

[Act 2001 No 94]



New South Wales

Workers Compensation Legislation Further Amendment Bill 2001

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The object of this Bill is to amend the *Workers Compensation Act 1987* (***the 1987 Act***) and the *Workplace Injury Management and Workers Compensation Act 1998* (***the 1998 Act***) and various other Acts:

- (a) to give effect to the recommendations of the Sheahan Inquiry, and
- (b) to provide that the threshold for lump sum statutory compensation for primary psychological or psychiatric injury is to be 15% whole person impairment, and
- (c) to provide that the threshold for pain and suffering lump sum statutory compensation (except for psychological/psychiatric injury) is to be 10% whole person impairment, and
- (d) to repeal provisions for private underwriting of the workers compensation scheme, and

* Amended in committee—see table at end of volume.

- (e) to make miscellaneous amendments and amendments of a minor, consequential or ancillary nature.

The amendments made by this Bill to the 1987 and 1998 Acts have been drafted on the basis that all the amendments made to those Acts by the *Workers Compensation Legislation Amendment Act 2001* (*the earlier amendments*) have commenced, even though some of those amendments have not commenced.

To assist readers of this Bill in this regard, unofficial prints of the 1987 and 1998 Acts incorporating all the earlier amendments (including those that have not yet commenced) are available on the Parliamentary Counsel's Office website (www.pco.nsw.gov.au) under "What's New".

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement (with certain exceptions) of the proposed Act on a day or days to be proclaimed. The exceptions relate to amendments concerning common law damages (and associated transitional arrangements) and special transitional arrangements dealing with the repeal of existing commutation provisions, which will be taken to have commenced at 9.00 am on the date of introduction of the Bill.

Clause 3 is a formal provision giving effect to the amendments set out in Schedules 1–10.

Common law work injury damages

Schedule 1.1 makes the following changes to provisions of the 1987 Act for the recovery of common law work injury damages:

- (a) There will be no recovery of common law damages unless the injury results in a degree of permanent impairment of the injured worker of 15% or more.
- (b) The existing entitlement to recover common law damages for non-economic loss (such as pain and suffering) will be abolished, without affecting the worker's entitlement to statutory compensation for non-economic loss. The Bill does this by restricting recovery of common law damages to damages for past economic loss due to loss of earnings and damages for future economic loss due to the deprivation or impairment of earning capacity.
- (c) The calculation of future economic loss in assessing common law work injury damages will be limited to loss up to age 65.

- (d) Existing provisions requiring an injured worker to elect whether to claim statutory non-economic loss compensation (under sections 66 and 67 of the 1987 Act) or common law damages for non-economic loss will be repealed. This is consequential on the amendments that will abolish the entitlement to common law work injury damages for non-economic loss.
- (e) Recovery of common law work injury damages (now to be restricted to economic loss) will continue to prevent recovery of any further statutory compensation and require repayment of any economic loss statutory compensation (weekly benefits) already paid. The worker will also cease to be entitled to participate in any injury management program. A worker will continue to be entitled to economic loss statutory compensation until common law damages are recovered. Consequential changes are made to ensure that existing arrangements for statutory compensation and common law damages in respect of the death of a worker are maintained.
- (f) Recovery of common law work injury damages from the Uninsured Liability and Indemnity Scheme will be permitted where the employer is uninsured and unable to meet the damages awarded or agreed.

These amendments will be back-dated to 9.00 am on the date of introduction of this Bill into Parliament.

New procedures for common law claims

Schedule 1.2 amends the 1998 Act to introduce the following new pre-litigation procedures and processes for common law work injury damages claims:

- (a) A claim for common law work injury damages will not be able to be made unless a claim for statutory lump sum compensation is made before or at the same time as the work injury damages claim.
- (b) Various new procedures ensure that the person on whom a claim is made makes admissions as to acceptance of the degree of permanent impairment resulting from the worker's injury.
- (c) A common law claim for work injury damages must include details of the alleged negligence or other tort of the employer.
- (d) If there is a dispute as to the degree of permanent impairment of the injured worker, court proceedings for common law work injury damages cannot be commenced until the degree of permanent impairment has been assessed by an approved medical specialist.
- (e) Before commencing court proceedings, the claimant will have to serve on the defendant a pre-filing statement setting out particulars of the common law claim and the evidence on which the claimant proposes to rely.

- (f) While the pre-filing statement is current, time stops running for the purposes of the 3-year limitation on the commencement of court proceedings for work injury damages. The pre-filing statement remains current until it is withdrawn or struck out by the President of the Commission on the application of the defendant. It cannot be struck out less than 6 months after the defendant files a defence in response to the pre-filing statement and cannot be struck out if an assessment of the degree of permanent impairment of the injured worker is pending.
- (g) Within 28 days after the pre-filing statement is served, the defendant is required to accept liability (and make a reasonable offer of settlement) or serve on the claimant a defence to the claim. If the defendant fails to respond to the pre-filing statement within 42 days, the claimant can commence court proceedings and the defendant is prevented from filing a defence in the proceedings, with the result that the claimant can obtain summary judgment on the issue of liability.
- (h) If the defendant responds as required to the pre-filing statement, the claim is required to proceed to mediation before a mediator chosen from a panel appointed by the President. The defendant must participate in mediation unless the defendant wholly disputes liability. The mediator will certify as to the results of mediation and as to the final offers made by the parties in the mediation.
- (i) If there is no dispute as to whether the degree of permanent impairment is sufficient for an award of work injury damages, the claimant can apply to the Registrar for a direction to the defendant to facilitate the claimant's access to premises for a purpose relevant to the claim. This adds to the existing powers of the Registrar to require the production of documents and the furnishing of information by the parties.
- (j) Costs in work injury damages matters are to be awarded in accordance with the regulations or rules of court, with the regulations to prevail in the event of an inconsistency with rules of court.

Schedule 1.3 makes amendments to the *District Court Act 1973* in respect of actions for common law work injury damages. Those actions will be able to be taken in the District Court irrespective of the amount claimed (as is currently the case for motor accident damages actions). The availability of a jury trial in such an action will be subject to the same restrictions as currently apply to motor accident damages actions. Provisions for the transfer of such an action between the District Court and the Supreme Court will be the same as for motor accident damages actions.

Statutory lump sum compensation

Schedule 2 makes the following amendments to the 1987 Act with respect to lump sum statutory compensation:

- (a) The Bill will establish formulae for the determination of permanent loss statutory compensation according to the degree of permanent impairment of the injured worker. The formulae provide for a weighted increase in compensation in favour of seriously injured workers.
- (b) The threshold for lump sum statutory compensation in respect of permanent impairment resulting from primary psychological/psychiatric injury will be set at 15% permanent impairment.
- (c) The threshold for statutory compensation for pain and suffering (under section 67 of the 1987 Act) will be set at 10% permanent impairment (except primary psychological/psychiatric injuries, for which the threshold will be 15%).
- (d) Provision for ascertaining diminution of hearing based on presumed hearing loss as a result of age will be repealed (with this matter to be dealt with in guidelines for the assessment of permanent impairment).

Statutory compensation for domestic assistance

Schedule 3 introduces a new entitlement to statutory compensation for domestic assistance that is reasonably necessary to be provided to an injured worker as a direct result of the injury, but only if the degree of permanent impairment of the injured worker resulting from the injury is 15% or more (with exceptions for short-term special needs). Compensation will also be payable for domestic assistance provided gratuitously subject to the care provider having lost income or forgone employment, and compliance with WorkCover Guidelines.

Savings and transitional amendments

Schedule 4 makes various savings and transitional amendments including amendments with respect to the following:

- (a) providing that a judge of the Compensation Court who is appointed to the Supreme Court is to have seniority, rank and precedence as a Supreme Court judge dating from his or her commission as a Compensation Court judge (or his or her original commission as a Supreme Court judge in the case of a Supreme Court judge appointed as Chief Judge of the Compensation Court),
- (b) broadening the power to make savings and transitional regulations with respect to claims for injuries to coal miners and exempting coal miners from the amendments made by Schedules 1, 2, 3 and 8 to this Bill,

- (c) minor fine-tuning of savings and transitional provisions enacted in connection with the *Workers Compensation Legislation Amendment Act 2001*,
- (d) authorising disclosure of information to the Commission,
- (e) providing for the phasing in of the amendments made by Schedule 1 to this Bill (which relate to common law damages).

Jurisdiction of the Commission

Schedule 5 amends the 1987 and 1998 Acts to make it clear that the jurisdiction of the Workers Compensation Commission extends to all matters arising under those Acts (whether or not relating to a new claim matter) except those matters concerning existing claims that remain within the jurisdiction of the Compensation Court. The distinction between new claims and existing claims is clarified.

Private underwriting arrangements

Schedule 6 repeals uncommenced provisions of the 1998 Act for underwriting of the workers compensation scheme by private insurance arrangements, and makes consequential amendments to the 1987 Act.

Industrial Magistrates

Schedule 7 amends various Acts to clarify the jurisdiction of Industrial Magistrates to deal with proceedings for offences and applications for related orders under occupational health and safety legislation, workers compensation legislation, essential services legislation and building and construction industry long service leave payments legislation.

Commutation

Schedule 8 amends the new provisions for commutation of liabilities (sections 87D–87K of the 1987 Act, as inserted by the *Workers Compensation Legislation Amendment Act 2001*) to limit the cases in which commutation will be available to cases where the WorkCover Authority is satisfied and certifies that:

- (a) the injury has resulted in a degree of permanent impairment of at least 15%,
and
- (b) lump sum compensation has already been paid, and
- (c) 2 years has elapsed since the worker's first claim for weekly payments, and
- (d) all opportunities for injury management and return to work for the injured worker have been fully exhausted, and
- (e) the worker has an existing and continuing entitlement to weekly payments,
and

- (f) the worker has received weekly payments regularly and periodically for the previous 6 months, and
- (g) the worker has not had weekly payments of compensation discontinued or reduced.

The new limitations will not apply to the commutation of liabilities arising under the *Workers' Compensation Act 1926*.

Transitional provisions to be inserted by Schedule 4 provide for the repeal of existing arrangements for commutations (section 51 of the 1987 Act) to have effect from the date of introduction of this Bill into Parliament, subject to the continuation of those arrangements in the case of applications pending immediately before the date of introduction of the Bill.

Uninsured Liability and Indemnity Scheme

Schedule 9 amends the 1987 Act to extend the Uninsured Liability and Indemnity Scheme to common law work injury damages. This will authorise the payment by the WorkCover Authority of work injury damages recoverable in respect of an injury to or the death of a worker in cases where the employer is uninsured or cannot be found or identified.

Miscellaneous amendments

Schedule 10 makes the following miscellaneous amendments:

- (a) The provision for a claims manual for insurers is amended to provide that the manual can make provision for procedures to be followed before a claim is made, such as procedures in connection with early notification of injury and provisional acceptance of liability.
- (b) The number of part-time directors of the WorkCover Board will be increased from 6 to 7 (with a consequential increase in quorum). The Chairperson of the Council will be able to be appointed as a part-time director of the Board.
- (c) The existing power to make rules of the Compensation Court and regulations with respect to the admission of medical reports in evidence and the appearance of medical experts will be applied to new claims before the Commission.
- (d) Approved medical specialists will be competent but not compellable to give evidence in proceedings before the Commission or a court.
- (e) An admission of liability at common law will not be able to be relied on in any prosecution under occupational health and safety legislation but a finding of guilt in such a prosecution will be able to be relied on in a common law work injury damages claim.

Explanatory note

- (f) An amendment will be made to provide that no objection may be made to an Arbitrator who has conciliated on a dispute determining the dispute.
- (g) Provisions concerning the determination and expedited assessment of compensation claim disputes are amended to provide that they extend to disputes about payment of provisional weekly payments (even though no claim has been made).
- (h) The regulation making power to fix maximum costs for legal services, agent services and associated matters in workers compensation and work injury damages matters is amended to make it clear that the power to fix a maximum includes power to provide that no amount is recoverable for particular services or matters.
- (i) The power to make rules of the Commission will be expanded to authorise the making of rules requiring the provision of documents and information by a party to a matter before the Commission to any other party to the matter, and specifying exemptions from, and cases in which the Commission must or must not exercise functions under, the provision enabling the Commission to require persons to furnish information or documents.
- (j) Other amendments are made by way of statute law revision.