and are also guidelines under Section 54(4) of the Act.

2. **Objectives of these Directions**

The objectives of these Directions are to:

- (a) facilitate a practical means by which Sections 98 and 98A claims can be speedily resolved in a co-operative, equitable and efficient manner that provides adequate and just compensation to workers without any party unnecessarily incurring legal costs and without resort to legal processes; and
- (b) minimise the flow of Sections 98 and 98A claims into the Conciliation and Court systems.

3. **Application of these Directions and the Previous Directions**

- (a) These Directions apply to claims given, served or lodged on the employer, the Authority or self insurer after the date upon which they are published in the Government Gazette.
- (b) The previous directions apply to claims given, served or lodged on the employer, Authority or self insurer on or before the date that these directions are published in the Government Gazette.

4. **Definitions**

The following definitions apply for the purposes of these Directions:

"authorised agent" means a person appointed as an authorised agent under Section 23 of the Act;

"dispute" means a dispute in connection with a claim between the worker and the employer, or the Authority or a self insurer;

"Medical Panel" means a Medical Panel under the Act;

"medical question" means a medical question as defined in Section 5(1) of the Act.

"medical report" means a medical report as defined in Section 104(15) of the Act;

"offer" means an offer in settlement or compromise of the claim, and includes an offer of a nil amount;

"Section 104A conference" means a meeting, discussion or series of meetings or discussions between:

the worker or the worker's legal practitioner; and

the Authority, or the self insurer, or the employer of the worker, or their respective legal practitioner;

in relation to the claim at or during which such meeting, discussion or series of meetings or discussions the employer, the Authority, or self insurer or their respective legal practitioner makes an offer or offers and the worker or the worker's legal practitioner either accepts one of these offers, or makes a counter offer or counter offers in relation to the claim;

"self insurer" is a body corporate approved as a self insurer under Part V of the Act;

"the Authority" is the Victorian WorkCover Authority;

4.

"**the claim**" is the claim for compensation under Section 98 alone or under Sections 98 and 98A of the Act submitted through the "Claim for Compensation for Permanent Disability" claim form;

"**the previous directions**" mean the ministerial directions specifying the procedures for the determination of Sections 98 and 98A claims issued and published in the Government Gazette on the first day of June 1998;

"**the receipt date**" means the date the claim was received by the Authority, or self insurer;

"**the worker**" is the worker who has made the claim;

DIRECTIONS

5. Lodgement of the claim and provision of medical reports by the worker

- (a) The claim must be given or served by the worker on the employer that is named as the employer on the claim or where Section 106 of the Act or Part 5 of the *Accident Compensation (WorkCover Insurance) Act 1993* apply, on the Authority. At the time which the claim is given, served or lodged the worker must serve a copy of all medical reports the worker intends to tender or the substance which the worker intends to adduce in evidence in proceedings relating to the claim;
- (b) If at the time the claim is given, served or lodged the worker has suffered more than one of the injuries listed in the Table to Section 98(1) arising out of, or in the course or, or due to the nature of the worker's employment with the employer that is named as the employer on the claim, then unless Section 103(12) applies, the claim must include each such injury that is manifest and that has stabilised;
- (c) If at the time the claim is given, served or lodged the worker has suffered an injury listed in the Table to Section 98(1) arising out of, or in the course of, or due to the nature of, the worker's employment with the employer who is named as employer in the claim, which has not stabilised, the claim must be accompanied by the written statement and written medical report referred to in Section 103A(1)(b)(ii) of the Act.

6. Worker's Affidavit

- (a) Where the worker seeks compensation pursuant to Section 98A of the Act, the worker or the worker's legal practitioner must, at the time of the service of the claim, provide the employer or Authority or self insurer with an Affidavit sworn or affirmed by the worker which details the nature and extent of the pain and suffering as defined by Section 98A(5) of the Act resulting from the injury or injuries which is or are the subject of the claim.
- (b) Where the worker seeks compensation pursuant to Section 98(5) of the Act in respect of an injury which was sustained prior to 1 December 1992 the worker or the worker's legal practitioner must, at the time of the service of the claim, provide the employer or the Authority or self insurer with an Affidavit sworn or affirmed by the worker which details the nature and extent of the pain and suffering and other non-pecuniary loss resulting from the injury or injuries which is or are the subject of the claim.
- (c) The Affidavit of the worker provided in accordance with Directions 6(a) or 6(b) must contain the following information:-
 - (i) The injuries complained of and the date or dates those injuries occurred;
 - (ii) The circumstances under which the injuries arose;
 - (iii) The date the worker first sought medical treatment in respect of the injuries the subject of the claim;
 - (iv) The nature of the treatment received by the worker as a consequence of the injuries the subject of the claim including:-
 - (a) any operative procedure he or she has undergone;
 - (b) any period of hospitalisation;
 - (c) any medical treatment; and
 - (d) any further treatment proposed;

6.

- (v) Particulars of all absences from employment or periods on light or modified duties as a consequence of the injuries the subject of the claim;
- (vi) The nature and extent of the:-
 - (a) actual pain; or
 - (b) distress or anxiety;suffered or likely to be suffered by him/her resulting from the injuries or any necessary treatment; and
- (vii) The manner in which the injuries and resultant impairment the subject of the claim, has affected or is likely to affect the worker's:-
 - (a) ability to perform pre-injury duties; and
 - (b) ability to engage in hobbies, recreation, sporting pursuits and domestic activities undertaken prior to the injuries.
- (d) The failure of the worker or the worker's legal practitioner to comply with Directions 6(a), 6(b) or 6(c) may result in the claim (with respect to compensation pursuant to Section 98, Section 98A or Section 98(5)) being suspended if the worker or the worker's legal practitioner is so notified by the Authority, or self insurer within 14 days of the receipt date.

7. **Arranging Section 104A conferences**

- (a) Within 60 days of the receipt date the Authority, or self insurer must consult the worker or the worker's legal practitioner to arrange a Section 104A conference to be completed within 90 days of the receipt date;
- (b) Should the Authority, or self insurer fail to comply with Direction 7(a) then the worker or the worker's legal practitioner must consult with the Authority or self insurer to arrange for a Section 104A conference to be completed within 90 days of the receipt date;
- (c) The Authority must notify the employer of the date, time and venue of the Section 104A conference arranged in accordance with Directions 7(a) or 7(b); and

7.

- (d) If a Section 104A conference is not concluded within 90 days of the receipt date and if it is considered by the Authority or self insurer or their respective legal practitioner that it is reasonable to do so then by agreement with the worker or the worker's legal practitioner, the time within which a Section 104A conference may be concluded may be extended by the Authority or self insurer.

8. Provision of Medical Reports to the Worker Prior to the Section 104A Conference

The Authority or self insurer must serve on the worker or the worker's legal practitioner not less than seven days prior to the commencement of the Section 104A conference, a copy of all medical reports which the Authority or self insurer intends to tender or the substance of which it is intended to adduce in evidence in any proceedings relating to the claim.

9. Attendance at Section 104A Conferences

- (a) The worker must attend a Section 104A conference in person if requested to do so by the Authority or self insurer;
- (b) If the worker does not attend a Section 104A conference, but the conference is attended by the worker's legal practitioner, then the worker must be readily available to give instructions to the legal practitioner in relation to any offer made; and
- (c) The Authority or the self insurer or their respective legal practitioner shall attend a Section 104A conference. If the conference is attended only by the relevant legal practitioner, then the representative of the Authority or self insurer must be readily available to give instructions to the legal practitioner in relation to any offer or counter-offer made in the course of the Section 104A conference.

10. Offers at Section 104A conferences

- (a) The Authority or self insurer or their respective legal practitioner must have the appropriate authority or instructions so as to be able to make an offer in the course of the Section 104A conference;

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- (b) Prior to the conclusion of the Section 104A conference, the Authority, or self insurer or their respective legal practitioner must make an offer; and
- (c) The parties or their respective legal practitioners to the Section 104A conference are not restricted in the number of offers or counter offers which may be made by them.

11. Concluding a Section 104A conference

- (a) A Section 104A conference is not concluded until the worker either accepts an offer made by the Authority or self insurer or makes a counter-offer in response to each offer made by the Authority or self insurer;
- (b) At the completion of a Section 104A conference, the worker or the worker's legal practitioner and the Authority or self insurer or their respective legal practitioners shall complete and sign the form marked "A" annexed to these Directions so as to accurately record:
 - (i) all medical reports and the substance of such reports served in accordance with Directions 5 and 8;
 - (ii) all offers and counter-offers made at or during the Section 104A conference; and
 - (iii) any settlement or compromise reached in relation to the claim;
- (c) The original of the form marked "A" shall be retained by the worker or the worker's legal practitioner. A copy of the completed and signed form marked "A" shall be retained by the Authority or self insurer.

12. Section 104A conference costs

- (a) Where a legal practitioner represents the worker at a Section 104A conference the following legal fee is payable by the Authority or self insurer to that legal practitioner providing that the claim in its totality resolves for monetary consideration prior to the issue of proceedings:

- (i) where the worker recovers compensation under Sections 98 and 98A or where applicable in respect of an injury which was sustained prior to 1 December 1992 the worker recovers compensation under Sections 98 and 98(5), \$745; or
- (ii) where the worker recovers compensation under Section 98 alone for injury pre or post 1 December 1992, \$445;

together with the reasonable costs of medical reports (including the reasonable costs of any written medical report required by Section 103A(1)(b)(ii)(B)) and interpreters' fees;
- (b) Once proceedings are commenced in relation to the claim, the fee referred to in Direction 12(a) is no longer payable;
- (c) No legal fee is payable in respect of a Section 104A conference where the claim is one which:
 - (i) is solely for hearing loss; or
 - (ii) involves hearing loss and any other claim which may be made pursuant to Section 98 or Section 98A of the Act, but the claim is resolved for compensation which relates solely to hearing loss.
- (d) The fees referred to in Direction 12 apply only to claims lodged after these Directions are published.

13. **Timing of Section 104A conferences**

- (a) If the worker lodges a referral for conciliation of a dispute with the Senior Conciliation Officer in accordance with Division 2 of Part III of the Act before a Section 104A conference has been concluded then, pursuant to Section 54(4) of the Act, the Senior Conciliation Officer shall direct the parties to the dispute hold and/or conclude a Section 104A conference prior to proceeding further with the conciliation;

- (b) The Senior Conciliation Officer may make recommendations to the parties to a dispute regarding the timing and location of a Section 104A conference;
- (c) If the worker refers a dispute for conciliation, then the worker must, at the time at which such a referral for conciliation is lodged, provide to the Senior Conciliation Officer a copy of the form "A" as referred to in Direction 11(b); and
- (d) The Authority or self insurer must, within seven days of receiving notification of the referral of the dispute for conciliation, provide to the Senior Conciliation Officer a full copy of all the reports served in accordance with Directions 5 and 8 and the Affidavit material served by the worker.

14. Conciliation

- (a) The Conciliation Officer must, having regard to the need to be fair, economical, informal and quick and having regard to the objects of the Act, make all reasonable efforts to conciliate in connection with a dispute and to bring the parties to agreement; and
- (b) Where the dispute does not resolve at conciliation then provided Section 104(7) applies the Conciliation Officer must issue a certificate in accordance with Section 104(8) of the Act.

15. Statutory Offer and Counter Statutory Offer

- (a) In accordance with Section 104(9) of the Act, the Authority or self insurer must, within fourteen days after the certificate issued by the Conciliation Officer has been served on the Authority or self insurer, make a statutory offer in writing in settlement or compromise of the claim. The statutory offer in settlement or compromise of the claim shall be in the form marked "B" annexed to these Directions and must be served on the worker's legal practitioner or where the worker is not represented by a legal practitioner, on the worker;

11.

- (b) The worker or the worker's legal practitioner must acknowledge receipt of the statutory offer within seven days of the receipt of that offer to the Authority, or self insurer;
- (c) The statutory offer shall remain open to be accepted by the worker or the worker's legal practitioner for a period of 21 days from receipt of that offer by the worker or the worker's legal practitioner;
- (d) If the worker or worker's legal practitioner does not accept the statutory offer the worker or the worker's legal practitioner must within 21 days of receipt of the statutory offer make a counter statutory offer in writing in settlement or compromise of the claim in accordance with Section 104(11A)(b) of the Act. The counter statutory offer in settlement or compromise of the claim shall be in the form marked "C" annexed to these directions and must be served upon the Authority or self insurer unless the Authority or self insurer is legally represented in which case it must be served on their legal practitioner;
- (e) The Authority or self insurer or their legal practitioner must acknowledge receipt of the counter statutory offer within 7 days of the receipt of that offer to the worker or the worker's legal practitioner; and
- (f) The counter statutory offer shall remain open to be accepted by the Authority or self insurer for a period of 21 days from the date of receipt of that offer by the Authority or self insurer.

16. **Proceedings**

- (a) Where proceedings are instituted in respect of the claim by the worker or worker's legal practitioner prior to the period in which the counter statutory offer can be accepted by the Authority or self insurer expiring, the Authority or self insurer can accept the counter statutory offer within 21 days of receipt of that offer providing the worker or worker's legal practitioner agree to forego any claim for payment of party/party costs by the Authority, employer or self insurer in connection with the proceedings;

- (b) Proceedings in relation to the claim should be instituted in the correct jurisdiction having regard to the quantum of the claim;
- (c) Failure to institute proceedings in relation to the claim in the correct jurisdiction, having regard to the outcome (whether by way of judgment or settlement) of the claim, will result in cost penalties imposed by Sections 50 and 50A of the Act; and
- (d) The Authority, self insurer and/or their legal practitioners must ensure that the operation of Sections 50 and 50A of the Act is enforced by making appropriate applications and submissions to the Magistrates Court or County Court when the need arises to facilitate the operation and enforcement of those sections.

17. Withdrawal of claims for compensation under Sections 98 and 98A

- (a) The notice pursuant to Section 104AA approved by the Authority to withdraw the claim shall be the form marked "D" annexed to these Directions.
- (b) A notice withdrawing the claim pursuant to Section 104AA must be:
 - (i) signed by the worker; and
 - (ii) served upon the Authority or self insurer or where the Authority or self insurer is legally represented, upon their respective legal practitioner before the certificate described in Section 104(8) is issued in respect of the claim.

Bob Cameron MP

Minister for WorkCover

...20.... / ...6.... / ...02...

SECTION 104A CONFERENCE FORM

FORM A

1. CLAIM DETAILS

WorkCover Claim Number:..... Sections 98 and 98A Ref. No.:.....

Sections 98 and 98A Claim lodged on/...../.....

Claimant's Surname:.....

Given Names:.....

Claimant's Legal Practitioner:

Employer:.....

The Authority/authorised agent/self insurer:

The Authority/authorised agent/self insurer's Legal Practitioner:

Compensation Claimed: **Section 98 only**

(Tick appropriate box) **Sections 98 & 98A**

2. CONFERENCE DETAILS

Conference Date:/...../.....

Conference Location:

Conference Attendees:

Claimant: *(name)*

Claimant's Legal Practitioner: *(name)*

Employer Representative: *(name)*

The Authority/self insurer Representative: *(name)*

The Authority Representative: *(name)*

The Authority/self insurer's Legal Practitioner: *(name)*.....

.....

.....

Other: *(name)*.....

3. OFFERS

The Authority/self insurer:

Claimant:

Section 98	Section 98A	Total	Section 98	Section 98A	Total
.....
.....
.....
.....
.....

If claim rejected or partially rejected by the Authority or self insurer provide details:

.....

4. CONFERENCE RESULT

Claim Settled: Settlement Details:

.....

Claim Not Resolved:

Claim Withdrawn:

5. MEDICAL EVIDENCE EXCHANGED

CLAIMANT MEDICAL EVIDENCE

Date	Doctor	Number of pages including attachments	Description of Attachments

THE AUTHORITY/ SELF INSURER MEDICAL EVIDENCE

Date	Doctor	Number of pages including attachments	Description of Attachments

6. WORKER'S RIGHTS IF WORKER DISPUTES DECISION MADE

If you dispute the Authority/self insurer's decision in respect of the claim you have the following rights:

- *To take the matter to Conciliation (Sections 53 to 62 of the Act);*

To refer a dispute to Conciliation you must lodge a Request for Conciliation with the Senior Conciliation Officer, WorkCover Conciliation Service, Level 9, 460 Lonsdale Street, Melbourne, 3000 within 60 days of receiving this notice. The Senior Conciliation Officer may increase that time but only upon application in appropriate circumstances. Request for Conciliation forms are available from this office or WorkCover Conciliation Service (telephone: 1800 635 960). Conciliation is a free service. Please see the attached brochure for information regarding WorkCover Conciliation Service.

- *To apply to either the County Court or the Magistrates' Court to determine any question or matter arising out of this dispute (Sections 39 and 43 of the Act);*

However, before Court proceedings can be commenced, the dispute must have been referred to Conciliation. Once this has been done, you may then only commence Court proceedings after a Conciliation Officer issues a certificate stating that the Conciliation Officer is satisfied all reasonable steps have been taken by the claimant to settle the dispute. A solicitor can advise you about legal action.

7. DECLARATION

We confirm that a Section 104A Conference in accordance with the “Ministerial Directions Sections 98 and 98A Compensation Claims” issued on theday of2002 has been conducted and the information provided in this form is true and correct.

Signature of Officer Representing
the Authority or self insurer

Signature.....Date:.....

OR

Signature of Legal Practitioner Representing
the Authority or self insurer

Signature.....Date:.....

NOTICE OF STATUTORY OFFER

FORM B

DATE:/...../.....

TO: *(The Worker or the Worker’s Legal Practitioner)*.....

RE: *(Worker’s Name)*.....

(Employer’s Name).....

Sections 98 and 98A Claim lodged on/...../.....;

WorkCover Claim No.: Sections 98 and 98A Ref. No:.....

This notice is provided in accordance with Direction 15 of the “Ministerial Directions Sections 98 and 98A Compensation Claims” issued on theday of.....2002. Pursuant to Section 104(9) of the *Accident Compensation Act 1985* ("the Act") (*name of the Authority/self insurer*)..... makes a statutory offer of \$..... in full settlement of your client's claim for compensation under Section 98/Sections 98 and 98A of the *Accident Compensation Act 1985*.

Conditions of Statutory Offer

1. Pursuant to Direction 15(b) of the above Ministerial Directions, the claimant or the claimant's legal practitioner must acknowledge this statutory offer within 7 days of its receipt.
2. This statutory offer will remain open for 21 days from the date of its receipt by the claimant where he/she is not legally represented, or the claimant’s legal practitioner or the issue of legal proceedings in relation to the claim, whichever occurs first.
3. Acceptance of this offer will result in payment of a legal fee of \$..... to the legal practitioner who represented the claimant in relation to the claim at the Section 104A conference.
4. Pursuant to Section 50(2A) of the Act this statutory offer and the statutory counter offer made by the claimant will be used to determine the payment of legal costs in the event that a judgement or order is made in relation to a claim under Section 98 or Section 98A claim by the Magistrates or County Court as follows:-
 - Where the amount of the judgement or order is not less than 90% of the counter statutory offer made by the claimant, but is greater than the statutory offer made by the Authority or self insurer, the Authority or self insurer will be responsible for payment of the claimant's party and party costs and its own costs.

- Where the amount of the judgement or order is equal to or less than the statutory offer made by the Authority or self insurer, the claimant must pay the party and party costs of the Authority or self insurer and is responsible for his /her own legal costs.
- Where the amount of the judgement or order is greater than the statutory offer made by the Authority or self insurer, but less than 90% of the counter statutory offer made by the claimant, each party will be responsible for their own legal costs.

Signature of Officer Representing
the Authority or self insurer

Signature.....Date:.....

or

Signature of Legal Practitioner Representing
the Authority or self insurer

Signature.....Date:.....

NOTICE OF COUNTER STATUTORY OFFER

FORM C

DATE:/...../.....

TO: *(the Authority or self insurer)*.....

RE: *(Worker's Name)*.....

(Employer's Name).....

Sections 98 and 98A Claim lodged on/...../.....;

WorkCover Claim No.:Sections 98 and 98A Ref. No.:

This notice is provided in accordance with Direction 15 of the "Ministerial Directions Sections 98 and 98A Compensation Claims" issued on theday of.....2002. Pursuant to Section 104(11A)(b) of the *Accident Compensation Act 1985* ("the Act") *(the worker)* will accept the sum of \$..... in full settlement of his/her claim for compensation under Section 98/Sections 98 and 98A of the *Accident Compensation Act 1985*.

CONDITIONS OF COUNTER STATUTORY OFFER

1. Pursuant to Direction 15(e) of the above Ministerial Directions the Authority or self insurer or their legal practitioner must acknowledge this counter statutory offer within 7 days of its receipt.
2. This counter statutory offer will remain open for 21 days from the date of its receipt by the Authority or self insurer or their legal practitioners.
3. Acceptance of this counter statutory offer will result in payment of a legal fee of \$..... to the legal practitioner who represented the claimant in relation to the claim at the Section 104 A conference.
4. Pursuant to Section 50(2A) of the Act the statutory offer and this counter statutory offer made by the claimant will be used to determine the payment of legal costs in the event that a judgement or order is made in relation to a claim under Section 98 or Section 98A by the Magistrates or County Court as follows:-
 - Where the amount of the judgement or order is not less than 90% of the counter statutory offer made by the claimant, but is greater than the statutory offer made by

the Authority or self insurer, the Authority or self insurer will be responsible for payment of the claimant's party and party costs and its own costs.

- Where the amount of the judgement or order is equal to or less than the statutory offer made by the Authority or self insurer, the claimant must pay the party and party costs of the Authority or self insurer and is responsible for his/her own legal costs.
- Where the amount of the judgement or order is greater than the statutory offer made by the Authority or self insurer, but less than 90% of the counter statutory offer made by the claimant, each party will be responsible for their own legal costs.

Signature of Worker

Signature.....Date:...../...../.....

or

Signature of Legal Practitioner

Representing Worker

Signature.....Date:...../...../.....

NOTICE OF WITHDRAWAL OF CLAIM FOR COMPENSATION
UNDER SECTIONS 98 & 98A

DATE: / /

TO: (the Authority or self insurer).....

RE: (Worker's Name).....
(Employer's Name).....

Sections 98 and 98A Claim lodged on / / ;

WorkCover Claim No.:.....Sections 98 and 98A Ref. No.:.....

This notice is provided in accordance with Direction 17 of the "Ministerial Directions Sections 98 and 98A Compensation Claims" issued on the day of 2002.

No Certificate having been issued by a Conciliation Officer in accordance with Section 104(8) of the Act in respect of the above claim made by me pursuant to Sections 98 and 98A of the Act I hereby withdraw the Claim.

Although I have withdrawn this claim I understand that it is the effect of Section 104AA(4) of the Act that the opinion of a Medical Panel on a medical question referred under Section 56(6) of the Act where relevant will apply to any subsequent Claim lodged by me under Section 98 or Section 98A of the Act as if that opinion had been obtained for the purposes of that subsequent Claim.

Signature of Worker

Signature.....Date:...../...../.....