

Act No. 133 of 1989

WORKERS COMPENSATION (BENEFITS) AMENDMENT BILL 1989

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to amend the Workers Compensation Act 1987:

- (a) to restore, retrospectively to 30 June 1987, common law rights to damages for serious work-related injuries;
- (b) to require injured workers to elect between the recovery of common law damages or the lump sum payments of workers compensation for so-called "Table of Maims" injuries;
- (c) to modify the damages otherwise recoverable in a common law action for a work-related injury by imposing monetary thresholds and maximum limits and by making other changes in line with those applying to awards of damages in motor vehicle accidents;
- (d) to increase (from 30 June 1989) workers compensation benefits for the dependants of deceased workers, for workers suffering serious permanent injuries and for partially incapacitated unemployed workers;
- (e) to make further provision with respect to the rehabilitation of injured workers (including the payment of additional rehabilitation expenses);
- (f) to exclude from the payment of workers compensation benefits injuries received on a worker's daily or other periodic journey to or from work (except in certain cases);
- (g) to make further provisions with respect to workers compensation claims (including the creation of special offences relating to false claims and the exchange of information among insurers);
- (h) to deal with so-called "top-up" arrangements (under which injured workers receive additional compensation) by enabling an appropriate reduction in

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workers compensation or by enabling the imposition of additional premiums for the insurance policies of employers who are a party to any such arrangement;

- (i) to extend the compensation scheme for voluntary bush-fire fighters to surf life savers;
 - (j) to increase the rates of workers compensation payable in the case of work-related dust diseases; and
 - (k) to make other miscellaneous changes.
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Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act commences on a day or days to be appointed by proclamation. However the amendments relating to benefit increases are to be taken to have commenced at 4 p.m. on 30 June 1989.

Clause 3 is a formal provision that gives effect to the Schedules of amendments to the Workers Compensation Act 1987 (Schedules 1-8).

Clause 4 is a formal provision that gives effect to the Schedule of amendments to the Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987 (Schedule 9).

Clause 5 is a formal provision that gives effect to the Schedule of amendments to the Workers' Compensation (Dust Diseases) Act 1942 (Schedule 10).

Clause 6 is a formal provision that gives effect to the Schedule of amendments to other Acts (Schedule 11).

**SCHEDULE 1 - AMENDMENT OF WORKERS COMPENSATION
ACT 1987 RELATING TO COMMON LAW RIGHTS**

Restoration of common law rights and modification of damages

Schedule 1 (1) replaces Part 5 of the Act (which at present provides for the abolition of common law rights to damages for work-related injuries) with a new Part containing the following provisions relating to the restoration of common law rights and the modification of damages.

Division 1 - Preliminary

Section 149 defines, for the purposes of the Part, "damages" and "non-economic loss".

Section 150 ensures that the provisions of the Part relating to common law actions against employers apply equally to any such actions against fellow workers and others for whom the employer is vicariously liable etc.

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Division 2 - Common law and other remedies generally

Section 151 preserves common law actions in negligence or other torts for work-related injuries.

Section 151A requires an injured worker to elect between the recovery of common law damages or the lump sum payment of workers compensation for so-called "Table of Maims" injuries. The election is made by commencing court proceedings for damages or by accepting the lump sum compensation payment.

Section 151B provides that a person who recovers damages must repay any previous workers compensation payments from the damages and is not entitled to any further workers compensation.

Section 151C provides for a 6 months delay before common law actions may be commenced.

Section 151D requires common law actions to be commenced within 3 years unless the leave of the court is obtained.

Division 3 - Modified common law damages

Section 151E applies the Division to the award of damages for work-related injuries except for motor vehicle accidents which are dealt with under Part 6 of the Motor Accidents Act 1988.

Section 151F requires the court to comply with the Division in awarding damages to which the Division applies.

Section 151G deals with the assessment of damages for non-economic loss ("pain and suffering" etc.) generally in accordance with the Motor Accidents Act 1988, namely:

- (a) maximum damages to be \$180,000; and
- (b) no damages unless they exceed \$45,000; and
- (c) damages of between \$45,000 and \$60,000 to be reduced on a sliding scale.

In the case of retrospective claims the figure of "\$45,000" is increased to "\$75,000" and the figure of "\$60,000" is increased to "\$100,000".

Section 151H prevents the award of damages for economic loss (loss of earnings, medical expenses etc.) unless:

- (a) the worker has suffered a "Table of Maims" injury of at least 33% (or 60% for retrospective claims) of the maximum compensation under the "Table of Maims"; or
- (b) the worker has been awarded damages for non-economic loss of at least \$60,000 (or \$100,000 for retrospective claims); or
- (c) the worker dies as a result of the injury.

Section 151I limits the amount of damages for the loss of past or future earnings by imposing a limit of the maximum amount (from time to time) of workers compensation weekly payments (currently \$545.70 per week).

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Section 151J requires the application of a discount rate of 5 per cent (or of a subsequently prescribed percentage) in assessing lump sum damages for future economic loss.

Section 151K provides for the circumstances in which damages may be awarded for the cost of providing home care services to an injured worker and regulates the amount of any such damages.

Section 151L requires consideration to be given in assessing damages to the participation of the injured worker in rehabilitation or other measures that will mitigate damages.

Section 151M provides that interest on an award of damages is not to be ordered by a court as a matter of course but rather by way of penalty against a defendant who does not take such steps (if any) as may be reasonable and appropriate to effect settlement of the plaintiff's claim.

Section 151N requires a court to reduce a plaintiff's damages in accordance with the law of contributory negligence (including actions based on a breach of statutory duty), but prevents a reduction in damages for loss of future earnings below the amount otherwise payable by way of weekly payments of workers compensation.

Section 151O excludes the defence of voluntary assumption of risk and, instead, creates a presumption of negligence on the part of the injured worker for which damages may be reduced.

Section 151P limits the class of persons who may claim damages for psychological or psychiatric injury.

Section 151Q provides for structured settlements of damages awarded to a plaintiff. The section generally requires an arrangement to be made for periodic payment of at least that part of the loss of future earnings that is equivalent to the basic statutory weekly payment of workers compensation (currently \$173.50 per week).

Section 151R prohibits a court from awarding exemplary or punitive damages.

Section 151S requires a court to apportion damages in certain cases.

Section 151T enables the making of lump sum awards of costs and avoids the necessity for taxation of costs so awarded.

Division 4 - Retrospective restoration of modified common law

Section 151U restores common law rights (as modified under Part 5) to injuries received after common law rights were abolished, namely, 30 June 1987.

Section 151V excludes, in the case of retrospective claims, the election between common law damages and "Table of Maims" compensation.

Section 151W modifies the time limit for commencement of retrospective common law claims.

Section 151X extends workers compensation insurance policies since 30 June 1987 so as to cover retrospective common law claims.

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Section 151Y provides for the funding of retrospective common law claims (in excess of the workers compensation entitlement) from premiums in the "managed" funds of workers compensation insurers. The employers whose liability will be so funded include self-insurers, Government employers and employers insured with specialised insurers.

Division 5 - Miscellaneous provisions

Section 151Z makes the necessary provisions and adjustments to deal with common law actions against third-parties at fault (being third-parties who are solely at fault or are jointly at fault with the worker's employer).

Section 151AA continues a provision which abolishes the doctrine of common employment.

Other consequential changes

Schedule 1 (2)-(4) require workers compensation insurance policies to cover employers for liability at common law etc.

Schedule 1 (5) makes a consequential amendment.

SCHEDULE 2 - AMENDMENT OF WORKERS COMPENSATION ACT 1987 RELATING TO INCREASED BENEFITS

Increased death benefit

Schedule 2 (1) amends section 25 (death of worker leaving dependants) to increase the maximum amount payable to the dependants of a deceased worker from \$87,350 (the current indexed maximum amount) to \$150,000.

"Deemed" total incapacity payments extended to 52 weeks

Schedule 2 (2) amends section 38 (partially incapacitated unemployed workers compensated as if totally incapacitated) to extend, from 34 to 52 weeks, the maximum period for which a partially incapacitated worker is entitled to receive compensation (by way of income support) as if totally incapacitated. That section applies, as at present, if the partially incapacitated worker's employer fails to provide suitable employment and the worker is either seeking employment or undergoing rehabilitation training.

Increased benefit for permanent injuries

Schedule 2 (3) amends section 66 (compensation for permanent injuries) to increase the maximum amount payable to seriously injured workers (that is, workers who have suffered multiple losses specified in the so-called "Table of Maims") from \$87,350 (the current indexed maximum amount) to \$106,300.

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**SCHEDULE 3 - AMENDMENT OF WORKERS COMPENSATION
ACT 1987 RELATING TO INDEXATION ETC. OF
AMOUNTS OF BENEFITS**

Indexation changes

Division 6 of Part 3 of the Principal Act at present provides for the indexation of amounts of certain benefits payable under that Part. That is, an adjustable amount (e.g. the maximum death benefit payable under section 25) is adjusted twice a year according to award rates of pay indexes. As a consequence of the increases made by Schedule 2 it is necessary to bring all the adjustable amounts in Part 3 in line with the current figures. Schedule 3 (1) (a), (2), (3), (4), (6) (a), (7) (a), (9) and (10) amend the relevant provisions.

Schedule 3 (8) amends the definition of "base index number" in section 79 to update the index used in calculating an adjustable amount for the purposes of the Act.

Operation of increased benefits

Schedule 3 (1) (b), (5), (6) (b) and (7) (c) generally provide that if an amount of compensation is adjusted either by indexation or by amending the section concerned, the compensation payable is the relevant amount in force at the date of the particular injury or death.

**SCHEDULE 4 - AMENDMENT OF WORKERS COMPENSATION
ACT 1987 RELATING TO REHABILITATION**

Partially incapacitated workers

Schedule 4 (1) amends section 38 (partially incapacitated unemployed workers compensated as if totally incapacitated) as follows:

Schedule 4 (1) (a) enables the WorkCover Authority or the Compensation Court to have regard to any delay on the part of a worker or to the worker's efforts in seeking suitable employment when the Authority or the Court approves a longer period than the 2 years from the date the employer first failed to provide suitable employment (being the period in which compensation under section 38 is payable).

Schedule 4 (1) (b) provides that a worker must request the employer to provide suitable employment as soon as practicable after becoming partially incapacitated.

Schedule 4 (1) (c)-(g) extends and clarifies the existing requirements on the part of both the worker and the employer in respect of determining entitlement to compensation under section 38.

Schedule 4 (1) (h) enables regulations to be made regarding approved rehabilitation training procedures etc. and for other related matters.

Schedule 4 (2) inserts section 38A (definitions : section 38) which contains definitions for the purposes of section 38. In particular, "suitable employment" is

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defined to take into account the rehabilitation of the worker as well as individual details.

"Suitable employment" - ordinary partial incapacity benefits

Schedule 4 (3) amends section 40 (weekly payment for partial incapacity) to make further provision for determining what is suitable employment in respect of a worker and also to provide that a partially incapacitated worker may be required to undergo an assessment of the amount that the worker is able to earn in some suitable employment.

Compensation for rehabilitation expenses etc.

Schedule 4 (4) amends section 59 (definitions) to insert a definition of "occupational rehabilitation service", being a wide range of services provided by an accredited provider of rehabilitation services or by a prescribed person or class of persons. These services are to be compensable as a separate rehabilitation expense.

Schedule 4 (5) substitutes section 60 (compensation for cost of medical or hospital treatment and rehabilitation etc.) to take into account occupational rehabilitation service as a separate category of compensation.

Schedule 4 (6) inserts section 63A (rates applicable for occupational rehabilitation service) to provide that the amount for which an employer is liable in respect of occupational rehabilitation service is such amount as is reasonably appropriate to the service provided. The overall maximum amount for which an employer is liable is to be \$1,200 or such greater amount as may be prescribed.

Schedule 4 (11) amends Schedule 6 (savings, transitional and other provisions) to provide that the above set of amendments do not apply to services provided before the commencement of the amendments and do not affect compensation payable for certain treatment before that commencement.

Schedule 4 (7) makes a consequential amendment.

Rehabilitation programmes

Schedule 4 (8) amends section 152 (rehabilitation programmes to be established by employers) to enable a group of 2 or more employers to establish a single rehabilitation programme for each member of the group.

Schedule 4 (9) amends section 154 (rehabilitation counsellors) to provide that a rehabilitation counsellor can include an authorised officer of the Authority.

Schedule 4 (10) inserts section 154A (rehabilitation etc. not admission of liability) to provide that anything done by an employer or insurer in connection with the assessment of an injured worker for rehabilitation or for employment or with the provision or arrangement of rehabilitation services etc. does not constitute an admission of liability.

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**SCHEDULE 5 - AMENDMENT OF WORKERS COMPENSATION
ACT 1987 RELATING TO JOURNEYS**

Compensation for injuries on journeys between worker's home and place of employment

Schedule 5 (1) (a) amends section 10 (journey claims - where compensation is payable) to remove the general entitlement of workers to compensation for personal injury received on journeys between the worker's home and place of employment (or certain other related places). A personal injury received by a worker on a journey to or from the worker's home will (unless otherwise work-related) be taken to be work-related (and be compensated accordingly) only if the risk of injury (compared with the risk on the worker's normal journey) was materially increased for a reason connected with the worker's employment. Schedule 5 (1) (e) makes it clear that a personal injury received by a worker on any daily or other periodic journey to or from the worker's home is not work-related merely because the journey was made to or from the worker's place of employment or the worker uses a vehicle owned or supplied by the employer.

Minor or consequential changes

Schedule 5 (1) (d) enables the regulations to prescribe additional classes of journeys which will be covered.

Schedule 5 (1) (b) and (c) are consequential amendments.

Schedule 5 (2) amends Schedule 6 (savings, transitional and other provisions) to provide that the changes made to journey claims do not apply to injuries on journeys made before the changes take effect.

**SCHEDULE 6 - AMENDMENT OF WORKERS COMPENSATION
ACT 1987 RELATING TO CLAIMS**

Making of claims

Schedule 6 (2) inserts section 92A (manner of making claim for compensation) which provides that a claim is to be made by serving it on the employer concerned or on the insurer who has indemnified the employer if, for example, the employer has refused to receive the claim or cannot be identified or found. Schedule 6 (1) consequentially amends section 92 (making of claim for compensation) because the manner in which claims are to be made is no longer to be as prescribed by the regulations.

False claims

Schedule 6 (2) also inserts section 92B (false claims etc.) which creates an offence (Penalty: \$5,000 or 12 months imprisonment, or both) of making a false or misleading statement in relation to a claim for compensation or the furnishing of information concerning a claim.

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Administration of claims for compensation etc.

Schedule 6 (3) inserts Division 1A (administration of claims for compensation or damages by insurers) in Part 4. The Division contains section 93A (definitions) and the following sections:

Section 93B (claims administration manual) enables the WorkCover Authority to prepare and publish a claims manual for use by insurers. The manual may provide for procedures to be followed in the administration of claims, including liaison between insurers and employers concerning rehabilitation assessment of injured workers and arrangements for partially incapacitated workers. The Authority may also give an insurer directions as to the procedure to be followed and it will be a condition of the licence of the insurer under Part 7 of the Act that the direction is complied with.

Section 93C (duty of claimant to co-operate) requires a claimant to co-operate fully (only until court proceedings are commenced) in respect of a claim with the insurer who is liable. This may involve complying with a reasonable request to furnish specified information in addition to the claim form.

Section 93D (inspection of relevant claims information etc.) enables the WorkCover Authority to allow an insurer or other appropriate person to inspect claims information held by the Authority or other prescribed information. Insurers are also authorised to exchange claims information.

Schedule 6 (4) makes a consequential amendment.

Schedule 6 (5) amends section 276 (disclosure of information) to include disclosure of information in accordance with proposed section 93D as an exception to the existing offence of disclosing information obtained in connection with the administration etc. of the Act.

SCHEDULE 7 - AMENDMENT OF WORKERS COMPENSATION ACT 1987 RELATING TO "TOP-UP" ARRANGEMENTS ETC.

Reduction etc. of benefits if additional or alternative compensation payable

Schedule 7 (1) inserts Division 8 (reduction of benefits where additional or alternative compensation payable) in Part 3. The Division contains the following sections:

Section 87A (additional or alternative compensation to which Division applies) provides that the Division applies to additional or alternative compensation prescribed by the regulations. This may include payments to injured workers and their dependants under a contract of employment, an award, the Trade Practices Act 1974 etc.

Section 87B (reduction of compensation under this Act) generally provides that if a person who is entitled to compensation under the Act has been paid additional or alternative compensation, then the amount of compensation payable under the Act is reduced by the amount of the additional or alternative compensation. If additional or alternative compensation is paid after

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compensation has been paid under the Act, the relevant amount paid under the Act must be refunded.

- Section 87C (employer etc. to notify claim or payment of additional or alternative compensation) provides that an employer or "top-up" insurer on whom a claim is made for additional or alternative compensation (or who pays that compensation) must notify the relevant workers compensation insurer of the details of the claim or payment. It will be an offence (Penalty: \$2,000) to contravene the section.

Increased insurance premiums

Schedule 7 (2) amends section 168 (insurance premiums order) to enable an insurance premiums order to provide for the payment of increased premiums by employers who are or may become liable to make "top-up" payments to injured workers etc.

**SCHEDULE 8 - MISCELLANEOUS AMENDMENTS TO
WORKERS COMPENSATION ACT 1987**

Schedule 8 (1) permits the extension of the categories of specialised insurer who are not part of the workers compensation managed fund system.

Schedule 8 (2) abolishes the Workers Compensation Review Committee appointed under section 8.

Schedule 8 (3) amends section 43 (computation of average weekly earnings) to clarify an existing obligation on the part of an employer to supply an injured worker with certain details in order to enable the worker to determine his or her average weekly earnings.

Schedule 8 (4) amends section 62 (rates applicable for hospital treatment) so that the amount for which an employer is liable in respect of public hospital treatment of a worker may be prescribed by regulation (as is the case with private hospitals).

Schedule 8 (5) makes the employer liable for the costs of interpreter services provided to an injured worker in connection with a claim for compensation.

Schedule 8 (6) amends section 71 to clarify a provision dealing with compensation for a further loss.

Schedule 8 (7) substitutes "loss of mental powers" with "brain damage" as an injury in the Table to Division 4 of Part 3 (compensation for permanent injuries). Schedule 8 (8) is a consequential amendment.

Schedule 8 (9) clarifies the requirement for the payment of the \$500 excess by employers.

Schedule 8 (10) enables Government employers who are not funded from the Consolidated Fund to be part of the same workers compensation insurance arrangements as other employers.

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Schedule 8 (11) and (12) make minor amendments concerning the recovery of unpaid premiums and the requirement of former self-insurers to supply certain information and records.

Schedule 8 (13) - (15) and (17) make minor or consequential amendments to various provisions relating to the statutory funds of licensed insurers (particularly in relation to the pooling of premiums) and to the application of money deposited by self-insurers with the Treasurer.

Schedule 8 (16) enables a self-insurer to satisfy the requirement to deposit money with the Treasurer by providing a bank guarantee or undertaking instead.

Schedule 8 (18) corrects a wrong cross-reference.

Schedule 8 (19) - (21) amends Schedule 6 (savings, transitional and other provisions) particularly in respect of the operation of the amendments made by Schedule 8 (4) and in respect of policies of insurance issued or renewed before 4 p.m. on 30 June 1987, and also to enable savings and transitional regulations to be made consequent on the enactment of the proposed Act.

SCHEDULE 9 - AMENDMENT OF WORKERS COMPENSATION (BUSH FIRE, EMERGENCY AND RESCUE SERVICES) ACT 1987

Surf life savers to be compensated for injury etc.

Schedule 9 (4) (a) amends section 23 (definitions) to bring surf life savers within the definition of "rescue association worker" and, in so doing, extends the operation of the Act to include surf life savers. Under Part 3 of the Act, if a rescue association worker suffers an injury arising out of or in the course of carrying out an authorised activity, the worker is entitled to receive compensation in accordance with the Workers Compensation Act 1987 (the "Principal Act").

Schedule 9 (4) (b) also amends section 23 to define "surf life saver" widely to include not only members of a club which is affiliated with a branch of the Surf Life Saving Association of Australia - New South Wales State Centre Incorporated, but elected or appointed officers, or advisors, of that Association.

Extension of cover to "prescribed persons"

Schedule 9 (1) amends section 7 (injuries to which Part applies) to extend the application of Part 2 (bush fire fighters compensation) to personal injury received by a person of a prescribed class arising out of or in the course of carrying out an associated operation or work or a relevant journey. That Part currently covers fire fighters and official fire fighters (i.e. captains etc. of bush fire brigades).

Compensation payable for certain services

Schedule 9 (2) amends section 10 (compensation payable for injury or death) to provide that a fire fighter is entitled to receive the benefits prescribed by Division 3 of Part 3 (compensation for medical, hospital and rehabilitation expenses etc.) of the Principal Act if an occupational rehabilitation service (as defined in section 59 of that Act) becomes necessary as a result of the fire fighter's injury.

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Schedule 9 (5) amends section 26 (compensation payable for injury or death) to make the same amendment in respect of an emergency service worker or a rescue association worker.

Death of fire fighter etc. leaving no dependants

Schedule 9 (3) amends section 11 (provisions relating to compensation for injury or death) to provide that if a fire fighter has died as a result of an injury and has left no dependants, the amount of compensation (which is not payable in those circumstances under the Principal Act) is not increased by the increases proposed for the dependants of deceased workers.

Schedule 9 (6) amends section 27 (provisions relating to compensation for injury or death) to make the same amendment in respect of an emergency service worker or a rescue association worker who dies as a result of an injury and who leaves no dependants.

Minor consequential amendment

Schedule 9 (7) amends section 32 (application of Principal Act) to further extend the application of certain provisions of the Principal Act.

**SCHEDULE 10 - AMENDMENT OF WORKERS' COMPENSATION
(DUST DISEASES) ACT 1942**

Increased rates of compensation etc.

Schedule 10 (1) amends section 8 as follows:

- Schedule 10 (1) (a) provides for the payment of compensation (in accordance with the benefits set out in Division 3 of Part 3 of the Workers Compensation Act 1987 ("the Principal Act")) for any occupational rehabilitation service that is necessary as a result of a dust disease.
- Schedule 10 (1) (b)-(d) increases the maximum (i.e. lump sum) amount payable to the dependants of a deceased worker from \$25,650 to \$100,000, and increases the weekly payment to the dependants of a deceased worker from \$89.10 to \$97.20 for spouses and from \$31.10 to \$49.10 for each dependent child. An injured worker's weekly payments for incapacity are increased to the amount payable under the Principal Act.
- Schedule 10 (1) (e) provides that the increased rates only apply in respect of the death of a person on or after 1 July 1989 or in respect of compensation that becomes payable after that date.

Effect of changes in dust disease compensable under Act

Schedule 10 (2) inserts section 11 (effect of extending Act to other dust diseases: *Baker v. Australian Asbestos Insulations Pty. Ltd.* overruled). If the Act is extended, the exclusion of the disease from the Workers Compensation Act 1987 is to be taken to apply to existing diseases for which claims have not yet been made under that Act.

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SCHEDULE 11 - AMENDMENT OF OTHER ACTS

Workmen's Compensation (Broken Hill) Act 1920

The Act is amended to update references to rates of compensation as a result of the changes made to the indexation provisions of the Workers Compensation Act 1987.

Defamation Act 1974

The Act is amended to extend the defence of absolute privilege to certain publications to or by insurers and the WorkCover Authority in connection with claims and proceedings under the Workers Compensation Act 1987. A similar defence is provided in the case of publications under the Motor Accidents Act 1988.
