

# Workers Compensation Legislation Amendment Act 2002 No 124

[2002-124]



New South Wales

## Status Information

### Currency of version

Repealed version for 1 July 2005 to 1 June 2006 (accessed 23 November 2024 at 12:17)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

### Notes—

- **Repeal**

The Act was repealed by sec 5 of the [Workers Compensation Legislation Amendment Act 2006 No 25](#) with effect from 2.6.2006.

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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# Workers Compensation Legislation Amendment Act 2002 No 124



New South Wales

An Act to amend the *Workers Compensation Act 1987* and certain other Acts to make further provision in respect of cross-border liability for compensation, choice of law for common law damages, sporting injuries and compliance; and for other purposes.

## 1 Name of Act

This Act is the *Workers Compensation Legislation Amendment Act 2002*.

## 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

## 3 Amendments

The Acts specified in Schedules 1–4 are amended as set out in those Schedules.

## Schedule 1 Cross-border amendments

(Section 3)

### 1.1 Workers Compensation Act 1987 No 70

#### [1] Sections 9AA–9AC

Insert after section 9:

#### **9AA Liability for compensation**

- (1) Compensation under this Act is only payable in respect of employment that is connected with this State.
- (2) The fact that a worker is outside this State when the injury happens does not prevent compensation being payable under this Act in respect of employment that is connected with this State.
- (3) A worker's employment is connected with:

- (a) the State in which the worker usually works in that employment, or
  - (b) if no State or no one State is identified by paragraph (a), the State in which the worker is usually based for the purposes of that employment, or
  - (c) if no State or no one State is identified by paragraph (a) or (b), the State in which the employer's principal place of business in Australia is located.
- (4) In the case of a worker working on a ship, if no State or no one State is identified by subsection (3), a worker's employment is, while working on a ship, connected with the State in which the ship is registered or (if the ship is registered in more than one State) the State in which the ship most recently became registered.
- (5) If no State is identified by subsection (3) or (if applicable) (4), a worker's employment is connected with this State if:
- (a) the worker is in this State when the injury happens, and
  - (b) there is no place outside Australia under the legislation of which the worker may be entitled to compensation for the same matter.
- (6) In deciding whether a worker usually works in a State, regard must be had to the worker's work history with the employer and the intention of the worker and employer. However, regard must not be had to any temporary arrangement under which the worker works in a State for a period of not longer than 6 months.
- (7) Compensation under this Act does not apply in respect of the employment of a worker on a ship if the *Seafarers Rehabilitation and Compensation Act 1992* of the Commonwealth applies to the worker's employment.
- (8) In this section:

**ship** means any kind of vessel used in navigation by water, however propelled or moved, and includes:

- (a) a barge, lighter, or other floating vessel, and
  - (b) an air-cushion vehicle, or other similar craft,
- used wholly or primarily in navigation by water.

**State** includes Territory and, in a geographical sense, a State's or Territory's relevant adjacent area as described in Schedule 1.

### **9AB Recognition of determination of State of connection in another State**

- (1) If a designated court makes a determination of the State with which a worker's employment is connected for the purposes of a corresponding law, that State is

to be recognised for the purposes of section 9AA as the State with which the worker's employment is connected.

- (2) This section does not prevent or affect the operation of a determination of the State with which a worker's employment is connected for the purposes of section 9AA made by the Commission or a court of this State before the determination is made by a designated court.
- (3) This section does not prevent any appeal relating to any such determination of a designated court. If the determination is altered on appeal, the altered determination is to be recognised under subsection (1).
- (4) In this section:

**corresponding law** means the provisions of the statutory workers compensation scheme of another State that corresponds with section 9AA.

**designated court** means:

- (a) the Supreme Court of a State in which a corresponding law is in force, or
- (b) a court, tribunal or other decision-making body of a State in which a corresponding law is in force that is declared by the regulations to be a designated court for the purposes of this section.

**State** includes Territory.

#### **9AC Person not to be compensated twice**

- (1) Compensation under this Act is not payable in respect of any matter to the extent that compensation has been received under the laws of a place other than this State.
- (2) If a person receives compensation under this Act and, for the same matter, subsequently receives compensation under the laws of a place other than this State, the person from whom compensation under this Act is received may, in a court of competent jurisdiction, sue and recover from the person the amount described in subsection (3).
- (3) The amount that is recoverable under subsection (2) is:
  - (a) the amount of compensation paid under this Act, or
  - (b) the amount of compensation received under the laws of a place other than this State,whichever is less.

**[2] Section 13 Injuries received outside New South Wales**

Omit the section.

**[3] Section 21 Sailors**

Omit the section.

**[4] Part 5 Common law remedies**

Insert after Division 1:

## **Division 1A Choice of law**

### **150A The applicable substantive law for work injury claims**

- (1) If compensation is payable (whether or not it has been paid) under the statutory workers compensation scheme of a State in respect of an injury to a worker, the substantive law of that State is the substantive law that governs:
  - (a) whether or not a claim for damages in respect of the injury can be made, and
  - (b) if it can be made, the determination of the claim.
- (2) This Division does not apply if compensation is payable in respect of the injury under the statutory workers compensation scheme of more than one State.
- (3) For the purposes of this section, compensation is considered to be payable under a statutory workers compensation scheme of a State in respect of an injury if compensation in respect of it:
  - (a) would have been payable but for a provision of the scheme that excludes the worker's right to compensation because the injury is attributable to any conduct or failure of the worker that is specified in that provision, or
  - (b) would have been payable if a claim for that compensation had been duly made, and (where applicable) an election to claim that compensation (instead of damages) had been duly made.
- (4) A reference in this section to compensation payable in respect of an injury does not include a reference to compensation payable on the basis of the provisional acceptance of liability.
- (5) In this Division:

**State** includes Territory.

### **150B Claims to which Division applies**

- (1) This Division applies only to a claim for damages against a worker's employer in respect of an injury that was caused by:
  - (a) the negligence or other tort (including breach of statutory duty) of the worker's employer, or
  - (b) a breach of contract by the worker's employer.
- (2) Subsection (1) (a) applies even if damages resulting from the negligence or other tort are claimed in an action for breach of contract or other action.
- (3) A reference in this Division to a worker's employer includes a reference to:
  - (a) a person who is vicariously liable for the acts of the employer, and
  - (b) a person for whose acts the employer is vicariously liable.

### **150C What constitutes injury and employment and who is employer**

For the purposes of this Division:

- (a) ***injury*** and ***employer*** include anything that is within the scope of a corresponding term in the statutory workers compensation scheme of another State, and
- (b) the determination of what constitutes employment or whether or not a person is the worker's employer is to be made on the basis that those concepts include anything that is within the scope of a corresponding concept in the statutory workers compensation scheme of another State.

### **150D Claim in respect of death included**

For the purposes of this Division, a claim for damages in respect of death resulting from an injury is to be considered as a claim for damages in respect of the injury.

### **150E Meaning of "substantive law"**

In this Division:

***a State's legislation about damages for a work related injury*** means:

- (a) for this State—Part 5 of this Act and Chapter 7 of the 1998 Act, and any other provision of this Act or the 1998 Act providing for the interpretation of anything in that Part or Chapter, and
- (b) for any other State—any provisions of a law of the State that is declared by the regulations to be the State's legislation about damages for a work related injury.

**substantive law** includes:

- (a) a law that establishes, modifies, or extinguishes a cause of action or a defence to a cause of action, and
- (b) a law prescribing the time within which an action must be brought (including a law providing for the extension or abridgment of that time), and
- (c) a law that provides for the limitation or exclusion of liability or the barring of a right of action if a proceeding on, or arbitration of, a claim is not commenced within a particular time limit, and
- (d) a law that limits the kinds of injury, loss or damage for which damages or compensation may be recovered, and
- (e) a law that precludes the recovery of damages or compensation or limits the amount of damages or compensation that can be recovered, and
- (f) a law expressed as a presumption, or rule of evidence, that affects substantive rights, and
- (g) a provision of a State's legislation about damages for a work related injury, whether or not it would be otherwise regarded as procedural in nature,

but does not include a law prescribing rules for choice of law.

**150F Availability of action in another State not relevant**

- (1) It makes no difference for the purposes of this Division that, under the substantive law of another State:
  - (a) the nature of the circumstances is such that they would not have given rise to a cause of action had they occurred in that State, or
  - (b) the circumstances on which the claim is based do not give rise to a cause of action.

- (2) In this section:

**another State** means a State other than the State with which the injury is connected.

**[5] Section 155 Compulsory insurance for employers**

Insert after section 155 (3):

- (3A) It is a defence to a prosecution for an offence under this section concerning an employer's liability in respect of a worker if the court is satisfied that at the time of



the alleged offence:

- (a) the employer believed on reasonable grounds that the employer could not be liable under this Act in respect of the worker because under section 9AA the worker's employment was not connected with this State, and
- (b) the employer had workers compensation cover in respect of the worker's employment under the law of the State or Territory with which the employer believed on reasonable grounds the worker's employment was connected under section 9AA.

(3B) In subsection (3A), **workers compensation cover** means insurance or registration required under the law of a State or Territory in respect of liability for statutory workers compensation under that law.

**[6] Section 156 Recovery of double premiums from employer not obtaining policy of insurance**

Insert after section 156 (7):

- (8) Despite any other provision of this section, if the Authority is satisfied that:
  - (a) the reason for the employer not being insured against liability to pay compensation to the worker is that the employer believed on reasonable grounds that the employer could not be liable under this Act in respect of the worker because under section 9AA the worker's employment was not connected with this State, and
  - (b) the employer had workers compensation cover in respect of the worker's employment under the law of the State or Territory with which the employer believed on reasonable grounds the worker's employment was connected under section 9AA,

the employer is not liable under this section in respect of that liability.

(9) In subsection (8), **workers compensation cover** means insurance or registration required under the law of a State or Territory in respect of liability for statutory workers compensation under that law.

**[7] Schedule 1**

Insert as Schedule 1:

## Schedule 1 Adjacent areas

(Section 9AA)

### 1 Definitions

In this Schedule:

**continental shelf** has the same meaning as in the *Seas and Submerged Lands Act 1973* of the Commonwealth.

**territorial sea** has the same meaning as in the *Seas and Submerged Lands Act 1973* of the Commonwealth.

### 2 Adjacent areas

- (1) The **adjacent area** for New South Wales, Victoria, South Australia or Tasmania is so much of the area described in Schedule 2 to the *Petroleum (Submerged Lands) Act 1967* of the Commonwealth in relation to that State as is within the outer limits of the continental shelf and includes the space above and below that area.
- (2) The **adjacent area** for Queensland is:
  - (a) so much of the area described in Schedule 2 to the *Petroleum (Submerged Lands) Act 1967* of the Commonwealth in relation to Queensland as is within the outer limits of the continental shelf, and
  - (b) the Coral Sea area (within the meaning of subsection (7) of section 5A of the *Petroleum (Submerged Lands) Act 1967* of the Commonwealth) other than the territorial sea within the Coral Sea area, and
  - (c) the areas within the outer limits of the territorial sea adjacent to certain islands of Queensland as determined by proclamation on 9 February 1983 under section 7 of the *Seas and Submerged Lands Act 1973* of the Commonwealth, and
  - (d) the space above and below the areas described in paragraphs (a), (b) and (c).
- (3) The **adjacent area** for Western Australia is so much of the area described in Schedule 2 to the *Petroleum (Submerged Lands) Act 1967* of the Commonwealth in relation to Western Australia as:
  - (a) is within the outer limits of the continental shelf, and
  - (b) is not within Area A of the Zone of Cooperation,and includes the space above and below that area.

- (4) The **adjacent area** for the Northern Territory is:
- (a) so much of the area described in Schedule 2 to the *Petroleum (Submerged Lands) Act 1967* of the Commonwealth in relation to the Northern Territory as:
    - (i) is within the outer limits of the continental shelf, and
    - (ii) is not within Area A of the Zone of Cooperation, and
  - (b) the adjacent area for the Territory of Ashmore and Cartier Islands (within the meaning of subsection (3) of section 5A of the *Petroleum (Submerged Lands) Act 1967* of the Commonwealth) other than the territorial sea within that area, and
  - (c) the space above and below the areas described in paragraphs (a) and (b).
- (5) However, the adjacent area for a State does not include any area inside the limits of any State or Territory.

**[8] Schedule 6 Savings, transitional and other provisions, Part 2 Provisions relating to liability for compensation**

Insert as clause 11:

**11 Workers Compensation Legislation Amendment Act 2002**

- (1) The amendments made by Schedule 1 to the *Workers Compensation Legislation Amendment Act 2002* (referred to in this clause as the **Schedule 1 amendments**) do not apply in respect of an injury received before the commencement of those amendments, and this Act applies in respect of such an injury as if those amendments had not been made.
- (2) If the death of a worker results from both an injury received before the commencement of the Schedule 1 amendments and an injury received after that commencement, the worker is, for the purposes of the application of the Schedule 1 amendments to and in respect of the death of the worker, to be treated as having died as a result of the injury received after that commencement.
- (3) If a period of incapacity for work resulted both from injury received before the commencement of the Schedule 1 amendments and an injury received after that commencement, the incapacity is, for the purposes of the application of the Schedule 1 amendments to and in respect of that incapacity for work, to be treated as having resulted from the injury received after that commencement.
- (4) The Schedule 1 amendments and subclauses (2) and (3) do not affect the

following:

- (a) the liability of an employer or insurer in respect of an injury received before the commencement of those amendments, including a liability to make a contribution under section 15, 16 or 17 in respect of compensation payable for an injury received after that commencement,
  - (b) the apportionment of liability under section 22 in a case where one or more of the injuries concerned were received or suffered before, and one or more received or suffered after, that commencement.
- (5) A policy of insurance that an employer has against liability under this Act and that is in force on the commencement of the Schedule 1 amendments covers the employer, for as long as the policy remains in force, for the employer's liability under this Act as amended by the Schedule 1 amendments.

**[9] Schedule 6, Part 20 Savings and transitional regulations**

Insert at the end of clause 1 (1):

*Workers Compensation Legislation Amendment Act 2002*

## **1.2 Workers Compensation Legislation Amendment Act 1995 No 30**

### **Schedule 6 Amendments relating to liability for workers compensation**

Omit the Schedule.

### **Schedule 2 Compliance amendments**

(Section 3)

## **Workers Compensation Act 1987 No 70**

### **[1] Section 3 Definitions**

Insert in alphabetical order:

**group** means the employers who constitute a group under Division 2A of Part 7.

**principal member** means the principal member of a group for the time being under Division 2A of Part 7.

### **[2] Section 163 Records relating to policies and claims to be kept by insurers and self-insurers**

Omit "the policy holder" from section 163 (1) (a).

Insert instead “the insured under the policy (or of each insured under the policy in the case of the members of a group)”.

**[3] Section 174 Records relating to wages and contracts to be kept and supplied**

Insert after section 174 (1):

- (1A) If an employer is a member of a group, the records required to be kept by the principal member of the group must include the records required to be kept under this section by each member of the group.

**[4]-[7] (Repealed)**

**[8] Section 175 Employers evading payment of correct premiums**

Insert after section 175 (4):

(4AA) If the Authority finds that:

- (a) an employer has contravened section 175F (Members of group to be insured under one policy) as a result of the issue or renewal of a policy of insurance, and
- (b) the premium payable for the policy is less by a certain amount than the increase in premium that would have been payable for the issue or renewal of the policy of insurance (**the group policy**) that the employer was required by this section to be covered by (had the group policy been issued or renewed to cover the employer),

the Authority may recover from the employer in a court of competent jurisdiction as a debt due to the Authority a sum equal to twice that amount plus the late payment fee provided for by subsection (4A), half of which sum is to be paid by the Authority to the insurer and the other half into the WorkCover Authority Fund.

- (4AB) For the purposes of the application of the *Limitation Act 1969* to an action on a cause of action to recover an amount under subsection (4), the cause of action first accrues to the Authority when the Authority makes the finding referred to in that subsection.

**[9], [10] (Repealed)**

**[11] Part 7, Division 2A**

Insert after Division 2:

## **Division 2A Grouping of employers for insurance purposes**

### **175C Grouping of employers**

(1) In this Division:

**group** means a group constituted under Part 10A of the *Taxation Administration Act 1996*, but does not include any member of the group in respect of whom a determination under section 175D of this Act is in force.

(2) This Division does not apply to an employer who is a self-insurer.

(3) The regulations may make provision for or with respect to excluding any class or classes of employers from the operation of this Division or specified provisions of this Division. Any such exclusion may be prescribed to apply subject to specified conditions or conditions determined and notified from time to time by the Authority.

### **175D Exclusion of employers from groups**

(1) The Authority may, by order in writing, determine that an employer who would, but for the determination, be a member of a group is not a member of the group.

**Note—**

Section 175E sets out the circumstances in which a determination may be made under this section.

(2) The Authority must give notice in writing of a determination to the employer in respect of whom the determination is made and to each member of the group.

(3) A determination takes effect:

(a) on the date on which notice under subsection (2) is given to the employer excluded from the group, or

(b) if another date of effect (including an earlier date) is specified in the notice—on that other date.

(4) A determination continues in force until it is revoked and notice of the revocation has been served on the employer in respect of whom the determination was made.

(5) The Authority may revoke a determination if satisfied that the circumstances referred to in section 175E do not apply to the employer.

(6) Notice of the revocation of a determination must be given by the Authority:

(a) to the employer in respect of whom the determination was made, and

(b) to each other member of the group of which the employer is a member, as a

result of the revocation, by virtue of Part 10A of the *Taxation Administration Act 1996*.

- (7) A revocation of a determination takes effect on the date on which notice under subsection (6) is given to the employer in respect of whom the determination was made.
- (8) The Authority may charge a fee (not exceeding any maximum fee prescribed by the regulations for the purposes of this section) for considering any application for a determination under this section.

### **175E Grounds for excluding employers from group**

- (1) A determination may be made by the Authority under section 175D in respect of the following employers only:
  - (a) an employer who would, but for the determination, be a member of a group arising under section 106H of the *Taxation Administration Act 1996* (Primary groups arising from the use of common employees),
  - (b) an employer who carries on a business as trustee of a trust and would, but for the determination, be a member of a group arising under section 106I of that Act (Primary groups of commonly controlled businesses).
- (2) In the case of an employer referred to in subsection (1) (b), the determination may be made only if the Authority is satisfied that the employer would, but for the determination, be a member of a group with a person who carries on another business because of the application of one (but not more than one) of the following grouping principles:
  - (a) the exclusive ownership grouping principle (section 106I (2) (a) and (b) of the *Taxation Administration Act 1996*),
  - (b) the corporate grouping principle (section 106I (2) (c) and (d) and (3) of the *Taxation Administration Act 1996*),
  - (c) the common beneficiary grouping principle (section 106I (2) (e) and (f) and (5)–(8) of the *Taxation Administration Act 1996*).
- (3) The Authority must not make a determination under section 175D unless satisfied that the employer who is the subject of the determination has continuously carried on the business concerned, and will continue to carry on that business, substantially independently of the other members of the group.
- (4) In determining whether an employer carries on business substantially independently of the other member or members of a group, the Authority is to have regard to the nature and degree of ownership or control of the business of

each member of the group, the nature of each of those businesses and any other matter that the Authority considers relevant.

### **175F Members of group to be insured under one policy**

- (1) The policy of insurance that an employer who is a member of a group obtains and maintains in force for the purposes of compliance with section 155 must be a policy that also covers each of the other members of the group as the policy that each of them obtains and maintains in force for that purpose.
- (2) A licensed insurer is authorised to issue, or alter the coverage of, a policy of insurance so that the policy covers employers that constitute a group.
- (3) An employer who contravenes this section is guilty of an offence.  
Maximum penalty: 100 penalty units.
- (4) If an employer who is a member of a group does not obtain or maintain in force a policy of insurance in compliance with this section, the Authority may by notice in writing to an insurer:
  - (a) direct the cancellation of any policy of insurance obtained or maintained in contravention of this section, and
  - (b) direct the alteration of a policy of insurance (being a policy that covers members of the group concerned) so that the policy covers the employer concerned.
- (5) An insurer must give effect to a direction given to the insurer under this section.
- (6) If an employer who is a member of a group does not obtain and maintain in force a policy of insurance in compliance with section 155:
  - (a) the employer is deemed to be insured under the policy of insurance under which other members of the group are insured for the purposes of compliance with this section, and
  - (b) section 175 applies in respect of the actual failure of the employer to be insured under that policy of insurance (as if paragraph (a) did not deem the employer to be insured under the policy).

### **175G Principal member of group**

- (1) A group must at all times have a principal member.
- (2) The ***principal member*** of a group is the member of the group who is for the time being nominated by members of the group as the principal member of the group for the purposes of this Act.



(3) A nomination is to be made to the Authority and must be made in writing in a form approved by the Authority.

(4) If at any time a group does not have a principal member, each member of the group is guilty of an offence.

Maximum penalty: 100 penalty units.

### **175H Functions of principal member of group**

(1) The principal member of a group may exercise any of the following functions of any member of the group as agent for and on behalf of the member:

(a) any function in connection with the issue or renewal of a policy of insurance by the member for the purposes of section 155,

(b) any function under section 170 (Action by employer where premium not in accordance with insurance premiums order).

(2) The principal member of a group is guilty of an offence if any member of the group contravenes section 175F.

Maximum penalty: 200 penalty units.

(3) The principal member of a group must, as soon as practicable (but not later than 2 months) after:

(a) making an application to an insurer for the issue of a policy, or

(b) the renewal of a policy,

supply the insurer concerned with a return in the form approved by the Authority specifying details of all the persons (whether or not they are employers) who are members of the group.

(4) The principal member of a group must, not later than 2 months after the end of the relevant period of insurance relating to a policy, supply the insurer who issued or renewed the policy with a return in the form approved by the Authority specifying details of all the persons (whether or not they are employers) who were members of the group during that period of insurance.

(5) The principal member of a group who fails to furnish a return as required by subsection (3) or (4) or who in purported compliance with such a requirement furnishes a return that is false or misleading in a material particular is guilty of an offence.

Maximum penalty: 200 penalty units.

(6) The principal member of a group must notify the principal member's insurer in

writing within 10 days after any change occurs in the membership of the group giving details of the change.

Maximum penalty: 200 penalty units.

### **175I Joint and several liability of group members**

- (1) If an employer who is a member of a group fails to pay an amount that the employer is required to pay under this Act (including any premium payable for a policy of insurance required under this Act and any sum recoverable by the Authority under this Act from the employer) every member of the group is liable jointly and severally to pay the amount.
- (2) When 2 or more persons are jointly or severally liable to pay an amount as referred to in this section, the person entitled to payment may recover the whole of the amount from them, or any of them, or any one of them.
- (3) A person who pays an amount in accordance with the liability imposed by this section has such rights of contribution or indemnity from the other person or persons as are just.

### **175J Inspection of records of employers**

- (1) The Authority may direct an employer in writing to make available, at such time and at such place as is specified in the direction, for inspection by a specified person authorised by the Authority, records of a specified kind in the possession of the employer that are relevant to the determination of whether the employer is a member of a group and the identity of other members of the group.
- (2) A person authorised under subsection (1) may inspect records in accordance with the terms of the direction and make copies of, or take extracts from, those records.
- (3) An employer given a direction under this section:
  - (a) must comply with the direction, and
  - (b) must not wilfully obstruct or delay an authorised person when exercising any power under subsection (2).

Maximum penalty: 100 penalty units.

- (4) If an inspection under this section reveals that an employer has contravened a provision of this Division, the Authority is entitled to recover in a court of competent jurisdiction as a debt due to the Authority from the employer the costs incurred by the Authority in connection with that inspection.
- (5) A certificate issued by the Authority certifying as to the costs incurred by the

Authority in connection with such an inspection is evidence of the matters certified.

**[12] (Repealed)**

**Schedules 3, 4 (Repealed)**