

Western Australia

**Workers' Compensation and Rehabilitation
Amendment (Cross Border) Act 2004**

As at 28 Oct 2004

No. 36 of 2004

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Workers' Compensation and Rehabilitation Amendment (Cross Border) Act 2004

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Western Australia

Workers' Compensation and Rehabilitation Amendment (Cross Border) Act 2004

No. 36 of 2004

An Act to amend the *Workers' Compensation and Rehabilitation Act 1981* and for related purposes.

[Assented to 28 October 2004]

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Workers' Compensation and Rehabilitation Amendment (Cross Border) Act 2004*.

2. Commencement

(1) This Act comes into operation on a day fixed by proclamation.

(2) Different days may be fixed under subsection (1) for —

(a) Part 2; and

(b) Part 3,

but the day fixed for Part 3 is not to be earlier than the day fixed for Part 2.

(3) If the day fixed under subsection (1) for Part 3 is the same as the day fixed for Part 2, Part 3 comes into operation immediately after Part 2.

Part 2 — Cross border provisions

Division 1 — Amendments

3. The Act amended

The amendments in this Part are to the *Workers' Compensation and Rehabilitation Act 1981**.

[* Reprinted as at 14 September 2001.

For subsequent amendments see Western Australian Legislation Information Tables for 2003, Table 1, p. 438-9.]

4. Section 5 amended

Section 5(1) is amended as follows:

- (a) by deleting the definition of “ship” and inserting instead —

“

“**ship**” means any kind of vessel used in navigation by water, however propelled or moved, and includes —

- (a) a barge, lighter, or other floating vessel; and
(b) an air-cushion vehicle, or other similar craft, used wholly or primarily in navigation by water;

”;

- (b) by inserting in the appropriate alphabetical position —

“

“**State**” includes Territory;

”.

5. Section 15 repealed

Section 15 is repealed.

6. Section 16 amended

- (1) Section 16(1) and (1a) are repealed.
- (2) Section 16(2) is amended by deleting the portion of the subsection beginning with “The” and ending with “modifications” and inserting instead —

“

This Act applies with the following modifications in respect of a disability occurring to a worker employed on a ship where under section 20 the worker's employment is connected with this State

”.

7. Section 20 inserted

After section 19 the following section is inserted —

“

20. Compensation not payable unless worker's employment connected with this State

- (1) In this section —
“**State**”, in a geographical sense, includes a State's relevant adjacent area as described in Schedule 6.
- (2) Compensation under this Act is only payable in respect of employment that is connected with this State.
- (3) The fact that a worker is outside this State when the disability occurs does not prevent compensation being payable under this Act in respect of employment that is connected with this State.
- (4) A worker's employment is connected with —
 - (a) the State in which the worker usually works in that employment;
 - (b) if no State or no one State is identified by paragraph (a), the State in which the worker is

usually based for the purposes of that employment; or

- (c) if no State or no one State is identified by paragraph (a) or (b), the State in which the employer's principal place of business in Australia is located.
- (5) In the case of a worker working on a ship, if no State or no one State is identified by subsection (4), a worker's employment is, while working on a ship, connected with the State in which the ship is registered or (if the ship is registered in more than one State) the State in which the ship most recently became registered.
- (6) If no State is identified by subsection (4) or (if applicable) (5), a worker's employment is connected with this State if —
- (a) a worker is in this State when the disability occurs; and
 - (b) there is no place outside Australia under the legislation of which the worker may be entitled to compensation for the same matter.
- (7) In deciding whether a worker usually works in a State, regard must be had to —
- (a) the worker's work history with the employer over the preceding period of 12 months; and
 - (b) the intentions of the worker and employer,
- but regard must not be had to any temporary arrangement under which the worker works in a State for a period of not longer than 6 months.
- (8) Subject to subsection (7), in deciding whether a worker usually works in a State or is usually based in a State for the purposes of employment, regard must be had to any period during which a worker works in a State or is

in a State for the purposes of employment whether or not under the statutory workers' compensation scheme of that State the person is regarded as a worker or as working or employed in that State.

- (9) Compensation under this Act does not apply in respect of the employment of a worker on a ship if the *Seafarers Rehabilitation and Compensation Act 1992* of the Commonwealth applies to the worker's employment.

”.

8. Section 23 replaced

Section 23 is repealed and the following section is inserted instead —

“

23. Person not to be compensated twice

- (1) Compensation under this Act is not payable in respect of anything to the extent that —
- (a) compensation has been received under the laws of a place other than this State; or
 - (b) judgment has been obtained against the employer independently of this Act.
- (2) If a person receives compensation under this Act and, for the same matter, subsequently —
- (a) receives compensation under the laws of a place other than this State; or
 - (b) obtains judgment against the employer independently of this Act,

the person from whom compensation under this Act is received may, in a court of competent jurisdiction, sue and recover from the person the amount described in subsection (3).

- (3) The amount that is recoverable under subsection (2) is —
- (a) the amount of compensation paid under this Act; or
 - (b) the amount of compensation received under the laws of a place other than this State or for which judgment was obtained independently of this Act,
- whichever is less.

”.

9. Part III Division 1a inserted

After section 23 the following Division is inserted —

“

Division 1a — Determination by courts and recognition of determination

23A. Definition

In this Division —

“**court**” includes a tribunal constituted by a judicial officer.

23B. Determination of State with which worker's employment is connected in proceedings under this Act

- (1) If the question of whether this State is connected with a worker's employment arises in proceedings in a court in relation to a claim for compensation under this Act, that court must —
- (a) determine the State with which the worker's employment is connected in accordance with section 20; and

(b) cause that determination to be entered in the records of the court.

(2) Subsection (1) does not apply if there is a determination that is to be recognised under section 23D.

23C. Determination by the District Court of State with which worker's employment is connected

(1) If a claim for compensation has been made under this Act, a party to the claim may apply to the District Court for a determination of the question of which State is the State with which the worker's employment is connected.

(2) The District Court must determine an application under subsection (1) in accordance with section 20 and cause that determination to be entered in the records of the court.

(3) An application under subsection (1) is not to be made or heard if there is a determination that is to be recognised under section 23D.

23D. Recognition of previous determinations

(1) This section applies if a determination of the State with which a worker's employment is connected has been made —

(a) by a court of this State under section 23B or 23C;

(b) by a court of another State under a provision of a law that corresponds with section 23B or 23C; or

(c) by a court of this State or another State in the course of proceedings on a claim for damages to which Part IV Division 1a applies or to

which provisions of a law of another State corresponding to that Division apply.

- (2) The State determined as mentioned in subsection (1) is to be recognised for the purposes of this Act as the State with which the worker's employment is connected.
- (3) This section does not prevent any appeal relating to the determination.
- (4) If the determination is altered on appeal, the altered determination is to be recognised under subsection (2).

23E. Determination may be made by consent

In this Division a reference to a determination made by a court in a proceeding includes a reference to a determination made by the court with the consent of the parties to the proceeding.

”.

10. Part IV Division 1a inserted

Before the heading to Part IV Division 2 the following Division is inserted —

“

Division 1a — Choice of law

93AA. The applicable substantive law for work disability claims

- (1) If there is an entitlement to compensation under the statutory workers' compensation scheme of a State in respect of a disability to a worker (whether or not compensation has been paid), the substantive law of that State is the substantive law that governs —
 - (a) whether or not a claim for damages in respect of the disability can be made; and

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- (b) if it can be made, the determination of the claim.
- (2) This Division does not apply if compensation is payable in respect of the disability under the statutory workers' compensation scheme of more than one State.
- (3) For the purposes of this section, compensation is considered to be payable under a statutory workers' compensation scheme of a State in respect of a disability if compensation in respect of it —
 - (a) would have been payable but for a provision of the scheme that excludes the worker's right to compensation because the disability is attributable to any conduct or failure of the worker that is specified in that provision; or
 - (b) would have been payable if a claim for that compensation had been duly made, and (where applicable) an election to claim that compensation (instead of damages) had been duly made.
- (4) A reference in this section to compensation payable in respect of a disability does not include a reference to compensation payable on the basis of the provisional acceptance of liability.

93AB. Claims to which Division applies

- (1) This Division applies to a claim for damages or recovery of contribution brought against a worker's employer in respect of a disability that was caused by —
 - (a) the negligence or other tort (including breach of statutory duty) of the worker's employer; or
 - (b) a breach of contract by the worker's employer.

- (2) This Division also applies to a claim for damages or recovery of contribution brought against a person other than a worker's employer in respect of a disability if —
- (a) the worker's employment is connected with this State; and
 - (b) the negligence or other tort or the breach of contract on which the claim is founded occurred in this State.
- (3) Subsection (1)(a) and subsection (2) apply even if damages resulting from the negligence or other tort are claimed in an action for breach of contract or other action.
- (4) A reference in this Division to a worker's employer includes a reference to —
- (a) a person who is vicariously liable for the acts of the employer; and
 - (b) a person for whose acts the employer is vicariously liable.

93AC. What constitutes disability and employment

For the purposes of this Division —

- (a) **“disability”, “employer” and “worker”** include anything that is within the scope of a corresponding term in the statutory workers' compensation scheme of another State; and
- (b) the determination of what constitutes employment or whether or not a person is a worker or a worker's employer is to be made on the basis that those concepts include anything that is within the scope of a corresponding concept in the statutory workers' compensation scheme of another State.

93AD. Claim in respect of death included

For the purposes of this Division, a claim for damages in respect of death resulting from a disability is to be considered as a claim for damages in respect of the disability.

93AE. Meaning of “substantive law”

In this Division —

“a State’s legislation about damages for a work related disability” means —

- (a) for this State — Division 2;
- (b) for another State — any provisions of a law of that State that is declared by the regulations to be the State’s legislation about damages for a work related disability;

“substantive law” includes —

- (a) a law that establishes, modifies, or extinguishes a cause of action or a defence to a cause of action;
- (b) a law prescribing the time within which an action must be brought (including a law providing for the extension or abridgment of that time);
- (c) a law that provides for the limitation or exclusion of liability or the barring of a right of action if a proceeding on, or arbitration of, a claim is not commenced within a particular time limit;
- (d) a law that limits the kinds of injury, loss or damage for which damages or compensation may be recovered;
- (e) a law that precludes the recovery of damages or compensation or limits the amount of

- damages or compensation that can be recovered;
- (f) a law expressed as a presumption, or rule of evidence, that affects substantive rights; and
 - (g) a provision of a State's legislation about damages for a work related disability, whether or not it would be otherwise regarded as procedural in nature,
- but does not include a law prescribing rules for choice of law.

93AF. Availability of action in another State not relevant

- (1) It makes no difference for the purposes of this Division that, under the substantive law of another State —
 - (a) the nature of the circumstances is such that they would not have given rise to a cause of action had they occurred in that State; or
 - (b) the circumstances on which the claim is based do not give rise to a cause of action.
- (2) In subsection (1) —

“another State” means a State other than the State with which the worker's employment is connected.

”.

11. Section 170 amended

- (1) After section 170(3) the following subsections are inserted —

“

 - (3a) It is a defence to a prosecution for an offence under this section of failing to comply with section 160(1) or (2) in respect of a worker if the court is satisfied that at the time of the alleged offence the employer believed on reasonable grounds that the employer could not be liable under this Act in respect of the worker because

”

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under section 20 the worker's employment was not connected with this State.

- (3b) If the employer's belief on reasonable grounds was that under section 20 the worker's employment was connected with another State, subsection (3a) does not apply unless at the time of the alleged offence the employer had workers' compensation cover in respect of the worker under the law of that other State.

”.

- (2) After section 170(6) the following subsection is inserted —

“

- (7) In subsection (3b) —

“workers' compensation cover” means insurance or registration required under the law of a State in respect of liability for statutory workers' compensation under that law.

”.

12. Section 174 amended

After section 174(5) the following subsection is inserted —

“

- (5a) Despite any other provisions of this section, if the Commission is satisfied that the reason for the employer not being insured against liability to pay compensation to the worker is that the employer believed on reasonable grounds that the employer could not be liable under this Act in respect of the worker because under section 20 the worker's employment was not connected with this State, the employer is not liable to the Commission for any amount paid by the Commission under this section.

”.

13. Schedule 6 inserted

After Schedule 5 the following Schedule is inserted —

“

Schedule 6 — Adjacent areas

[s. 20]

1. Terms used in this Schedule

In this Schedule —

“**continental shelf**” and “**territorial sea**” have the same meanings as those terms have in the Seas and Submerged Lands Act;

“**Petroleum Act**” means the *Petroleum (Submerged Lands) Act 1967* of the Commonwealth;

“**Seas and Submerged Lands Act**” means the *Seas and Submerged Lands Act 1973* of the Commonwealth.

2. Adjacent areas

- (1) The “**adjacent area**” for New South Wales, Victoria, South Australia or Tasmania is so much of the area described in Schedule 2 to the Petroleum Act in relation to that State as is within the outer limits of the continental shelf and includes the space above and below that area.
- (2) The “**adjacent area**” for Queensland is —
 - (a) so much of the area described in Schedule 2 to the Petroleum Act in relation to Queensland as is within the outer limits of the continental shelf;
 - (b) the Coral Sea area (within the meaning of subsection (7) of section 5A of the Petroleum Act other than the territorial sea within the Coral Sea area;
 - (c) the areas within the outer limits of the territorial sea adjacent to certain islands of Queensland as determined by proclamation on 4 February 1983 under section 7 of the Seas and Submerged Lands Act; and

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- (d) the space above and below the areas described in paragraphs (a), (b) and (c).
- (3) The “**adjacent area**” for Western Australia is so much of the area described in Schedule 2 to the Petroleum Act in relation to Western Australia as —
- (a) is within the outer limits of the continental shelf; and
- (b) is not within Area A of the Zone of Cooperation, and includes the space above and below that area.
- (4) The “**adjacent area**” for the Northern Territory is —
- (a) so much of the area described in Schedule 2 to the Petroleum Act in relation to the Northern Territory as —
- (i) is within the outer limits of the continental shelf; and
- (ii) is not within Area A of the Zone of Cooperation;
- (b) the adjacent area for the Territory of Ashmore and Cartier Islands (within the meaning of subsection (3) of section 5A of the Petroleum Act) other than the territorial sea within that area; and
- (c) the space above and below the areas described in paragraphs (a) and (b).
- (5) However, the adjacent area for a State does not include any area inside the limits of any State or Territory.

”.

Division 2 — Transitional

14. Transitional provisions

- (1) In this section —
- “**amendments**” means amendments made to the principal Act by this Act;

“commencement day” means the day on which this Part comes into operation;

“principal Act” means the *Workers' Compensation and Rehabilitation Act 1981*,

and other terms used have meanings consistent with the meanings they have in the principal Act.

- (2) The amendments do not apply in respect of a disability that occurred before the commencement day, and the principal Act applies in respect of such a disability as if the amendments had not been made.
- (3) If the death of a worker results from both a disability that occurred before the commencement day and a disability that occurred on or after that day, the worker is, for the purposes of the application of the amendments to and in respect of the death of the worker, to be treated as having died as a result of the disability that occurred on or after that day.
- (4) If a period of incapacity for work resulted both from a disability that occurred before the commencement day and a disability that occurred on or after that day, the incapacity is, for the purposes of the application of the amendments to and in respect of that incapacity for work, to be treated as having resulted from a disability that occurred on or after that day.
- (5) Neither the amendments nor subsections (3) and (4) affect the apportionment of liability under Part III Division 6 of the principal Act in a case where one or more of the disabilities concerned occurred before the commencement day and one or more occurred on or after that day.
- (6) A policy of insurance that an employer has against liability under the principal Act and that is in force at the beginning of the commencement day covers the employer, for as long as the policy remains in force, for the employer's liability under the principal Act as amended by this Act.

Part 3 — Further amendments

15. The Act amended

Except as otherwise indicated, the amendments in this Part are to the *Workers' Compensation and Rehabilitation Act 1981** as amended by Part 2 Division 1.

[* *Reprinted as at 14 September 2001.*

*For subsequent amendments see Western Australian
Legislation Information Tables for 2003, Table 1, p. 438-9.]*

16. References to “a disability” changed to “an injury”

The provisions specified in the Table to this section are amended by deleting “a disability” in each place where it occurs and inserting instead —

“ an injury ”.

Table

s. 16(2)	s. 93AD
s. 93AA(1), (3) and (4)	s. 14(2), (3) and (4) of this Act
s. 93AB(1) and (2)	

17. References to “disability” changed to “injury”

- (1) Section 93AC(a) is amended by deleting “disability” and inserting instead —

“ **injury** ”.

- (2) Section 93AD is amended by deleting “disability” in the second place where it occurs and inserting instead —

“ injury ”.

- (3) Section 93AE is amended as follows:

- (a) in the definition of “a State’s legislation about damages for a work related disability” by deleting “disability” in the first place where it occurs and inserting instead —

“ **injury** ”;

(b) in paragraph (b) of the definition of “a State’s legislation about damages for a work related disability” by deleting “disability” and inserting instead —

“ injury ”;

(c) in paragraph (g) of the definition of “substantive law” by deleting “disability” and inserting instead —

“ injury ”.

(4) Section 20(3) and (6)(a) and section 93AA(1)(a), (2) and (3)(a) are amended by deleting “disability” in each place where it occurs and inserting instead —

“ injury ”.

(5) Section 14(3) of this Act is amended by deleting “disability” in the third place where it occurs and inserting instead —

“ injury ”.

18. References to “the Commission” changed to “WorkCover WA”

Section 174(5a) is amended by deleting “the Commission” in each place where it occurs and inserting instead —

“ WorkCover WA ”.

19. Reference to “disabilities” changed to “injuries”

Section 14(5) of this Act is amended by deleting “disabilities” and inserting instead —

“ injuries ”.

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