



New South Wales

Workers Compensation Legislation Amendment Bill 2004

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**), the *Workplace Injury Management and Workers Compensation Act 1998* (the **1998 Act**) and the *Sporting Injuries Insurance Act 1978* as follows:

- (a) Provision for payment of compensation to an injured worker for domestic assistance is amended to provide that the existing requirement that compensation for *gratuitous* domestic assistance is only payable if the assistance is provided in accordance with a care plan established in accordance with the WorkCover Guidelines applies to all domestic assistance (not just gratuitous domestic assistance). (**Schedule 1 [1] and [2]**)
- (b) Provision for appeals to the Workers Compensation Commission constituted by a Presidential member from decisions of Arbitrators is amended to enable the matter with which an appeal is concerned to be

- remitted back to the Arbitrator who made the decision (or to another Arbitrator) for determination in accordance with any decision or directions of the Commission. **(Schedule 2 [5])**
- (c) A Workers Compensation Insurance Fund Investment Board is established under the 1998 Act to determine policies for the investment of the Workers Compensation Insurance Fund and to report to the Minister on the investment performance of the Fund. **(Schedules 2 [1]–[3] and [6] and 4)**
- (d) An amendment to the 1987 Act addresses concerns arising from the Court of Appeal decision in *Orica Limited & Anor v CGU Insurance Limited* [2003] NSWCA 331 to the effect that a common law liability for an injury (in that case a dust disease) that accrued after the period for which a policy of insurance was in force was not covered by the terms of the policy, which limited the policy to liability arising during the currency of the policy. The amendment provides that policies of insurance affected by the decision (those issued prior to the adoption of the new form of policy in 1995) operate in respect of a common law liability of the employer for an injury to a worker as if the liability arose when the injury was received (ie during the term of the policy concerned). An existing special provision dealing with insurer liability for damages for occupational disease is also amended to take account of the *Orica* decision and to correct an anomaly that prevented the provision applying in a case where a single insurer was on risk for the period in question. The amendments are for the removal of doubt and extend to existing liabilities (but without affecting court decisions, compromises or settlements already made except for the purposes of an appeal against a court decision already made). **(Schedule 1 [3]–[5])**
- (e) An existing provision in the 1998 Act that protects the Authority, the Board of Directors and the Council and their members from personal liability for acts in good faith is extended to the proposed Workers Compensation Insurance Fund Investment Board and to committees of that Board or the Board of Directors. **(Schedule 2 [4])**
- (f) Currently a licensed workers compensation self-insurer is required to deposit money with the Authority as security for the performance of the self-insurer's obligations. The provision of a guarantee by certain financial institutions is an alternative form of security. This is to be broadened to enable the Treasury Corporation to provide the guarantee for a self-insurer that is a State owned corporation. **(Schedule 1 [6])**
- (g) The *Sporting Injuries Insurance Act 1978* is amended by permitting the assessment of degree of permanent loss suffered as a result of a sporting injury to be made on the assumption that any improvement likely to result from further treatment has occurred, but only if that treatment has been unreasonably refused. **(Schedule 3)**

(h) Savings and transitional provisions are enacted. (**Schedule 1 [7] and [8]**)

Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation (except for amendments referred to in paragraph (d) of the Overview and transitional provisions, which are taken to have commenced on the date of introduction into Parliament of this Bill).

Clause 3 is a formal provision that gives effect to the amendments to the Acts set out in the Schedules.

Schedules 1–4 contain the amendments referred to in the Overview.

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Workers Compensation Legislation Amendment Bill 2004

No. , 2004

A Bill for

An Act to amend the *Workers Compensation Act 1987*, the *Workplace Injury Management and Workers Compensation Act 1998* and other Acts to make further provision for funds investment, insurance policies, appeals, self-insurers and assessment of sporting injuries; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Workers Compensation Legislation Amendment Act 2004*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by this section.
- (2) Schedule 1 [3], [4], [6] and [7] are taken to have commenced on the date of introduction into Parliament of the Bill for this Act.
- (3) 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 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 60AA Compensation for domestic assistance

Insert at the end of section 60AA (1) (c):

, and

- (d) the assistance is provided in accordance with a care plan established by the insurer in accordance with the WorkCover Guidelines.

[2] Section 60AA (3)

Omit the subsection. Insert instead:

- (3) Compensation is not payable under this section for gratuitous domestic assistance unless the person who provides the assistance has lost income or forgone employment as a result of providing the assistance.

[3] Section 151AAA

Insert after section 151AA:

151AAA Special provision for common law liabilities under pre-1995 policies

- (1) A policy of insurance issued before 1 September 1995 (including a policy issued under the former Act) operates in respect of a liability of the employer for an injury to a worker that arises independently of this Act or the former Act as if the liability arose at the time of injury.

Note. 1 September 1995 was the commencement date of the *Workers Compensation (General) Regulation 1995* which adopted a new form of workers compensation insurance policy that made it clear that the policy covered a common law liability of the employer for an injury to a worker received during the term of the policy even if liability in respect of the injury arose after the period for which the policy was in force.

- (2) This section does not apply to a liability in respect of an occupational disease within the meaning of section 151AB.

[4] Section 151AB Special insurance provisions relating to occupational diseases

Omit section 151AB (1) and (2). Insert instead:

- (1) If an employer is liable independently of this Act for damages for an occupational disease contracted by a worker, the following provisions have effect for the purposes of any policy of insurance obtained by the employer:
 - (a) the liability is taken to have arisen when the worker was last employed by the employer in employment to the nature of which the disease was due, subject to paragraph (b),
 - (b) if the worker was employed by the employer in employment to the nature of which the disease was due both before and after the relevant commencement, the liability is taken to have arisen both when the worker was last employed by the employer in employment to the nature of which the disease was due before the relevant commencement and when the worker was last employed by the employer in employment to the nature of which the disease was due after the relevant commencement.
- (2) In a case in which subsection (1) (b) applies, 2 insurers will be liable under policies of insurance to indemnify the employer (or pay damages to the worker) and the following provisions apply with respect to those insurers (referred to in this subsection as the *responsible insurers*):
 - (a) Of the responsible insurers, the one that is the insurer in respect of the employer's liability that arose after the relevant commencement is to be the insurer *primarily responsible* for the claim.
 - (b) The responsible insurers can however agree as to which of them is to be primarily responsible for the claim or the court can order that one of them is to be the insurer primarily responsible, and any such agreement or order overrides paragraph (a).
 - (c) The insurer who is primarily responsible for the claim is to act for both the responsible insurers in respect of any claim for the damages and has sole liability for the claim (that is, it is to indemnify the employer for the full amount of the damages or is to pay the full amount of

damages to the worker, without any right to a contribution from any other insurer, except as provided by paragraph (d)).

- (d) The insurer who is primarily responsible is entitled to recover from the other responsible insurer half of the amount paid as damages to the worker, half of the amount paid in respect of the worker's legal costs and half of such reasonable amount as the insurer primarily responsible may have incurred in respect of its own legal expenses in the matter.

[5] Section 215A Guarantees as alternative to deposit

Insert at the end of section 215A (1):

In the case of a self-insurer that is a State owned corporation, the guarantee may also be provided by the Treasury Corporation on terms acceptable to the Authority.

[6] Schedule 6 Savings, transitional and other provisions

Insert after Part 18G:

Part 18H Provisions consequent on enactment of 2004 amending Act

1 Definition

In this Part:

2004 amending Act means the *Workers Compensation Legislation Amendment Act 2004*.

2 Appeals

The amendment made by the 2004 amending Act to section 352 of the 1998 Act extends to an appeal made under that section before the commencement of the amendment.

3 Compensation for domestic assistance

An amendment made by the 2004 amending Act to section 60AA does not apply to domestic assistance provided before the commencement of the amendment but otherwise extends

to apply in respect of an injury received before the commencement of the amendment.

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4 Pre-1995 insurance cover and occupational diseases

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(1) The amendments made by the 2004 amending Act that insert section 151AAA and amend section 151AB are for the removal of doubt and accordingly extend to liabilities arising before the commencement of the amendments, but not so as to affect any decision of a court, or any compromise or settlement, made before the commencement of the amendments, subject to subclause (2).

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(2) For the purposes of the making and determination of any appeal (including providing grounds for appeal) against a decision of a court made before the commencement of the amendments referred to in subclause (1), being an appeal pending on or made after that commencement, those amendments extend to liabilities that are the subject of any such decision.

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[7] Schedule 6, Part 20

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Insert at the end of clause 1 (1):

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Workers Compensation Legislation Amendment Act 2004

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

(Section 3)

[1] Section 4 Definitions

Insert in alphabetical order in section 4 (1):

Investment Board means the Workers Compensation Insurance Fund Investment Board established by this Act.

[2] Section 19A

Insert after section 19:

19A Investment Board

- (1) There is to be a Workers Compensation Insurance Fund Investment Board.
- (2) The Investment Board is to consist of 6 members, being:
 - (a) the General Manager, and
 - (b) 5 part-time members appointed by the Governor on the joint recommendation of the Minister and the Treasurer.
- (3) The persons recommended for appointment as members of the Investment Board must have such business, investment or other qualifications or experience as the Minister and the Treasurer consider necessary to enable the Investment Board to exercise its functions.
- (4) The Investment Board has the following functions:
 - (a) determining investment policies for the investment of the Insurance Fund,
 - (b) reporting to the Minister on the investment performance of the Insurance Fund.
- (5) The functions of the Board of Directors do not include any function of the Investment Board.
- (6) Schedule 3A has effect with respect to the Investment Board.

[3] Section 35 Payments into and from the Fund	1
Insert “, Investment Board” after “Board of Directors” in section 35 (2) (a).	2 3
[4] Section 240 Personal liability	4
Insert “, the Investment Board, a committee of the Board of Directors or of the Investment Board,” after “Board of Directors” in section 240 (1).	5 6
[5] Section 352 Appeal against decision of Commission constituted by Arbitrator	7 8
Insert at the end of section 352 (7):	9
Alternatively, the matter may be remitted back to the Arbitrator concerned, or to another Arbitrator, for determination in accordance with any decision or directions of the Commission.	10 11 12 13
[6] Schedule 3A	14
Insert after Schedule 3:	15
Schedule 3A Provisions relating to Investment Board	16 17
<p style="text-align: right;">(Section 19A (6))</p>	18
1 Definitions	19
In this Schedule:	20
<i>appointed member</i> means a member of the Investment Board other than the General Manager.	21 22
<i>member</i> means any member of the Investment Board.	23
2 Chairperson and Deputy Chairperson	24
(1) Of the appointed members, 2 are (in and by their respective instruments of appointment or in and by other instruments executed by the Governor) to be appointed as Chairperson and Deputy Chairperson of the Investment Board respectively. An appointment of a member as Chairperson or Deputy Chairperson is to be on the joint recommendation of the Minister and the Treasurer.	25 26 27 28 29 30 31

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- (2) The Governor may at any time remove an appointed member from the office of Chairperson or Deputy Chairperson. 1
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- (3) A member holding the office of Chairperson or Deputy Chairperson vacates that office if the person: 3
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- (a) is removed from that office by the Governor, or 5
 - (b) resigns that office by instrument in writing addressed to the Minister, or 6
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 - (c) ceases to be a member. 8
- 3 Term of office of appointed members** 9
- Subject to this Schedule, an appointed member holds office for such period (not exceeding 3 years) as is specified in the member's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment. 10
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- 4 Remuneration** 14
- An appointed member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member. 15
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- 5 Vacancy in office of appointed member** 19
- (1) The office of an appointed member becomes vacant if the member: 20
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- (a) dies, or 22
 - (b) completes a term of office and is not re-appointed, or 23
 - (c) resigns the office by instrument in writing addressed to the Minister, or 24
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 - (d) is removed from office by the Governor under this clause or Chapter 5 of the *Public Sector Employment and Management Act 2002*, or 26
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 - (e) is absent from 3 consecutive meetings of the Investment Board of which reasonable notice has been given to the member personally or in the ordinary course of post, except on leave granted by the Investment Board or unless, before the expiration of 4 weeks after the last of those meetings, the member is excused by the Investment Board for having been absent from those meetings, or 29
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- (f) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or 1
 - (g) becomes a mentally incapacitated person, or 2
 - (h) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable. 3
 - (2) The Governor may at any time remove an appointed member from office. 4
 - (3) Without limiting subclause (2), an appointed member may be removed from office under that subclause for a contravention of clause 6. 5
- 6 Disclosure of pecuniary interests** 6
- (1) If: 7
 - (a) a member has a direct or indirect pecuniary interest in a matter being considered or about to be considered at a meeting of the Investment Board, and 8
 - (b) the interest appears to raise a conflict with the proper performance of the member's duties in relation to the consideration of the matter, 9
- the member must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the Investment Board. 10
- (2) A disclosure by a member at a meeting of the Investment Board that the member: 11
 - (a) is a member, or is in the employment, of a specified company or other body, or 12
 - (b) is a partner, or is in the employment, of a specified person, or 13
 - (c) has some other specified interest relating to a specified company or other body or to a specified person, 14
- is a sufficient disclosure of the nature of the interest in any matter relating to that company or other body or to that person 15

- which may arise after the date of the disclosure and which is required to be disclosed under subclause (1). 1
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- (3) Particulars of any disclosure made under this clause must be recorded by the Investment Board in a book kept for the purpose and that book must be open at all reasonable hours to inspection by any person on payment of the fee determined by the Investment Board. 3
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- (4) After a member has disclosed the nature of an interest in any matter, the member must not, unless the Minister or the Investment Board otherwise determines: 8
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- (a) be present during any deliberation of the Investment Board with respect to the matter, or 11
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- (b) take part in any decision of the Investment Board with respect to the matter. 13
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- (5) For the purposes of the making of a determination by the Investment Board under subclause (4), a member who has a direct or indirect pecuniary interest in a matter to which the disclosure relates must not: 15
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- (a) be present during any deliberation of the Investment Board for the purpose of making the determination, or 19
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- (b) take part in the making by the Investment Board of the determination. 21
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- (6) A contravention of this clause does not invalidate any decision of the Investment Board. 23
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- 7 Filling of vacancy in office of appointed member** 25
- If the office of an appointed member becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy. 26
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- 8 Effect of certain other Acts** 29
- (1) Chapter 2 of the *Public Sector Employment and Management Act 2002* does not apply to or in respect of the appointment of an appointed member. 30
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- (2) If by or under any Act provision is made: 33
- (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or 34
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(b) prohibiting the person from engaging in employment outside the duties of that office,	1 2
the provision does not operate to disqualify the person from holding that office and also the office of an appointed member or from accepting and retaining any remuneration payable to the person under this Act as such a member.	3 4 5 6
9 General procedure	7
The procedure for the calling of meetings of the Investment Board and for the conduct of business at those meetings is, subject to this Act and the regulations, to be as determined by the Investment Board.	8 9 10 11
10 Quorum	12
The quorum for a meeting of the Investment Board is 4 members.	13 14
11 Presiding member	15
(1) The Chairperson of the Investment Board or (in the absence of the Chairperson) the Deputy Chairperson is to preside at a meeting of the Investment Board.	16 17 18
(2) In the absence of both the Chairperson and the Deputy Chairperson at a meeting of the Investment Board, another member chosen by the members present at the meeting is to preside at the meeting.	19 20 21 22
(3) The person presiding at a meeting of the Investment Board has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.	23 24 25
12 Voting	26
A decision supported by a majority of the votes cast at a meeting of the Investment Board at which a quorum is present is a decision of the Investment Board.	27 28 29
13 Transaction of business outside meetings or by telephone	30
(1) The Investment Board may, if it thinks fit, transact any of its business by the circulation of papers among all the members of the Investment Board for the time being, and a resolution	31 32 33

in writing approved in writing by a majority of those members is taken to be a decision of the Investment Board.	1 2
(2) The Investment Board may, if it thinks fit, transact any of its business at a meeting at which members (or some members) participate by telephone, closed-circuit television or other means, but only if any member who speaks on a matter before the meeting can be heard by the other members.	3 4 5 6 7
(3) For the purposes of:	8
(a) the approval of a resolution under subclause (1), or	9
(b) a meeting held in accordance with subclause (2),	10
the Chairperson and each member have the same voting rights as they have at an ordinary meeting of the Investment Board.	11 12
(4) A resolution approved under subclause (1) is, subject to the regulations, to be recorded in the minutes of the meetings of the Investment Board.	13 14 15
(5) Papers may be circulated among the members for the purposes of subclause (1) by facsimile or other transmission of the information in the papers concerned.	16 17 18
14 Committees of Investment Board	19
(1) The Investment Board may establish committees to assist it in connection with the exercise of any of its functions.	20 21
(2) It does not matter that any or all of the members of a committee are not members of the Investment Board.	22 23
(3) The procedure for the calling of meetings of a committee and for the conduct of business at those meetings is to be as determined by the Investment Board or (subject to any determination of the Investment Board) by the committee.	24 25 26 27
15 First meeting	28
The Minister is to call the first meeting of the Investment Board in such manner as the Minister thinks fit.	29 30

Schedule 3	Amendment of Sporting Injuries Insurance Act 1978 No 141	1
		2
	(Section 3)	3
[1]	Section 24 Assessment of injuries	4
	Insert after section 24 (5):	5
	(5A) If the applicant has refused medical treatment that the medical panel or referee considers would be likely to result in an improvement in the applicant's condition, the assessment under subsection (4) may be made on the assumption that the improvement likely to result from the refused treatment has in fact occurred, but only if the medical panel or referee is satisfied that the applicant's refusal of the treatment is unreasonable.	6 7 8 9 10 11 12 13
[2]	Schedule 5 Savings and transitional provisions	14
	Insert at the end of clause 1 (1):	15
	<i>Workers Compensation Legislation Amendment Act 2004 to the extent that it amends this Act</i>	16 17
[3]	Schedule 5, Part 4	18
	Insert after Part 3:	19
Part 4	Provisions consequent on enactment of Workers Compensation Legislation Amendment Act 2004	20 21 22
5	Assessment of permanent loss	23
	Section 24 (5A) extends to an injury received before the commencement of that subsection, but not so as to affect any assessment of permanent loss for the purposes of section 24 made before the commencement of that subsection.	24 25 26 27

**Schedule 4 Amendment of Workers Compensation
Amendment (Insurance Reform) Act 2003
No 81**

(Section 3)

**Schedule 1 Principal amendments to Workers Compensation Act
1987 relating to insurance**

Insert “, subject to the investment policies determined by the Investment Board” after “as the Nominal Insurer thinks fit” in proposed section 154D (3) as inserted by Schedule 1 [2].

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