

1991

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

WORKERS' COMPENSATION (AMENDMENT) BILL 1991

EXPLANATORY MEMORANDUM

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WORKERS' COMPENSATION (AMENDMENT) BILL 1991

The Workers' Compensation (Amendment) Bill 1991 is the major component of a package of legislation to amend workers' compensation law in the Australian Capital Territory. The other components of the package are the Workers' Compensation (Consequential Amendments) Bill 1991, the Workers' Compensation Regulations (Amendment) and the Workers' Compensation Rules (Amendment).

These amendments arise out of a 1984 Report of the Working Party on Workmen's Compensation in the ACT. The terms of reference of that Working Party were to:

"Examine the operations and provisions of the current Workmen's Compensation Ordinance and to report on the required changes to enable the legislation to function more effectively."

In line with the recommendations of the Working Party this Bill significantly amends the *Workmen's Compensation Act 1951* (the Principal Act). The Principal Act provides for the compensation of workers for injuries arising out of or in the course of their employment and for related matters. This Bill will amend the Principal Act to:

- extend the application of the Act to religious workers;
- increase the types of medical treatment and associated services for which compensation may be claimed;
- remove limits on the liability of the nominal insurer at common law;
- require employers to have unlimited common law insurance cover;

- prevent claim splitting by dependents in death cases;
- require employers to keep certain information regarding the requirements of the Act and claim forms for compensation at the place of employment;
- allow the nominal insurer to recover unpaid and short paid insurance premiums from employers;
- increase the powers of inspectors to enforce the Act;
- allow the Minister to determine fees for certain purposes under the Act;
- increase the penalties in the Act; and
- clarify and simplify much of the Act and remove the sexist terminology and assumptions that are presently in the Act.

In line with this last area of change the Bill also changes the name of the Principal Act from the "*Workmen's Compensation Act 1951*" to "*Workers' Compensation Act 1951*".

The Bill has no financial implications for Government.

Details of the Bill are included in the Attachment.

ATTACHMENT

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Clauses 1, 2 and 3 deal with formal matters.

Clauses 4 and 5 amend the Principal Act so that the long title and the short title are expressed in gender neutral terms.

Clause 5 also inserts the heading "PART I - PRELIMINARY" before section 1 of the Principal Act. Part I consists of sections 1 to 6B inclusive and deals with formal matters and the interpretation of the Act.

Clause 6 amends the interpretation section of the Principal Act to insert new definitions and alter some existing definitions. The definition of "medical treatment" particularly is expanded to include more forms of treatment consistently with the Commonwealth and New South Wales. The provision, repair or replacement of contact lenses and spectacles will additionally become part of "medical treatment". Clause 6 also removes sexist language in the interpretation section.

Clause 7 inserts a new provision into the Principal Act which allows the Minister, on request, to declare ministers of religion to be workers for the purposes of the Act. This section will remove the doubt about what status ministers of religion currently have under the Act.

In addition, clause 7 inserts a provision that allows the Minister to determine categories of workers for insurance purposes. This provision is currently part of section 18 of the Principal Act. The inclusion of this provision as a separate section is more logical as categories of workers are referred to in two other provisions of the Act apart from section 18. The determination of categories of workers is required for insurance purposes.

Clause 7 also inserts the heading "PART II - ENTITLEMENT TO COMPENSATION" after new clause 6B. Part II comprises sections 7 to 15 inclusive of the Act. These sections set out workers' entitlements to compensation for various injuries and diseases, processes for variation of amounts of compensation, liability for compensation under the Act where subcontracting occurs and prohibit contracting out of the provisions of the Act.

Clause 8 omits subsection 10(2) of the Principal Act. Subsection 10(2) provides that, once a worker receives a lump sum for a specified injury that does not result in total and permanent incapacity for work, the worker is no longer entitled to weekly compensation payments. This means, for example, that a construction worker who received a lump sum, as calculated by reference to section 10 and Schedule 2 of the Act, for the loss of a foot would not be adequately compensated for continuing economic disability.

Clause 8 further amends section 10 of the Principal Act to provide that, in considering questions of the partial and permanent loss of use of a part of the body, the loss should be calculated at the time when the employer becomes liable to pay compensation or when it is unlikely that there will be any improvement in the injury, whichever occurs later. The amendments also provide that subsequent applications may be made in respect of increases in the percentage loss. This is to take account of the fact that an injury may continue to deteriorate over a period of time and a worker should not have to wait for compensation where this occurs.

Clause 9 omits subsection 10F(2) of the Principal Act. Subsection 10F(2) provides that once a worker receives a lump sum under section 10A, 10B, 10C or 10D then the worker is no longer entitled to weekly compensation payments. Sections 10A, 10B, 10C and 10D provide for lump sum compensation for, respectively, facial disfigurement, loss of sense of smell or taste, injuries to sexual organs and breasts and loss of capacity to engage in sexual intercourse. The repeal of subsection 10F(2) removes the impediment to the compensation of workers for continuing economic disability once a lump sum payment has been made in respect of these type of injuries.

Clause 10 simplifies section 11 of the Principal Act and adds to the types of things for which compensation may be obtained. Under the amendments made by this Bill, damaged or lost clothing associated with the injury, loss of wages, fares and accommodation costs incurred in obtaining medical treatment are added to those items for which compensation is payable under section 11 of the Principal Act.

Clause 11 inserts a new heading - "PART III - INSURANCE" - after section 15 of the Principal Act. Part III comprises sections 16 to 21 inclusive and deals with all matters pertaining to the obtaining of insurance under the Act, the nominal insurer, and the relationship between the nominal insurer and the employer with regard to claims.

Clause 12 repeals sections 16 and 18 of the Principal Act, which, respectively, deal with inspectors and compulsory insurance, and replaces them with sections 16, 17, 17A, 17B, 17C, 17D and 18. The provisions dealing with inspectors are replaced in new Part V which is inserted by clause 18 of the Bill. Proposed new sections 16 to 18 are a simplification of existing section 18 of the Principal Act with some additional matters being provided for.

Proposed new section 16 provides that an insurance policy shall, among other things, be for an unlimited amount in respect of any liability of an employer arising under the Act, or independently of the Act, in respect of any injury to, or death of, any worker employed by the employer. Under existing section 18 of the Principal Act employers are only required to be insured in respect of liability for an amount of not less than \$200 000. The figure of \$200 000 is out of date and does not take account of the levels of compensation and damages that are now being awarded. On the recommendation of the Working Party insurance policies are now required to be for an unlimited amount.

Proposed new section 17 provides that the Minister may approve insurers and revoke the approval of insurers for the purposes of the Act. This section is a restatement of part of existing section 18 of the Principal Act with the addition of fees for applications and a minimum 28 day notification of revocation of an approval. The addition of the fees is to cover the cost of investigation to ascertain the suitability of the applicant as an approved insurer. The Minister is not required to give any notice of revocation of approval under existing section 18 the Principal

Act. The notification requirements give an approved insurer warning of impending revocation and time to seek a review, by the Administrative Appeals Tribunal, of the decision to revoke the approval. Proposed new section 27B of the Act (which is inserted by clause 20 of this Bill) confers new rights of appeal to the Tribunal against decisions of the Minister to refuse to approve an application under new paragraph 17(1)(b) or to revoke an approval under new subsection 17(2).

Proposed new section 17A sets out the effect of revocation of the approval of an insurer on the policy of insurance and on the liability of the insurer. This section restates part of existing section 18 of the Principal Act and clarifies the application of the compulsory insurance requirements of section 17B of the Act.

Proposed new section 17B provides for the obtaining of compulsory insurance by employers. The new section is a restatement of part of existing section 18 of the Principal Act in this respect. Subsection 17B(2) is a new requirement that has been inserted to clarify the position where an approved insurer goes into liquidation. Subsection 17B(5) is also a new provision that allows the nominal insurer to recover unpaid insurance premiums from employers who do not meet their obligations under the subsection. The nominal insurer handles claims where there is no relevant insurance policy and the employer has defaulted in payments to the employee. Allowing the nominal insurer to recover unpaid premiums is an added incentive for employers to maintain the required insurance policy and will also assist the nominal insurer in meeting claims.

Proposed new section 17C provides for the exemption of employers from the compulsory insurance requirements. This new section clarifies existing provisions for exemptions in clause 18 of the Principal Act and also provides for some additional matters. Those additional matters are the payment of an application fee and the provision of minimum time periods for the giving of notice of the suspension or revocation of an exemption. The addition of the fees is to cover the cost of investigation to ascertain the suitability of the applicant as an exempt employer. While existing section 18 of the Principal Act does provide for the giving of notice of revocation or suspension of exemptions the time allowed for the employer to make representations is at the discretion of the Minister. Proposed new section 27B of the Act (which is inserted by clause 20 of this Bill) confers new rights of appeal to the Administrative Appeals Tribunal against decisions of the Minister to refuse to exempt an employer under new paragraph 17C(1)(b) or to suspend or revoke an exemption under new paragraphs 17C(4)(a) or (b).

Proposed new section 17D provides that an approved insurer may not refuse to issue a prescribed insurance policy and may not issue an insurance policy which is not a prescribed insurance policy. This provision duplicates part of existing section 18 of the Principal Act.

Proposed new section 18 provides for the provision of information to insurers. This new section duplicates part of existing section 18 of the Principal Act.

Clause 13 amends section 18A of the Principal Act. Section 18A provides that the Minister may, by notice in writing, require approved insurers and exempt employers to furnish information. Clause 13 amends section 18A to specifically provide for the furnishing of information by approved insurers and exempt employers that are bodies corporate.

Clause 13 further amends section 18A to provide procedural requirements for the giving of such notice by the Minister and to provide that a person is not excused from providing information on the basis that it may incriminate that person. However, where information is provided on this basis then it may only be used as evidence against that person in proceedings for perjury, failing to comply with the requirement to provide information, or providing false or misleading information.

Clause 14 amends section 18D of the Principal Act by omitting subsection (2). Subsection 18D(2) provides a ceiling of \$200 000 for payments made by the nominal insurer upon default in payments by the employer. The maximum of \$200 000 is out of date and does not take account of the levels of compensation and damages that are now being awarded. This ceiling is no longer appropriate and is removed on the recommendation of the Working Party.

Clause 15 simplifies subsection 18F(1) of the Principal Act by repealing that subsection and substituting three new subsections. The increased penalty for proposed new subsection 18F(1B) recognises the more serious consequences of making an agreement or admission in relation to a claim without the consent of the nominal insurer. This is contrasted with the simpler notification offence in proposed new subsection 18F(1A).

Clause 16 amends section 18J of the Principal Act in accordance with current drafting practice. Section 18J provides that the nominal insurer may require an employer to give information and assistance to the nominal insurer. The effect of section 18J is unchanged by this amendment except for the increase in the penalty from \$200 to \$2000 or 12 months imprisonment for non-compliance.

Clause 17 repeals sections 20 and 21 of the Principal Act and substitutes new sections 20, 21, 21A and 21B. New sections 20, 20A and 21 are contained in Part III of the Act and deal with insurance matters. Sections 21A, 21B, 22, 23, 23A and 23B form Part IV of the Act headed "COMPENSATION AND COMMON LAW REMEDIES".

New section 20 provides that an insurer may not charge a premium that is greater than that prescribed in the Regulations as the maximum rate of premium. This new section simplifies existing section 20 of the Principal Act which is omitted by clause 17.

New section 20A of the Act sets out the adjustments to be made to insurance policies after a variation is made under section 12A of the Act. Section 12A provides that where there is a variation in the Index number (defined to mean the Consumer Price Index) then the amount of compensation payable in respect of certain injuries or diseases is varied in accordance with a formula. The variation in potential liability necessitates some adjustment in premiums for the policies of insurance that cover liability for compensation obligations under the Act. Section 12C of the Principal Act, which currently provides for this adjustment, is repealed by the formal amendments contained in the Schedule 3 of the Bill and a simpler provision for adjustment is provided by proposed new section 20A of the Act.

New section 21 restates the principles of existing section 21 of the Principal Act and expands the types of information that employers are required to provide to workers employed by them. New section 21 also requires employers to provide copies of claim forms for compensation to workers on request. This provision was recommended by the Working Party to help injured workers who may be disadvantaged through ignorance of their rights under the legislation or through delays in obtaining claim forms from employers.

New Part IV deals with compensation and common law remedies. Part IV contains new provisions dealing with claim-splitting by dependents in the case of work-caused injuries that result in the death of a worker.

New section 21A provides for the interpretation of the Part. Section 21A contains some definitions that are currently in sections 22 and 23 of the Principal Act. The definitions that are currently in those sections are omitted from those sections by clause 24 of the Bill.

New section 21B provides that the Part applies to the nominal insurer and that where compensation is paid by both the nominal insurer and the employer then the rights of the nominal insurer have priority over the rights of the employer in relation to the payment. This new section is a restatement of existing subsection 22(3) of the Principal Act which is omitted by clause 24 of the Bill. The inclusion of the provision as a separate section is more logical as it has implications for the whole of Part IV.

Clause 18 inserts new sections 23A to 23I inclusive after section 23 of the Principal Act. Sections 23A and 23B deal with compensation and common law remedies and are part of Part IV of the Act. New sections 23C, 23D, 23E, 23F, 23G, 23H, and 23I form Part V of the Act which deals with the inspection aspects of the Act.

New section 23A operates to prevent claim-splitting in death claims. Claim-splitting may occur where one dependant institutes proceedings to recover or receives compensation under the Act and another dependant institutes proceedings at common law against the employer or a third party. This amendment will make the Territory consistent with the Commonwealth and New South Wales in this respect.

New section 23B provides a mechanism for discharge of a worker's or deceased worker's dependant's liability to repay an amount under section 22 or 23A. Providing for direct payment by the Court where possible will avoid delays.

New Part V of the Act will replace the inspection provisions in section 16 of the Principal Act (which is repealed by clause 12 of the Bill) with updated and more effective provisions. New Part V also replaces section 19 of the Principal Act (which is repealed by clause 24 of the Bill). Section 19 of the Principal Act deals with the

provision of information regarding insurance policies to the Minister or an inspector.

The significant new powers that inspectors will have under new Part V of the Act are powers, under new section 23G, to enter commercial premises where the inspector believes on reasonable grounds that the premises are being used by an employer in connection with the employment of a worker. Inspectors may now also, under new section 23G, require information from persons other than the employer in the course of entry and inspection of premises. The interests of employers are protected through the specification, in new sections 23H and 23I, of procedures to be followed in gaining entry to premises with the occupiers consent or pursuant to a court order or a search warrant. New Part V also has significant penalties for failure to provide information to inspectors when requested in accordance with the Act. These penalties will greatly increase the ability of inspectors to fulfil their inspection role.

Clause 18 also inserts the heading "PART VI - PROCEDURE FOR PAYMENT OF COMPENSATION" after the inspection provisions. Part VI is comprised of sections 24 to 26 inclusive and deals with arbitration, notification of injuries, time for taking proceedings under the Act and appeals.

Clause 19 of the Bill inserts a new section 25A after section 25 of the Principal Act. New section 25A provides that statements in relation to an injury by a worker to the employer or to the employer's insurer are not admissible as evidence unless the worker has received a copy of the statement not less than 14 days before the proceedings are heard. This section is designed to prevent the possibility of any abuse by a person wittingly or unwittingly taking unfair advantage of a worker while taking a written statement in the course of investigating a claim.

Clause 20 of the Bill inserts the heading "PART VII - MISCELLANEOUS" after section 26. Part VII comprises sections 27, 27A, 27B, 27C and 28 of the Act inclusive.

New section 27 is a standard provision to establish the state of mind of a body corporate or of a natural person where that body corporate or person does not act personally but acts through a director, servant or agent (as the case may be).

New section 27A provides for larger penalties for corporations at the rate of five times the penalty provided for natural persons.

New section 27B consolidates the rights of affected persons to apply to the Administrative Appeals Tribunal for review of a decision of the Minister under the Act. Section 27B also provides for procedures for the giving of notice where the Minister makes an appealable decision and sets out the effect on the validity of the decision of not giving the required notice.

New section 27C allows the Minister to determine fees for the purposes of the Act. This complements new sections 17 and 17C of the Act which provide for application fees to be paid by applicants for approved insurer and exempt employer status respectively.

Clause 21 provides for the amendment of section 28 of the Act to provide that penalties for offences against the regulations may not exceed \$1000 in the case of a natural person and \$5000 in the case of a body corporate. The increased penalties are in line with current criminal law policy and reflect inflationary changes.

Clause 22 provides that the First Schedule of the Principal Act is amended as set out in Schedule 1 of the Bill. These amendments are substantive amendments in that they allow for weekly compensation for dependent children who are full-time students up to the age of 25 years. Previously, the definition of a student was restricted to students who were up to 16 years of age only. The Schedule is also simplified and sexist assumptions regarding dependents are removed.

Clause 23 amends the Fourth Schedule of the Principal Act to simplify existing clause 7 of that Schedule.

Clause 24 makes formal amendments to the Principal Act. These amendments substitute gender neutral terms for gender specific terms and also update the Act in accordance with current drafting practices.

Clauses 25 to 29 are transitional provisions which preserve the effect of existing arrangements under the Principal Act as necessary.