

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

MINISTER FOR JUSTICE AND ATTORNEY-GENERAL

**WORKERS REHABILITATION AND COMPENSATION LEGISLATION
AMENDMENT BILL 2012
SERIAL NO. 200**

EXPLANATORY STATEMENT

GENERAL OUTLINE

The main aim of the Bill is to amend the *Workers Rehabilitation and Compensation Act* (the Act) to amend:

- the definition of ‘worker’ to remove the reference to Australian Business Number (ABN) and to clarify the test for determining whether a person is a ‘worker’, or whether the person is a true independent contractor;
 - section 65B of the Act to permit injured workers who reside overseas to obtain compensation, despite the status of rehabilitation;
 - section 65 of the Act to reflect the Commonwealth Government’s decision to increase the qualifying age for the age pension and allowing fairer access to compensation by older workers who are injured;
 - section 49 of the Act to provide certainty of the types of non-cash remuneration that can be taken into account in calculating a worker’s normal weekly earnings for the purposes of payment of weekly compensation;
 - section 89 of the Act to bring the interest rate payable on late payments of weekly compensation in line with the interest rate applicable to Supreme Court judgment debts;
 - section 116 of the Act to provide specific power for the Supreme Court to remit matters back to the Work Health Court in appropriate circumstances.
- The Bill also makes consequential amendments to the Workers Rehabilitation and Compensation Regulations, and amendments to both the Act and the Regulations that are of a statute law revision nature.

NOTES ON CLAUSES

Part 1 Preliminary matters

Clause 1. Short title

This clause provides that the Act may be cited as the *Workers Rehabilitation and Compensation Legislation Amendment Act 2012*.

Clause 2. Commencement

This clause provides that the Bill once enacted will commence on the day fixed by the Administrator by *Gazette* notice.

Part 2 Amendment of Workers Rehabilitation and Compensation Act

Clause 3.

Part 2 of the Bill amends the *Workers Rehabilitation and Compensation Act*.

Clause 4. Section 3 amended

This clause amends section 3(1) of the *Workers Rehabilitation and Compensation Act*. Section 3(1) is the definitions section of the Act.

Subclause (1) removes the definition of ‘this Act’ because it is no longer necessary as section 17 of the *Interpretation Act* provides that ‘this Act’ includes Regulations. This subclause also removes the definition of ‘worker’ which is replaced by subclause (2).

The subclause also inserts a new definition of ‘worker’ which includes a person who performs work or a service of any kind under a contract or agreement of any kind (whether it is expressed, implied, oral or in writing, or whether it is under the law of the Territory or not).

However, the person performing the work under the contract or agreement is not a ‘worker’ if the person:

- is paid to achieve a specified result or outcome; and

- has to supply plant and equipment or tools of trade needed to perform the work or service; and
 - is or would be liable for the cost of rectifying any defect arising out of the work or service performed;
- or if the person
- is a person in respect of whom a personal services business determination is in effect under section 87-60 of the *Income Tax Assessment Act 1997* (Cth).

The change in the definition of ‘worker’ uses the ‘results test’ which is a test used by the Australian Tax Office in considering a person’s status as a sub-contractor. The ‘results test’ provides that even if a contractor is supplying their own plant, equipment or tools, the person will be a worker if they are not being paid to achieve a specified result or outcome. The test ensures that people who work substantially for the provision of labour are deemed to be workers for the purposes of workers compensation, unless they meet the results test.

Therefore, the satisfaction of the ‘results test’ or the existence of a personal services business determination under the *Income Tax Assessment Act* will thereby exclude those people who are true independent contractors.

The new definition of ‘worker’ provides that it also includes a person or a member of a class of persons prescribed as a worker.

Subsections (2)(b) to (j) which provide for exclusions from the definition of ‘worker’ have not substantially changed and only the numbering style has changed.

Subclause (3) makes a minor amendment to the definition of ‘insurer’ which does not affect the meaning.

Subclauses (4) and (5) amend subsections 3(2) and 3(3), and omits 3(6) and 3(6A) respectively so that these subsections are consistent with the new definition of worker in subclause (2) which no longer defines ‘worker’ on the basis of whether the person has provided an ABN.

New subclause (6) inserts a new subsection 3(12) that clarifies that section 3 of the Act is not relevant to determining whether a person is a worker or employee under

any other Act unless otherwise provided by that other Act.

Clause 5 section 49 amended

Subclause 5(1) makes a minor amendment to section 49(1) which is statute law revision nature.

Subclause 5(2) inserts a new section 49(4) to limit the types of non-cash remuneration that can be taken into account for the purposes of the definitions of *normal weekly earnings* and *ordinary time rate of pay*. The section provides that the value of a benefit (which is in a form other than an amount of money paid or credited by the employer to the worker) must not be taken into account, unless the benefit relates to the provision of accommodation, meals and/or electricity.

Clause 6. Section 65 amended

This clause omits the current section 65(1) of the Act and inserts a new one which provides for an increase in the retirement age to reflect the decision of the Commonwealth Government to gradually increase the qualifying age for the age pension from age 65 to 67 between 2017 and 2023. The clause also provides for an immediate entitlement to older workers to claim an extended period of compensation payments.

New subsection (1) provides that the section applies to a worker who is totally or partially incapacitated for work as a result an injury out of which the worker's incapacity arose or which materially continued to the worker's incapacity.

New subsection (1A) provides that the section does not apply to worker who, at the date of injury, had already attained the age of 67 years, unless the normal retiring age for the worker is more than age 67 years. An example of this would be a worker who is injured at age 68, would not be entitled to compensation under this section, unless the worker had a normal retiring age of more than 67 years.

New subsection (1B) provides that a worker must be paid compensation (in accordance with subsection (1C) to (1H), whichever is applicable to the worker, equal to 75% of the worker's loss of earning capacity or 150% of average weekly earnings at the time the payment is made, whichever is the lesser amount.

New subsection (1C) provides that the compensation paid pursuant to (1B) is payable only after the first 26 weeks of incapacity, and, is otherwise in addition to any other compensation to which under the Part, the worker may be entitled. Examples of other such compensation include payment of medical and rehabilitation expenses, and compensation for permanent impairment. The compensation paid to a worker pursuant to (1B) is otherwise subject to Part 5 of the Act.

New subsection (1D) provides that if, at the date of injury, the pension age is 65 years, and the worker's age is less than 63 years, the worker shall be entitled to weekly compensation until the worker reaches the pension age. If, however, the worker has a normal retiring age that is more than the pension age, the worker will be entitled to be paid until the worker reaches that normal retiring age.

Examples of the operation of new subsection (1D) is where the pension age is 65:

- A worker injured at age 61 will be entitled to be paid until the worker reaches 65 years of age.
- A worker injured at age 61, but who has a normal retiring age of 70 years, will be entitled to be paid until the worker reaches 70 years of age.

Essentially, new subsection (1D) does not provide any change to the current entitlement to compensation found in section 65(1)(a) and (b) in the Act, at least until the pension age begins to increase pursuant to the Commonwealth Government policy. In this case, the worker will be entitled to be paid until they attain the increased pension age, or where the worker has a normal retiring age that is more than the increased pension age, until the worker reaches that normal retiring age.

New subsection (1E) provides that if, at the date of injury, the pension age is 65 years, and the worker's age at the injury date is 63 years or more; the worker is entitled to be paid compensation:

- Where the worker has a normal retiring age that is more than the pension age, until the worker attains that normal retiring age, or the worker attains 67 years, whichever occurs later; or
- Until the expiration of 104 weeks after the date on which the worker's incapacity commences, or, the worker attains the age of 67, whichever occurs first.

Examples of the operation of new subsection (1E) is where the pension age is 65:

- A worker who is injured at age 64, but has a normal retiring age of, say, 70 years, will be entitled to be paid until the person reaches 70 (the attaining of 70

years occurring later than the person attaining 67 years).

- Otherwise, a worker who is injured at age 64, will be entitled to be paid for a period of 104 weeks (that is, until the person reaches 66 years) as this would occur prior to the person attaining 67 years.

- A worker who is injured at age 65.5, will be entitled to be paid until the person attains the age of 67, the attaining of this age occurring prior to the expiration of 104 weeks payment of compensation.

New subsection (1F) reflects the gradual increase to the pension age pursuant to the Commonwealth Government policy. New subsection (1F) provides that if, at the date of injury, the pension age is more than 65 years but less than 67 years; and the worker's age at the date of injury is more than 2 years before that pension age, the worker is entitled to be paid compensation, where a worker for whom the normal retiring age is more than the pension age, until the worker reaches that normal retiring age, or the worker attains the pension age, whichever is the later. Examples of the operation of new subsection (1F) is where the pension age is 65.5 years:

- A worker injured at age 62, but whose normal retiring age is 66, will be entitled to be paid until the worker attains the age of 66. The attaining of this age will occur later than the worker attaining the pension age of 65.5.

- Otherwise, a worker injured at age 62, will be entitled to be paid until the worker attains the pension age of 65.5.

New subsection (1G) provides for the protection of older workers who are closer to reaching the pension age, or who are aged between the pension age and age 67. New subsection (1G) provides that if, at the date of injury, the pension age is more than 65 years but less than 67 years, and an injured worker's age is 2 years or less before the pension age, or is aged beyond the pension age but less than 67 years, compensation is to be paid:

- Where a worker for whom the normal retiring age is more than the pension age – until the worker attains that normal retiring age, or, until the worker attains the age of 67 years, whichever occurs later;

- Otherwise, for a period of 104 weeks following the date on which the worker's incapacity commences, or until the worker attains the age of 67 years, whichever occurs first.

Examples of the operation of subsection (1G) is where the pension age is 66 years:

- A worker injured at age 64.5 years, but whose normal retiring age is, say, 68, will be entitled to be paid until the worker attains the age of 68. (The attaining of

age 68 will occur later than the worker attaining the age of 67.)

- Otherwise, a worker injured at age 64.5 years, will be entitled to be paid for a period of 104 weeks, that is, until the worker attains the age of 66.5 years. (The attaining of age 66.5 will occur prior to the worker attaining the age of 67.)

- A worker injured at age 66.5 years, but whose normal retiring age is, say, 68, will be entitled to be paid until the worker attains the age of 68. (The attaining of age 68 will occur later than the worker attaining the age of 67.)

- Otherwise, a worker injured at age 66.5 years, will be entitled to be paid until the worker attains the age of 67. (The attaining of age 67 will occur prior to the expiration of 104 weeks payment of compensation.)

New subsection (1H) provides for entitlement to compensation by injured workers when the pension age increases to age 67. New subsection (1H) provides that if, at the date of injury, the pension age is 67, a worker is entitled to be paid compensation:

- Where a worker is injured and has a normal retiring age that is more than the pension age – until the worker attains that normal retiring age;

- Otherwise, the worker attains 67 years.

Examples of the operation of new subsection (1H) is where the pension age is 67:

- A worker who is injured, but has a normal retiring age of, say, 70, will be entitled to be paid compensation until the worker attains the age of 70;

- Otherwise, a worker who is injured will be entitled to be paid compensation until the worker attains the age of 67.

New subsection (2) provides for the amendment of the remaining provisions in section 65. Those provisions will now refer to the new subsection (1B) and are relevant for the purposes of calculating weekly benefits of compensation.

Subclause (3) inserts a new subsection (14) which sets out new definitions of terms used throughout section 65(1).

- ‘future pension age’ which means the age that once attained by the worker, the worker would, subject to satisfying any other qualifying requirements, be eligible to receive an age pension under the *Social Security Act 1991* (Cth).

- ‘injury date’ which means the date of injury as a result of which the worker is totally or partially incapacitated.

- ‘injury pension age’ which means, for a worker who is totally or partially incapacitated as a result of an injury, the age that, at the injury date, the worker would, subject to satisfying any other qualifying requirements, be eligible to receive an age pension under the *Social Security Act 1991* (Cth).

- ‘normal retiring age’ which means the age that workers in the industry or occupation in which the worker is employed usually retire.

Clause 7 Section 65B replaced

This clause repeals the current section 65B of the Act and inserts a new one which provides for entitlement to compensation of a worker who resides outside of Australia.

New subsection 65B(1) provides that the section applies if a worker is receiving weekly payments of compensation mentioned in section 64 or 65 and is living outside Australia. The subsection provides that the worker’s entitlement to payments pursuant to section 64 or 65 is **suspended**, unless the worker’s entitlement continues pursuant to subsection (2) or (3).

Subsection (2) provides that a worker’s entitlement to weekly compensation continues, despite the worker residing outside Australia if the worker complies with the requirements prescribed by regulation and the employer is satisfied about the worker’s continued incapacity.

However, subsection (3) provides that the worker’s continued entitlement ceases after 104 weeks whilst the worker resides outside Australia. This subsection includes any part of the 26 weeks referred to in section 64 which provides for the rules for compensation during the first 26 weeks of incapacity. The subsection provides for weekly compensation to be paid for an aggregate period of 104 weeks whilst the worker resides outside Australia.

New Subsection (4) provides that the Court may order that the payments continue under the continued entitlement if the Court is satisfied about the following matters:

- The worker continues to be totally and permanently incapacitated;
- The circumstances of the worker residing outside Australia are otherwise exceptional because of the nature of the worker’s incapacity or other circumstances applying to the worker; and
- The worker would suffer undue hardship if the Court did not make the order.

New subsection (5) provides the Court must make such an order in accordance with the Regulations and specify the period for which the continued entitlement is

extended.

New subsection (6) provides the extended period of the continued entitlement must be a single period that does not exceed 104 weeks and starts, or is taken to have started, on a date specified in the order of the Court.

New subsection (7) confirms that at the end of the extended period in relation to a worker's continued entitlement, the worker's entitlement to weekly compensation ceases while the worker is residing outside Australia.

Clause 8 Section 89 amended

Subclause (1) replaces the word 'where' with 'if', and defines the person liable to pay the weekly benefits as 'the liable person', in section 89 and inserts a subsection number. The amendment is minor and does not change the meaning of the subsection.

Subclause (2) inserts a provision to clarify that where the liable person fails to make the weekly payment on or before the day on which the liable person is required to do so, the worker must be paid interest on the late payments of weekly compensation.

Subclause (3) inserts new subsection 89(2). New subsection (2) provides that if liable person disputes liability for compensation and the dispute is later resolved wholly or partly in favour of the worker, for the purposes of calculating interest under subsection (1), weekly payments are taken to have fallen due when the payments would have fallen due if there had been no dispute.

Clause 9 Section 116 amended

This clause inserts a new subsection 116(2). Section 116, as a result of the way it is currently drafted, requires a party to commence a new application to the Work Health Court following a decision from an appeal to the Supreme Court. New subsection (2) will allow the Supreme Court, in deciding the appeal, to do the following things:

- confirm or vary the decision or determination;
- set aside the decision or determination and substitute its own decision; or

- set aside the decision or determination and remit the matter to the Work Health Court.

New subsection (2A) also provides that, for subsection (2), the Supreme Court may make the orders and give the directions it considers appropriate.

Clause 10 Part 12 inserted

This clause inserts at the end of the Act:

Part 12 Transitional matters for Workers Rehabilitation and Compensation Legislation Amendment Act 2011

This clause inserts a new Part 12 of the Act, which provides for transitional matters.

New section 198 provides that, following commencement of section 198 a person may be a worker as defined in section 3(1) even if the person was not a worker as defined in section 3(1) immediately before commencement. Subsection (2) makes it clear that it is irrelevant if the person notified their ABN prior to commencement, and an agreement prior to commencement as to whether the person was or was not a worker, is also irrelevant.

New section 199 provides clarity for the consideration of claims for non-cash benefits prior to the commencement of the Bill.

New subsection (1) provides the subsection applies to a worker who suffered an injury before the commencement of the section that resulted in or materially contributed to, or subsequently results in or materially contributes to, his or her incapacity.

New subsection (2) provides that in determining the worker's remuneration for the definition of *normal weekly earnings* and *ordinary time rate of pay* in section 49, that section as in force immediately before the commencement applies as if section 5 of the Workers Rehabilitation and Compensation Legislation Amendment Act 2012 (the Amendment Act) had not commenced. Section 5 of the Amendment Act is not intended to be retrospective.

New section 200 provides for the continued entitlement to weekly compensation by workers who have claims being managed prior to the commencement of the amendment.

New subsection (1) provides the section applies to a worker who is totally or partially incapacitated for work as mentioned in the previous section 65. The date of injury subject of the claim would be prior to the commencement of amendment.

New subsection (2) provides that the worker's entitlement to payment of compensation under the previous section 65 continues as if section 6 of the *Workers Rehabilitation and Compensation Legislation Amendment Act 2012* had not commenced.

New subsection (3) provides that under the previous section 65, a worker must be paid until the first of the following occurs, unless one of the following happened before the commencement:

- for a worker in relation to who the normal retiring age relating to that worker is more than 65 years – the worker attains that normal retiring age;
- otherwise – the worker attains the future pension age for the worker.

Examples of the operation of subsection (3) is where a worker was injured prior to the commencement and:

- where the worker had a normal retiring age of, say, 70, the worker would be entitled to be paid compensation until they attain that normal retiring age of 70.
- Otherwise, the worker would be entitled to be paid compensation until they attain the age of 65 years.
- Where a worker was injured prior to commencement, and the worker continues to be paid compensation for loss of earning capacity and the pension age increases to reflect the decision of the Commonwealth Government to increase the pension age, the worker will be entitled to claim payment of compensation until the worker attains the new pension age.

Clause 11 Act further amended

Clause 14 provides that the amendments in Schedule 1 to the Bill have effect. The amendments in Schedule 1 are minor and are of a statute law revision nature.

Part 3 Amendment of Workers Rehabilitation and Compensation Regulations

Clause 12 Regulations amended

This clause states that Part 3 of the Bill amends the Workers Rehabilitation and Compensation Regulations.

Clause 13 Regulation 3A amended

Subclause (1) makes a minor amendment of a statute law revision nature and does not affect the meaning of the subsection.

Subclause (2) makes a similar amendment and also removes the reference to paragraph (b)(vii) of the definition of ‘worker’ in the Act to paragraph (g) which is consequential to the amendments made by clause 4 of this Bill.

Subclause (3) makes a minor amendment of a statute law revision nature and does not affect the meaning of the subsection.

Clause 14 Regulation 6A inserted

This clause inserts a new Regulation 6A. This new regulation provides for the requirements for new section 65B(2) (inserted by clause 7 of this Bill) regarding the continued entitlement to compensation of workers residing outside of Australia. New regulation 6A provides that for section 65B(2) of the Act the worker must give the employer a declaration completed by the worker and a medical practitioner or, if the worker is living in another country, a person registered under the law of the country that provides for the registration of persons practising the medical profession. This declaration must be given every 3 months.

Clause 15 Regulation 14 replaced

This clause replaces current Regulation 14 and replaces it with one which provides that for section 89 and interest calculations on late payments, the rate of interest is the rate applicable to a judgment debt under a judgment of the Supreme Court.

Clause 16 Regulation 17A replaced

This clause replaces current regulation 17A and replaces it with one which provides that for section 131(3) of the Act which provides for the requirement to pay interest on late premiums, the interest rate that is applicable is the rate applicable to a judgment debt under a judgment of the Supreme Court.

Clause 17 Regulations further amended

Clause 17 provides that the amendments in Schedule 2 to the Bill have effect. The amendments in Schedule 2 are minor and are of a statute law revision nature.

Part 4 Expiry of Act**Clause 18 Expiry**

This clause provides the Act expires the day after it commences.

Schedule 1 Workers Rehabilitation and Compensation Act further amended

The amendments in Schedule 1 are minor and of a statute law revision nature.

Schedule 2 Workers Rehabilitation and Compensation Regulations further amended

The amendments in Schedule 2 are minor and of a statute law revision nature.