

**Workers Compensation Legislation
Amendment (Miscellaneous
Provisions) Bill 2005**

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Workplace Injury Management and Workers Compensation Act 1998* and the *Workers Compensation Act 1987* (the **Workers Compensation Acts**) as follows:

- (a) to enable all relevant documents to be served on a worker at the same time as a notice disputing a workers compensation claim and to prevent medical reports being used in medical dispute proceedings unless they are disclosed prior to those proceedings,
- (b) to require insurers to undertake internal reviews of disputed claims before issuing dispute notices and to enable workers to subsequently request insurers to review disputed claims before they are referred to the Workers Compensation Commission (the **Commission**),
- (c) to impose further restrictions on when disputes can be referred to or dealt with by the Commission,
- (d) to enable the Registrar of the Commission to deal with certain small claims for weekly payments instead of the Commission and to increase the amount the Registrar may award for medical expenses in expedited proceedings,
- (e) to clarify the powers of the Commission and the Registrar to refer medical disputes for assessment or further assessment,
- (f) to enable the Registrar to prevent appeals against decisions of the Constitution constituted by an Arbitrator if applicable requirements have not been complied with,
- (g) to remove the right to appeal against an interlocutory decision of the Commission constituted by an Arbitrator, if the regulations prescribe that decision for that purpose,
- (h) to make it clear that the Commission and the Registrar may dismiss proceedings before the Commission,
- (i) to confer a power on the Registrar, an approved medical specialist or an Appeal Panel for a medical dispute to reconsider and change their decisions,
- (j) to clarify the provision that deems certain persons whose services are temporarily lent or on hire to others to be workers for the purposes of the workers compensation legislation,
- (k) to clarify that outworkers are deemed to be workers for the purposes of the Workers Compensation Acts only if they neither employ any worker nor subcontract work for their own profit,
- (l) to provide that certain contractors are deemed to be workers employed by labour hire agencies where the labour hire agencies provide services to the contractors to facilitate the contractors' performance of work,
- (m) to provide that the rate of interest that employers may recover from insurers in relation to certain overpayments of insurance premiums may be set in the annual insurance premiums order that applied to the insurance policy that gave rise to the overpayment,
- (n) to provide that the rate of interest to be used in calculating a late payment fee for unpaid amounts or balances of insurance premiums may be set in the annual insurance premiums order that applied to the insurance policy that gave rise to the obligation to pay the amount or balance,
- (o) to provide that the WorkCover Authority (**WorkCover**) orders requiring a

person to make available certain records relating to the performance of work, may only be made in relation to work that was performed in the 3 years preceding the order, unless WorkCover is of the opinion that there has been a serious failure to comply with the Workers Compensation Acts, in which case, the order (or a subsequent order) may relate to records with respect to work performed in the 7 years preceding the order,

(p) to provide that WorkCover may waive or reduce the late payment fees of certain employers who have not paid the correct insurance premium amount,

(q) to provide that WorkCover may make private rulings, for workers compensation insurance premiums purposes, as to whether any person is a worker, or any class of persons are workers, employed by an applicant for the ruling,

(r) to make further provision with respect to the payment of costs in connection with claims for compensation,

(s) to increase the compensation payable for permanent back injuries by 5%,

(t) to abolish the requirement for permanent impairment compensation agreements to be registered with the Commission, and to provide that such agreements are to be made in respect of the degree of permanent impairment suffered rather than the quantum of compensation to be paid,

(u) to extend the responsibilities of a legal practitioner as to the advice that must be given to a worker before entering into an agreement to commute periodic payments into a lump sum,

(v) to apply to proceedings before the Commission, and certain medical appeal panels, such of the provisions of the *Legal Profession Act 2004* as prohibit the provision of legal services in connection with matters that have no reasonable prospects of success,

(w) to make other minor and consequential amendments,

(x) to make provision of a savings and transitional nature.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation, with certain exceptions.

Clause 3 is a formal provision that gives effect to the amendments to the Workers Compensation Acts set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the Workers Compensation Acts set out in Schedule 2.

Clause 5 is a formal provision that gives effect to the amendments to the Workers Compensation Acts set out in Schedule 3.

Clause 6 is a formal provision that gives effect to the amendments to the *Workers Compensation Act 1987* set out in Schedule 4.

Clause 7 repeals the *Workers Compensation Legislation Further Amendment Act 2001*, which contains only one uncommenced amendment and is rendered redundant by the amendment contained in **Schedule 1.1 [21]** to the proposed Act.

Schedule 1 Amendments relating to claims and dispute resolution

Schedule 1.1 amends the *Workplace Injury Management and Workers Compensation Act 1998* (the **1998 Act**) as follows:

Provision of relevant documents to claimants

Currently, various provisions of the 1998 Act require an insurer to provide copies of documents to claimants. The amendments remove a requirement preventing copies of reports from being provided at the same time as a notice of dispute is given to a claimant and restrict the use of medical reports that have not been disclosed to a claimant.

Schedule 1.1 [1] amends section 73 of the 1998 Act to remove a time requirement

(as discussed above).

Schedule 1.1 [2] amends section 73 of the 1998 Act to prevent a report from being disclosed by an insurer or employer in connection with an assessment of a medical dispute if a copy of the report has not been provided under the section.

Schedule 1.1 [7] amends section 119 of the 1998 Act to prevent a report or opinion obtained in connection with a requirement to submit to a medical examination from being disclosed by an insurer or employer in connection with an assessment of a medical dispute if a copy of the report or opinion has not been provided under the section.

Schedule 1.1 [8] amends section 126 of the 1998 Act to bring the treatment under that section of the requirement to supply medical reports, and the failure to supply them, in line with the amendments made by the proposed Act to sections 73 and 119.

Reviews of disputed claims

Schedule 1.1 [5] amends section 74 of the 1998 Act to require an insurer to carry out an internal review of a decision to dispute liability on a claim before issuing a notice of dispute to the claimant.

Schedule 1.1 [9] inserts proposed section 287A into the 1998 Act which enables a worker to request an insurer to review a disputed claim.

Schedule 1.1 [3] makes a consequential amendment to section 74 of the 1998 Act to require a notice of dispute of a claim for workers compensation to notify the claimant of the right to ask for a review.

Restrictions on referring or dealing with disputes

Schedule 1.1 [10] amends section 288 of the 1998 Act to prohibit the Registrar from accepting for referral to the Commission a dispute that is not permitted to be referred to the Commission for determination.

Schedule 1.1 [11] amends section 289 of the 1998 Act to make it clear that the Commission may not hear or otherwise deal with a dispute if the section prohibits the dispute from being referred to the Commission.

Schedule 1.1 [12] inserts proposed section 289A into the 1998 Act. The proposed section prevents a dispute from being referred to the Commission if it relates to matters not contained in a notice of dispute of a claim or a subsequent decision as to an application for review of a claim or in correspondence in relation to a settlement offer for lump sum compensation or a request for a further review. However, a dispute relating to additional matters may be heard or otherwise dealt with by the Commission if it is of the opinion that it is in the interests of justice to do so. The proposed section also makes it clear that the Commission may not hear or otherwise deal with a dispute if the section prohibits the dispute from being referred to the Commission.

Schedule 1.1 [4] amends section 74 of the 1998 Act to require an insurer to include in a notice of dispute a statement about the limitation arising from proposed section 289A on the matters that may be referred to and dealt with by the Commission.

Determination of certain small claims by Registrar

Schedule 1.1 [18] amends section 297 of the 1998 Act to raise to \$7,500 (from \$5,000) the maximum amount that the Registrar may direct to be paid in an interim payment direction relating to certain disputes concerning medical expenses.

Schedule 1.1 [19] inserts proposed Division 2A of Part 5 (Expedited assessment) of Chapter 7 (New claims procedures) into the 1998 Act. The proposed Division confers on the Registrar the function of determining disputes relating to weekly payments of compensation where the dispute relates to a past period of not more than 12 weeks and the period is not one for which an interim payment direction can be made. For this purpose, the Registrar is to have the functions of the Commission constituted by an Arbitrator. **Schedule 1.1 [13]** makes a consequential amendment.

Schedule 1.1 [17] makes a consequential amendment to section 296 of the 1998 Act to make it clear that the prohibition on review does not apply to the Registrar when

exercising the powers to determine certain small claims.

Assessments relating to medical disputes

The scheme of the Act is that all disputes relating to permanent impairment (including hearing loss) are to be conclusively determined by an approved medical specialist and dealt with on appeal by Appeal Panels including approved medical specialists. Medical disputes relating to the general medical condition of the worker and the nature of the injury and a worker's fitness to work are to be determined by the Commission.

Schedule 1.1 [16] amends section 293 of the 1998 Act to prevent the Registrar from referring a medical dispute for assessment before proceedings come before the Commission where the dispute concerns permanent impairment and liability is in issue and has not been determined by the Commission or where the dispute does not concern permanent impairment (except where the Registrar is dealing with the matter under expedited assessment procedures). **Schedule 1.1 [14] and [15]** make consequential amendments.

Schedule 1.1 [20] amends section 321 of the 1998 Act to prevent the Commission from referring a dispute relating to permanent impairment (including hearing loss) to an approved medical specialist for assessment. The amendment also prevents the Registrar from referring a medical dispute for assessment where the dispute concerns permanent impairment and liability is in issue and has not been determined by the Commission or where the dispute does not concern permanent impairment (except where the Registrar is dealing with the matter under expedited assessment procedures).

Other changes to medical disputes procedures

Schedule 1.1 [21] amends section 322 of the 1998 Act to make it clear that the procedure that will apply for the purposes of an assessment of the degree of permanent impairment of an injured worker will be that set out in the WorkCover Guidelines, as in force when the assessment is made.

Schedule 1.1 [22] amends section 327 of the 1998 Act to make it clear that the Registrar is not to allow an appeal against a medical assessment to proceed unless the Registrar is satisfied that, on the face of the application and any submissions made to the Registrar, at least one of the required grounds of appeal has been made out.

Schedule 1.1 [23] amends section 327 of the 1998 Act to enable the Registrar to refer any medical dispute to an approved medical specialist for further assessment or reconsideration as an alternative to an appeal (currently this power is limited to referring appeals on the ground of a change in a worker's condition or new information for further assessment).

Schedule 1.1 [24] amends section 329 of the 1998 Act to empower the Registrar to refer matters to an approved medical specialist for reconsideration.

Schedule 1.1 [25] makes a consequential amendment.

Appeals against Arbitrator's decisions

Schedule 1.1 [26] amends section 352 of the 1998 Act to enable the Registrar to prevent an appeal to the Commission constituted by a Presidential Member against a decision by the Commission constituted by an Arbitrator if the requirements of that section and any applicable Rules and regulations for the making of an appeal are not complied with. An example of such a requirement is the requirement to appeal within 28 days of the decision being made.

Schedule 1.1 [27] amends section 352 of the 1998 Act to make it clear that interlocutory decisions (being decisions of a kind prescribed by the regulations) by the Commission constituted by an Arbitrator may not be the subject of an appeal.

Review of decisions

Schedule 1.1 [30] inserts proposed Part 11 (Reconsideration of decisions) of Chapter 7 into the 1998 Act. The proposed Part contains proposed section 378 which provides that the Registrar, an approved medical specialist and an Appeal Panel are

to have a power to reconsider any matter that they have dealt with and to rescind, alter or amend any previous decision.

Other amendments

Schedule 1.1 [3] amends section 74 of the 1998 Act to require a notice of dispute of a claim issued by an insurer to include issues relevant to the reason for the dispute.

Schedule 1.1 [6] amends section 119 of the 1998 Act to provide that the WorkCover Guidelines, rather than regulations under the Act, are to prescribe conditions for submitting to a medical examination required by an employer.

Schedule 1.1 [28] amends section 354 of the 1998 Act to provide that the Commission may dismiss proceedings on certain grounds, including that they have been abandoned or are frivolous or vexatious or otherwise misconceived or lacking in substance.

Schedule 1.1 [29] amends section 371 of the 1998 Act to provide that the Registrar may exercise the Commission's powers to dismiss proceedings.

Schedule 1.2 amends the *Workers Compensation Act 1987* (the **1987 Act**) as follows:

Review of disputed claims

Schedule 1.2 [1] amends section 54 of the 1987 Act to require an insurer to carry out an internal review of a decision to dispute liability on a claim before issuing a notice of dispute to the claimant.

Schedule 1.2 [2] amends section 65 of the 1987 Act as a consequence of the amendments made by **Schedule 1.1 [16] and [20]** to restrict the circumstances in which the Commission may refer a medical dispute for assessment.

Schedule 2 Amendments relating to insurance premiums and deemed workers

Deeming of persons to be workers

Schedule 1 to the 1998 Act contains provisions that deem certain persons to be workers (and sets out who their deemed employers are).

Schedule 2.1 [1] replaces clause 1 of Schedule 1 to the 1998 Act to clarify when workers whose services are lent or on hire are deemed to be workers for the purposes of the Workers Compensation Acts.

Outworkers may employ or subcontract for no pay, fee or reward

Currently, clause 2 of Schedule 1 to the 1998 Act deems certain contractors who are outworkers to be workers for the purposes of the Workers Compensation Acts, but only if they neither sublet the contract nor employ any worker.

Schedule 2.1 [2] and [3] remove the provisions relating to outworkers from clause 2 and insert a proposed new clause 1A into Schedule 1 to the 1998 Act. The new clause makes it clear that an outworker is a worker for the purposes of the Workers Compensation Acts only if the outworker neither employs any other worker, nor subcontracts with any person, to carry out any of the work for the profit of the outworker.

Contractors under labour hire services arrangements

Schedule 2.1 [4] inserts clause 2A of Schedule 1 to the 1998 Act. The proposed clause provides that in certain circumstances, if a labour hire agency arranges for a contractor to perform work for a third person, the contractor is, for the purposes of the Workers Compensation Acts, deemed to be a worker employed by the labour hire agency while performing that work.

The proposed clause covers certain labour hire services arrangements (some commonly known as "ODCO" arrangements) whereby certain services are provided by the labour hire agency to a contractor to facilitate the performance of work by the contractor for a third party.

The proposed clause operates in addition to any other provisions of the 1998 Act relating to the employment of workers.

Interest on certain insurance premium overpayments

Section 170 (4) of the 1987 Act currently provides that where an insurer redetermines

an insurance premium following the dispute procedure set out in that section, and the employer has already paid to the insurer the premium that was in dispute, the employer may recover from the insurer the amount determined to be an overpayment, together with interest on the amount calculated at the rate of 1.2% per month compounded monthly (or, where some other rate of interest is prescribed by the regulations, that other rate).

Schedule 2.2 [1] and [2] amend section 170 of the 1987 Act to provide that the rate to be used in calculating that interest may also be set in the annual insurance premiums order that applied to the insurance policy that gave rise to the overpayment.

Late payment fees for insurance premiums

Section 172 of the 1987 Act currently provides that the late payment fee for certain unpaid insurance premium amounts and balances is 1.2% of the relevant amount or balance per month compounded monthly or, where some other late payment fee rate is prescribed by the regulations, that other rate.

Schedule 2.2 [3] and [4] amend section 172 of the 1987 Act to provide that the rate of interest used in calculating the late payment fee may also be set in the annual insurance premiums order that applied to the insurance policy that gave rise to the obligation to pay the insurance premium amount or balance.

Orders relating to work records

Section 174 (6A) of the 1987 Act currently provides that WorkCover may order a person to make available certain records relating to contracts with respect to the performance of work during a period specified in the order, but not more than 7 years preceding the order.

Schedule 2.2 [5] and [6] amend section 174 of the 1987 Act to provide that that period is to be reduced to 3 years preceding the order, unless WorkCover is of the opinion that there has been a serious failure to comply with the Workers Compensation Acts, in which case, the order (or a subsequent order) may relate to records with respect to work performed in the 7 years preceding the order.

Waiver or reduction of certain late payment fees

Section 175 of the 1987 Act provides for the payment of certain late payment fees in relation to amounts payable as premiums or balances of premium in respect of the issue or renewal of a policy of insurance.

Schedule 2.2 [7] inserts proposed section 175 (4B) into the 1987 Act to provide that WorkCover may waive or reduce a late payment fee payable under section 175.

Private rulings regarding workers

Schedule 2.2 [8] inserts a new section 175C into the 1987 Act. The proposed section provides that WorkCover may, on application, make a private ruling, based on information submitted to it by the applicant, as to whether any particular person is a worker, or any particular class of persons are workers, employed by the applicant for workers compensation insurance premiums purposes.

A private ruling is to be used in the calculation of a relevant insurance premium by the insurer concerned, unless:

- (a) there has been a material change in the information submitted to WorkCover relating to the ruling, or
- (b) the ruling has been withdrawn.

A private ruling may be used by the person on whose application it was made as evidence as to whether any person is a worker, or any class of persons are workers, employed by the applicant, but only if there is no material change in the information submitted to WorkCover relating to the application.

The provisions make it clear that, other than in proceedings under section 155 of the 1987 Act (relating to the failure to take out a policy of insurance) or other proceedings relating to payment of insurance premiums required by the 1987 Act, a private ruling is inadmissible in proceedings in which the status of a person as a

worker is at issue.

The proposed private rulings are to have no effect on any determination by any person or body as to whether a person is a worker entitled to compensation under the Workers Compensation Acts. The proposed section will allow regulations to make provision for or with respect to private rulings.

Schedule 3 Miscellaneous amendments

Payment of costs in relation to compensation claims

Schedule 3.1 [17] amends section 340 of the 1998 Act so as to extend the operation of Division 3 of Part 8 of Chapter 7 of that Act (which currently applies to costs payable by a party in relation to a claim for compensation) to costs payable by a party's insurer.

Schedule 3.1 [20] amends section 342 of the 1998 Act so as to provide that, if it is satisfied that any party's costs on a claim have been unreasonably incurred, the Commission must order that the costs are not to be paid by any other party, and that any costs agreement in respect of such costs is of no effect.

Schedule 3.1 [21] further amends section 342 of the 1998 Act so as to provide that costs on a claim for which there have been no grounds for believing there to be reasonable prospects of success are taken to be costs that have been unreasonably incurred, and for which the Commission will therefore not make an order for payment.

Schedule 3.1 [22] further amends section 342 of the 1998 Act so as to prevent an insurer's lawyer from recovering from the insurer any costs that the Commission has ordered to be treated as unreasonably incurred.

Schedule 3.1 [24] and [25] amend section 345 of the 1998 Act so as to provide that, if an appeal is unsuccessful, the Commission must order that the appellant's costs are not to be paid by any other party, and that any costs agreement in respect of such costs is of no effect. **Schedule 3.1 [19]** makes a consequential amendment to section 341 of the 1998 Act.

Minor, consequential and ancillary matters

Schedule 3.1 [1]–[7], [13]–[16], [18], [23], [26] and [27] amend sections 112, 113, 114, 116, 142, 332, 334, 335, 337, 339, 341, 343 and 347 of the 1998 Act so as to replace references to the former *Legal Profession Act 1987* with references to the current *Legal Profession Act 2004*. **Schedule 3.1 [28]** omits an unnecessary section.

Schedule 3.1 [8], [9] and [10] amend section 239 of the 1998 Act so as to clarify the powers of WorkCover to inspect, copy and take extracts from documents held in the registry of the District Court in relation to the residual jurisdiction that was conferred on the District Court when the former Compensation Court was abolished.

Compensation for permanent back injuries

Schedule 3.2 [1] amends section 66 of the 1987 Act so as to provide that, to the extent to which an injury results in permanent impairment of the back, the compensation that is otherwise payable under that section (compensation for permanent impairment) is to be increased by 5%. This increase will apply only to impairment that results from injuries occurring after 1 January 2006.

Agreements as to degree of permanent impairment

Section 66A of the 1987 Act currently provides that compensation cannot, except in certain circumstances, be awarded by the Commission for a worker's permanent impairment or pain and suffering if an agreement as to the compensation payable has been entered into, between the worker and the relevant employer or insurer, and has been registered by the Registrar.

Schedule 3.2 [2] repeals the section and replaces it with a new section 66A. The proposed section provides that, where the worker and the employer or insurer have entered into an agreement as to the degree of the worker's permanent impairment, or as to the amount of pain and suffering compensation to which the worker is entitled, and the agreement contains a provision in which the employer or insurer has certified

that it is satisfied that the worker has obtained independent legal advice before entering into the agreement, the compensation to which the worker is entitled for the impairment is the compensation payable in respect of the degree of impairment so agreed and the amount of pain and suffering compensation to which the worker is entitled is the amount so agreed. Additional compensation may be awarded if it is established that the worker's agreement was procured by fraud or misrepresentation, that the agreed degree of permanent impairment or the agreed amount of pain and suffering compensation is manifestly too low or that, since the agreement was entered into, there has been any increase in the degree of impairment (as with the current section 66A). **Schedule 3.2 [4]** makes a consequential amendment to section 87J of the 1987 Act.

Agreements to commute liability to lump sum

Section 87F (2) (a) of the 1987 Act prohibits an agreement to commute to a lump sum any liability for periodic payments from being entered into unless an independent legal practitioner has certified that he or she has advised the worker as to the full legal implications of the agreement.

Schedule 3.2 [3] substitutes that provision with a new provision that requires the legal practitioner to certify that he or she has also advised the worker of the desirability of the worker obtaining independent financial advice as to the financial consequences of the agreement.

Prohibition on law practices providing legal services in connection with matters having no reasonable prospects of success

Section 345 of the *Legal Profession Act 2004* prohibits a law practice from providing legal services in connection with a claim or defence, in proceedings before a court, where the claim or defence has no reasonable prospects of success.

Schedule 3.2 [5] and Schedule 3.1 [11], [12] and [29] amend section 144 of the 1987 Act and sections 327 and 352 of the 1998 Act and insert proposed section 288A into the 1998 Act so as to apply that prohibition to proceedings before the Commission and proceedings before a medical appeal panel.

Schedule 4 Savings and transitional amendments

Schedule 4 [1] inserts proposed Part 18J into Schedule 6 to the 1987 Act. The proposed Part contains savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 4 [2] amends Schedule 6 to the 1987 Act to enable regulations containing savings and transitional provisions to be made consequent on the enactment of the proposed Act.