

Passed by both Houses



New South Wales

Workers Compensation Legislation Amendment Bill 2003

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE COUNCIL, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

Legislative Council
2003

Clerk of the Parliaments



New South Wales

Workers Compensation Legislation Amendment Bill 2003

Act No , 2003

An Act to amend the Workers Compensation Act 1987, the Workplace Injury Management and Workers Compensation Act 1998 and certain other Acts to make further provision with respect to commencement of proceedings, dust diseases and injury notification; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Workers Compensation Legislation Amendment Act 2003*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation.
- (2) A proclamation under this section may appoint a particular time on a day as the time for commencement on that day.

3 Amendments

The Acts and Regulation specified in the Schedules to this Act are amended as set out in those Schedules.

Schedule 1 Amendment of Workers Compensation Act 1987 No 70

(Section 3)

[1] Section 87I Payment

Omit section 87I (2).

[2] Section 151DA Time not to run for commencement of proceedings in certain cases

Insert before section 151DA (1) (a):

- (a1) while the determination of the claim concerned is delayed as permitted by section 281 of the 1998 Act, but not including delay beyond 2 months after the claimant has provided all relevant particulars about the claim as required by section 281 (2) (b) of that Act, or

Note. Delay in determining a claim beyond 2 months is only permitted on the basis that degree of permanent impairment is not fully ascertainable and the insurer has notified the claimant of this. In such a case, paragraph (a) of this subsection can apply (if a dispute about whether degree of permanent impairment is fully ascertainable is the subject of medical assessment) to further prevent time running for the purposes of section 151D.

[3] Section 151DA (1) (a)

Omit the paragraph. Insert instead:

- (a) while a medical dispute as to whether the degree of permanent impairment of the injured worker is at least 15%, or whether the degree of permanent impairment of the injured worker is fully ascertainable, is the subject of a referral for determination by the Commission or a referral for assessment under Part 7 of Chapter 7 of the 1998 Act (including any further assessment under section 329 of that Act), or

[4] Section 151DA (1) (a2), (a3)

Insert after section 151DA (1) (a):

- (a2) during the period of 1 month after an offer of settlement is made to the claimant pursuant to the determination of the claim as and when required by the 1998 Act, or

- (a3) while an assessment under Part 7 of Chapter 7 of the 1998 Act in respect of a medical dispute referred to in paragraph (a) is the subject of a pending appeal under section 327 of the 1998 Act, or

[5] Section 151DA (6)

Insert after section 151DA (5):

- (6) The President may delegate to a Deputy President any function of the President under this section (except this power of delegation), but only if the President is satisfied that the delegation is necessary to avoid a conflict of interest or the appearance of bias.

[6] Section 208AA Contributions by employers exiting the managed fund scheme

Omit section 208AA (6) (d). Insert instead:

- (d) a licensed insurer must pay to the responsible insurer such amount as the Authority determines to be fair and reasonable,

[7] Schedule 6 Savings transitional and other provisions, Part 18F

Insert as Part 18F:

Part 18F Provisions consequent on enactment of 2003 amending Act

1 Definition

In this Part:

2003 amending Act means the *Workers Compensation Legislation Amendment Act 2003*.

2 Requirement to produce records

A requirement imposed under section 238 (2) (h) of the 1998 Act before the repeal of that paragraph by the 2003 amending Act continues to have effect as if that paragraph had not been repealed.

3 Reinstatement of costs provision in regulations

The amendments made to the *Workers Compensation (General) Regulation 1995* by the *Workers Compensation (General) Further Amendment (Costs in Compensation Matters) Regulation 2003* are taken to have had effect on and from 28 February 2003.

4 General operation of amendments

Except as provided by this Part or the regulations, an amendment made to this Act or the 1998 Act by the 2003 amending Act does not apply in respect of:

- (a) proceedings commenced in the Commission before the commencement of the amendment, or
- (b) a claim for compensation made before the commencement of the amendment, or
- (c) an injury received before the commencement of the amendment.

[8] Schedule 6, Part 20

Insert at the end of clause 1 (1):

Workers Compensation Legislation Amendment Act 2003

Schedule 2 Amendment of Workplace Injury Management and Workers Compensation Act 1998 No 86

(Section 3)

[1] Section 44 Early notification of workplace injury

Insert after section 44 (4):

- (5) The regulations under section 160 of the 1987 Act may make provision for the prescribed excess amount applicable to an employer under that section to vary according to the time within which the employer notifies the insurer concerned that a worker has received a workplace injury.

[2] Section 142 Regulation of advertising

Insert “or claims for work injury damages” after “this Act” in section 142 (1).

[3] Section 238 Powers of entry and inspection by officers of Authority

Omit section 238 (2) (h).

[4] Section 238AA Power to obtain information, documents and evidence

Insert “or the regulations under those Acts” after “1987 Act” in section 238AA (1).

[5] Section 238AA (8)

Insert after section 238AA (7):

- (8) A person must not:
 - (a) without reasonable excuse, refuse or fail to comply with a requirement under this section, or
 - (b) in purported compliance with a requirement under this section, give information or evidence or produce a document knowing it to be false or misleading in a material particular.

Maximum penalty: 100 penalty units.

[6] Section 238B

Omit the section. Insert instead:

238B Protection from incrimination

(1) Self-incrimination not an excuse

A person is not excused from a requirement under section 238 or 238AA to produce a document, record or statement, to give information or evidence or to answer a question on the ground that the document, record, statement, information, evidence or answer might incriminate the person or make the person liable to a penalty.

(2) Answer, information or evidence not admissible if objection made

However, any answer, information or evidence given by a natural person in compliance with a requirement under section 238 or 238AA is not admissible in evidence against the person in criminal proceedings (except proceedings for an offence under section 238 or 238AA) if:

- (a) the person objected at the time to doing so on the ground that it might incriminate the person, or
- (b) the person was not warned at an appropriate time that the person may object to giving the answer, information or evidence on the ground that it might incriminate the person.

(3) Appropriate time for giving warning about incrimination

An *appropriate time* for warning a person as referred to in subsection (2) (b) is any of the following times:

- (a) the time when the requirement to give the answer, information or evidence is made,
- (b) in the case of evidence required to be given when appearing before an authorised officer, any time after the start of the appearance before the authorised officer,
- (c) at or about the time immediately before the person gives the answer, information or evidence.

(4) **Documents, records or statements admissible**

Any document, record or statement produced by a person in compliance with a requirement under section 238 or 238AA is not inadmissible in evidence against the person in criminal proceedings on the ground that the document, record or statement might incriminate the person.

(5) **Further information**

Further information obtained as a result of a document, record or statement produced or information, evidence or answer given in compliance with a requirement under section 238 or 238AA is not inadmissible on the ground:

- (a) that the document, record, statement, information, evidence or answer had to be produced or given, or
- (b) that the document, record, statement, information, evidence or answer might incriminate the person.

[7] Section 323 Deduction for previous injury or pre-existing condition or abnormality

Omit section 323 (5).

[8] Section 351 Reference of question of law on compensation claim to Commission constituted by Presidential member

Insert after section 351 (7):

- (8) The President may delegate to a Deputy President any function of the President under this section (except this power of delegation), but only if the President is satisfied that the delegation is necessary to avoid a conflict of interest or the appearance of bias.

[9] Section 363 Control and direction of members of Commission

Omit the section.

[10] Section 372

Omit the section. Insert instead:

372 Control and direction of members of Commission

- (1) The members of the Commission other than the Arbitrators are, in the exercise of their functions, subject to the general control and direction of the President.
- (2) Arbitrators are, in the exercise of their functions, subject to the general control and direction of the Registrar.

[11] Section 374 Staff and facilities

Omit “Part 2 of the *Public Sector Management Act 1988*” from section 374 (1).

Insert instead “Chapter 2 of the *Public Sector Employment and Management Act 2002*”.

[12] Section 374 (3)

Omit “*Public Sector Management Act 1988*”.

Insert instead “*Public Sector Employment and Management Act 2002*”.

[13] Section 374 (5) and (6)

Insert after section 374 (4):

- (5) The Department Head of the Department in which staff of the Commission are employed may delegate to the Registrar any of the Department Head’s functions under the *Public Sector Employment and Management Act 2002* with respect to those staff (other than this power of delegation).
- (6) For the purposes of section 12 of the *Public Finance and Audit Act 1983*, the Registrar is taken to be an officer of the Department in which staff of the Commission are employed.

[14] Section 375 Constitution of Commission for particular proceedings

Insert after section 375 (3):

- (4) The Registrar does not constitute, and does not exercise functions as, the Commission (except when acting as an Arbitrator pursuant to the Registrar’s power to exercise the functions of an Arbitrator).

Schedule 3 Amendment of Occupational Health and Safety Act 2000 No 40

(Section 3)

[1] Section 39A

Insert after section 39:

39A Civil liability under regulations

The regulations may provide that nothing in a specified provision or provisions of the regulations is to be construed:

- (a) as conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of the provision or provisions, or
- (b) as conferring a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings,

but the failure of the regulations to so provide in respect of a provision is not to be construed as conferring such a right of action or defence.

[2] Section 65 Protection from incrimination

Omit “on that occasion” from section 65 (2) (b).

Insert instead “at an appropriate time”.

[3] Section 65 (2A)

Insert after section 65 (2):

(2A) Appropriate time for giving warning about incrimination

An *appropriate time* for warning a person as referred to in subsection (2) (b) is any of the following times:

- (a) the time when the requirement to make the statement or to give or furnish the answer or information is made,
- (b) in the case of evidence required to be given when appearing before an inspector, any time after the start of the appearance before the inspector,
- (c) at or about the time immediately before the person makes the statement or gives or furnishes the answer or information.

[4] Part 5, Division 4, heading

Omit the heading. Insert instead:

Division 4 Incidents at places of work

[5] Section 86 Notification of incidents

Omit “occurrences” from section 86 (1).

Insert instead “incidents”.

[6] Section 86 (1) (a) and (b)

Omit the paragraphs. Insert instead:

- (a) any serious incident at the place of work (as referred to in section 87),
- (b) any incident occurring at or in relation to the place of work that the regulations declare to be an incident that is required to be notified to WorkCover.

[7] Section 86 (2)

Omit the subsection. Insert instead:

- (2) Any such notice must be given:
 - (a) as soon as practicable (but not later than 7 days) after the occupier becomes aware of the incident, and
 - (b) in the manner and form required by the regulations.

[8] Section 86 (3)

Omit “a non-disturbance occurrence”. Insert instead “a serious incident”.

[9] Section 86 (3) (b)

Omit “(for example, by telephone or facsimile)”.

[10] Section 86 (3)

Omit “the occurrence” wherever occurring. Insert instead “the incident”.

[11] Section 86 (3A)

Insert after section 86 (3):

- (3A) Despite subsection (1), an occupier is not required to give notice under this section if the occupier has given notice of the incident in accordance with section 44 (2) of the *Workplace Injury Management and Workers Compensation Act 1998*.

[12] Section 87 Non-disturbance of plant involved in serious incidents (and of surrounding area)

Omit section 87 (1). Insert instead:

- (1) In this section:

serious incident means:

- (a) an incident that has resulted in a person being killed, or
(b) any other incident prescribed by the regulations for the purposes of this definition.

[13] Section 87 (2)

Omit “non-disturbance occurrence” wherever occurring. Insert instead “serious incident”.

[14] Section 87 (5)

Omit “occurrence” wherever occurring. Insert instead “incident”.

[15] Section 88 Minister may require and publish special reports into incidents

Omit section 88 (1). Insert instead:

- (1) The Minister may direct WorkCover, or any department of the Government responsible to the Minister, to prepare a special report for the Minister with respect to:
- (a) any incident that occurred at a place of work and that caused the death of or bodily injury to any person, or
(b) any incident at a place of work that constituted a danger to any person.

[16] Section 107 Time for instituting proceedings for offences

Omit “Notification of accidents and other matters” from section 107 (2).

Insert instead “Notification of incidents”.

[17] Section 109 Evidentiary statements

Omit “accident”. Insert instead “incident”.

Schedule 4 Amendment of Workers' Compensation (Dust Diseases) Act 1942 No 14

(Section 3)

[1] Section 8E Reimbursement of compensation from negligent third parties

Omit "as is prescribed by the regulations" from section 8E (3) (d).

Insert instead "as is provided by Schedule 1A or prescribed by the regulations".

[2] Section 8E (3) (e)

Omit "as prescribed by the regulations".

Insert instead "as provided by Schedule 1A".

[3] Section 8E (4) (a)

Omit "economic".

[4] Section 8E (4) (d)

Omit "limited to the amount of those damages".

Insert instead "limited to the amount of those damages to the extent that they are damages for economic loss".

[5] Section 8E (8)–(9A)

Omit section 8E (8) and (9). Insert instead:

- (8) In a case in which the deduction from damages referred to in subsection (3) (b) is not apparent or readily ascertainable from the terms of any judgment or award in respect of the damages, the amount of the deduction is as determined in accordance with Schedule 1A.
- (9) The regulations may make provision for or with respect to:
 - (a) the determination of the amount of any deduction from damages referred to in subsection (3) (b), being provisions not inconsistent with the provisions of Schedule 1A, and
 - (b) requiring (in addition to the requirements of Schedule 1A) the provision to the board of information or documents by a person from whom or by whom

damages in respect of disablement or death from a dust disease are recovered or recoverable, being information or documents relevant to the determination of any matter in connection with the operation of this section or Schedule 1A, and

- (c) exempting classes of persons or cases from the operation of all or specified provisions of this section or Schedule 1A.

(9A) Schedule 1A has effect for the purposes of this section.

[6] Section 8E (10)

Omit "In this section". Insert instead "In this section and Schedule 1A".

[7] Section 8E (10)

Insert in alphabetical order:

final determination, in relation to proceedings, includes a final determination by judgment, verdict, award, settlement, agreement, dismissal, discontinuance or otherwise.

[8] Schedule 1A

Insert after Schedule 1:

Schedule 1A Reimbursement of compensation from negligent third parties

(Section 8E)

1 Application of Schedule

This Schedule applies to proceedings referred to in section 8E for damages in respect of disablement or death that:

- (a) were commenced on or after 1 January 2002, or
- (b) were commenced before 1 January 2002 but were not finally determined before that date.

2 Definitions

In this Schedule:

first person and *second person* have the same meanings as in section 8E (3).

3 Notification of final determination of proceedings

- (1) A person (*the defendant*) against whom proceedings to which this Schedule applies have been taken must notify the board in writing of any award, judgment, settlement or agreement resulting in the final determination of the proceedings.
- (2) The notification must be given to the board within 28 days after the final determination.
- (3) The notification must be accompanied by the following documents:
 - (a) a document or documents that set out the following particulars:
 - (i) the name, address and date of birth of the person who commenced the proceedings (and if more than one, those particulars for each person),
 - (ii) a statement as to whether or not the defendant was sued in the capacity of employer,
 - (iii) a statement as to whether or not the defendant has made, or is required to make, any contribution or other payment in connection with the final determination of the proceedings,
 - (iv) the amount and extent of any such contribution or other payment,
 - (v) if a contribution or other payment (as referred to in subparagraphs (iii) and (iv)) has been or is to be made—a statement as to whether or not an amount has been deducted from the contribution or payment as referred to in section 8E (3) (b),
 - (vi) the amount and extent of any such deduction,
 - (vii) the names and addresses of all parties to the award, judgment, settlement or agreement,
 - (viii) a statement as to whether or not any person against whom the proceedings were brought (other than the defendant) has made, or is required to make, any contribution or other payment in connection with the final determination of the proceedings,
 - (ix) the amount and extent of any such contribution or other payment,

- (x) if a contribution or other payment (as referred to in subparagraphs (viii) and (ix)) has been or is to be made—a statement as to whether or not an amount has been deducted from the contribution or other payment as referred to in section 8E (3) (b),
 - (xi) the amount and extent of any such deduction,
 - (b) a copy (whether in electronic or hard copy form) of the following documents:
 - (i) the final statement of claim in the proceedings,
 - (ii) the final particulars of damage filed by the person or persons who commenced the proceedings,
 - (iii) any award, judgment, terms of settlement, agreement, or other document (such as a deed of release) evidencing the terms of the final determination of the proceedings.
- (4) It is sufficient compliance with subclause (3) (a) to the extent that documents provided under subclause (3) (b) contain the particulars required by subclause (3) (a).
- (5) Where there is more than one defendant in proceedings to which this Schedule applies, each defendant is required to comply with this clause. In such a case, the board may consent to a defendant complying with this clause on behalf of other defendants in the proceedings.
- (6) The board may at any time by notice in writing require a defendant in proceedings to which this Schedule applies to provide to the board, within 21 days or such longer period as the board may allow, specified information or documents concerning the determination of the proceedings.
- (7) A person who fails to comply with a requirement imposed by or under this clause is guilty of an offence.
Maximum penalty: 10 penalty units.
- (8) The board may exempt any particular proceedings or class of proceedings from the requirements as to notification under this clause. Any exemption given for a class of proceedings is to be publicised in a manner determined by the board and any revocation or variation of such an exemption must be similarly publicised.

4 Determination of amount of compensation

In a case in which the deduction from damages referred to in section 8E (3) (b) is not apparent or readily ascertainable from the terms of any judgment or award in respect of the damages, the amount of the deduction is the amount determined in accordance with, and subject to, the following principles:

- (a) Subject to the following paragraphs, the amount of compensation (the *deducted compensation*) taken to have been deducted from the damages payable by the second person to the first person is the total of the following amounts as assessed by the board:
 - (i) the amount of compensation paid by the board to, or on behalf of, the first person up to the date of final determination,
 - (ii) the present value of future benefits payable by the board to, or on behalf of, the first person after that date (where the assessment of those future benefits is based on the assumption that the medical condition of the worker as to disablement and life expectancy will remain unchanged),

less any reduction required by section 8E (6).

- (b) The board may by notice in writing served on the second person give the second person notice (an *assessment notice*) of the amount of the deducted compensation assessed by the board under paragraph (a). An assessment notice must include the board's method of calculation and reasons for the assessment.

Note. When assessing the amount of the deducted compensation under paragraph (a), the board does not include any damages for non-economic loss.

- (c) If a second person disputes the assessment of an amount of deducted compensation set out in an assessment notice, the second person may request that the board reconsider the assessment (a *reconsideration request*).
- (d) A reconsideration request must:
 - (i) be in writing in the form approved by the board, and
 - (ii) be lodged with the board within 28 days after the service on the person of the assessment notice.

- (e) In reconsidering an assessment, the board may consider the advice of accountants, actuaries, legal practitioners and other persons.
- (f) Following the reconsideration of the assessment, the board may:
 - (i) confirm the original assessment of the amount of the deducted compensation made under paragraph (a), or
 - (ii) if the board considers that a lesser amount of deducted compensation is appropriate—issue an amended assessment notice setting out that lesser amount.
- (g) As soon as practicable (and in any event within 28 days) after the lodgment of a reconsideration request, the board must notify the second person in writing of the outcome of the reconsideration. The notification must include the board's reasons for its decision following the reconsideration.
- (h) The second person is not entitled to make more than one reconsideration request in relation to an amount of deducted compensation.

5 Interest

- (1) Interest is payable on an amount that the second person is liable to pay under section 8E (3) (e) at the rate prescribed for the time being under section 95 (1) of the *Supreme Court Act 1970* for payment of interest on judgment debts.
- (2) That interest begins to run from:
 - (a) in a case in which the deduction from damages referred to in section 8E (3) (b) is apparent or readily ascertainable from the terms of any judgment or award in respect of the damages—the date of expiry of the 42 day period referred to in section 8E (3) (d), or
 - (b) in any other case:
 - (i) if the second person has not lodged a reconsideration request before the expiry of the 28 day period referred to in clause 4 (d) (ii)—the date of expiry of the 42 day period referred to in clause 6 (a) (being 42 days after the service of an assessment notice referred to in clause 4 (b)), or

- (ii) if the second person has lodged a reconsideration request before the expiry of the 28 day period referred to in clause 4 (d) (ii)—the date of expiry of the 28 day period referred to in clause 6 (b) (being 28 days after the second person is notified by the board of the outcome of the reconsideration).
- (3) If the board has issued an amended assessment notice in accordance with clause 4 (f) (ii), the amount of interest is to be calculated on the amount of deducted compensation set out in that amended notice.

6 Reimbursement period

For the purposes of section 8E (3) (d), in a case in which the deduction from damages referred to in section 8E (3) (b) is determined in accordance with clause 4, an amount that the second person is liable to pay to the board under section 8E (3) must be paid:

- (a) if the second person does not lodge a reconsideration request before the expiry of the 28 day period referred to in clause 4 (d) (ii)—within 42 days after the service of the assessment notice determining the amount of compensation, or
- (b) if the second person lodges a reconsideration request before the expiry of the 28 day period referred to in clause 4 (d) (ii)—within 28 days after the second person is notified by the board of the outcome of the reconsideration.

[9] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Workers Compensation Legislation Amendment Act 2003 to the extent that it amends this Act

[10] **Schedule 2**

Insert after Part 3:

**Part 4 Provisions consequent on enactment of
Workers Compensation Legislation
Amendment Act 2003**

11 Reimbursement of compensation from negligent third parties

- (1) The amendments made to section 8E by the *Workers Compensation Legislation Amendment Act 2003*, and Schedule 1A as inserted by that Act, are taken to have had effect on and from 1 January 2002.
- (2) Any act, matter or thing done or purporting to have been done under or for the purposes of Part 3 of the *Workers' Compensation (Dust Diseases) Regulation 1998* is, to the extent that it would have been validly done had it been done under this Act as amended by the *Workers Compensation Legislation Amendment Act 2003*:
 - (a) is taken to be (and always to have been) validly done, and
 - (b) is taken to have been done under and for the purposes of section 8E as amended by, and Schedule 1A as inserted by, the *Workers Compensation Legislation Amendment Act 2003*.
- (3) This clause does not apply in respect of relevant proceedings referred to in section 8E (3) (a) that are the subject of any proceedings against the board pending in the Supreme Court on the date of introduction into Parliament of the Bill for the *Workers Compensation Legislation Amendment Act 2003*. This Act and Part 3 of the *Workers' Compensation (Dust Diseases) Regulation 1998* continue to apply in respect of those relevant proceedings as if the *Workers Compensation Legislation Amendment Act 2003* had not been enacted.

**Schedule 5 Amendment of Workers Compensation
(Bush Fire, Emergency and Rescue
Services) Act 1987 No 83**

(Section 3)

[1] Section 32 Application of Principal Act and 1998 Act

Insert after section 32 (1) (g):

(h) Division 9 of Part 3,

[2] Schedule 1 Savings and transitional provisions

Insert at the end of clause 1A (1):

Workers Compensation Legislation Amendment Act 2003 to
the extent that it amends this Act

[3] Schedule 1

Insert after Part 3:

**Part 4 Workers Compensation Legislation
Amendment Act 2003**

4 Commutations

Division 9 of Part 3 of the Principal Act is taken to have had effect as provided by section 32 (1) of this Act (and subject to Schedule 6 of the Principal Act in its application to that Division) on and from the commencement of that Division, but not so as to affect any claim determined before the commencement of this clause.

**Schedule 6 Amendment of Workers' Compensation
(Dust Diseases) Regulation 1998**

(Section 3)

Part 3 Reimbursement of compensation from negligent third parties

Omit the Part.

Workers Compensation Legislation Amendment Bill 2003

Schedule 7 Amendment of Workers Compensation Legislation Amendment Act 2002
No 124

**Schedule 7 Amendment of Workers Compensation
Legislation Amendment Act 2002 No 124**
(Section 3)

Schedule 4.3 Occupational Health and Safety Act 2000 No 40

Omit Schedule 4.3.