

# **WORKERS' COMPENSATION AND INJURY MANAGEMENT AMENDMENT (COVID-19 RESPONSE) BILL 2020**

## **EXPLANATORY MEMORANDUM**

### **OVERVIEW**

The *Workers' Compensation and Injury Management Amendment (COVID-19 Response) Bill 2020* (the Bill) amends the *Workers' Compensation and Injury Management Act 1981* to address a small number of issues in response to the COVID-19 pandemic.

Each of the issues covered by the Bill are being brought forward from the broader rewrite of the *Workers' Compensation and Injury Management Act 1981* currently underway, as there is an imperative to deal with them as a priority.

The issues addressed are:

- 1) Providing for regulations to be made which establish a presumption of work-related injury for prescribed diseases contracted by workers in prescribed employment.
- 2) Discontinuing the common law 'termination day' which unfairly impacts on the common law rights of workers and is an additional and more restrictive statutory timeframe to the general limitation period that applies to common law claims for personal injury.
- 3) Providing for the periodic indexation of worker entitlements and the applicable methodology to be prescribed in regulations, and to protect against any reduction in worker entitlements if that would otherwise occur as a result of the indexation method in regulations.
- 4) Changes to facilitate electronic service and exchange of certain notices and documents required to be sent under the workers' compensation legislation.

## **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 come into operation on a day fixed by proclamation. This is to enable regulations to be made to give effect to the changes.

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

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

#### **CLAUSE 4. SECTION 5 (1) AMENDED**

Clause 4 amends the definition of 'prescribed amount', which will have the meaning given in section 5A as amended.

The prescribed amount is a monetary amount that represents the general maximum amount of compensation payable to workers over the life of their claim. Most worker entitlements refer to the prescribed amount and cap the entitlement as a multiple of the prescribed amount. For example, the maximum amount for medical and related expenses is 30% of the prescribed amount. Lump sum payments for permanent impairment also refer to the prescribed amount.

#### **CLAUSE 5. SECTION 5A AMENDED**

Currently worker entitlements and caps that apply to them are indexed annually using various Australian Bureau of Statistics (ABS) indices such as Average Weekly Earnings, Wage Price Index and Consumer Price Index. The applicable indexation methodology depends on the type of entitlement.

For most entitlements the indexation methodology is hard coded in the Act which is problematic if the ABS change its indices in a way that is different to the Act. This has occurred with Average Weekly Earnings (AWE) and the Wage Price Index.

Further, the ABS AWE index has reduced twice since 2015/16 resulting in a decrease in the cap on workers' weekly payments (which is set at twice the average amount of AWE in WA from the preceding financial year).

The economic impacts of COVID-19 may be reflected in other ABS indices being negative in the future, which would result other worker entitlements reducing.

This clause provides for periodic indexation of worker entitlements and the applicable methodology to be prescribed in regulations. The clause also protects against any worker entitlement reducing if that would otherwise occur as a result of the indexation method in regulations.

The clause sets the 'prescribed amount' and 'Amount C' (which is the cap on weekly payments) for the financial year ending 30 June 2021 and preserves arrangements for prior financial years.

The value for the 'prescribed amount' and 'Amount C' for the financial year ending 30 June 2021 is derived from the current Act and indexation methodology. There is no reduction in indexed worker entitlements based on the current methodology for the financial year ending 30 June 2021 which is the reason that period is referred to.

For subsequent financial years (from 1 July 2021) amounts payable on worker entitlements (prescribed amount, 'Amount C', and any other adjustable amount) will be varied in accordance with the regulations, subject to new section 5A(5) to protect against any reduction occurring.

## **CLAUSE 6. PART III DIVISION 4B INSERTED**

### **Division 4B — Injury: prescribed diseases**

Under current legislative requirements a worker's employment must be a significant contributing factor to the contraction of a disease in order to access workers' compensation entitlements.

The requirement to prove an occupational link to diseases which are prevalent in the community can be difficult and costly.

New Division 4B provides for regulations to be made which establish a presumption of work-related injury for prescribed diseases contracted by workers in prescribed employment. It will be up to the employer or insurer to rebut that presumption and establish the disease was not contracted at work.

It therefore reverses the onus of proof and will assist workers through the claim process and access compensation in a timely manner.

The regulation making power is brought forward from the rewrite of the Act and needs to be flexible to accommodate specified occupational diseases and classes of employment if the circumstances justify it.

Section 49E(2) clarifies that regulations cannot specify a disease to which section 33 or 34 applies, as those sections provide for an alternative way of deeming certain asbestos related diseases to be work related.

Section 49F(4) authorises the regulations to deal with the date of injury for prescribed diseases or impose conditions on the operation of the presumption. For example, regulations may require a worker to be in prescribed employment for a specified period for the presumption to apply, if relevant.

Section 49E(5) provides for the presumptive provision to have retrospective operation. For example, regulations could specify the date of injury a person is taken to have contracted a disease (such as COVID-19) if the disease was contracted prior to the commencement of this legislation or future regulations.

## **CLAUSE 7. SECTION 93L AMENDED**

Deletes subsections that refer to the 'termination day' which is discontinued by this Amendment Act. See clause 8.

## **CLAUSE 8. SECTION 93M DELETED**

Deletes a section of the Act that refers to the ‘termination day’ which is discontinued by this Amendment Act.

To pursue common law damages against an employer an injured worker is required to register an election with WorkCover WA which certifies the worker has a permanent impairment greater than 15% as determined by an approved medical specialist.

The Act currently requires an election to be made before a ‘termination day’. Unless the election is made by the termination day, the worker loses the right to pursue common law damages. The termination day generally falls one year from the date of a claim for weekly payments of compensation is made on an employer, however, it can be extended by a further 12 months, based on certification by an approved medical specialist. A high proportion of workers obtain an extension which enables the election to be registered up to two years after the initial claim for compensation is made.

The period by which an injured worker must elect to pursue common law damages is shorter than the three-year limitation period established in the *Limitation Act 2005* for other kinds of personal injury.

Some workers have experienced problems obtaining impairment assessments from approved medical specialists due to the availability of specialists and social distancing requirements during the COVID-19 response.

The amendments do not affect the procedural requirements to elect to pursue common law damages based on an impairment of at least 15%. The only time constraint on workers commencing common law proceedings will be the general limitation period that already applies to common law claims for personal injury.

## **CLAUSE 9. SECTION 93N AMENDED**

Section 93N provides for workers to obtain a special evaluation of their impairment if their condition has not stabilised by the termination day or any extension of the termination day previously given. It overcomes a barrier in the impairment guidelines that requires a condition to be stable before an assessment can be done.

While the termination day will be discontinued, there may still be circumstances where a special evaluation is required so the worker can make an election to pursue common law damages.

Section 93N is therefore to be amended to allow for a special evaluation after a period of 18 months from the claim date. This is comparable to the earliest date that a special evaluation can be done under current arrangements.

## **CLAUSE 10. SECTION 93O DELETED**

Deletes a subsection of the Act that refers to the ‘termination day’ which is discontinued by this Amendment Act. See clause 8.

#### **CLAUSE 11. SECTION 93Q AMENDED**

Deletes a subsection of the Act that refers to the ‘termination day’ which is discontinued by this Amendment Act. See clause 8.

#### **CLAUSE 12. SECTION 93R AMENDED**

Deletes a subsection that refers to the ‘termination day’ which is discontinued by this Amendment Act. See clause 8.

#### **CLAUSE 13. SECTION 93S AMENDED**

Deletes a subsection that refers to the ‘termination day’ which is discontinued by this Amendment Act. See clause 8.

#### **CLAUSE 14. PART IV DIVISION 2 SUBDIVISION 4 INSERTED**

Section 93T clarifies the effect of discontinuing the termination day for common law actions accruing before the commencement day of the Amendment Act.

Clause 14 enables any worker whose termination day had expired before the commencement day to elect to retain the right to seek damages.

Any worker’s common law claim affected by this clause will still be subject to the limitation period under the *Limitation Act 2005*.

Section 93T(4) preserves any impairment assessment or agreement recorded by the Director and any election registered with the Director before the commencement day.

#### **CLAUSE 15. SECTION 314A INSERTED**

New section 314A facilitates electronic service and exchange of certain notices and documents required to be sent under the workers’ compensation legislation.

#### **CLAUSE 16. SECTION 315 DELETED**

Deletes section 315 which requires the prescribed amount and two other indexed worker entitlements to be published in the Government Gazette.

Clause 5 [new section 5A(2)(6)] requires that any adjustable amount, such as the prescribed amount and other indexed worker entitlements, are to be published on the WorkCover WA website. WorkCover WA already publishes all indexed worker entitlements on the website, and this is the main source of information for scheme participants.

#### **CLAUSE 17. SCHEDULE 1 AMENDED**

Makes a consequential change to the definition of ‘Amount C’ in Schedule 1 clause 11(2) which now has the meaning given in new sections 5A(1A) – see clause 5.