

# **WORKERS' COMPENSATION AMENDMENT BILL 1995**

## **EXPLANATORY NOTES**

### **GENERAL OUTLINE**

#### **Objectives of the legislation**

The objectives of this legislation are :—

- To introduce a series of immediate measures to ensure that the Workers' Compensation Scheme is returned to a fully funded position over the next 5 years, including:—
  - a choice for workers with less serious injuries between improved statutory benefits and common law action;
  - increased statutory benefits;
  - introduction of an employer excess
  - introduction of a surcharge on premiums;
  - abolition of the cost indemnity rule as part of common law proceedings for less serious injuries.

#### **Reasons for the Bill**

1. The Queensland Workers' Compensation Scheme has experienced a particularly difficult period primarily due to pressure on costs, particularly as a result of rising common law claims costs. In addition, the scheme suffered a decline in premium income during the 1990/91 and 1991/92 years.
2. Premium rates were increased during 1993/94 and 1994/95 to cope with pressure on the scheme. However, a 48.7% growth in common law claims in 1994/95 has increased cost pressures on the scheme.

3. The result has been a trading deficit recorded in the Profit and Loss Account at 30 June 1995 of \$173.0M and an unfunded liability of \$114.3M being recorded in the Balance Sheet.
4. To address these financial difficulties, a number of reform measures have been considered together with extensive consultation with stakeholders to the Scheme resulting the policy changes detailed in this Bill.

### **Consultation**

Extensive consultation has been undertaken with all major stakeholders including:

- members of the Workers' Compensation Board
- unions of employees
- employer organisations
- legal profession
- medical profession

## **NOTES ON PROVISIONS**

*Clause 1* sets out the short title of the Bill.

*Clause 2* states that this Act commences from 1 January 1996.

*Clause 3* states that this Act amends the *Workers' Compensation Act 1990*.

### **Definitions**

*Clause 4* sets out to:

- remove the definitions of 'accident pay' and 'prescribed base rate' as these terms are redundant due to the changes to weekly payments of compensation as provided for by part 9.

- insert a definition of 'approved form' to simplify such references throughout the Act in accordance with current drafting practice. An 'approved form' means a form approved by the board.
- insert a definition of 'AWE' as an abbreviation of average weekly earnings as is currently defined in section 5(1) of this Part and refers to the injured workers average weekly earnings.
- refer to 'certificate injury' as defined in section 6A.
- insert a definition of 'household worker' for the purpose of section 123A which relates to an employer excess.
- insert a definition of 'impairment' for the purpose of assessment of impairment in accordance with the new table of injuries, the payment of statutory lump sums under part 9 and entitlements under part 11.
- insert a definition of 'permanent impairment' to clarify that permanent impairment only arises when the injury is stable and stationary and not likely to improve with further medical or surgical treatment.
- refer to the abbreviation 'QOTE' as defined in section 6B.
- refer to 'serious injury' as defined in section 182A.
- insert a definition of 'statutory maximum compensation' as an amount prescribed under section 154(1)(c) which is the maximum amount payable for one incident.
- insert a definition of 'student' in accordance with current drafting practice to simplify references made in part 9, division 3.
- insert a definition of 'table of injuries' to mean the table of injuries prescribed under the regulations.

*Clause 5* amends the meaning of injury by:

- inserting 'in a reasonable way' in subsection 6(3)(a) to be consistent with the new subsection (aa);
- inserting a new subsection 6(3)(aa) to limit the grounds for compensation for a stress related condition resulting from certain work incidents where reasonable action has been taken in a reasonable way to transfer or redeploy the worker.

This clause also provides for renumbering of subsections 6(3)(aa) and (b).

*Clause 6* inserts new sub-sections 6A and 6B to provide meaning of the terms of 'certificate injury' and 'QOTE'.

- 'Certificate injury' is defined for the purposes of parts 9 and 11 to clarify the requirements of the irrevocable choice and abolition of the cost order provision. A certificate injury means either a psychiatric or psychological injury or a physical or organic injury that entitles the injured worker to lump sum compensation of at least 20% of the statutory maximum compensation. A certificate injury excludes the combination of the worker's lump sum entitlements for both the psychological and physical injuries.
- 'QOTE' has been adopted as the new standard for:
  - increasing statutory payments under part 9, on an annual basis, and
  - establishing certain minimum weekly compensation benefits under part 9.

In this regard QOTE replaces the Engineering Award—State 'Wage Group C10' Southern Division and has been chosen as a representative indicator of the average wage of Queensland workers.

*Clause 7* inserts a new section 51A to:

- clarify that premium is to be assessed at either rates fixed by the regulations or in the case of special insurance arrangements the rate fixed by the Board
- introduce a new subsection to provide for circumstances where premium rates can be varied during the period of the insurance contract. The Board is entitled to reassess policies by applying to the rate as varied
- provide for apportionment of annual wages between periods subject to different premium rates.
- provide the power to enforce the collection of premium following a premium reassessment after a change of rates during an insurance period.

*Clause 8*

- amends section 113(2) to remove reference to the prescribed base rate and to make provision for the inclusion of the new standard “QOTE” in the calculation of a lump sum compensation payment to workers moving abroad.
- inserts a new subsection 2A to define abbreviations used in subsection (2).
- This clause also provides for renumbering of sections 113(2)-(4)

*Clause 9* inserts a new section 123A to introduce provisions for an employer excess in relation to weekly payments of compensation:—

- Subsection 1 requires an employer to pay the worker the worker’s entitlement to weekly compensation for a prescribed period of up to 4 ordinary working days during which the workers’ entitlement to weekly payment of compensation continues as a result of the work related injury. This is in addition to any payment for which an employer is legally liable for in relation to the day on which the injury occurs.
- Subsection 2 refers to an injured worker who has 2 or more employers. In this instance, the employer, in whose employ the injury occurred, is only responsible for paying the proportion of weekly compensation benefits that relate to the wages paid by that employer. The board will pay any balance of the weekly compensation benefits to which the injured worker is entitled.
- Subsection 3 requires the employer to make payment to the injured worker within 14 days of receiving notice from the Board. If the employer fails to do so then the Board must make that payment to the worker.
- Subsections 4, 5 and 6 provide for the method of recovery from the employer of payments made by the board under subsection 3, the penalty applicable in the circumstances and the board’s discretionary powers to waive or reduce the penalty.
- Subsections 7 and 8 describe the appeals provisions to apply in relation to subsections 4, 5 and 6. These appeals provisions reflect the current appeals provisions under sections 53 and 58.

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- Subsection 9 clarifies that the payment of a penalty under this section does not limit the power to impose a penalty under section 49 where the employer is uninsured.
- Subsection 10 defines for the purpose of this section “employer” as not including the employer of a householder worker, “injured worker” and “prescribed period”.

*Clause 10*

- amends the existing title of division 1 of part 9 to more accurately reflect its purpose which outlines the compensation payable in terms of weekly payments and omits the existing sections 124-127.
- inserts new sections 124-126 to provide for the revised basis of calculation of weekly payments:—
  - Section 124 indicates that this division applies to payment of payments in relation to both total and partial incapacity. Under this division a number of new provisions are introduced:—
    - a step down in the level of weekly compensation payments after 26 weeks of incapacity in lieu of the existing 39 week step down;
    - an extension of the basis of calculation of weekly payments to include a proportion of the worker’s “average weekly earnings” where it will enhance the level of compensation payments;
    - a new minimum level of weekly compensation based on a proportion of QOTE.
  - Section 124A clarifies the level of the award or industrial agreement to apply to the calculation of the rate of weekly payments, as that being the level that applies on the date the injury was sustained.
  - Section 124B applies to workers who are totally incapacitated and whose employment is governed by an award or industrial agreement.

- Section 124C applies to workers who are totally incapacitated and whose employment is not governed by an award or industrial agreement.
- Section 124D applies to certain contract workers who are totally incapacitated as defined under this subsection.
- Section 124E applies to certain waterside workers who are totally incapacitated as defined under this subsection.
- Section 124F applies to workers who are totally incapacitated and who are casual or part-time workers.
- Section 124G applies to workers who are totally incapacitated and who are in receipt of Commonwealth Payments such as age, disability support or class B widow pension.
- Section 124H applies to workers who are totally incapacitated and who have more than one employer.
- Section 125 applies to prescribed volunteers who are totally incapacitated. Prescribed volunteers include members of a local emergency service or body that acts under the authority of the State Counter-Disaster Organisation or State Emergency Service and members of a rural fire brigade.
  - Calculation of weekly compensation payments for prescribed volunteers who are otherwise employed, self-employed or unemployed at the time of the injury are detailed in subsections 2-6.
- Section 126 details the circumstances under which weekly compensation payments under sections 124-125 may be ceased.

#### *Clause 11*

- amends the existing title of division 2 of part 9 to more accurately reflect its purpose which outlines the lump sum compensation payable for permanent impairment. The term 'permanent partial disability' is replaced with 'permanent impairment' as the new table of injuries is now based on level of impairment.

- omits the existing section 129 to remove the current table which is to be replaced by the new table of injuries prescribed under the regulations.
- inserts a new section 129 which describes the application of division 2 regarding permanent impairment as a result of an injury to a worker.
- removes the existing section 130 which related to the previous section 129.
- inserts a new section 130 which provides an entitlement for a lump sum payment calculated in terms of the worker's degree of impairment against the table of injuries. Subsection 130(3) excludes lump sum compensation for any pre existing condition or injury.
- inserts a section 130A which describes the process for assessing the degree of permanent impairment.
  - Subsection 1 requires that the degree of permanent impairment, under subsection 1, is to be assessed:
    - for hearing loss, under section 95(9)
    - for psychiatric or psychological injury, by a medical assessment tribunal
    - for any other injury, by a registered medical practitioner
  - Subsection 2 requires that the level of impairment be assessed against the table of injuries prescribed in the regulations and that a report is to be provided to the board describing how the level was assessed.
  - Under subsection 3, the board or the worker may accept or reject the degree of impairment in cases other than for psychiatric or psychological injury
  - Subsection 4 provides the means by which any dispute can be resolved ie. by a medical assessment tribunal.
- inserts a section 130B which outlines the additional lump sum compensation payable on a scale to a maximum of \$100,000 where the injury sustained is a spinal cord injury or chronic organic brain syndrome and results in an entitlement of at least 50% of the statutory maximum under the table of injuries.

*Clause 12*

- amends Section 131(3), relating to previous lump sums received, due to its reference to 'bodily function' and the amendment of the table of injuries.
- amends certain wording in section 131(4) in line with current drafting principles but does not alter the meaning of this subsection.
- inserts a new section 131(5) to define the wording amended in section 131(4).

*Clause 13*

- This clause omits sections 132 and 133 as they relate to 'permanent partial disability' and 'loss of bodily function' which have been replaced by the new table of injuries based on impairment.
- A new section 132 is inserted which outlines offers and payments of lump sum compensation payments having regard to the irrevocable choice provision.
  - This section allows for the board to make an offer of lump sum compensation following either a medical practitioner's assessment or medical assessment tribunal's assessment of the degree of permanent impairment.
  - An offer in regard to hearing loss can only be made if assessed under section 95(9).
  - Where the degree of permanent impairment is less than 20% of statutory maximum compensation the worker must be advised of the choice to be made under sections 182A, 182B, 182C and 182D which outline the irrevocable choice provision.
  - A worker may accept, reject or defer the offer within 28 days. If the offer is accepted the board is to pay the lump sum to the worker.

*Clause 14* amends section 135 to reflect the offer outlined in section 132.

- This section states that after an offer of a lump sum has been made, no further compensation or expenses are payable (other

than the payment of lump sum compensation) in relation to the injury after the prescribed period of 28 days or acceptance of the offer.

*Clause 15* amends Section 136 to:

- increase the maximum sum payable to the totally dependent dependants of a deceased worker from the current amount of \$122,260 to \$160,000.
- incorporate the term student as defined in section 5.
- increase the weekly payment to children or students who were totally dependent on the deceased worker. The weekly payment is now calculated as 7% of QOTE in lieu of a percentage of prescribed base rate.
- increase the lump sum payable to dependants of a totally dependent spouse to \$6,000 per child or student.
- increase the weekly compensation payment to dependent children or students who were partially dependent on the deceased worker. The weekly compensation payment is now calculated as 7% of QOTE in lieu of a percentage of prescribed base rate.
- amends the amount of \$10,000 referred to in section 136(1)(f), column 2, to have regard for indexation. The amount will change to \$11,050.

*Clause 16* amends Section 138 to:—

- increase the weekly compensation payment to a surviving spouse who was dependent on the deceased but who dies before the payment of compensation. The weekly payment is now calculated at 14% of QOTE in lieu of a percentage of prescribed base rate.
- increase the weekly compensation payment to a carer of the workers' dependant children in a situation where there was no surviving spouse. The weekly payment is now calculated at 14% of QOTE in lieu of a percentage of prescribed base rate. The term student as defined in section 5 is applied to section 138(2).
- increase the weekly compensation payment to children or students who were totally dependent on the deceased worker. The weekly payment is now calculated as 7% of QOTE in lieu of a percentage of prescribed base rate.

*Clause 17*

- omits subsections 140(3)-(6) as these provisions are now detailed in the new table of injuries.
- inserts a new subsection 140(3) which refers to the table of injuries for the method of assessment for prescribed disfigurement and the maximum lump sum payable.
- enhances the structure of the Act and regulations to make them more user friendly so that they can be regularly updated to reflect necessary changes in medical descriptors.

*Clause 18* inserts a new subsection 2A under section 141 to specify that the tribunal must assess prescribed disfigurement in accordance with the table of injuries under the regulations.

*Clause 19* amends Section 154 to:

- increase the maximum amount of compensation payable as weekly payments or as a lump sum or a combination of both from the current \$74,050 to \$100,000.
- delete reference to sections 129 and 140. The criteria for eligibility for payment of lump sum payments for permanent impairment is now covered under section 130.
- clarify that lump sum payments for serious spinal cord or organic brain damaged workers available under section 130B are additional to the maximum sums prescribed in this section.

*Clause 20* removes reference to the prescribed base rate to make provision for the inclusion of the new standard "QOTE" in the variation of entitlements for payments for mining diseases.

*Clause 21* removes reference to the prescribed base rate to make provision for the inclusion of the new standard "QOTE" in the annual adjustment of weekly benefit rates and lump sum payments. It introduces a "rounding up" provision instead of the "nearest" in accordance with current drafting principles. Hence the adjustment of a weekly payment and the lump sum payment have been changed from 10 cents to 5 cents and from \$10 to \$5 respectively.

*Clause 22*

Subclauses 1 to 3 amend the reference in sections 171(3) and 171(4) to 'a permanent partial disability resulting from the injury'. The reference is

now to an 'injury under the table of injuries resulting in permanent impairment'.

Subclause 4 inserts a new subsection 171(4A) which requires a tribunal to assess the permanent impairment under the regulations for consistency with section 130A.

*Clause 23* contains five new sections which have been introduced to effect changes in the access entitlements to common law for less serious injuries. Further, the new sections outline the conditions to apply in respect of cost orders and a review process in relation to the irrevocable choice.

Section 182A details a number of general provisions which apply to sections 182B to 182E.

Subsection 182A(1) sets out the circumstances where a worker who does not have a serious injury can take a common law damages action in the terms of the Act.

Subsection 182A(2) clarifies that the special provisions of the Workers' Compensation Act do not apply to other Acts.

The subsection further defines serious injury as one where a worker has an entitlement to a lump sum of at least 20% of the statutory maximum compensation. This definition is important in establishing the threshold for:

- the irrevocable choice between accepting lump sum compensation and seeking damages at common law; and
- entitlement to the payment of disbursement costs (legal and other costs) where a worker chooses to take a common law.

Section 182B outlines the circumstances which apply in making an irrevocable choice where the worker has previously made a statutory workers compensation claim and had their level of permanent impairment assessed.

The provision under this section describes that a worker must choose between accepting a lump sum and seeking common law damages, the notice conditions to apply and the irrevocable nature of the choice.

Section 182C has been designed and introduced in order to foster efficient management and settlement of claims. It provides for cost orders to be made against the employer/board or the worker in circumstances where inappropriate offers have been made during settlement negotiations prior to trial.

The basis of cost orders is that if a judge makes an award at or above the workers' final offer then the employer/board must pay scale costs from the date of offer to trial. Conversely, should the trial judge award damages equal to or below the employer/board's final offer, then scale costs are awarded against the worker from the date of the final offer to trial.

In circumstances where the judgement award falls between each parties final offers, then both parties bear their own costs.

The section also contains provisions for cost orders where parties to an action are required to make necessary court applications to enforce progress or supply information in an action and where another party is joined in the proceedings.

In practice, this section will be used in the effective application of section 182B and 182D.

Section 182D outlines the process to apply where a statutory workers compensation claim has never been received and/or where an offer of lump sum compensation has never been made. Where these conditions exist, the section requires a worker to apply to the board for a certificate so that he/she may commence common law proceedings. The section requires a worker to have his / her permanent impairment assessed under section 130A. Where there is an entitlement to lump sum compensation, an offer under section 132 would be made by the board. The worker would then proceed with their common law action under the provisions outlined in section 182B.

Section 182D contains a further provision to address time constraints which might occur where a worker decides to take a common law action towards the end of the statute of limitations period. Under these circumstances, a conditional certificate process has been introduced so that the worker suffers no disadvantage.

Section 182E has been included so that a worker is not disadvantaged where he/she has made an irrevocable choice and accepted an offer of a lump sum but subsequently suffers deterioration in their medical condition. The section entitles the worker to reconsider the choice only where their condition deteriorates by at least a further 10% of statutory maximum compensation (under section 130) and the workers impairment assessment gives an entitlement to lump sum compensation under section 130 of at least 20% of the statutory maximum.

In requesting reconsideration on medical grounds of a previously made irrevocable choice, a condition which applies is that the request for a review must occur within one year of the original degree of permanent impairment decision being agreed on, decided or assessed.

*Clause 24* inserts a new subsection (3)(e) to section 200 to provide an additional evidentiary certificate consistent with the revised table of injuries to indicate the injured worker's entitlement to cost awards and irrevocable choice at common law.

*Clause 25* amends Section 207 to:—

- introduce a power to apply a surcharge on premiums or rates of premium, depending upon which basis surcharges are to apply.
- omit section 207(w) as it is unnecessary and provided for under Sub-sections (1) and (2) as required by the Statutory Instruments Act.

*Clause 26* amends Section 208 to clarify the intent of this section in providing the power to apply rates of premium, demerit charges or increases to these to a policy where the regulation is silent.

*Clause 27* amends section 213(2) to:—

- allow the payment for lump sum compensation, weekly payments and allowances (for injuries prior to 1 January 1996) to increase in accordance with increases in the prescribed base rate.
- allow for the commencement of this act to apply to injuries occurring on or after 1 January 1996.
- clarify that the prescribed base rate retains its current meaning after the commencement of this section.

## **MINOR AMENDMENTS**

*Clause 1* inserts “approved form” instead of “prescribed form” in accordance with the definition in Section 5.

*Clause 2* amends reference to “employees” to “workers” to ensure consistency with other sections of the Act.

*Clause 3* amends section 90 to recognise the effect of sections 182B and 182D which stipulate that for a certain level of injury, an injured worker must make a choice between a statutory lump sum and proceeding to a common law damages action.

*Clause 4* amends reference to 'permanent disability' to 'permanent impairment' to ensure consistency with the new definition in section 5.

*Clause 5* amends section 95(4)(b) to include reference to the new table of injuries referred to in section 130.

*Clause 6* replaces section 109(2)(b) with a worker's average weekly earnings.

*Clauses 7, 8, 9 and 10* amends reference to lump sum to read "lump sum compensation".

*Clause 11* amends multiple references to the new table of injuries referred to in section 130.

*Clause 12* amends reference to lump sum to read "lump sum compensation".

*Clause 13* amends section 134 to refer to the new table of injuries.

*Clause 14* amends reference to lump sum to read "lump sum compensation".

*Clause 15* amends reference to lump sum to read "lump sum compensation".

*Clause 16* amends multiple reference to the new table of injuries referred to in section 130.

*Clause 17* amends reference to lump sum to read "lump sum compensation".

*Clause 18* omits section 158 in view of the fact that the prescribed base rate has been replaced by QOTE.

*Clause 19* amends multiple references to "the disability" to "the impairment"

*Clause 20* provides a power under the Act for the board to approve forms. Forms were previously prescribed under the regulation.

*Clause 21* removes the provision for prescribed forms under the regulation.

*Clause 22* inserts a new subsection 2 to clarify that all references to the State Accident Insurance Fund under any Act or document refers to the Workers' Compensation Fund.

*Clause 23* amends reference to lump sum to read "lump sum compensation".

*Clause 24* inserts a new section 215 to allow the continuity of existing forms for a period of six months.