



New South Wales

Employees (Priority of Debts and Wage Protection Insurance) Bill 2001

Explanatory note

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

Overview of Bill

The object of this Bill is to give priority, where companies are insolvent, to the payment of employee entitlements over other company debts, to provide for the establishment and administration of an insurance scheme to guarantee the payment of wages and certain other liabilities owed to employees in the event of employer insolvency.

Outline of provisions

Part 1 Preliminary

Proposed Part 1 (clauses 1 and 2) sets out the name (also called the short title) of the proposed Act and provides for the commencement of the proposed Act 3 months after the date of assent, unless commenced sooner by proclamation.

Part 2 Priority of employee entitlements

Proposed Part 2 (clauses 3–5) contains provisions that alter the priority of payment of debts on the winding up of an insolvent company. Clause 5 provides that employee entitlements (as specified in that clause) will take priority over other debts.

Part 3 Wage protection insurance

Proposed Part 3 (clauses 6–24) establishes a wage protection insurance scheme to guarantee the payment of wages and certain other liabilities owed to employees in the event of employer insolvency. All employers (other than employers whose employees are not employed for the purposes of a trade or business carried on by the employer and employers who employ less than 20 employees) will be required to take out, and maintain, policies of wage protection insurance with an approved insurer for the employer's workforce.

Part 4 Miscellaneous

Proposed Part 4 (clauses 25–27) contains provisions of a miscellaneous nature. The provisions provide for an offence of giving false or misleading information in insurance claims, deal with how proceedings for offences against the proposed Act or the regulations are to be dealt with and empower the Governor to make regulations in connection with the proposed Act.



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New South Wales

Employees (Priority of Debts and Wage Protection Insurance) Bill 2001

No. , 2001

A Bill for

An Act to give priority, where companies are insolvent, to the payment of employee entitlements over other company debts, to provide for the establishment and administration of an insurance scheme to guarantee the payment of wages and certain other liabilities owed to employees in the event of employer insolvency, and for other related purposes.

Clause 1 Employees (Priority of Debts and Wage Protection Insurance) Bill 2001

Part 1 Preliminary

The Legislature of New South Wales enacts: 1

Part 1 Preliminary 2

1 Name of Act 3

This Act is the *Employees (Priority of Debts and Wage Protection Insurance) Act 2001*. 4
5

2 Commencement 6

This Act commences 3 months after the date of assent, unless 7
commenced sooner by proclamation. 8

Part 2	Priority of employee entitlements	1
Division 1	Interpretation	2
3	Definitions	3
	In this Part:	4
	<i>company</i> means a company incorporated in New South Wales, or taken to be incorporated in New South Wales, that is being wound up.	5 6
	<i>employee</i> , in relation to a company, means a person:	7
	(a) who has been or is an employee of the company, whether remunerated by salary, wages, commission or otherwise, and	8 9
	(b) whose employment by the company commenced before the relevant date.	10 11
	<i>excluded employee</i> , in relation to a company, means:	12
	(a) an employee of the company who has been:	13
	(i) at any time during the period of 12 months ending on the relevant date, or	14 15
	(ii) at any time since the relevant date,	16
	or who is, a director of the company, or	17
	(b) an employee of the company who has been:	18
	(i) at any time during the period of 12 months ending on the relevant date, or	19 20
	(ii) at any time since the relevant date,	21
	or who is, the spouse of an employee of the kind referred to in paragraph (a), or	22 23
	(c) an employee of the company who is a relative (other than a spouse) of an employee of the kind referred to in paragraph (a).	24 25
	<i>non-priority day</i> , in relation to an excluded employee of a company, means a day on which the employee was:	26 27
	(a) if paragraph (a) of the definition of <i>excluded employee</i> applies—a director of the company, or	28 29
	(b) if paragraph (b) of that definition applies—a spouse of an employee of the kind referred to in paragraph (a) of that definition, or	30 31 32

Clause 3	Employees (Priority of Debts and Wage Protection Insurance) Bill 2001	
Part 2	Priority of employee entitlements	
Division 1	Interpretation	
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	(c) if paragraph (c) of that definition applies—a relative (other than a spouse) of an employee of the kind referred to in paragraph (a) of that definition,	1
		2
		3
	even if the day was more than 12 months before the relevant date.	4
	<i>relevant date</i> has the meaning given to it by section 9 of the <i>Corporations Law</i> .	5
		6
	<i>retrenchment payment</i> , in relation to an employee of a company, means an amount payable by the company to the employee, by virtue of an industrial instrument, in respect of the termination of the employee’s employment by the company, whether the amount becomes payable before, on or after the relevant date.	7
		8
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	<i>spouse</i> includes a de facto spouse.	12
	<i>superannuation contribution</i> , in relation to a company, means a contribution by the company to a fund for the purposes of making provision for, or obtaining, superannuation benefits for an employee of the company, or for dependants of such an employee.	13
		14
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		16
	4 Application of Part	17
	This Part has effect despite any provision of the <i>Corporations (New South Wales) Act 1990</i> or the <i>Corporations Law</i> .	18
		19
Division 2	Ranking of debts	20
	5 Priority of employee entitlements	21
	(1) Despite any other law, in the winding up of a company the following debts and claims must be paid in priority to all other debts, whether preferential, secured or unsecured:	22
		23
		24
	(a) first, subject to subsection (2)—wages and superannuation contributions payable by the company in respect of services rendered to the company by employees before the relevant date,	25
		26
		27
	(b) next, amounts due in respect of injury compensation, being compensation the liability for which arose before the relevant date,	28
		29
		30
	(c) subject to subsection (3)—next, all amounts due:	31
	(i) on or before the relevant date, and	32
	(ii) because of an industrial instrument, and	33
	(iii) to, or in respect of, employees of the company, and	34

- (iv) in respect of leave of absence, 1
 - (d) subject to subsection (4)—next, retrenchment payments payable 2
to employees of the company. 3
- (2) The amount or total paid under paragraph (1) (a) to, or in respect of, 4
an excluded employee of the company must be such that so much (if 5
any) of it as is attributable to non-priority days does not exceed \$2,000. 6
- (3) The amount or total paid under paragraph (1) (c) to, or in respect of, 7
an excluded employee of the company must be such that so much (if 8
any) of it as is attributable to non-priority days does not exceed \$1,500. 9
- (4) A payment under paragraph (1) (d) to an excluded employee of the 10
company must not include an amount attributable to non-priority days. 11

Clause 6 Employees (Priority of Debts and Wage Protection Insurance) Bill 2001

Part 3 Wage protection insurance

Division 1 Interpretation

Part 3 Wage protection insurance

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Division 1 Interpretation

2

6 Interpretation

3

In this Part:

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approved insurer means an insurer approved by the Minister for the purposes of this Act.

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contract of employment includes:

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(a) a contract of apprenticeship, and

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(b) a contract under which a person works for commission, and

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(c) a contract that is wholly or principally for the labour of a person, and

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(d) a contract under which a person performs or presents, or participates in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills, and

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(e) a contract under which a person provides services in connection with an activity referred to in paragraph (d), and

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(f) a contract under which a person performs services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast.

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employee means a person who provides services under a contract of employment and includes a former employee.

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employer means a person who is liable to pay for the services of another under a contract of employment and includes a former employer.

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exempt employer has the meaning given by section 11.

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insolvent has the meaning given by section 7.

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insurer means:

- (a) a person authorised by the *Insurance Act 1973* of the Commonwealth or a law of a State to carry on insurance business, or
- (b) a body corporate that is, under the law of a State, responsible for administering a scheme of workers compensation.

wages includes any payment made, or to be made, by an employer to or for the benefit of an employee under a contract of employment.

workforce means the total body of an employer's employees (and, if an employer has only one employee, is a reference to that employee).

7 Insolvency

- (1) A person is insolvent if the person is unable to pay debts as they fall due.
- (2) Without limiting subsection (1), an individual is to be regarded as insolvent if the individual:
- (a) has become bankrupt, or
- (b) has applied to take the benefit of a law for the benefit of bankrupt or insolvent debtors, or
- (c) has compounded with his or her creditors, or
- (d) has assigned his or her remuneration for the benefit of creditors.
- (3) Without limiting subsection (1), a company is to be regarded as insolvent if:
- (a) the company has entered into a compromise or arrangement with its creditors, or a class of its creditors, and the administration of the compromise or arrangement has not yet ended, or
- (b) a receiver, or a receiver and manager, of property of the company has been appointed and is acting, or
- (c) the company is under administration within the meaning of the *Corporations Law*, or
- (d) the company has executed a deed of company arrangement under the *Corporations Law* and the arrangement has not yet terminated, or
- (e) the company is under official management, or

Clause 7	Employees (Priority of Debts and Wage Protection Insurance) Bill 2001	
Part 3	Wage protection insurance	
Division 1	Interpretation	
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	(f) the company is being wound up, or	1
	(g) a provisional liquidator has been appointed for the company and has not since been removed.	2 3
Division 2	Policy of wage protection insurance	4
8	Nature of policy of wage protection insurance	5
	A policy of wage protection insurance is a policy of insurance under which an approved insurer insures an employer's workforce against loss resulting from the employer's insolvency.	6 7 8
9	Extent of employee's protection	9
	An employee is entitled to be indemnified under a policy of wage protection insurance for liabilities of the following kinds owed by an insolvent employer to the employee:	10 11 12
	(a) a liability for unpaid wages,	13
	(b) a liability resulting from termination of employment without notice or with insufficient notice,	14 15
	(c) a liability for annual leave or long service leave,	16
	(d) a liability for repayment of a premium or other amount paid by the employee to the employer for training in a particular trade or profession.	17 18 19
Division 3	Obligation to hold insurance	20
10	Obligation to hold wage protection insurance	21
	An employer (other than an exempt employer) must take out, and maintain, a policy of wage protection insurance with an approved insurer for the employer's workforce.	22 23 24
	Maximum penalty: 150 penalty units.	25

11 Exempt employers	1
An employer is exempt from the requirement to hold a policy of wage protection insurance if:	2
(a) the employer's employees are not employed for the purposes of a trade or business carried on by the employer, and	3
(b) the employer employs less than 20 employees.	4
Division 4 Information about insurance	5
12 Employer to give information to employees about wage protection insurance	6
An employer must provide each employee with an information booklet in a form approved by the Minister:	7
(a) explaining the employee's rights under the policy of wage protection insurance maintained by the employer, and	8
(b) stating the name of the employer's insurer under the policy of wage protection insurance.	9
Maximum penalty: 50 penalty units.	10
13 Requests for information	11
An employer must, at the request of the employee, notify the employee of the name and address of the insurer under the employer's policy of wage protection insurance.	12
Maximum penalty: 50 penalty units.	13
14 Insurer to notify policy of wage protection insurance	14
An insurer must, on issuing a policy of wage protection insurance for an employer's workforce, give the Minister written notice:	15
(a) stating the name and address of the employer, and	16
(b) containing the information required by the regulations.	17
Maximum penalty: 50 penalty units.	18

Clause 15 Employees (Priority of Debts and Wage Protection Insurance) Bill 2001

Part 3 Wage protection insurance

Division 4 Information about insurance

- 15 Minister to give information on request to employee** 1
- (1) The Minister must, at the request of an employee, notify the employee of the name and address of the insurer under the employer's policy of wage protection insurance, as shown in the Minister's records. 2
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- (2) If it appears from the Minister's records that the employer does not have a current policy of wage protection insurance, the Minister must notify the employee of that fact. 5
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Division 5 Claims 8

- 16 Entitlement to make claim** 9
- (1) An employee is entitled to make a claim under a policy of wage protection insurance if: 10
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- (a) the employer is insolvent, and 12
- (b) an amount covered by the policy has fallen due for payment by the employer, and 13
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- (c) the employer has failed to pay the unpaid amount in full within 14 days after receiving a written claim for payment made by or on behalf of the employee. 15
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- (2) If: 18
- (a) an employer is insolvent, and 19
- (b) written notice of the insolvency is given to an employee by: 20
- (i) the employer, or 21
- (ii) a trustee in bankruptcy, liquidator or other person authorised to administer the employer's affairs, or 22
23
- (iii) an insurer under a policy of wage protection insurance, and 24
25
- (c) the notice contains information required under the regulations, 26
the employee's right (if any) to make a claim under the policy of wage protection insurance is extinguished if the claim is not brought within 27
4 months after the date the written notice was given. 28
29

17 Making of claim	1
(1) A claim by an employee under a policy of wage protection insurance must be made in writing.	2 3
(2) The claim must set out:	4
(a) the name and address of the claimant, and	5
(b) the name of the insolvent employer, and	6
(c) the dates when the claimant's employment with the insolvent employer started and ended, and	7 8
(d) the amount claimed by the claimant under the policy and the basis on which it is claimed.	9 10
(3) The claimant must at the request of the insurer provide any further information or materials that the insurer may reasonably require to determine the claim.	11 12 13
18 Insurer's response to claim	14
(1) An insurer must, within 1 month after receiving a claim under a policy of wage protection insurance, respond to the claim by giving written notice to the claimant stating:	15 16 17
(a) whether the insurer rejects or accepts the claim, and	18
(b) if the insurer accepts the claim in part, stating the amount to which the insurer believes the claimant to be entitled under the policy.	19 20 21
(2) If, within 14 days after receiving the claim, the insurer reasonably asks the claimant to provide further information or materials to enable the insurer to determine the claim, the insurer is not required to respond to the claim until 14 days after the information or materials are provided.	22 23 24 25
19 Conciliation of disputes	26
If a claim under a policy of wage protection insurance is disputed, either the insurer or the claimant may refer the dispute for conciliation in accordance with conciliation procedures approved by the Minister.	27 28 29

20	Proceedings in court	1
(1)	If:	2
(a)	an insurer does not respond to a claim as required under this Act, or	3 4
(b)	a disputed claim is not resolved in conciliation proceedings,	5
	the claimant may bring an action against the insurer to recover the amount of the claim in a court with jurisdiction to determine claims in contract up to the amount of the claim.	6 7 8
(2)	In an action brought under subsection (1), an employee protected by a policy of wage protection insurance is to be regarded as having the same rights to claim under the policy as if the employee were a party to the insurance contract.	9 10 11 12
21	Insurer's rights of subrogation	13
	If an insurer makes any payment on a claim under a policy of wage protection insurance, the insurer is subrogated to the rights of the claimant against the claimant's employer.	14 15 16
Division 6	Administration	17
22	Powers of Minister	18
	For the purpose of undertaking the general administration of this Act, the Minister has the power to do all things that are necessary or convenient to be done in connection with the administration of the Act and, without limiting the generality of that power, has power:	19 20 21 22
(a)	to promote the development of facilities for handling inquiries in relation to wage protection insurance, and	23 24
(b)	to monitor complaints in relation to wage protection insurance, and	25 26
(c)	to liaise generally with other persons or bodies having a responsibility to deal with inquiries, complaints and disputes concerning protection of employees, and	27 28 29
(d)	to review information and returns given by insurers under this Act, and	30 31

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|-----------|---|--------------------|
| (e) | to monitor legal judgments, industry trends and the development of community expectations that are, or are likely to be, of relevance to the efficient operation of this Act, and | 1
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| (f) | to promote the education of employers, employees and the insurance industry as to the objectives and requirements of this Act. | 4
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| 23 | Supervisory powers—Minister may obtain information and material | 7 |
| (1) | The Minister may, for a purpose connected with the administration or enforcement of this Act, by notice in writing, require an employer or insurer, within 30 days of receipt of the notice, or such longer period as is specified in the notice: | 8
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| (a) | to give the Minister written answers to questions stated in the notice, or | 12
13 |
| (b) | to give the Minister copies of documents specified in the notice. | 14 |
| (2) | The answers to questions must, if the notice so requires, be verified by statutory declaration. | 15
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| (3) | A person to whom a notice is given under subsection (1) must not fail, without reasonable excuse, to comply with the requirements of the notice. | 17
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19 |
| | Maximum penalty: 150 penalty units. | 20 |
| (4) | It is a reasonable excuse for an individual to refuse or fail to comply with the requirements of a notice under subsection (1) if to do so would tend to incriminate the individual. | 21
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23 |
| 24 | Delegation | 24 |
| | The Minister may delegate to a person any of the Minister's powers under this Act or the regulations. | 25
26 |

Part 4 Miscellaneous	1
25 False or misleading information in claims	2
A person is guilty of an offence if:	3
(a) the person makes a claim against an insurer under this Act, and	4
(b) the claim contains information that the person knows is false or misleading in a material particular.	5
Maximum penalty: 30 penalty units.	6
26 Proceedings for offences	7
Proceedings for an offence against this Act or the regulations are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.	8
27 Regulations	9
The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.	10
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