

WORKERS' COMPENSATION AND REHABILITATION AMENDMENT (CROSS BORDER) BILL 2004

EXPLANATORY MEMORANDUM

1. INTRODUCTION

Employers are often required to obtain workers' compensation coverage for an individual worker in more than one State or Territory, even if these workers are working only temporarily in another jurisdiction. The key objectives of the amendments to the *Workers' Compensation and Rehabilitation Act, 1981* (the Act) introduced by this Bill are to:

- (a) Eliminate the need for employers to obtain workers' compensation coverage for a worker in more than one jurisdiction and ensure each worker is connected to one jurisdiction.
- (b) Ensure workers' working temporarily in another jurisdiction only have access to the workers' compensation entitlements and common law provisions in their home State or Territory, or "State of connection", which is the term used in the Bill.
- (c) Provide greater certainty for injured workers as to the State or Territory in which to make a workers' compensation claim and what the associated entitlements are.
- (d) Allow employers to determine in which jurisdiction to insure each of their workers, before the worker commences work.
- (e) Allow a court to determine the "State of connection" and have that determination recognised by other courts in other jurisdictions, so only one determination is made.

2. Background

National principles were endorsed by the Heads of Workers' Compensation Authorities (HWCA) in July 2003, which cleared the way for Western Australia and all other States and Territories to progress cross border related amendments to their legislation, to ensure national coverage of the cross border workers' compensation principles. The nationally agreed principles are reflected in the key objectives of the amendments.

The tests for establishing the home "State of connection" are set out in proposed section 20 (Compensation not payable unless worker's employment connected with this State). If a home jurisdiction cannot be established by the first test, that is, where is the usual place of

employment, the second test – where the worker is usually based – will be applied.

If applying the first two tests identifies no State or Territory, the final test, being the employer's principal place of business in Australia, is applied. If no "State of connection" can be determined for an injured worker and the worker is not entitled to compensation for the same matter, under the laws of a place outside Australia, the worker's employment is deemed to be connected with the jurisdiction the worker is in when their injury occurred.

While the series of tests to help establish "State of connection" represent the cornerstone for achieving the key objectives it is also important to ensure that:

- (i) There is no fallback to any other jurisdiction (except in the circumstances outlined in (vi) below).
- (ii) The determination of the "home" jurisdiction will not be affected by the worker undertaking a temporary period of work for the same employer for a period up to and including six months in another State or Territory.
- (iii) The benefits of the "home" jurisdiction will apply to a worker temporarily working in another State or Territory for the period of work up to and including six months.
- (iv) When six months has expired, the intention of the employer and the worker as to the temporary nature of the work in the other jurisdiction must be reviewed.
- (v) As far as possible, workers on ships are to be treated the same as other workers. Some modification may be required to address specific requirements for such workers. For example, some seafarers may come within the first connection test if they usually work within one State or Territory. If it were necessary to move to the second test, i.e. where they are based, and they are based on a ship, the ship would be linked to one State or Territory.
- (vi) In relation to common law access:
 - A claim in tort in respect of a work-related personal injury suffered by a worker is to be determined in accordance with the substantive law of the State or Territory with which the workers' employment is connected (as determined by the tests in section 20 above) at the time of the injury.
 - The relevant rules will apply to actions taken against an employer or a person for whom the employer may be vicariously liable.

- Courts will apply the substantive law of the “home” jurisdiction which under the amendments is the substantive law governing –
 - (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.

CLAUSE NOTES

PART 1 - PRELIMINARY

Clause 1. – Short title

3. Specifies the short title of the Amendment Act is the “*Workers’ Compensation and Rehabilitation (Cross Border) Act 2004*”.

Clause 2. – Commencement

4. Commencement of the provisions contained in the Bill will be on a day fixed by proclamation. The different dates for proclamation that may be fixed for Parts 2 and 3 reflects the fact that workers’ compensation amendments are contained not only in the Cross Border Bill but also in the Government’s *Workers’ Compensation Reform Bill 2004*. The clause provides for one Bill to be proclaimed before the other or for both Bills to be proclaimed on the same day. This covers all scenarios for progress of the two Bills.

PART 2 – CROSS BORDER PROVISIONS

Division 1 – Amendments

Clause 3. – The Act amended

5. Specifies the amendments relating to the cross border provisions are to the *Workers’ Compensation and Rehabilitation Act 1981 (the Act)*.

Clause 4. – Section 5 amended

6. Definition of “**ship**” in the Act has been extended to include any kind of vessel used in navigation by water, however propelled or moved and includes a barge, lighter or other floating vessel, and an air-cushioned vehicle or similar craft, in place of any ship, vessel, boat or other craft. This reflects the current and proposed legislation of other jurisdictions to ensure the legislation is applied and interpreted consistently.

“State” is defined to include a Territory, being a Territory of Australia.

Clause 5. – Section 15 repealed

7. Section 15 is repealed. It will be replaced and extended by sections 20 and 23 to ensure compensation is only payable in relation to employment connected with Western Australia and to ensure a person is not compensated twice.

Clause 6. – Section 16 amended

8. Section 16(1) and (1a) of the Act are repealed as new sections 20(5) and (6) will be applied to establish whether a worker on a ship is connected with Western Australia and entitled to compensation under the Act.
9. Section 16(2) is amended to recognise an entitlement to compensation under the Act for an injury that occurs on a ship must align with the worker’s employment being connected with a State or Territory, as required by new section 20.

Clause 7. – Section 20 inserted

10. Section 20 provides greater certainty in connecting a worker with a “State” and the entitlements to compensation under that State’s Act.
11. Section 20(1) provides a link to Schedule 6, which establishes geographically each jurisdiction’s relevant adjacent area. This is used to help determine “State of connection”.
12. Section 20(2) stipulates compensation under the Act is only payable to a worker where the employment is connected with Western Australia, the tests for which are described in section 20(4).
13. Section 20(3) provides that even if a worker happens to be outside Western Australia when an injury occurs, compensation may be payable under the Act as long as the worker’s employment can be connected with Western Australia.
14. Section 20(4) provides a sequential series of tests to determine whether a worker’s employment is connected with Western Australia, or another jurisdiction. If a worker “usually” performs their job in a particular State or Territory, then the employment is deemed to be connected with that jurisdiction. If the above test does not apply then the “State of connection” will be based on the jurisdiction in which the worker is “usually based” for their employment. If the “usually based” test doesn’t apply, “State of connection” will be determined according to where the employer’s “principal place of business” in Australia is located.
15. Section 20(5) provides a test to establish a “State of connection” for workers working on ships. If the tests under section 20(4) do not apply, a

worker's employment, while working on ship, is connected to the jurisdiction in which the ship is registered, or if registered in more than one State, the State where the ship was most recently registered.

16. Section 20(6) provides for exceptional circumstances where none of the "State of connection" tests apply. The test of whether a worker's employment is connected with Western Australia is based upon the worker being in Western Australia when the injury occurs. This is conditional upon there being no place outside Australia that the worker is entitled to compensation for the same injury.
17. Section 20(7) specifies that when deciding whether a worker "usually works" in a State at a particular time (as per the first test of connection under section 20(4)(a)), consideration must be given to the worker's work history with the employer over the preceding period of 12 months and the intentions of the worker and employer. This is to ensure courts in different jurisdictions apply standard tests. Otherwise, one court may decide the whole period of the worker's employment with the employer, while another court may consider a much more recent history.

No regard is to be had for temporary arrangements when a worker works outside the State for six months or less.

18. Section 20(8) stipulates that when deciding whether a worker "usually works" in a State or is "usually based" in a State for employment purposes, consideration must be given to any period a worker works in a State or is in a State for employment related purposes. This is subject to the provisions of section 20(7).
19. Section 20(9) states compensation is not payable under the Act if the worker is employed on a ship and the Commonwealth *Seafarers Rehabilitation and Compensation Act 1992* applies to the worker's employment. This is logical, as a person should not be entitled to payments under both Acts.

Clause 8. – Section 23 replaced

20. Repealed section 23 (Where a claim exists elsewhere as well as in this State) currently prevents a worker claiming compensation under the Act if a claim had been made under the law of another State or Territory or country, unless the worker declares in writing that compensation has not, or will not be claimed.

New section 23(1) (Person not to be compensated twice) specifies compensation is not payable where compensation has been received under laws outside Western Australia or a judgement obtained against the employer independently of the Act.

21. Where a person receives compensation under the Act and also receives compensation under laws outside Western Australia or obtains

judgement against the employer independently of this Act, section 23(2) empowers the person who paid the compensation to sue and recover.

22. Section 23(3) states the amount recoverable under section 23(2) is that amount of compensation paid under the Act, or the amount of compensation received under the laws of a jurisdiction outside Western Australia, whichever is less.

Clause 9. – Part III Division 1a inserted

23. The nationally adopted model for choice of law requires the court in which the application is made to determine the “State of connection” and courts in all jurisdictions are to recognise and support a determination made in another jurisdiction. Division 1a outlines procedures for the courts to determine the State connected with the worker’s employment. This determination is to be recognised by courts in all other jurisdictions, so further determinations cannot be applied for. A determination can be appealed and amended and recognised by the State of connection.

Division 1a – Determination by courts and recognition of determination

23A. Definition

24. “**court**” is defined to include “a tribunal constituted by a judicial officer” which ensures wide coverage in order to determine “State of connection”. “**court**” (in WA to be the District Court) was not previously defined in the principal Act, but is necessary under the proposed amendments as the designated court of each jurisdiction may be called upon to determine “State of connection”.

23B. Determination of State with which worker’s employment is connected in proceedings under this Act

25. When assessing whether Western Australia is the jurisdiction connected to the worker’s employment, the court must determine the “State of connection”, (in accordance with section 20), which is then entered into the records of the court. Under section 23B(2) a court determination does not apply if the “State of connection” has already been determined, as per proposed section 23D (Recognition of previous determinations).

23C. Determination by the District Court of State with which worker’s employment is connected

26. Under section 23C(1) a party to a claim under this Act, like the insurer, employer or worker, can apply to the District Court for a determination of which State or Territory is the “State of connection” with regard to the worker’s employment.

27. An application made under section 23C(1) must be determined by the District Court in accordance with the tests to determine “State of connection” in section 20, the outcome of which is to be entered into the records of the court under section 23C(2).
28. If a determination of a “State of connection” is already recognised by a previous determination under section 23D (Recognition of previous determinations), section 23C(3) specifies the application under section 23C cannot be made.

23D. Recognition of previous determinations

29. Under section 23D(1) previous determinations recognised under section 23D apply if a court has already determined the State or Territory with which a worker’s employment is connected, under sections 23B or 23C.
30. Under section 23D(2) the “State of connection”, as determined in section 23D(1), is the one to be recognised for the purposes of the West Australian Act.
31. Section 23D(3) states appeals on any determination are not prevented by section 23D.
32. Under section 23D(4) if an appeal changes a previous determination of “State of connection”, section 23D(2) stipulates the jurisdiction determined under appeal is to be formally recognised as the jurisdiction with which the worker’s employment is connected.

23E. Determination may be made by consent

33. Under, Part III, Division 1a, a reference to a determination of a “State of connection” made by a court, includes a determination made by the court with the consent of the parties to the proceeding. This provides flexibility for all parties to negotiate an agreed position even if the matter is formally before a court.

Clause 10. Part IV Division 1a inserted

Division 1a - Choice of law

34. The model adopted by all Australian workers’ compensation jurisdictions for choice of laws to determine “State of connection”, requires the court in which the application is made to determine the “State of connection”. The model also requires courts in all jurisdictions recognise and support a determination made in another State or Territory. In adopting this choice of laws model all States and Territories have agreed to pursue a common commencement date of 1 July 2004.

35. Two main benefits of the choice of laws model are:
- The court in the jurisdiction in which the application is made makes the determination of whether that State or Territory was the State or Territory connected with the worker's employment. This determination is to be recognised by other State and Territory courts and so is made only once.
 - The laws of the "State of connection" will determine all questions relating to the claim, including whether or not the claimant was a worker for the purposes of that law.
36. A further aim of the choice of law model is to ensure common law damages claims and statutory compensation claims arising out of a work related injury are both able to be dealt with under the law of the same jurisdiction.

93AA. The applicable substantive law for work disability claims

37. Section 93AA(1) stipulates that if a worker is entitled to compensation under a State or Territory statutory workers' compensation scheme, the substantive law of the State or Territory governs whether or not a claim for damages can be made and what the determination of the claim is. This ensures workers can only pursue common law claims in the "State of connection", which provides certainty and consistency.
38. Section 93AA(2) states Division 1a does not apply if workers' compensation is payable under a statutory scheme in more than one State. This means if another jurisdiction is also able to pay workers' compensation then Division 1a does not apply, as it would be inappropriate for workers to be eligible for two payments.
39. Section 93AA (3) stipulates that where the substantive law of a jurisdiction applies, workers' compensation is still payable even if the provisions of the scheme excludes a worker's right to compensation due to any conduct or failure of the worker, or when compensation would have been payable if the claim for compensation had been duly made but an election to claim that compensation by lump sum instead of common law had been duly made. This means despite any technicalities, a worker's entitlements can still be preserved.
40. Section 93AA(4) stipulates a reference in section 93AA to compensation payable for an injury does not include compensation that may be payable based on a provisional acceptance of liability. This is to ensure the employer and/or insurer is not unfairly bound by an interim decision, which may have been made in good faith to assist the claimant and expedite a final decision.

93AB. Claims to which Division applies

41. Section 93AB(1) explains Division 1a relates to a worker's claim for common law damages against the employer for a disability caused by negligence or other tort of the worker's employer, or a breach of contract by the worker's employer.
42. Section 93AB(2) specifies Division 1a also applies to a common law claim or the recovery of contribution brought against a person other than a workers' employer if the worker's employment is connected with Western Australia and the negligence or other tort or the breach of contract on which the claim is based occurred in Western Australia.
43. Section 93AB(3) specifies that even if damages resulting from the negligence or other tort are claimed in another action for breach of contract or another action, sections 93AB(1)(a) and (2) still apply.
44. Section 93AB(4) makes it clear that where there is reference to a "worker's employer" in Division 1a, this includes a person who is vicariously liable (liable for the acts of another) for the acts of the employer and a person for whose acts the employer is vicariously liable.

93AC. What constitutes disability and employment

45. To help ensure courts in all jurisdictions make consistent decisions with regard to the law of the jurisdiction which is to apply, "**disability**", "**employer**" and "**worker**" have been defined so they are within the scope of corresponding terms in the statutory worker's compensation scheme of other workers' compensation jurisdictions.

93AD. Claim in respect of death included

46. This is included to ensure a claim for damages also includes a claim for damages in respect of death resulting from a disability.

93AE. Meaning of "substantive law"

47. The first part of section 93AE defines "**a State's legislation about damages for a work related disability**" as Division 2 for Western Australia and provides for regulations to declare any provision of a law of another State, in relation to damages for a work related disability.

As a State or Territory substantive law is to be used as the law that governs whether or not a claim for common law damages can be made, and what the determination of the claim can be, this section defines "**substantive law**" in relation to Western Australia and what is referred to in other State's, and what it includes. This ensures wide coverage and application of the term.

93AF. Availability of action in another State not relevant

48. It is not relevant to the application of Division 1a in relation to common law under this Act, if the substantive law of **“another State”**, being “a State other than the State with which the worker’s employment is connected”, would not give rise to a cause of action if the disability had occurred in that State or if the circumstances on which the claim is based do not give rise to a cause of action. This ensures workers can only pursue common law under the legislation of the established “State of connection”, which provides certainty as to which jurisdiction common law can be claimed and eliminates the potential for forum shopping.

Clause 11. Section 170 amended

49. Section 170(3a) is inserted to ensure that when an employer fails to obtain a workers’ compensation insurance policy and fails to provide employment details under section 160(1) or (2), the employer has a defence against prosecution on the basis he/she believed, on reasonable grounds, that they were not liable because the worker’s employment was not connected with Western Australia. This is appropriate in cases where employers genuinely believe they did not have a responsibility to take out a workers’ compensation policy.
50. Section 170(3b) was inserted to provide that if the employer believed on reasonable grounds that the worker’s employment was connected with another State then section 170(3a) does not apply, to the extent that the employer had workers’ compensation cover for the worker under the law of that other State or Territory.
51. New section 170(7) defines **“workers’ compensation cover”**, for the purposes of section 170(3b), to mean insurance or registration required under the laws of a jurisdiction for liability for workers’ compensation under that law. This is worded to ensure the term is wide enough to capture definitions in all jurisdictions.

Clause 12. Section 174 amended

52. New section 174(5a) specifies that if WA’s Worker’s Compensation and Rehabilitation Commission (the Commission) is satisfied an employer does not have a current worker’s compensation insurance policy, because the employer believed on reasonable grounds that the employment was not connected to Western Australia under the “State of connection” test (section 20), the employer is not liable to the Commission for any amount paid out of the General Fund by the Commission under section 174 of the current Act. This ensures employers found to have a reasonable belief that a policy was not necessary are not required to repay monies to the General Fund that were paid to a disabled worker because the employer was uninsured.

Clause 13. Schedule 6 inserted

Schedule 6 – Adjacent areas

53. Schedule 6 is inserted to describe explicitly the geographical boundaries of each State and Territory and allow interpretation of whether ships are travelling within the geographical boundaries of a State or Territory, for the purpose of deciding whether a worker's employment is connected with a particular jurisdiction.

Division 2 - TRANSITIONAL

Clause 14. Transitional provisions

54. Clause 14(1) specifies:

“amendments” means amendments made to the *Workers' Compensation and Rehabilitation Act 1981* (Principal Act).

“commencement day” is defined to mean the day on which the cross border provisions under Part 2 come into operation.

“principal Act” is defined as the *Workers' Compensation and Rehabilitation Act 1981*.

To maintain consistency other terms used in the Amendment Bill are specified to have the same meanings as they have in the Principal Act.

55. In clause 14(2); for any disability occurring before commencement day of the amendments, the principal Act applies.
56. In clause 14(3); if a worker dies either from a disability before the commencement day, and a disability on or after commencement day, the worker is treated as having died, subject to the new amendments.
57. In clause 14(4); similar provisions apply to a period of incapacity, whereby incapacity resulting from a disability occurring before commencement day, and from a disability occurring on or after commencement day, is treated as subject to the new amendments.
58. In clause 14(5); no changes to apportionment of liability where the disabilities occurred before the commencement day and one or more occurred on or after that day.
59. In clause 14(6); an existing policy of insurance already being utilised by an employer against liability at commencement day will continue to cover the employer as long as it remains in force, even after the principal Act is amended.

Part 3 - Further Amendments

60. The amendments under Part 3 relate to the amendments proposed in the Government's *Workers' Compensation Reform Bill 2004*, which provides for references in the Act to be changed from "disability" to "injury", "disabilities" to "injuries" and "the Commission" to "WorkCover WA". As the Cross-Border Bill is separate to the Reform Bill it is necessary to include these amendments to ensure consistent terminology.

Clause 15. The Act amended

61. Specifies the amendments under Part 3 are to the *Workers' Compensation and Rehabilitation Act 1981*.

Clause 16. References to "a disability" changed to "an injury"

62. Specifies sections of the Act where references to "a disability" are changed to "an injury". This reflects the amendments proposed under the Reform Bill and ensures consistent terminology.

Clause 17. References to "disability" changed to "injury"

63. Identifies sections of the Act, which are to be amended by deleting references to "disability" and substituting "injury". The amendments reflect changes proposed under the Reform Bill to ensure consistent terminology.

Clause 18. References to "the Commission" changed to "WorkCover WA"

64. Amends section 174(5a) of the principal Act by deleting "the Commission" and substituting "WorkCover WA". This reflects the amendments to the structure of the "Commission" proposed under the Reform Bill to ensure consistent terminology.

Clause 19. Reference to "disabilities" changed to "injuries"

65. Identifies section 14(5) of this Bill is amended by deleting "disabilities" and substituting "injuries". The amendments reflect changes proposed under the Reform Bill to ensure consistent terminology.