



New South Wales

Workers Compensation Legislation Amendment (Costs) Bill 2012

Explanatory note

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

Overview of Bill

The objects of this Bill are as follows:

- (a) To repeal an uncommenced amendment to the *Workplace Injury Management and Workers Compensation Act 1998* that, if commenced, would remove the power of the Workers Compensation Commission to make cost orders in compensation claims and would provide that each party is to bear the party's own costs. The effect of the repeal is to restore the existing scheme for costs in compensation claims, under which the Commission may order costs but may not order costs against workers (except in cases of frivolous, vexatious or fraudulent proceedings).
- (b) To restore the existing scheme for costs in compensation claims (whether or not the uncommenced amendment has commenced), but with an amendment that requires any costs order made by the Commission to provide for costs to follow the event (i.e. costs are awarded to the successful party) and that provides that costs are not to be awarded against a worker unless the worker's compensation claim was without arguable merit.

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 the date of assent to the proposed Act.

Clause 3 repeals Schedule 11 [11] of the *Workers Compensation Legislation Amendment Act 2012* to give effect to paragraph (a) of the Overview.

Schedule 1 amends the *Workplace Injury Management and Workers Compensation Act 1998* as described in paragraph (b) of the Overview.



New South Wales

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New South Wales

Workers Compensation Legislation Amendment (Costs) Bill 2012

No. , 2012

A Bill for

An Act to amend workers compensation legislation with respect to the awarding of costs in claims for workers compensation.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Workers Compensation Legislation Amendment (Costs) Act 2012</i> .	3 4
2 Commencement	5
This Act commences on the date of assent to this Act.	6
3 Amendment of Workers Compensation Legislation Amendment Act 2012 No 53	7 8
Schedule 11 Miscellaneous amendments	9
Omit Schedule 11 [11].	10

Schedule 1	Amendment of Workplace Injury Management and Workers Compensation Act 1998 No 86	1
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Chapter 7, Part 8		4
Omit Division 3. Insert instead:		5
Division 3	Special provisions for costs in compensation and damages assessment matters	6
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340	Application of Division	8
	This Division applies to costs payable by a party, or by a party's insurer, in or in relation to a claim for compensation.	9
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341	Costs to be determined by Commission	11
(1)	Costs to which this Division applies are in the discretion of the Commission.	12
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(2)	The Commission has full power to determine by whom, to whom and to what extent costs are to be paid.	14
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(3)	The Commission may order costs to be assessed on the basis set out in Division 11 of Part 3.2 of the <i>Legal Profession Act 2004</i> (or in relevant regulations under Division 4 of this Part) or on an indemnity basis.	16
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(4)	Subject to this Division, if the Commission makes any order as to costs, the Commission is to order that the costs follow the event unless it appears to the Commission that some other order should be made as to the whole or any part of the costs, or as the regulations otherwise provide.	20
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(5)	Despite subsection (4), the Commission may only order the payment of costs by a claimant if the Commission is satisfied that the claimant's claim was without any arguable merit.	25
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(6)	Any party to a claim may apply to the Commission for an award of costs.	28
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342	Costs unreasonably incurred	30
(1)	If the Commission is satisfied that any party's costs on a claim have been unreasonably incurred, the Commission is to order that those costs are not to be paid by any other party to the claim.	31
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Schedule 1 Amendment of Workplace Injury Management and Workers Compensation Act 1998 No 86

- (2) A costs agreement within the meaning of Part 3.2 of the *Legal Profession Act 2004* is of no effect to the extent to which it relates to costs the subject of an order in force under subsection (1). 1
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- (3) Costs incurred by a party to a claim are considered to have been unreasonably incurred for the purposes of this section only if they were incurred by the party: 4
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- (a) after a reasonable offer of settlement of the claim was made to the party, or 7
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- (b) after the party has failed without reasonable excuse to comply with a written request from another party to the claim to provide that other party with particulars (including any necessary medical report) sufficient to enable that other party to properly consider the claim for the purpose of making an offer of settlement, or 9
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- (c) after the party has unreasonably failed to participate in conciliation of a dispute with which the claim is concerned and the Commission is of the opinion that the failure has resulted in unnecessary litigation, or 15
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- (d) in connection with an unsuccessful application by the party to admit further evidence in respect of matters of which a medical assessment certificate of an approved medical specialist that has been admitted in evidence in proceedings is evidence (whether or not conclusive evidence) and the Commission is of the opinion that the application was frivolous or vexatious, or 19
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- (e) in connection with any issue raised in relation to a claim in respect of which there were, when the issue was raised, no grounds for a reasonable belief that the issue would be determined in favour of the party by whom it was raised. 26
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- (4) A legal practitioner representing a party to proceedings before the Commission, or providing legal services to the party's insurer, is not entitled to recover from the party or insurer, as the case may be, any costs that the Commission has ordered are to be treated as unreasonably incurred. 30
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- (5) The Commission may by order exempt any costs or a proportion of any costs from the operation of this section if of the opinion that it would be unjust not to do so because the legal practitioner concerned made all reasonable efforts to avoid unnecessary litigation in the proceedings or for any other reason should not be held responsible for the incurring of the costs concerned. 35
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343	Restrictions on recovery of solicitor/client costs	1
(1)	The legal representative or agent of a person in respect of a claim made or to be made by the person:	2
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(a)	is not entitled to recover from the person any costs in respect of the claim unless those costs are awarded by the Commission, and	4
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(b)	is not entitled to claim a lien in respect of those costs on, or deduct those costs from, the sum awarded, ordered or agreed as compensation unless those costs are awarded by the Commission.	7
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(2)	Any such award of costs may be made on the application either of the person or of the legal representative or agent concerned.	11
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(3)	This section prevails to the extent of any inconsistency with Part 3.2 of the <i>Legal Profession Act 2004</i> .	13
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(4)	A person must not:	15
(a)	claim a lien that the person is not entitled to claim because of this section, or	16
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(b)	deduct costs from a sum awarded, ordered or agreed as compensation that the person is not entitled to deduct because of this section.	18
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	Maximum penalty: 50 penalty units.	21
(5)	A person who has paid an amount in respect of costs to another person that the other person was not entitled to recover because of this section is entitled to recover the amount paid as a debt in a court of competent jurisdiction.	22
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344	Liability of legal practitioner for client's costs in certain cases	26
(1)	The Commission may, at any stage of a matter, make one or more of the following orders in respect of a legal practitioner whose serious neglect, serious incompetence or serious misconduct delays, or contributes to delaying, the matter:	27
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(a)	an order disallowing the whole or any part of the costs between the legal practitioner and his or her client,	31
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(b)	an order directing the legal practitioner to repay to his or her client the whole or any part of the costs that the client has been ordered to pay to any other party,	33
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(c)	an order directing the legal practitioner to indemnify any party other than his or her client against the whole or any part of the costs payable by the party indemnified.	36
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Schedule 1 Amendment of Workplace Injury Management and Workers Compensation Act 1998 No 86

- (2) The Commission may refer a matter to a costs assessor for inquiry and report before making such an order. 1
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- (3) The Commission may order that notice of such an order against a legal practitioner is to be given to the legal practitioner's client in a specified manner. 3
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- (4) A legal practitioner is not entitled to demand, recover or accept from his or her client any part of the amount for which the legal practitioner is directed by the Commission to indemnify a party pursuant to such an order. 6
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- (5) This section does not limit any other provision of this Part. 10
- 345 Costs penalties where appeal is unsuccessful 11**
- (1) On an appeal from the Commission constituted by an Arbitrator to the Commission constituted by a Presidential member: 12
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- (a) if the appellant is unsuccessful on the appeal, the Commission is to order that the appellant's costs on the appeal are not to be paid by any other party to the appeal, and 14
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- (b) if the appellant is an insurer (other than a licensed insurer that maintains a statutory fund under the 1987 Act) and is unsuccessful on the appeal, the Commission may order the insurer to pay to the Authority for payment into the WorkCover Authority Fund an administration fee of \$1,000 or such other amount as may be prescribed by the regulations. 18
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- (2) A costs agreement within the meaning of Part 3.2 of the *Legal Profession Act 2004* is of no effect to the extent to which it relates to costs the subject of an order in force under subsection (1) (a). 25
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- (3) If an appeal concerns lump sum compensation, weekly payments of compensation or medical expenses compensation, the appellant is considered to be unsuccessful on the appeal unless the decision on appeal results in a change in favour of the appellant in the amount awarded or ordered to be paid in the decision appealed against of at least \$5,000 (or such other amount as may be prescribed by the regulations) and at least 20% of the amount awarded or ordered to be paid. 28
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Amendment of Workplace Injury Management and Workers Compensation Act 1998 No 86 Schedule 1

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| (4) | An administration fee that an insurer is ordered to pay is recoverable as a debt due to the Authority. | 1 |
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| (5) | The Registrar is to notify the Authority of an order to an insurer under this section to pay an administration fee. | 3 |
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