

Workers' Compensation Legislation Amendment Bill 2005

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Western Australia

LEGISLATIVE ASSEMBLY

Workers' Compensation Legislation Amendment Bill 2005

A Bill for

An Act to —

- **amend the *Workers' Compensation and Injury Management Act 1981*; and**
- **amend the *Workers' Compensation Reform Act 2004*,
and for related purposes.**

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This is the *Workers' Compensation Legislation Amendment Act 2005*.

2. Commencement

(1) Subject to subsections (2) and (3) —

(a) this Act comes into operation on the day on which it receives the Royal Assent; and

(b) Part 3 comes into operation immediately after the coming into operation of Part 2.

(2) Section 30(1) and (2) are deemed to have come into operation on 1 July 2005.

(3) If this Act receives the Royal Assent on or before 14 November 2005, section 7 and Parts 3 and 5 come into operation on 14 November 2005, immediately after the coming into operation of section 130 of the *Workers' Compensation Reform Act 2004*.

Part 2 — Amendments to *Workers' Compensation Reform Act 2004*

3. The Act amended

5 The amendments in this Part are to the *Workers' Compensation Reform Act 2004**.

 [* Act No. 42 of 2004.]

4. Section 10 repealed

Section 10 is repealed.

5. Section 101 amended

10 Section 101(4)(a) is deleted.

6. Section 120 amended

Section 120(1) is repealed.

7. Section 184 amended

After section 184(4) the following subsection is inserted —

15 “

 (5) Without limiting sections 84ZP and 115 of the principal Act as in force on 13 November 2005, a compensation magistrate's court acting under this section may remit a matter to an arbitrator for determination, with or without any direction.

20

”.

Part 3 — Amendments to *Workers' Compensation and Injury Management Act 1981*

Division 1 — Preliminary

8. The Act amended

- 5 (1) The amendments in this Part are to the *Workers' Compensation and Injury Management Act 1981** as amended by the *Workers' Compensation Reform Act 2004***.
- (2) References in this Part to provisions of the *Workers' Compensation and Injury Management Act 1981** are references
10 to those provisions as amended and renumbered by the *Workers' Compensation Reform Act 2004***.

[* Reprinted as at 14 September 2001.

For subsequent amendments see *Western Australian Legislation Information Tables for 2004, Table 1, p. 507-08.*

15 **Act No. 42 of 2004.]

Division 2 — Deemed worker amendments

9. Section 10A replaced and transitional provision

- (1) Section 10A is repealed and the following section is inserted
instead —

20 “

10A. Working directors

- (1) In this section —
- “**company**” means a company as defined in
section 5(1) other than a public company as that
25 term is defined in the *Corporations Act 2001* of
the Commonwealth;
- “**corporate body**” has the same meaning as
“company” in section 5(1);

“director” has the meaning given to that term in the *Corporations Act 2001* of the Commonwealth;

“earnings” means wages, salary and other remuneration;

5 **“working director”**, in relation to a company, means a director of the company, whether or not the director would be a worker if this section did not apply —

- 10 (a) who executes work for or on behalf of the company; and
- (b) whose earnings as a director of the company by whatever means are in substance for personal manual labour or services.

15 (2) Despite anything in section 5, a director of a corporate body is not a worker of that corporate body for the purposes of this Act unless this section makes the director a worker.

20 (3) A company may apply to an approved insurance office under section 160(2) on the basis that a working director of the company is a worker.

 (4) If a company complies with section 160 in respect of a working director of the company on the basis that the director is a worker, then, for the purposes of this Act —

- 25 (a) the director is a worker; and
- (b) the company is the employer of the director.

(5) Subsection (4) ceases to apply if the circumstances described in subsection (7) arise.

30 (6) If a company that is an employer is, or is one of a group of employers that is, exempt under section 164, then, for the purposes of this Act —

- (a) a director of the company who is a working director is a worker; and

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(b) the company is the employer of the director.

(7) If a company (other than a company that is, or is one of a group of employers that is, exempt under section 164) does not comply with section 160 on the basis that a working director of the company is a worker, then, for the purposes of this Act, the working director is not a worker.

(8) Subsection (7) does not prevent the company from applying as described in subsection (3), and subsection (7) ceases to apply if the circumstances described in subsection (4) arise.

”.

(2) Nothing in this section affects or limits the operation of the *Workers' Compensation and Injury Management Act 1981* in relation to a director of a company if that director, at any time before the coming into operation of this section, received, or was entitled to receive, compensation under that Act, and for that purpose that Act continues to apply in relation to the director as if this section had not been enacted.

10. Section 93B amended

Section 93B(5) is amended by inserting after “section 175” —
“ or 175AA ”.

11. Section 160 amended

After section 160(2a) the following subsection is inserted —

“

(2b) After the termination of the period referred to in subsection (2), an employer referred to in subsection (2a) is to furnish to the insurance office —

(a) a statement of the aggregate amount of the wages, salary and other remuneration paid in fact during that period to the director; and

- (b) supporting particulars to verify the aggregate amount stated.

”.

12. Section 160A inserted

5 After section 160 the following section is inserted —

“

160A. Insurance in respect of working directors

- 10 (1) If a dispute arises between an employer that is a company requesting insurance from an insurance office and the insurance office as to whether a person is a working director of the company, the employer or insurance office may apply to have the question determined by an arbitrator.
- 15 (2) An insurance office that has issued a policy or contract of insurance to a company that is an employer in respect of a working director pursuant to an application as described in section 10A(3) cannot decline to indemnify the employer in respect of a liability of the employer for the director on the basis that the director
- 20 is not a worker, or that the company is not the employer of the director, unless an arbitrator determines that —
- 25 (a) a representation made by the company in respect of the director when applying for the issue of a policy or contract of insurance in respect of that director was false or misleading in a material particular; and
- 30 (b) the decision of the insurance office to issue a policy or contract of insurance in respect of the director was materially affected by that representation.

”.

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13. Section 175AA inserted

After section 175 the following section is inserted in Part X
Division 2 —

“

5 **175AA. Certain persons deemed workers**

- (1) For the purposes of this section, a person (“**W**”)
executes work for another person (“**E**”) under an
avoidance arrangement if —
- 10 (a) the work is executed under an arrangement that
is contrived to enable E to have the benefit of
W’s services without having liabilities and
duties as W’s employer under this Act;
- 15 (b) the arrangement was entered into on or after the
coming into operation of section 13 of the
*Workers’ Compensation Legislation
Amendment Act 2005*; and
- 20 (c) while the arrangement is in effect —
- (i) W executes work principally for E on
behalf of a company of which W is an
employee or director (the “**company**”);
and
- (ii) the work is directly a part or process in
the trade or business of E.
- 25 (2) Unless the arrangement is, or is of a class of
arrangements, prescribed by the regulations, an
arrangement is contrived for the purpose described in
subsection (1)(a) if —
- 30 (a) before executing work under the arrangement,
W was E’s worker and provided substantially
similar services; or
- (b) although the circumstances described in
paragraph (a) did not exist before W executes

work under the arrangement, E intimated,
before the arrangement was entered into, that E
was unwilling to enter into an arrangement for
the provision of substantially similar services
that would have resulted in W being E's
worker.

(3) A person may apply to an arbitrator for a determination
as to whether a person was, at a particular time or
during a particular period, executing work for another
person under an avoidance arrangement.

(4) In making a determination for the purposes of
subsection (3) the arbitrator is not to have regard to
whether or not proceedings have been instituted under
section 303A against E, or to the outcome of those
proceedings (if any).

(5) If an injury occurs to W and W and E agree or an
arbitrator determines that, when the injury occurred, W
was executing work for E under an avoidance
arrangement —

(a) E is liable to pay any compensation that E
would have been liable to pay under this Act if
W had been E's worker when the injury
occurred;

(b) if, when the injury occurred, E was insured as
required by section 160 against its liability to
pay compensation to its workers under this
Act —

(i) that insurance extends to E's liability
under paragraph (a) to pay
compensation; and

(ii) the insurer is entitled to indemnity from
E for the cost of satisfying its liability
under subparagraph (i);

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- 5 (c) the company is relieved of its duties and liabilities, if any, under this Act in respect of the payment of compensation to W, and in respect of its duties, if any, under section 155C in respect of W; and
- (d) section 175 does not apply so as to entitle E to an indemnity from the company or W.
- 10 (6) If E is liable to pay compensation under subsection (5), for purposes related to the compensation and duties under section 155C, and matters related to the compensation and those duties, this Act applies as if —
- 15 (a) a reference in this Act to an employer were a reference to E except where, for the purpose of calculating the amount of compensation, a reference is made to the earnings of the worker, the reference is to be read as a reference to the earnings of the company to the extent that those earnings were for work executed for E by W on behalf of the company;
- 20 (b) a reference in this Act to a worker were a reference to W.
- (7) E or any person on behalf of E, or an insurer of E or any person on its behalf, must not, directly or indirectly, take or receive any money or indemnity from the company or W in respect of any liability of E or the company to pay compensation in respect of W under this Act.
- 25 Penalty: \$2 000.
- 30 (8) An indemnity taken or received in contravention of subsection (7) is void.
- (9) Where money is taken or received as described in subsection (7), whether with the consent of the company or W or not, the company or W, as the case

requires, may sue and recover the amount of that money from the person who took or received it.

”.

14. Section 303A inserted

5 After section 303 the following section is inserted —

“

303A. Making employment conditional on avoidance arrangement

10 (1) If a person executes work for another person (“E”) under an avoidance arrangement, E commits an offence.

Penalty: \$5 000.

15 (2) The question of whether the person executes work for E under an avoidance arrangement is to be determined in accordance with section 175AA(1) and (2).

”.

15. Schedule 1 amended

(1) Schedule 1 clause 11(2) is amended in the definition of “Amount B” by inserting after “means” —

20 “

—

(a) in the case of a director who is a worker for a company other than a company that is exempt under section 164 —

25 (i) the average weekly earnings of the director over the period in respect of which a statement was last made in respect of the director under section 160(2b), determined by averaging the aggregate amount so stated; or

30 (ii) if a statement has not been made in respect of the director under section 160(2b), the

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average weekly earnings of the director
determined under subclause (2a);

(b) in the case of a director who is a worker for a
company that is exempt under section 164, the
average weekly earnings of the director determined
under subclause (2b);

and

(c) in any other case,

”.

(2) After Schedule 1 clause 11(2) the following subclauses are
inserted —

“

(2a) For the purposes of paragraph (a)(ii) of the definition of
“Amount B” the average weekly earnings of a director of a
company are to be determined —

(a) if the director has been a director of the company
for a period of less than one year, by averaging the
earnings paid to the director by the company over
that period ending on the day before the injury
occurs as a worker of the company;

(b) if the director has not been paid any earnings by the
company before an injury occurs as a worker of that
company, by averaging the estimate of earnings of
the director furnished by the company under
section 160(2a); and

(c) otherwise, by averaging the earnings paid to the
director by the company over the period of one year
ending on the day before the injury occurs as a
worker of the company.

(2b) For the purposes of paragraph (b) of the definition of
“Amount B” the average weekly earnings of a director of a
company are to be determined —

(a) if the director has been a director of the company
for a period of less than one year, by averaging the
earnings paid to the director by the company over

- that period ending on the day before the injury occurs as a worker of the company;
- (b) if the director has not been paid any earnings by the company before an injury occurs as a worker of that company, by estimating the average weekly earnings on the basis of any relevant contract, award or agreement with the company; and
- (c) otherwise, by averaging the earnings paid to the director by the company over the period of one year ending on the day before the injury occurs as a worker of the company.
- (2c) The earnings referred to in subclauses (2a) and (2b) are to be verified, to the extent practicable, by supporting particulars provided by the company.
- ”.

Division 3 — Miscellaneous amendments

16. Section 31H amended

Section 31H(4) is amended by deleting “accident by injury” and inserting instead —

“ injury by accident ”.

17. Section 72A amended

Section 72A(3) is amended by inserting after “examination” —

“ or obstructing the examination ”.

18. Section 146H amended

(1) Section 146H(2) is amended as follows:

- (a) in paragraph (a) by inserting after “evaluation” —
“ to be ”;
- (b) in paragraph (b) by inserting after “evaluation” —
“ to be ”.

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- (2) Section 146H(5) is amended by deleting “it contains an obvious error, the Director may reject it” and inserting instead —

“

a factual error is apparent on the face of the document,
the Director may reject the document

”.

19. Section 146O amended

Section 146O(8) is amended as follows:

- (a) by inserting after “If” —

“ a factual error is apparent on the face of ”;

- (b) by deleting “contains an obvious error, the Director may reject it” and inserting instead —

“ , the Director may reject the document ”.

20. Section 165 amended

Section 165(4)(b)(ii) is amended by deleting “deposited at the Treasury” and inserting instead —

“ given to the State ”.

21. Section 174 amended

Section 174(8) is amended by deleting “, and section 142(1) of the *Supreme Court Act 1935* applies to the amount specified in the certificate as if it were payable under a judgment of the court”.

22. Section 180 amended

Section 180(4) is amended by inserting after “DRD Rules and” —

“ is to be complied with ”.

23. Section 198 amended

Section 198(6) is amended by inserting after “conference or” —
“ a ”.

24. Section 219 amended

5 Section 219(3) is amended by deleting “, and section 142(1) of the *Supreme Court Act 1935* applies to the amount not paid under the decision as if it were payable under a judgment of the court”.

25. Section 231 amended

10 Section 231(2)(a) is amended by deleting “entitlements” and inserting instead —
“ expenses ”.

26. Section 241 amended

15 Section 241(2)(a) is amended by deleting “entitlements” and inserting instead —
“ expenses ”.

27. Section 247 amended

Section 247(4) is amended by inserting after “An” —
“ application for leave to ”.

20 **28. Section 277 amended**

Section 277(4) is amended by inserting after “registered under” —
“ regulations made under ”.

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Management Act 1981

Division 3 Miscellaneous amendments

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29. Schedule 1 amended

Schedule 1 clause 5(1)(a)(i) is amended by inserting after “lump sum” —

“ if ”.

Part 4 — Death benefit amendments

30. Section 5 amended and transitional provision

- 5 (1) The amendments in this section are to the *Workers' Compensation and Injury Management Act 1981* as in force on 1 July 2005.
- (2) Section 5 is amended in paragraph (b) of the definition of “notional residual entitlement” by deleting “the prescribed amount as at the date of his death, less” and inserting instead —
- 10 “
- if —
- (i) the date of the death of the worker is before 1 July 2005, the prescribed amount as at the date of the death; and
- (ii) the date of the death of the worker is on or
- 15 after 1 July 2005, \$200 000,
- less
- ”.
- 20 (3) In determining the compensation payable to a dependant of a worker under clause 1 or 2 in accordance with the *Workers' Compensation and Injury Management Act 1981* as amended by subsection (2) —
- (a) any compensation paid under the relevant clause before this Act received the Royal Assent is to be deducted; and
- 25 (b) if an apportionment of compensation has been determined or agreed in relation to compensation under the relevant clause before this Act receives the Royal Assent, any compensation payable under the relevant clause after this Act receives the Royal Assent is to be
- 30 apportioned in a like manner.

Part 5 — Court of Appeal amendments

31. Acts Amendment (Court of Appeal) Act 2004 amended

- (1) The amendment in this section is to the *Acts Amendment (Court of Appeal) Act 2004*.

5 [* Act No. 45 of 2004.]

- (2) Schedule 1 clause 29 is repealed.

32. Workers' Compensation and Injury Management Act 1981 amended

- 10 (1) The amendments in this section are to the *Workers' Compensation and Injury Management Act 1981** as amended by the *Workers' Compensation Reform Act 2004***.

- (2) References in this section to provisions of the *Workers' Compensation and Injury Management Act 1981** are references to those provisions as amended and renumbered by the
- 15 *Workers' Compensation Reform Act 2004***.

[* Reprinted as at 14 September 2001.

For subsequent amendments see *Western Australian Legislation Information Tables for 2004, Table 1, p. 507-08*.

**Act No. 42 of 2004.]

- 20 (3) Sections 251(1) and 252(1) are amended by deleting “Full Court of the Supreme Court” and inserting instead —

“ Court of Appeal ”.

- (4) Section 254(1) is amended by deleting “Supreme Court appeal to the Supreme Court” and inserting instead —

25 “ Court of Appeal appeal to the Court of Appeal ”.

- (5) Section 254(2) is repealed.

- (6) Section 254(3) and (6) are amended by deleting “Supreme Court” and inserting instead —

“ Court of Appeal ”.

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