

WORKERS' COMPENSATION AND INJURY MANAGEMENT AMENDMENT BILL 2012

EXPLANATORY MEMORANDUM

Overview

This Bill clarifies common law insurance requirements under the *Workers' Compensation and Injury Management Act 1981* (the Act) as a result of legal uncertainty over the scope of the insurance obligation introduced on 1 October 2011 by the *Workers' Compensation and Injury Management Amendment Act 2011*.

In order to provide certainty to employers, brokers and insurers the Bill:

- Clarifies the definition of 'damages' for insurance purposes.
- Provides that employers do not require common law insurance under the Act for 'deemed workers' - that is, workers of whom the employer would not be the employer but for being deemed an employer for compensation purposes only.
- Preserves public liability indemnity arrangements for employers of deemed workers.
- Strengthens the ability to prescribe insurance policies under the Act and to set out terms and conditions.
- Enables regulations to limit the amount of insurance which an employer is required to effect and maintain consistent with current insurance industry standards, including the \$50 million cap for common law liabilities arising out of a single event.
- Preserves terms, conditions and exclusions in employer indemnity policies to the extent these comply with the corrective amendments in the Bill.

PART 1 – PRELIMINARY

CLAUSE 1. SHORT TITLE

Sets out the name of the Act.

CLAUSE 2. COMMENCEMENT

Provides that the Act is to come into operation as follows:

- (a) sections 1 and 2 — on the day on which the Act receives the Royal Assent
- (b) the rest of the Act — on a day fixed by proclamation and different days may be fixed for different provisions.

PART 2– AMENDMENTS TO THE WORKERS’ COMPENSATION AND INJURY MANAGEMENT AMENDMENT ACT 1981

CLAUSE 3. ACT AMENDED

Sets out the name of the Act to be amended.

CLAUSE 4. SECTION 159 AMENDED

Definition of “damages”

Replaces the broad definition of ‘damages’ which came into effect on 1 October 2011 with a new definition that is more specific to common law liabilities insured under standard employer indemnity policies.

Definition of ‘deemed worker’

Defines ‘deemed worker’ for the purpose of the insurance obligation in section 160 (1)(b) of the Act. Deemed workers were not intended to be captured by the common law insurance obligation introduced from 1 October 2011.

Definition of ‘insurable damages’

Means ‘damages in respect of which an employer is required by section 160(1)(b) to insure’.

Section 160(1)(b) requires employers to insure for damages as part of a workers’ compensation policy. Not all common law liabilities are required to be insured under section 160(1)(b), hence the term ‘insurable damages’.

CLAUSE 5. SECTION 160 AMENDED

Clause 5(1)

Deletes and replaces section 160(1)(b) which requires employers to insure under the Act for common law damages as part of a workers' compensation policy. Employers are not required to insure 'deemed workers' as defined in section 159.

Deemed workers will continue to be insured under public liability policies. The legislative changes which came into effect on 1 October 2011 did not intend to disturb these arrangements.

Clause 5(2)

Amended section 160(3) imposes on an insurer an obligation to insure an employer requesting it for the amount of liabilities for which an employer is required by section 160(1) to insure. The penalty for non compliance is retained.

New section 169 modifies the insurance requirement in section 160. Under section 169 the regulations may limit the amount of insurance and limit, modify or exclude any requirement to hold insurance in respect of liabilities in prescribed circumstances or out of prescribed events.

Clause 5(3)

Consequential amendment that inserts the new defined term "insurable damages" - meaning damages in respect of which an employer is required by section 160(1)(b) to insure. Not all common law liabilities are required to be insured under section 160(1)(b), hence the term 'insurable damages'.

CLAUSE 6. SECTION 161A AMENDED

Consequential amendment that inserts the new defined term "insurable damages" - meaning damages in respect of which an employer is required by section 160(1)(b) to insure.

CLAUSE 7. SECTION 165 AMENDED

In each place, a consequential amendment that inserts the new defined term "insurable damages" - meaning damages in respect of which an employer is required by section 160(1)(b) to insure.

CLAUSE 8. SECTION 168 AMENDED

Consequential amendment that inserts the new defined term "insurable damages" in section 168(b)(iii)(II) meaning damages in respect of which an employer is required by section 160(1)(b) to insure.

A minor formatting change is also made to section 168(b)(iii).

CLAUSE 9. SECTION 169 REPLACED

Before 1 October 2011, administrative processes required the use of a standard workers' compensation policy which covered common law liabilities and provided for certain terms and conditions and exclusions from cover.

The regulations will give statutory recognition to what had previously been matters of contract in standard employer indemnity policies. A legislative arrangement for these matters is appropriate now that common law insurance is compulsory under the Act.

This clause will enable regulations to be made to limit the amount of insurance and limit, modify or exclude any requirement to hold insurance in respect of liabilities in prescribed circumstances or out of prescribed events.

It will also enable the regulations to standardise insurance arrangements by prescribing terms and conditions and the form of the policy itself.

Limits intended to be set in the regulations include a minimum limit of indemnity of \$50 million for common law liabilities arising out of a single event (a higher amount may be negotiated according to the degree of risk to which an employer is exposed) consistent with the insurance industry standard that has been in place for many years. Other standard limits and exclusions will also be prescribed.

CLAUSE 10. SECTION 174 AMENDED

Section 174 (1AA) provides for a 'common law safety net', which enables workers of uninsured employers to receive a damages award or settlement from WorkCover WA's General Account upon default of payment by the worker's uninsured employer.

A small number of amendments are made as a consequence of the changes to section 160 which sets out an employer's insurance obligation.

Clause 10(1)

Clarifies that statutory payments from WorkCover WA's General Account are subject to new section 174(5AA) which provides for a reduction in the amount of compensation by the amount that may be payable to the worker by any other employer (e.g. a deemed employer under section 175).

Clause 10(2)(a)

Inserts a new provision that requires, as one of the preconditions for payment from the General Account, that the damages awarded or agreed are, or include, 'insurable damages' as defined by the Act.

Clause 10(2)(b) and (c)

This amends section 174(1AA) to tie the exposure of WorkCover WA's General Account to the employer's insurance obligation under section 160(1)(b).

Clause 10(2)(d)

Clarifies that the payment of any damages from WorkCover WA's General Account is subject to new section 174(5AA) which provides for a reduction in the amount of damages by the amount of compensation that may be payable to the worker by any other employer (e.g. a deemed employer under section 175). This prevents recovery of both compensation and damages and is consistent with section 92.

Clause 10(2)(e)

Clarifies that WorkCover WA is to pay to the worker from moneys standing to the credit of the General Account the amount required to satisfy the judgment or agreement... 'to the extent that the judgment or agreement provides for the payment of insurable damages'. This means the General Account will only be exposed to pay for damages that are required to be insured under the Act (required under section 160(1)(b) and any regulated limits, exclusions and modifications on the employer's insurance obligation under section 169).

Clause 10(3)

Paragraph (a) provides that where WorkCover WA is to make a payment from the General Account in respect of an injury the amount of that payment (statutory or common law) is to be reduced by any amount of compensation paid or to be paid to the worker by any employer in respect of the injury (for example, a deemed employer under section 175 who is required to pay compensation to a contractor's worker in certain circumstances).

This is consistent with section 92 that prevents recovery of both compensation and damages by requiring that the amount of compensation paid (or a proportionately reduced amount where the worker was guilty of contributory negligence) is deducted from an award of damages against the employer or a third party, and is repaid to the employer.

Paragraph (b) clarifies that an employer required to pay compensation has no right under section 92 or 93 to recover or seek indemnity for compensation from the worker.

New subsection (5AB) puts beyond doubt that WorkCover WA, in providing payments of compensation or damages to a worker on behalf of an uninsured employer, is not required to make any payments to a 'deemed employer' who may be jointly and severably liable and/ or a party to the worker's action for damages. In effect, this clarifies that WorkCover WA is not required to make payments to meet indemnity and recovery arrangements that may exist between employers (e.g. between principals and contractors regarding payments to a contractor's worker).

Clause 10(4)

This clause deletes the reference to damages in section 174(9) as there would not be any circumstance where more than one person would be liable as an employer under the Act to pay damages to a worker.

CLAUSE 11. SECTION 174AB AMENDED

Consequential amendment that inserts the new defined term “insurable damages” - meaning damages in respect of which an employer is required by section 160(1)(b) to insure.

CLAUSE 12. SECTION 175 AMENDED

Currently under section 175(2) a principal is entitled to indemnity from the contractor for the principal’s liability to pay compensation to a contractor’s worker in certain situations.

The statutory indemnity is for total indemnity of any workers’ compensation paid by the principal.

This clause puts beyond doubt that the indemnity arrangements are between the principal and contractor and do not allow the principal to recover any amount from either the worker or WorkCover WA (for example, where WorkCover WA is making payments of compensation on behalf of an uninsured contractor).

PART 3– TRANSITIONAL

CLAUSE 13. TERMS USED

Defines terms including ‘Part X’ of the Act affected by the transitional arrangements (insurance) and the ‘transitional period’ that applies.

The transitional period begins on 1 October 2011, when common law insurance was made compulsory by the *Workers’ Compensation and Injury Management Amendment Act 2011*, and continues until the corrective amended provisions come into effect.

CLAUSE 14. THINGS DONE OR OMITTED DURING THE TRANSITIONAL PERIOD

Clause 14(1)

Provides that anything done during the transitional period that:

- (a) did not comply with a provision of Part X; and
- (b) would have complied with that provision if done immediately after the transitional period

is taken to have complied with that provision at the time it was done (a reference to doing anything includes a reference to omitting to do that thing).

The effect of the transitional arrangements is described below:

Scenario 1

Has the effect that where Part X of the Act imposes an obligation (such as the obligation to insure for certain liabilities) then whatever arrangements were in place during the transitional period will be taken to have complied with Part X of the Act if they would have complied after the transitional period (when the corrective amendments come into effect).

The clause protects employers and insurers from any allegations of non compliance with the Act during the transitional period as they may not have held or issued the required level of common law insurance during that time.

For example, the 1 October 2011 changes unintentionally imposed an obligation on employers to obtain insurance (and for insurers to issue policies) for *unlimited* common law cover, whereas the cover that was in place in most circumstances would have had a cap of \$50 million for common law claims arising out of a single event.

This problem will be remedied by the Bill via changes to section 160 and regulations made under proposed section 169 which will specify a cap on common law liability and clarify the liabilities that are insurable under the Act (consistent with the common law insurance arrangements in place before 1 October 2011).

Scenario 2

The clause also has the effect that where Part X of the Act imposes a restriction (like the prohibition on writing certain kinds of policy unless an approved insurer) then whatever done during the transitional period will be taken not to infringe that restriction if it would not infringe if done immediately after the transitional period.

For example, during the transitional period many non approved insurers (e.g. public liability insurers) would have insured employers for common law liabilities of 'deemed workers' (as defined in clause 4). The Act did not intend to disturb these arrangements. Section 160 will be amended to clarify that employers do not require common law insurance under the Act for deemed workers.

As only workers' compensation approved insurers can issue or renew policies to employers for liabilities which are mandatory to insure under the Act, this clause ensures non approved insurers would not have breached the Act by issuing policies to employers of deemed workers during the transitional period.

Clause 14(2)

The legislative amendments which came into effect on 1 October 2011 did not intend to require employers to insure under the Act for common law liabilities of 'deemed workers' as defined in clause 4 of the Bill. Employers insure deemed workers under public liability policies.

Public liability insurance policies often contain exclusion clauses if insurance is mandatory under law (for example, workers' compensation).

This clause prevents the denial of cover by public liability insurers on the grounds that insurance for 'deemed workers' was mandatory under the Act during the transitional period.

Clause 15

This clause preserves terms, conditions or exclusions in standard employer indemnity policies that were in force or effected during the transitional period to the extent that these would be lawful, valid and enforceable after the transitional period.

This ensures that the insurance arrangements currently in place can continue for the duration of the policy period if compliant with sections 160 and 169.