

# **WORKERS' COMPENSATION LEGISLATION**

## **AMENDMENT BILL 2005**

### **EXPLANATORY MEMORANDUM**

#### **INTRODUCTION**

1. The objectives of the *Workers' Compensation Legislation Amendment Bill 2005* are to:
  - Restore the ability for working directors to be covered by the statutory scheme and more directly and clearly address the issue of legal uncertainty created by past Court decisions;
  - Address the practice of some employers in certain industries requiring workers to form companies and undertake work as directors, as a condition of obtaining work.
  - Entitle dependants of workers who die as a result of an injury sustained between 1 July 2005 and 14 November 2005 access to the higher benefit of \$200,000 provided for in the *Workers' Compensation Reform Act 2004* (the Reform Act), due to the deferral in the proclamation of the Reform Act from 1 July 2005 to 14 November 2005.
  - Make minor technical and drafting amendments to the Reform Act and the *Workers' Compensation and Injury Management Act 1981* (the Principal Act).

#### **PART 1 – PRELIMINARY**

##### **CLAUSE 1. SHORT TITLE**

2. The name of the Bill when enacted is the *Workers' Compensation Legislation Amendment Act 2005*.

##### **CLAUSE 2. COMMENCEMENT**

3. The Bill repeals and amends certain provisions of the Reform Act that must be made before the Reform Act provisions come into operation on 14 November 2005. These are in Part 2 and commence on Royal Assent.
4. In effect, all the other provisions come into operation on 14 November 2005 immediately after the coming into operation of the Reform Act with

the exception of sections 30(1) and (2) which are deemed to have come into operation on 1 July 2005. Sections 30(1) and (2) provide for a retrospective increase in the death benefit payable to dependants.

## **PART 2 – AMENDMENTS TO THE WORKERS’ COMPENSATION REFORM ACT 2004**

5. The amendments and repeals in this Part are to the Reform Act and must be made before the balance of the provisions in that Act come into operation on 14 November 2005.

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

6. The amendments and repeals in this part are to the Reform Act.

### **CLAUSE 4. SECTION 10 REPEALED**

7. Clause 4 repeals the working director provisions that would have been introduced by section 10 of the Reform Act. Alternative provisions in relation to working directors are substituted under Part 3 Division 2 of the Bill.

### **CLAUSE 5. SECTION 101 AMENDED**

8. Rectifies a minor drafting error proposed to section 110(8) that would have deleted the word “and” between two paragraphs.

### **CLAUSE 6. SECTION 120 AMENDED**

9. Section 120(1) of the Reform Act would have repealed section 160(2a) of the Principal Act, which requires certain information in relation to working directors to be given to insurers. Clause 11 of this Bill amends rather than repeals section 160(2a).

### **CLAUSE 7. SECTION 184 AMENDED**

10. Section 184 of the Reform Act provides transitional provisions in relation to matters before a compensation magistrate’s court when the new dispute resolution system comes into operation on 14 November 2005. The Bill introduces a further transitional provision to allow matters that are on appeal before a compensation magistrate’s court on or after 14 November 2005 to be remitted to an arbitrator in the new system (rather than review officers which are replaced by arbitrators).

## **PART 3 – AMENDMENTS TO THE WORKERS’ COMPENSATION AND INJURY MANAGEMENT ACT 1981**

### **CLAUSE 8. THE ACT AMENDED**

11. The amendments in Part 3 are to the Principal Act as amended and renumbered by the Reform Act.

## **Division 2 – Deemed worker amendments**

12. Clauses 9, 11, 12 and 15 restore the ability for working directors to be covered by the statutory scheme and more directly and clearly address the issue of legal uncertainty created by past Court decisions.
13. Court decisions beginning with *Alana Holdings Pty Ltd –v- Findlay, Debra Sue (Cm-87/99)* made it a requirement for directors to meet the definition of “worker” under the Principal Act by proving the existence of a contract of employment between the company and director. In the absence of a contract, an injured director is not entitled to compensation, notwithstanding that a policy of insurance is effective for the director.
14. Many sole directors engaged in the daily activities of a company are essentially both employer and employee, which creates legal complications in demonstrating that a genuine contract of employment exists.
15. Given this background of uncertainty, the changes introduced by the Reform Act, due to commence on 14 November 2005, removed the option for working directors to be insured under the statutory scheme. It was intended that directors seek alternative insurance for workplace injuries, however unintended consequences were identified with this approach.
16. Clauses 9, 11, 12 and 15 restore the ability for working directors to be covered by the statutory scheme and more directly and clearly addresses the issue of legal uncertainty created by the Court decisions. In this regard, the opportunity for disputes are substantially minimised.
17. Clauses 10, 13 and 14 address the contrived avoidance arrangements that are designed to enable certain employers to gain the benefit of a worker’s services without having workers’ compensation responsibilities. This practice effectively shifts the employer/worker relationship and the responsibility for workers’ compensation from the real employer onto the worker’s company. In many instances workers continue to work exclusively or substantially for the company of which they were formerly an employee, but simply perform the work as a director of their own company. This leaves these workers, who are fundamentally employees, without any workers’ compensation cover.

## **CLAUSE 9. SECTION 10A REPLACED AND TRANSITIONAL PROVISION**

18. The definitions of “**company**” and “**corporate body**” clarify these terms for the purpose of the section and, when read in conjunction with subsection (2), have the effect of excluding the ability for public company directors to seek workers’ compensation insurance under section 5 or section 10A.
19. The definition of “**working director**” distinguishes working from non-working directors and obviates the need for directors to meet the

current section (5) definition of “worker” to be covered for workers’ compensation. This removes the uncertainty for directors and insurers resulting from various court interpretations of section 5 in relation to directors.

20. Subsection (2) clarifies that section 10A deems a working director a worker for the purposes of the Principal Act and the existing section 5 definition of worker does not apply. Without this provision legal disputes may arise as to whether directors who meet the section 5 definition of worker but do not choose to obtain insurance under section 10A (3) and (4) can still access benefits.
21. Subsection (3) enables companies to obtain insurance for directors who are “working directors” as defined in subsection (1).
22. Subsection (4) describes the act that deems a working director to be a worker under the Principal Act. If a company obtains insurance for a working director by complying with the requirements in section 160 (provides the name of the working director and complies with the requirements in relation to furnishing information on the director’s aggregate earnings) the working director is deemed a “worker”.
23. Subsections (5) and (7) clarify that if a company (other than a self insured company) does not comply with section 160 in relation to its directors when an insurance policy is effected or renewed the director is not a worker. The effect is that if a company does not opt into the workers’ compensation scheme a company’s directors are not covered and no workers’ compensation liability arises. Companies who choose not to take out statutory workers’ compensation for their directors may take other forms of insurance for workplace injury.
24. Subsection (6) deems working directors [as defined in subsection (1)] of self insured companies as workers.
25. Subsection (8) allows for companies to re-apply for insurance in circumstances where, for example, the policy may have lapsed.
26. Subclause (2) is a savings provision to protect the compensation rights of directors injured before these new amendments come into operation. The Principal Act as in force before 14 November 2005 continues to apply in relation to those directors.

#### **CLAUSE 10. SECTION 93B AMENDED**

27. It is not intended the common law restrictions in the Principal Act in relation to commencing an action against an employer be extended to a person liable to pay statutory compensation under section 175AA.
28. The amendment to section 93B allows workers to pursue damages outside the workers’ compensation system against a person who is liable for compensation under section 175AA. This is consistent with section 73(3) of the Reform Act which allows a contractor to pursue a

common law action against a principal employer described in section 175 without being caught by the common law restrictions in the Principal Act.

#### **CLAUSE 11. SECTION 160 AMENDED**

29. Supports the provisions in clause 9 by requiring the working director's wages, salary and other remuneration be verified at the end of the insurance period with supporting particulars. This is important for the purpose of making premium adjustments for the director and in determining the amount of weekly payments of compensation payable to the director in Schedule 1 clause 11(2).

#### **CLAUSE 12. SECTION 160A INSERTED**

30. Subsection (1) provides a mechanism for disputes to be resolved regarding whether the director is a "working director" as defined in section 10A(1). The dispute is determined by an arbitrator of the Dispute Resolution Directorate.
31. Subsection (2) prevents an insurer using technicalities relating to whether a working director is a worker to deny liability. The only ground for declining the claim on the basis the director is not a worker is where the application for insurance was false or misleading in a material particular and this materially affected the insurer's decision to provide coverage in the first place.

#### **CLAUSE 13. SECTION 175AA INSERTED**

32. Subsections (1) and (2) describe the circumstances in which an existing employer or prospective employer may be liable to pay compensation and meet obligations related to compensation for engaging in contrived workers' compensation avoidance arrangements. The section is prospective in operation applying to arrangements entered into on or after 14 November 2005.
33. An employer's liability may arise in two circumstances. The first applies to an employer who enters into an avoidance arrangement with an existing or former worker where the worker provides substantially similar services through a company of which the worker is a director or employee. For example, tradespeople who are former employees but enter into a new arrangement with the former employer as a director of their own company, but perform substantially the same work and principally for that same employer.
34. A liability may also arise for any entity that enters into an avoidance arrangement with an individual who executes work principally for that entity through a company, and where prior to the arrangement the entity intimated an unwillingness to enter into an arrangement for the provision of substantially similar services that would have resulted in the entity being the worker's employer under the Principal Act.

35. The work performed by the worker must also be directly a part or process in the trade or business of the employer or entity.
36. The word “intimated” in subsection (2)(b) is sufficiently broad to address the various means which entities use to secure beneficial arrangements without the workers’ compensation responsibilities. It may include explicit references to the need to incorporate in contracts or advertisements or expressed or implied through negotiations or discussions with the worker.
37. Subsection (3) provides a mechanism for disputes to be resolved regarding whether a person is working for another person under an avoidance arrangement.
38. Subsection (4) clarifies that proceedings instituted under section 303A will not affect a dispute under section 175AA. This is due to the fact that the purposes of those two provisions is different and that evidence for criminal proceedings under section 303A must meet different criteria.
39. Subsections (5)-(9) describe an employer’s liability to pay compensation and meet return to work obligations for an injured worker with whom the employer has engaged in an avoidance arrangement. An employer cannot contract out of this liability, or seek indemnity or money from the worker or the worker’s company. Any indemnity taken or received by the employer is void and any money taken from the worker or the worker’s company may be recovered.

#### **CLAUSE 14. SECTION 303A INSERTED**

40. Creates an offence for engaging in an avoidance arrangement.

#### **CLAUSE 15. SCHEDULE 1 AMENDED**

41. Provides a mechanism for determining the average weekly earnings of the director for compensation purposes. Clauses 11(2)(a) and (2a) of Schedule 1 apply to insured directors. Clauses 11(2)(b) and (2b) apply to directors of self insured companies.
42. In relation to insured directors clause 11(2)(a) links the average weekly earnings for compensation purposes to the actual amount of earnings paid to the director over the period of insurance and last declared under section 160(2b). If a director has not been insured for a full year before the injury occurred the amount of weekly earnings is determined by averaging the earnings of the director over the period of insurance as a working director ending on the day before the injury occurs [clause (2a)(a)]. If the director has not been paid any earnings by the company before the injury occurs the amount of compensation will reflect the estimate given under section 160(2a) when the company effected the insurance policy [clause (2a)(c)]. In any other case the earnings are calculated 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 [clause (2a)(c)].

43. In relation to directors of self insured companies, if the director has been a director for less than one year the average weekly earnings of the director are determined by averaging the earnings paid to the director over the period the director has been a director of the company [clause 2b)(a)]. If the director has not been paid any earnings by the company before the injury occurs reference will be made to any relevant contract, award or agreement with the company to determine the average weekly earnings. In any other case the earnings are determined 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 [clause (2a)(c)].
44. Clause (2c) provides that insured and self insured directors are required to provide supporting particulars to verify their earnings for compensation purposes.

### **Division 3 – Miscellaneous amendments**

#### **CLAUSE 16. SECTION 31H AMENDED**

45. Rectifies a minor clerical error. Deletes “accident by injury” and substitutes “injury by accident”.

#### **CLAUSE 17. SECTION 72A AMENDED**

46. Rectifies a minor clerical error. Under section 72A(1) and (2) an arbitrator can make an order suspending a worker’s entitlement to compensation if the employer requires the worker or an arbitrator orders the worker to submit to examination by a medical practitioner but the worker refuses or fails to do so. An order can also be made if the worker in any way obstructs the examination.
47. The amendment to section 72A clarifies that an arbitrator is not to make an order suspending a worker’s entitlement to compensation if the worker satisfies the arbitrator that the worker had a reasonable excuse for “obstructing the examination”. This is consistent with the worker’s defence that he or she had a reasonable excuse for failing or refusing to attend the medical examination before the arbitrator can make the order.

#### **CLAUSE 18. SECTION 146H AMENDED**

48. Rectifies a minor clerical error. The change to section 146H(5) is to clarify the meaning of “obvious error” to avoid any scope for litigation. The only basis on which the director would reject any of the documents is where a factual error is apparent on the face of the document.

#### **CLAUSE 19. SECTION 146O AMENDED**

49. The change to section 146O is to clarify the meaning of “obvious error” to avoid any scope for litigation. The only basis on which the director would reject any of the documents is where a factual error is apparent on the face of the document.

**CLAUSE 20. SECTION 165 AMENDED**

50. Rectifies a minor clerical error. Deletes “deposited at the Treasury” in section 156 and inserts “given to the State”.

**CLAUSE 21. SECTION 174 AMENDED**

51. A consequential amendment. Interest on judgment sums is now provided for by the Civil Judgments Enforcement Act 2004 section 8. The Supreme Court Act 1935 s.142 was therefore repealed by the Courts Legislation Amendment and Repeal Act 2004].

**CLAUSE 22. SECTION 180 AMENDED**

52. Rectifies a minor clerical error. Clarifies that a request under subsections (2) or (3) must comply with the timeframes in the *Workers’ Compensation (DRD) Rules*.

**CLAUSE 23. SECTION 198 AMENDED**

53. Rectifies a minor clerical error. Inserts “a” after “conference or” in section 198(6).

**CLAUSE 24. SECTION 219 AMENDED**

54. A consequential amendment. Interest on judgment sums is now provided for by the *Civil Judgments Enforcement Act 2004* section 8. The *Supreme Court Act 1935* section 142 was therefore repealed by the *Courts Legislation Amendment and Repeal Act 2004*].

**CLAUSE 25. SECTION 231 AMENDED**

55. Rectifies a minor clerical error. Deletes “entitlements” in section 231(2)(a) and inserts instead “expenses”.

**CLAUSE 26. SECTION 241 AMENDED**

56. Rectifies a minor clerical error. Deletes “entitlements” in section 241(2)(a) and inserts instead “expenses”.

**CLAUSE 27. SECTION 247 AMENDED**

57. Rectifies a minor clerical error. Inserts after “An” in section 247(4) “application for leave to”.

**CLAUSE 28. SECTION 277 AMENDED**

58. Rectifies a minor clerical error. Inserts after “registered under” in section 277(4) “regulations made under”.

**CLAUSE 29. SCHEDULE 1 AMENDED**

59. Rectifies a minor clerical error. Inserts after “lump sum”- “if”.



## **PART 4 – DEATH BENEFIT AMENDMENTS**

60. This Part entitles dependants of workers who die as a result of an injury between 1 July 2005 and 14 November 2005 access to the higher benefit provided for in the Reform Act. Due to the deferral in the proclamation of the Reform Act from 1 July 2005 to 14 November 2005, this entitlement is retrospective.

### **CLAUSE 30. SECTION 5 AMENDED AND TRANSITIONAL PROVISION**

61. Subclauses (1) and (2) retrospectively entitle dependants of workers who die from work related injuries in the period between 1 July 2005 and 14 November 2005 to claim the higher amount of \$200,000, rather than the prescribed amount of \$145,892.
62. Subclause (3) provides a mechanism for dependants to receive the balance of the increased amount where compensation has already been paid after 1 July 2005 and before this Bill comes into operation. If an apportionment of compensation has been determined or agreed before this Bill comes into operation the balance of the increased amount is to be apportioned in a like manner. This avoids any dispute as to the apportionment of the additional \$54,108 between dependants.

## **PART 5 – COURT OF APPEAL AMENDMENTS**

63. This Part enacts consequential amendments linked to the deferral of the proclamation of the Reform Act. The *Acts Amendment (Court of Appeal) Act 2004* Schedule 1 clause 29 amended the *Workers' Compensation and Injury Management Act 1981* as amended by the Reform Act 2004. The sections purported to be amended did not exist prior to the enactment of the Reform Act. Schedule 1 clause 29 was proclaimed to come into operation on 1 July 2005 (Gazette 14 January 2005 p.163). That proclamation was ineffective because there were no provisions to amend. Part 4 repeals clause 29 and re-enacts the amendments it purported to make (as well as some minor amendments that were missed).

### **CLAUSE 31. ACTS AMENDMENT (COURT OF APPEAL) ACT 2004 AMENDED**

64. A consequential amendment linked to the deferral of the proclamation of Reform Act, as outlined under Part 5.

### **CLAUSE 32. WORKERS' COMPENSATION AND INJURY MANAGEMENT ACT 1981 AMENDED**

65. A consequential amendment linked to the deferral of the proclamation of the Reform Act, as outlined under Part 5.