

FIRST PRINT

EMPLOYEES LIABILITY BILL 1990

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

This Bill deals with the liability for the payment of damages by employees for negligence or other wrongful acts ("torts") committed by them in the course of their employment.

At common law, an employer is vicariously liable for the torts committed by his or her employees. That vicarious liability does not displace the personal liability of the employee if the employee is sued directly by the tort victim. Furthermore, in *Lister v. Romford Ice* (1957) A.C. 555 the House of Lords held that an employer who has incurred any vicarious liability has a contractual right to a complete indemnity from the employee who committed the tort. The Employee's Liability (Indemnification of Employer) Act 1982 was enacted to overcome the decision in that case. It was ultimately decided by the High Court in *McGrath v. Fairfield Municipal Council* (1985) 59 ALR 18 that the Act also removed any right of the employer to claim a contribution from the employee under the Law Reform (Miscellaneous Provisions) Act 1946 as a joint tortfeasor.

The objects of this Bill are:

- (a) to re-enact the Employee's Liability (Indemnification of Employer) Act 1982 to confirm the decision of the High Court that an employer is not entitled to seek from an employee an indemnity in contract or a contribution as joint tortfeasor; and
- (b) to provide that, where the tort victim recovers damages directly from an employee, the employee is entitled to an indemnity from the employer; and
- (c) to abolish any action in tort that an employer may have to recover damages from an employee based on the loss of the services of any injured fellow employee; and

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(d) to enact consequential and ancillary provisions.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act is to commence on a day or days to be proclaimed.

Clause 3 (1) (a) re-enacts the prohibition on the employer seeking an indemnity or contribution from an employee.

Clause 3 (1) (b) provides that, where the tort victim recovers damages directly from an employee, the employee is entitled to an indemnity from the employer. The employee is not entitled to an indemnity from the employer if the employee is entitled to indemnity from some other person (e.g. the employee may have an insurance policy which covers the relevant liability).

Clause 3 (2) confirms the High Court decision that an employer is prohibited from seeking a contribution from the employee as joint tortfeasor. Other forms of contribution that would be prohibited include contributions under section 151Z of the Workers Compensation Act 1987.

Clause 4 abolishes any action in tort that an employer may have to recover damages from an employee based on the loss of the services of any injured fellow employee.

Clause 5 continues the provision in the Employee's Liability (Indemnification of Employer) Act 1982 that an employee is not protected if the conduct of the employee constitutes serious and wilful misconduct or is not related to the person's employment.

Clause 6 provides that an employer who becomes vicariously liable for the tort of an employee may claim under any policy of insurance obtained by the employee which covers the liability of the employee for the tort concerned.

Clause 7 ensures that the proposed Act prevails over any inconsistent Act or law or any contract or agreement.

Clause 8 provides that the proposed Act binds the Crown.

Clause 9 ensures that the proposed Act applies even though the liability arose before its commencement.

Clause 10 repeals the Employee's Liability (Indemnification of Employer) Act 1982.

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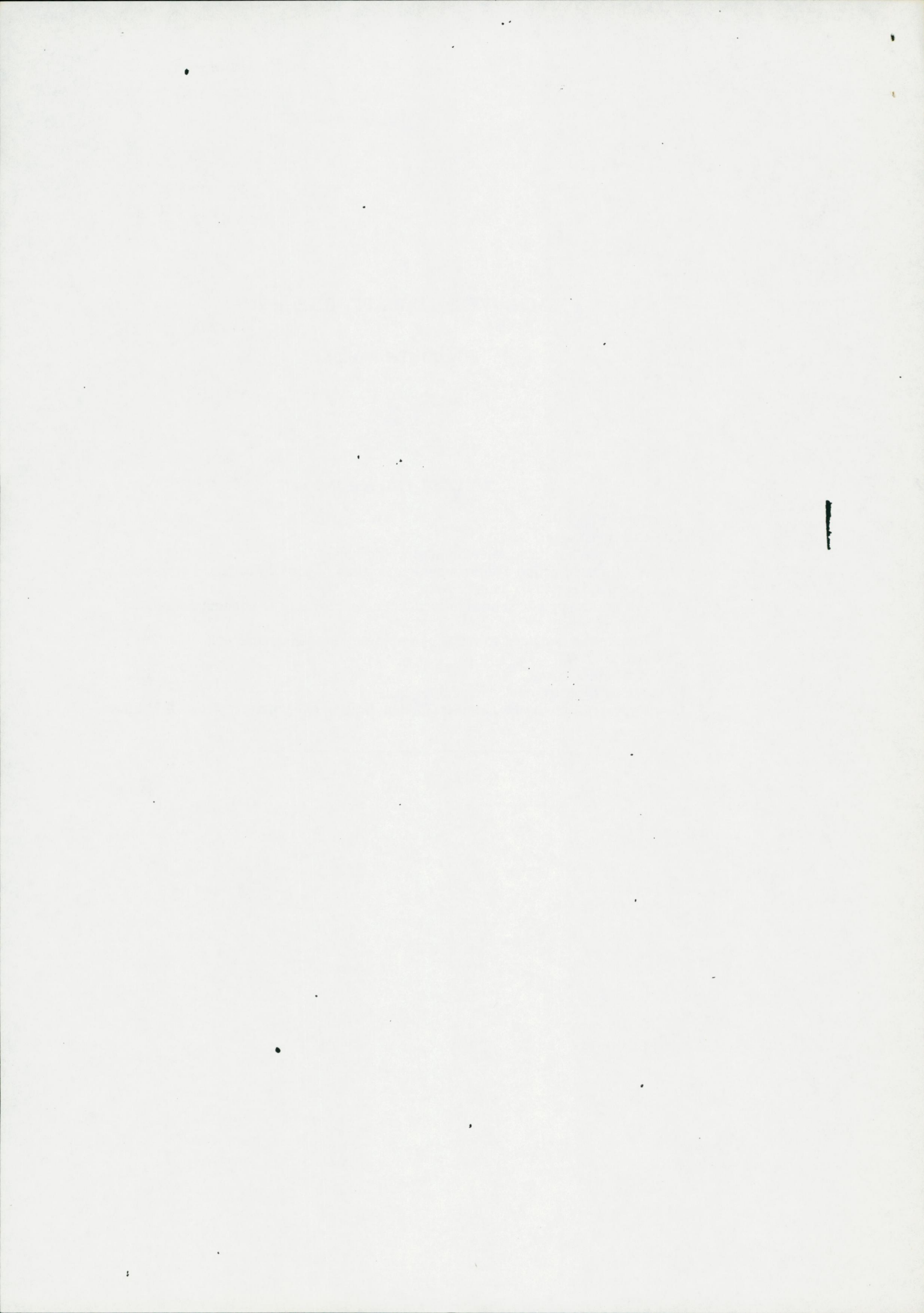
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EMPLOYEES LIABILITY BILL 1990

NEW SOUTH WALES



No. , 1990

A BILL FOR

An Act relating to the liability of employees in respect of torts committed by them; and to repeal the Employee's Liability (Indemnification of Employer) Act 1982.

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The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Employees Liability Act 1990.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Employee not liable where employer also liable

3. (1) If an employee commits a tort for which his or her employer is also liable:

- (a) the employee is not liable to indemnify, or to pay any contribution to, the employer in respect of the liability incurred by the employer; and
- (b) the employer is liable to indemnify the employee in respect of liability incurred by the employee for the tort (unless the employee is otherwise entitled to an indemnity in respect of that liability).

(2) Contribution under this section includes contribution as joint tortfeasor or otherwise.

Abolition of action against employee for loss of services of fellow employee (*per quod servitium amisit*)

4. An employee is not liable in tort to his or her employer merely because the employee has deprived the employer of the services of any other employee of the employer.

Act not to apply to serious misconduct of employee or to conduct not related to employment

5. This Act does not apply to a tort committed by an employee if the conduct constituting the tort:

- (a) was serious and wilful misconduct; or
- (b) did not occur in the course of, and did not arise out of, the employment of the employee.

Employer subrogated to rights of employee under insurance policy

6. (1) If

- (a) an employer is proceeded against for the tort of his or her employee; and
- (b) the employee is entitled under a policy of insurance to be indemnified in respect of liability that the employee may incur in respect of that tort,

the employer is subrogated to the rights of the employee under that policy in respect of the liability incurred by the employer arising from the commission of the tort.

(2) In this section, "insurance" includes indemnity.

Act to prevail

7. This Act has effect despite:

- (a) any other Act or law; or
- (b) the provisions (express or implied) of any contract or agreement entered into before or after the commencement of this section.

Act binds Crown

8. This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Act to apply to previous or future liability

9. This Act applies whether the cause of action concerned arose before, or arises after, the commencement of this section.

Repeal of Employee's Liability (Indemnification of Employer) Act 1982 No. 3

10. The Employee's Liability (Indemnification of Employer) Act 1982 is repealed.

