

WORKERS' COMPENSATION (COMMON LAW PROCEEDINGS) BILL 2004

EXPLANATORY MEMORANDUM

INTRODUCTION

The objectives of the Workers' Compensation (Common Law Proceedings) Bill 2004 are:

- To ensure Parliaments intent in enacting section 32 of the Workers' *Compensation and Rehabilitation Amendment Act 1999* is given effect;
- To ensure workers are not disadvantaged by the effect of certain decisions of the Supreme Court in relation to the operation of section 93D of the *Workers' Compensation and Rehabilitation Act 1981*.

PART 1 – PRELIMINARY

CLAUSE 1. SHORT TITLE

This Act may be cited as the *Workers' Compensation (Common Law Proceedings) Act 2004*.

CLAUSE 2. COMMENCEMENT

(1) Provides that except as stated in subsection (2), this Act comes into operation on the day on which it receives the Royal Assent.

(2) Provides that section 5(1) and (2) are deemed to have come into operation on 5 October 1999.

CLAUSE 3. PURPOSE

Ensures Parliaments intent in enacting section 32 of the 1999 Amendment Act is given effect.

Ensures workers are not disadvantaged by the effect of certain decisions of the Supreme Court in relation to the operation of section 93D of the *Workers' Compensation and Rehabilitation Act 1981*.

PART 2– PROVISIONS RELATING TO SECTION 32 OF THE WORKERS’ COMPENSATION AND REHABILITATION AMENDMENT ACT 1999

CLAUSE 4. TERMS USED IN THIS PART

(1) Defines 1999 Act and ensures the definitions of “assent day” and “former provisions” have the same meaning as in the 1999 Act. The term “amended provisions” means sections 93A to 93G of the Act which deals with constraints on awards of common law damages.

(2) provides that words and expressions have the same meaning as they have in the Principal Act.

CLAUSE 5. PROVISIONS APPLYING TO AWARDING OF DAMAGES

(1) (a) Provides the section is to be read in conjunction with section 32 of the 1999 Act as if the section was part of that section.

(1) (b) Provides that this section is additional to section 32(7) of the 1999 Act as it contains provisions dealing with common law applications and proceedings in light of the Dossett Decision which occurred after the 1999 Amendment Act.

(2) Reflects section 32(7) of the 1999 Amendment Act. This reinserts the transitional provision as it was intended to apply and restricts a courts ability to use section 37 of the Interpretation Act 1984 or any other written law to change the intended operation of the provisions. The result is that the two classes of proceedings identified in s32(7) of the 1999 Amendment Act are the only proceedings in which the former provisions may continue to apply(except in the circumstances in subsection (3)). That is, in order for the worker to be able to commence an action under the pre 1999 common law provisions the worker must have commenced a proceeding before 5 October 1999 or obtained leave from the District Court before 5 October 1999. This overcomes the effect of the Dossett Decision and will apply retrospectively from 5 October 1999. This enshrines in legislation the intent of the 1999 amendments and how the law was interpreted up to the Dossett Decision.

(3) In light of the Dossett decision, leave to commence proceedings will have been given in some cases after assent day of the 1999 Amendment Act and before this Bill comes into operation. In these cases the former provisions should continue to apply. Clause 5(3) deals with these cases. The references to “23 June 2004” in clause 5(3) should be references to the day on which the Minister for Consumer and Employment Protection released a statement informing parties of the Government’s intent to introduce amendments.

Therefore the Court can continue to deal with certain proceedings but only if leave to commence proceedings was given or proceedings had commenced before 23 June 2004 (see clause 7), or on District Court file number WC 93D 1194/1998.

CLAUSE 6. EXISTING DETERMINATIONS UNAFFECTED

A consequence of Dossett is to cast doubt on the validity of decisions, rulings, orders awards, judgements, settlements and agreements made under the amended provisions when the decisions should have been made under the former provisions. Clause 6 provides that determinations made under the amended provisions are final determinations and are not subject to review on the basis they should have been made under the former provisions. The only determinations excluded are determinations in respect of a proceeding referred to in clause 5(2)(c) or (d) in which it was wrongly determined that the amended provisions were the relevant provisions.

CLAUSE 7. JURISDICTION REMOVED AND WORKERS' COSTS INDEMNIFIED

After the 2004 Act comes into operation no application for leave to commence proceedings or appeal in relation to such an application can be commenced under the former provisions (clause 7(2)) and courts cannot hear or determine such an application or appeal (clause 7(3)). If a worker has commenced such an application or appeal in the period from 4 December 2003 (date of the Dossett decision) and ending on 22 June 2004 (the date on which it is announced by the Minister that it is intended to pass this law), the worker can recover costs incurred. Cost will be paid from the General Fund.

PART 3- AMENDMENTS TO OTHER ACTS

CLAUSE 8. THIS ACT AMENDED

Amendments in this part are to the Principal Act.

CLAUSE 9. SECTION 93E AMENDED

The amendment to section 93E(5) acknowledges the new circumstance added by new subsection (6a) under which an election may be made after the termination day. This applies to the Dutch and Dossett amendments.

Section 93E(6a) provides that if the Director notifies the worker that the Director accepts a referral under section 93EA(5)(b)(i) or 93EB(5)(b)(i) and that this subsection applies, the worker may make an election 14 days after they receive notification from the Director of the recording of an agreement or determination of the question.

CLAUSE 10. SECTION 93EA, 93EB, AND 93EC INSERTED

Section 93EA.

The insertion of section 93EA is intended to redress, with retrospective application, decisions of the Supreme Court, including *Re Monger; Ex Parte Dutch & Ors* [2001] WASCA 220 and *Re Monger; Ex Parte WMC Resources & Anor* [2002] WASCA 129 which have set precedents with unintended consequences, for the operation of the existing provisions of section 93D of the *Workers' Compensation and Rehabilitation Act 1981* ("the Act"). These decisions overturned determinations by the Director of the Conciliation and Review Directorate who had accepted certain medical evidence as satisfying the requirements of section 93D(6) of the Act. The retrospective application is particularly relevant to those workers with a significant disability (i.e. not less than 16%, but less than 30%), as workers in this category are required to comply with a strict timeframe for electing and commencing proceedings. The intention of the changes is to allow workers to revalidate their referral, subject to them meeting certain criteria as provided in section 93EA.

Subclause(1) allows certain workers who were disadvantaged as a result of the *Dutch* decision through having the referral dismissed by a review officer or overturned by a superior jurisdiction, to be able to progress their referral subject to them referring a new referral of the same question and producing fresh medical evidence that complies with the requirements of section 93D. One requirement workers will need to meet for lodging a new referral will be that the worker originally sought to refer the same question on or before 30 September 2001. Referrals lodged up to this time, which was two months after the *Dutch* decision was issued, may also have been supported by medical evidence which failed to meet the medical evidence requirements of section 93D(6). It is considered that after this time, workers and medical practitioners should be sufficiently aware of these requirements, in light of the *Dutch* decision.

Subclause (2) provides that if the question relates to whether the worker's degree of disability is not less than 16%, the worker can only refer the same question if the worker produced the original medical evidence not less than 21 days before the termination day (as required by section 93E(6)) or, if another day was fixed under 93E(7), before that day. This ensures these requirements are complied with in order for the worker to refer the same question under section 93EA(3).

Subclause (3) enables the worker to refer the same question originally referred to the Director under section 93D(5). The question must relate to the same injury, as the intent of the changes is to address or validate the initial referral, not to include secondary conditions or subsequent injuries that may have occurred since that time.

Subclause (4) provides for a question to only be referred if it is in a form specified in the regulations. A new referral and supporting fresh medical evidence (if not already lodged) must be lodged with the Director within 3 months after the day on which section 78 of the Reform Act comes into operation, or if a superior jurisdiction overturns a decision of a review officer that dealt with the substance of the question, within 3 months from the date of the decision overturning the review officer's determination.

Subclause (5) makes it a requirement for the Director to notify the worker and employer as soon as practicable, as to whether the fresh medical evidence complies with the requirements of section 93D(6) and the referral is properly made. The notification will also advise whether or not the referral is accepted and if accepted will advise as to the requirement to make an election within 14 days (as required by section 93E(6a)). The term, "if relevant" is used in paragraph (b)(i) because workers with a degree of disability of at least 30% are not required to make an election under section 93E(6a).

Section 93EB.

Enables workers affected by the Dossett decision to make an election even if the termination day has expired. This will apply where a worker who has referred a question of the degree of disability under section 93D(5) but have had their referral adjourned or dismissed in light of the Dossett et al decisions, on the basis they should have sought leave under the former provisions that applied prior to 1999.

This will preserve the common law rights of the small number of workers directly affected by the Dossett decision who prior to the Dossett decision would have been required to make an election by the termination day in accordance with the existing provisions but because of the Dossett Decision has made it impossible to elect by the termination day.

Section 93EC.

Where the Director notifies a worker that a question has been accepted and any limitations in law for commencing an action for damages has run out before the day on which the Director notifies the worker, or will run out on or before 2 years after that day, an action for damages may be commenced any time up until 2 years after the notification day. This is intended to ensure workers, to whom section 93EA and 93EB may apply, will not be precluded from pursuing common law damages due to time limitations on commencing an action.

CLAUSE 11. SECTION 154AB INSERTED

The cost impact of the Dutch amendments will be met by the Employers' Indemnity Supplementation Fund but only if the amount paid is greater than the current estimated costs. The regulations may specify how to determine the extent to which the cost may be regarded as attributable to a certain judicial decision.

**CLAUSE 12. EMPLOYERS' INDEMNITY SUPPLEMENTATION FUND ACT 1980
AMENDED**

A consequential amendment following introduction of clause 11 of this Bill.