

# **WORKERS' COMPENSATION AND INJURY MANAGEMENT AMENDMENT BILL 2017**

## **EXPLANATORY MEMORANDUM**

### **OVERVIEW**

The *Workers' Compensation and Injury Management Act 1981* (the Act) provides various entitlements for dependants of workers who die in work related accidents but the amounts are low in comparison with other Australian workers' compensation jurisdictions.

The legislative arrangements for compensating dependants are unnecessarily complex and, in relation to those in de facto relationships, inequitable and discriminatory.

Under the current Act a deceased worker's dependants have a potential maximum entitlement to:

- A lump sum payment to a maximum of \$308,339 (indexed annually), or apportioned if more than one dependant, or reduced if partially dependent.
- A dependent child's allowance of \$58.90 per week (indexed annually) up to the age of 16 or 21 if in full time study.
- Reasonable costs of medical and related expenses incurred between the date of injury and the worker's death.
- The cost of funeral expenses up to a maximum of \$9,813 (indexed annually).

While the current Act provides access to entitlements for a dependent married spouse or de facto partner, a de facto partner must have been living with the worker for at least two years immediately prior to the worker's death in order to qualify for compensation. This eligibility requirement is inequitable and discriminatory and was most recently highlighted in late 2015 when a dependent partner of a construction worker tragically killed was denied compensation having fallen just short of the two year period. This was despite having clear evidence of being in a long term, committed relationship.

The different standard imposed on de facto partners has significant financial impacts on those dependants left behind and is inconsistent with community expectations and contemporary indicators of a de facto relationship.



The purpose of the *Workers' Compensation and Injury Management Amendment Bill 2017* is to repeal and replace the provisions of the Act relating to entitlements payable to dependants of workers killed in the course of employment.

The objectives of the Bill are to:

- increase the lump sum payment to dependants;
- provide for a simple and equitable method for apportioning the lump sum between dependants;
- increase the weekly child's allowance for the care and maintenance of each dependent child;
- ensure dependent partners and children have access to the full entitlement irrespective of their level of dependency on the worker at the time of death;
- ensure dependent children can receive both the child's allowance and a portion of the lump sum;
- facilitate timely access to compensation for dependants through a clear claims procedure, support and guidance, and a single pathway for expedited resolution or claims;
- delete the outdated definition of 'de facto partner' and ensure de facto partners are put on the same footing as any married spouse for the purpose of accessing compensation as a dependant;
- simplify the legislation including definitions, the claims procedure and schedule of entitlements.

## **CLAUSE NOTES**

### **PART 1 - PRELIMINARY**

#### **CLAUSE 1. SHORT TITLE**

Sets out the name of the Amendment Act.

#### **CLAUSE 2. COMMENCEMENT**

This clause provides that the operative provisions of the Amendment Act come into operation on a day fixed by proclamation. This is because regulations, rules and administrative instruments must be finalised before the Amendment Act can commence.

#### **CLAUSE 3. ACT AMENDED**

The *Workers' Compensation and Injury Management Act 1981* is the principal act to be amended.



## **PART 2 – AMENDMENTS ABOUT COMPENSATION FOR DEPENDANTS OF WORKERS**

### **CLAUSE 4. SECTION 5 AMENDED**

Clause 4(1) deletes current definitions used in the Act relating to dependants and compensation entitlements following a workplace death.

Clause 4(2) inserts a definition of 'dependant' which has the meaning given in new Schedule 1A clause 3. All relevant definitions and compensation entitlements relating to dependants are set out in new Schedule 1A (clause 11 of Bill).

### **CLAUSE 5. SECTION 18 AMENDED**

Section 18 imposes a liability on employers to pay compensation to workers. The section is being amended to distinguish between compensation payable to workers and compensation payable to dependants and others where a worker dies.

New subsection 18(2) provides that an employer is liable to pay compensation in accordance with new Schedule 1A if an injury occurs and the worker dies.

New subsection 18 (3) clarifies that Schedule 5 continues to operate in relation to the death of the worker. Schedule 5 sets out specific entitlements for a dependant spouse or de facto partner of a worker suffering an asbestos related disease who dies at the time of receiving a supplementary amount described in that Schedule.

### **CLAUSE 6. PART III DIVISION 5A INSERTED**

#### **Division 5A – Claims by dependants and others for compensation**

New Division 5A sets out:

- 1) A clear procedure for dependants and others to make compensation claims.
- 2) Requirements on insurers and self insurers to make timely liability decisions.
- 3) A single and expedited pathway into WorkCover WA's Arbitration Services for resolution of claims and specific orders to be made about the compensation payable.

#### **Section 72C – Terms used**

This section defines the terms used in Division 5A.

#### **Section 72D – Application of this Division**

This section links the application of the Division to the compensation an employer is liable to pay to a person under Schedule 1A (i.e. compensation to dependants and others).



## **Section 72E – Claims for compensation for dependants and others**

This section provides for the claim to be made by the claimant in an approved form. WorkCover WA will issue a claim form and guidance to support dependants through the claim process including information on the supporting particulars required to be given to insurers so they can make timely liability decisions.

There is provision for compensation for more than 2 claimants to be the subject of 1 claim. This would occur, for example, where there is a current and former dependant partner, or a dependant partner who is also claiming on behalf of any dependent children.

## **Section 72F – Claims procedure where employer insured**

This section sets out the claim procedure where an employer is insured by one of the approved workers' compensation insurers (i.e. is not self-insured or uninsured).

The claim is made on the worker's employer. Employers have five days to forward the claim to their insurer [section 72F(2)]. Once the claim is given to the insurer the expectation is for claims to be processed and assessed quickly by insurers.

As soon as practicable after receiving the claim insurers must either give the claimant and WorkCover WA notice that liability is accepted or disputed or give notice that additional information and documents are required to make a liability decision. The latter notice may apply, for example, where an insurer seeks a copy of a yet to be completed Coroner's report if the cause of death needs to be investigated further.

WorkCover WA's role is to support the dependant through the claim process and keep insurers on track towards timely claims decisions. Guidance will set out what particulars to provide with the claim form and WorkCover WA advisory officers will assist claimants through the claims process and provide support if required.

## **Section 72G – Claims procedure where employer is self-insured or uninsured**

This section sets out the claim procedure where an employer is either a self-insurer, is not indemnified by an insurer or is uninsured.

The section mirrors the requirements in section 72F to support timely liability decisions. The only difference is that under section 72G it is the employer, rather than the insurer, that gives notice about whether the claim is accepted, disputed or whether more information or documents are required before a decision can be made.

## **Section 72H – Resolution of claim**

This section provides for a single and expedited pathway into WorkCover WA's Arbitration Service so that an arbitrator can determine the claim and make orders about the compensation payable.

Compensation is only payable following an order of an arbitrator. This will apply regardless of whether the claim is accepted or disputed by the insurer or self insurer.



Where a claim is accepted the arbitrator will make orders for payments of compensation with the consent of the parties. Where the claim is disputed the arbitrator will seek to resolve each issue in dispute as quickly as possible.

A claimant can make application for the claim to be determined by an arbitrator at any time after receiving the liability notice from the insurer or self insurer. The response period of 30 days provides for the claimant to make an application in the event no notice is received from the insurer or self insurer, or the employer fails to forward the claim.

Subsection (8) enables claims for funeral expenses to be paid without an order of an arbitrator. Specific orders are not required for these expenses.

### **Section 72I – Manner of payment of lump sum compensation**

This section deals with specific orders relating to the lump sum compensation payable to a dependant under new clauses 7 or 11 of Schedule 1A. Clause 7 of Schedule 1A sets out in table form the proportionate share of the increased lump sum between dependant partners and children. Clause 11 of Schedule 1A relates to a different lump sum payable to a dependant partner or child where a worker receiving compensation for at least 6 months dies but the death is not a result of the injury.

Subsection (1) requires the order to specify whether the lump sum is to be paid directly to the dependant or to WorkCover WA (and held in trust) and is similar to existing section 218.

This provides flexibility for the entitlement to be paid to dependants as they see fit. Under existing arrangements if a dependent child is eligible for the lump sum it is common for the parent or legal guardian of the child to request the entitlement be held in trust by WorkCover WA until the child is 18. Where there is a dependent partner of the worker but no children it is more common for the payment to be made directly to the dependant. Regardless of the number of dependants the order will specify who gets what portion of the lump sum with reference to the table in Schedule 1A and the manner of those payments.

Subsections (2) and (3) provide for variations to previous orders about how the lump sum compensation is to be paid in the event circumstances change after the initial order.

### **Section 72J – Manner of payment of child's allowance**

This section is dealing with specific orders relating to the child's allowance payable for the benefit of each dependent child under new clause 8 of Schedule 1A.

The child's allowance is a periodic payment intended to assist with the maintenance and care of children until the age of 16 or 21 if in full time study. A significant increase in the entitlement is provided in clause 5 of schedule 1A

Subsection 72J(2) clarifies that orders will always be made for the child's allowance to be paid to WorkCover WA (to be held in trust) by the insurer or employer either weekly or at such intervals as specified in the order. Under existing arrangements it is common



practice for WorkCover WA to invoice insurers quarterly for the employer's liability to pay the child's allowance. This is likely to continue but orders may specify payments to be made at different intervals.

Subsection 72J(3) directs WorkCover WA to make the periodic payments as specified in the compensation order. The provision clarifies that no payment is to be made in advance of a periodic payment or by way of commutation. This is to prevent the periodic child's allowance from being advanced and exhausted well before the child attains the age of 16 or 21 (if in full time study).

Subsection (8) enables the terms of a compensation order under subsections (2) or (3) relating to the child's allowance to be varied (i.e. the periods to be varied).

Subsection (4) supports the existing requirement for the child allowance to be payable between the ages of 16 and 21 subject to the child participating in full time study.

Subsection (5) provides a mechanism for the insurer or employer to discharge the full liability of the child's allowance by making a single payment to WorkCover WA, rather than making quarterly payments to WorkCover WA for up to 21 years. This may be a convenient option for insurers in particular to enable them to finalise the claim. WorkCover WA's scheme actuary will develop the method or formula contained in regulations for calculating the amount to be discharged. Subsection (6) enables insurers or employers to apply to WorkCover WA to progress this option.

Subsection (7) requires any monies in the Trust Fund for dependent children who are no longer eligible to receive the entitlement to be transferred to the WorkCover WA General Account (the operating account of the agency). This would only arise where the full amount of the child's allowance is discharged by the insurer or employer and the child does not participate in full time study to 21.

### **Section 72K – Effect of recovery of damages on moneys held in Trust Account**

The Act (section 92) currently prevents recovery of both damages and workers' compensation entitlements (double dipping).

However it is not clear in some previous common law judgements or settlements as to whether the damages payable to dependants is inclusive or exclusive of statutory compensation payable to the dependant under the Act. It is also not clear whether any payments to be made under the Trust Account in the future have been considered in the action for damages.

Section 72K ensures that where any claim for damages is pursued by a dependant who is receiving entitlements from the WorkCover WA Trust Account, WorkCover WA is notified. This will enable any issues relating to compensation already received or that impact on the right to receive payments from the Trust Account is resolved prior to any judgment or settlement. It also enables for clear directions to be given about the cessation or otherwise of payments to the dependant from the WorkCover WA Trust Account following resolution of the action for damages.

### **Section 72L – Application of Part XI to matters under this Division**



This section provides that an application from a dependant seeking a compensation order must be made in accordance with arbitration rules. The rules will be straight forward. The claim form and liability notice from the insurer/ employer will form the basis of the documents required to be submitted under the rules.

The jurisdiction of arbitrators is currently limited to resolving disputes. Subsection (3) clarifies that the Registrar and arbitrators have jurisdiction to receive applications and make orders irrespective of whether there is a dispute or not.

Subsection (4) supports the expedited pathway to receiving an arbitrator's order. The requirement to start the process in conciliation prior to seeking an arbitrator's order will not apply in relation to applications from dependants for compensation orders.

#### **CLAUSE 7. SECTION 106 AMENDED**

This is a consequential amendment to enable moneys in the Trust Account to be transferred to the General Account under new section 72J.

#### **CLAUSE 8. SECTION 110 AMENDED**

This is a consequential amendment to enable moneys to be paid into the Trust Account following a compensation order from an arbitrator.

#### **CLAUSE 9. SECTION 218 AMENDED**

Section 218 currently provides for an arbitrator to determine issues relating to the compensation payable to either dependants or persons under a legal disability (intellectual disability or a minor).

This amendment deletes the references to dependants as questions about the compensation payable are to be determined under new sections 72H(7), 72I and 72J.

Section 218 will continue to apply to workers under a legal disability.

#### **CLAUSE 10. SCHEDULE 1 AMENDED**

This amendment deletes the current complex provisions for compensating dependants following the death of a worker.

#### **CLAUSE 11. SCHEDULE 1A INSERTED**



## **Schedule 1A – Compensation entitlements when worker has died**

Schedule 1A sets out:

- 1) Definitions of 'dependants', 'partner', 'child' and 'prescribed family member'.
- 2) All entitlements payable following the death of a worker.

### **Division 1 - Application and terms used**

#### **1. Application of Schedule**

Clause 1 of new Schedule 1A clarifies that Schedule 1A applies if an injury of a worker occurs and the worker dies on or after the day that section 6 of the Amendment Act comes into operation.

#### **2. Partners, children and prescribed family members**

Clause 2 of new Schedule 1A defines the terms 'partner', 'child' and 'prescribed family member' and includes all family members currently covered by the Act (current defined terms to be deleted – see clause 4 of the Bill).

A key change is the deletion of the current term 'de facto partner' (clause 4 of the Bill makes the deletion) and the new defined term 'partner' which includes any current or former spouse or de facto partner of the worker.

The current definition of 'de facto partner' in section 5(1) of the Act applies only to persons who had been living in a de facto relationship with the worker for at least 2 years prior to the worker's death. This is an outdated definition and denies access to compensation for partners who fall short of the 2 year period but were clearly in a long term committed relationship with the worker. The definition of 'partner' puts de facto partners on the same footing as persons in a legal marriage. The term 'de facto partner' and indicators of a de facto relationship are set out in *the Interpretation Act 1984*, section 13A and will apply following enactment of the Bill.

#### **3. Dependants**

The defined term 'dependants' is consistent with the current definition (wholly or in part dependent upon the earnings of the worker at the time of the worker's death).

#### **4. Lump sum entitlement**

Clause 4 of new Schedule 1A sets the maximum lump sum payable to dependants. It is to be set at 250% of the prescribed amount as at the date of the worker's death.

The prescribed amount is a monetary amount applied as a cap on weekly compensation and permanent impairment benefits payable to injured workers over the life of their claim. The prescribed amount is indexed each financial year and is \$224, 921 from 1 July 2017 to 30 June 2018.



If the amendment Bill comes into effect in 2017/18 the lump sum entitlement payable to dependants will be \$562,303 until 30 June 2018 (and will be automatically indexed from 1 July 2018 in line with the prescribed amount). This is a significant increase on the current entitlement of \$308,339, an amount that has no connection to the prescribed amount.

Clause 7 of new Schedule 1A sets out each dependant's proportionate share of the lump sum entitlement.

## **5. Child's allowance**

Clause 5 of new Schedule 1A sets the initial child's allowance at \$133 per week. This amount will be automatically indexed each financial year in accordance with a method set out in regulations. The amount of \$133 is a significant increase on the current entitlement of \$58.90 per week.

Clause 8 of new Schedule 1A sets out eligibility criteria for the child's allowance.

## **Division 2 - Entitlements if the worker's death results from the injury**

### **6. Application of Division**

Division 2 applies to entitlements where the worker's death results from the injury. This is to distinguish it from Division 3 which applies to specific entitlements for dependants if the worker's death does not result from the injury.

### **7. Lump sum compensation for partners, children and others**

Clause 7 of new Schedule 1A sets out in table form the proportionate share of the lump sum entitlement payable to each partner and child dependent on the worker's earnings at the time of death.

The prescriptive method for apportioning the lump sum is equitable. The full proportionate share of the lump sum will be payable regardless of whether the person is wholly or partially dependant on the worker's earnings. It removes the need (in most cases) of dependants having to prove their precise level of dependency and having their entitlement reduced where they receive a modest income themselves. Levels of dependency will only be considered where there is more than one partner (current and former).

Unlike the current arrangements dependent children will receive a portion of the lump sum and the child's allowance.

New subclause 7(2) clarifies that if there is a dependant partner or child, no compensation is payable to a prescribed family member. If there is no dependant partner or children lump sum compensation is payable to a prescribed family member under subclauses 7(3) and 7(4) of new Schedule 1A, proportionate to the loss of financial support.



## **8. Allowance for children**

Clause 8 of new Schedule 1A sets out eligibility criteria for the child's allowance.

The child's allowance will be payable irrespective of the level of dependency (wholly or partially) and is in addition to the child's proportionate share of the lump sum.

Under the current Act the child's allowance is payable:

- a) until the child attains the age of 16;
- b) until the child attains the age of 21 and is a fulltime student or ceases to be a full time student, whichever is the sooner.

Clause 8 of new Schedule 1A retains the eligibility criteria for children to be in fulltime study between the ages of 16 and 21 but is redrafted to ensure the allowance is payable where a child stops and then recommences full time study between the ages of 16 and 21.

Subclauses (5) and (6) are consistent with the current discretion given to arbitrators to order payment of the child's allowance to a child between the ages of 16 and 21 even if the child is not in full time study, if circumstances justify it.

## **9. Funeral and medical expenses**

Clause 9 subclause (2) of new Schedule 1A sets the cap on funeral expenses. The amount of \$9,813 is the current limit on funeral expenses for the financial year ending 30 June 2018. This amount will be automatically indexed each financial year in accordance with a method set out in regulations.

Clause 9 subclause (3) of new Schedule 1A is a cost recovery provision for any person who has incurred the worker's medical expenses between the time of injury and the worker's death.

Payments under both subclauses are payable to the person who incurred the expenses which may be a dependant or the deceased worker's estate. Both are consistent with current entitlements.

## **Division 3 – Entitlements if the worker's death does not result from the injury.**

### **10. Application of this Division**

Clause 10 of new Schedule 1A establishes Division 3 which sets out eligibility criteria for any dependant partner or child claiming entitlements where the worker's death does not result from the injury. Entitlements are only claimable if the worker has been in receipt of weekly compensation for not less than 6 months immediately before the worker's death and no order for redemption or settlement had been recorded. It is consistent with clause 5 of current Schedule 1.



## **11. Lump sum compensation for partners and children**

Clause 11 of new Schedule 1A retains the current entitlement payable to dependant partners and children where the worker's death does not result from the injury and which meets the criteria in clause 10.

The entitlement is the aggregate of weekly payments for total incapacity of the worker at a rate calculated and varied as at the date of the worker's death for a period of 1 year after the worker's death.

## **CLAUSE 12. SCHEDULE 5 AMENDED**

Clause 12 makes consequential amendments to Schedule 5 of the Act.

Schedule 5 sets out specific entitlements for a dependant spouse or de facto partner of a worker suffering an asbestos related disease who dies at the time of receiving a supplementary amount described in that Schedule.

## **CLAUSE 13. SCHEDULE 8 DIVISION 1 HEADING INSERTED**

Clause 13 inserts a new Division 1 heading for transitional provisions that relate to the *Workers' Compensation and Injury Management Amendment Act 2011*.

## **CLAUSE 14. SCHEDULE 8 DIVISION 2 INSERTED**

Clause 14 inserts a new Division 2 heading for transitional provisions that relate to the *Workers' Compensation and Injury Management Amendment Act 2017*.

New clauses 9 and 10 of Schedule 8 contain the transitional provisions relating to this Amendment Bill. The former provisions of the Act will continue to apply to any work related injury or death occurring before the commencement day of the Amendment Act.

New subclause 10(2) of Schedule 8 provides an exception for the child's allowance. The increase in the child's allowance will be payable from the commencement day to dependent children currently receiving the child's allowance from the WorkCover WA Trust Account.



### **PART 3 – MINOR AMENDMENTS**

#### **CLAUSE 15. SECTION 146O AMENDED**

Corrects a minor typographical error.

#### **CLAUSE 16. SCHEDULE 1 AMENDED**

Corrects a minor typographical error.