

Western Australia

**Workers' Compensation (Common Law  
Proceedings) Act 2004**

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As at 25 Oct 2004

No. 35 of 2004

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# Workers' Compensation (Common Law Proceedings) Act 2004

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Western Australia

## **Workers' Compensation (Common Law Proceedings) Act 2004**

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**No. 35 of 2004**

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**An Act to —**

- **make provision for certain applications and proceedings relating to the awarding of damages to workers; and**
- **amend the *Workers' Compensation and Rehabilitation Act 1981* and the *Employers' Indemnity Supplementation Fund Act 1980*.**

[Assented to 25 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 (Common Law Proceedings) Act 2004*.

### **2. Commencement**

- (1) Except as stated in subsection (2), this Act comes into operation on the day on which it receives the Royal Assent.
- (2) Section 5(1) and (2) are deemed to have come into operation on 5 October 1999.

### **3. Purpose**

The purposes of this Act are —

- (a) to ensure that so far as is equitable the intention of Parliament in enacting section 32 of the *Workers' Compensation and Rehabilitation Amendment Act 1999*, as stated by the Minister for Labour Relations in the Legislative Assembly on 21 October 1999 (*Parliamentary Debates* (Hansard) at 2456), is given effect; and
- (b) to ensure that workers are not disadvantaged by the effect of certain decisions of the Supreme Court in relation to the operation of section 93D of the *Workers' Compensation and Rehabilitation Act 1981*.

**Part 2 — Provisions relating to section 32 of the  
*Workers' Compensation and Rehabilitation Amendment  
Act 1999***

**4. Terms used in this Part**

- (1) In this Part, unless the contrary intention appears —
  - “1999 Act”** means the *Workers' Compensation and Rehabilitation Amendment Act 1999*;
  - “amended provisions”** means sections 93A to 93G of the *Workers' Compensation and Rehabilitation Act 1981* as amended from time to time;
  - “assent day”** has the same meaning as in section 32(6) of the 1999 Act;
  - “former provisions”** has the same meaning as in section 32(6) of the 1999 Act.
- (2) Unless the contrary intention appears, words and expressions used in this Part have the same meaning as they have in the *Workers' Compensation and Rehabilitation Act 1981*.

**5. Provisions applying to awarding of damages**

- (1) This section —
  - (a) is to be read in conjunction with section 32 of the 1999 Act as if this section were incorporated with and formed part of that section; and
  - (b) applies in addition to section 32(7) of the 1999 Act.
- (2) Despite section 37 of the *Interpretation Act 1984* and any other law, written or unwritten but except as otherwise stated in subsection (3) or in the amended provisions —
  - (a) the amended provisions apply to, and affect the awarding of damages in, a proceeding; and

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- (b) the former provisions do not apply to, or affect the awarding of damages in, a proceeding,

unless it is a proceeding —

- (c) commenced before the assent day; or
- (d) for the commencement of which a court gave leave under the former provisions before the assent day.

- (3) Despite subsection (2), section 37 of the *Interpretation Act 1984* and any other law, written or unwritten, but except as otherwise stated in section 6(4) —

- (a) the amended provisions do not apply to, or affect the awarding of damages in, a proceeding; and
- (b) the former provisions apply to, and affect the awarding of damages in, a proceeding,

that is a proceeding —

- (c) commenced on or before the day on which this Act receives the Royal Assent with the leave of a court under the former provisions; or
- (d) for the commencement of which a court gave leave under the former provisions on or before the day on which this Act receives the Royal Assent or on District Court file number WC 93D 1194/1998.

**6. Existing determinations unaffected**

- (1) In this section —

**“determination”** includes a decision, ruling, order, award, judgment, settlement or agreement but does not include a determination in respect of a proceeding referred to in section 5(2)(c) or (d).

- (2) Where a determination was given, made or registered after the assent day on the basis that the amended provisions, and not the former provisions, applied, the fact that the determination was given, made, or registered on that basis is not a reason for —
  - (a) the determination to be rescinded, set aside, altered or amended;
  - (b) the determination to be subject to appeal, review or challenge in any way; or
  - (c) the worker to be entitled to any further payment under the provisions of the *Workers' Compensation and Rehabilitation Act 1981* or any other law, written or unwritten.
- (3) No determination given, made, or registered after the assent day is invalid or less effective by reason that it was given, made or registered on the basis that the amended provisions, and not the former provisions, applied.
- (4) Section 5(3) does not apply if the cause of action to which a proceeding relates is the subject of an award of damages, settlement or agreement to which subsections (2) and (3) apply.

**7. Jurisdiction removed and workers' costs indemnified**

- (1) In this section —

**“commencement day”** means the day on which this Act receives the Royal Assent;

**“former provisions matter”** means —

  - (a) an application for leave to commence proceedings under the former provisions;
  - (b) an application for leave to appeal from a refusal to grant leave to commence proceedings under the former provisions;
  - (c) an appeal from a refusal to grant leave to commence proceedings under the former provisions; or

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- (d) a proceeding to which section 5(3) would have applied but for the operation of section 6(4), but does not include an application, appeal or proceeding on or relating to District Court file number WC 93D 1194/1998.
- (2) On and after the commencement day no court may hear or determine a former provisions matter.
- (3) Any former provisions matter that has been commenced but not determined before the commencement day is a nullity, and is taken to have been dismissed by operation of this subsection with no order for costs.
- (4) A worker who, during the period commencing on 4 December 2003 and ending on the day on which this Act receives the Royal Assent, has incurred legal costs in commencing or continuing a former provisions matter that is taken to have been dismissed by operation of subsection (3), is entitled to be paid reasonable costs so incurred.
- (5) The Executive Director may determine what are reasonable costs for the purposes of subsection (4).
- (6) If the worker disputes the determination of the Executive Director, the Executive Director is to refer the matter to a registrar of the District Court or a taxing officer of the Supreme Court who may determine what are reasonable costs as if the determination were a taxation of costs.
- (7) Costs that a person is entitled to be paid under this section are payable from the General Fund.

### **Part 3 — Amendments to other Acts**

#### **8. The Act amended**

The amendments in this Part, other than the amendment in section 12, 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.]*

#### **9. Section 93E amended**

- (1) Section 93E(5) is amended by inserting after “subsections (6)” —

“ , (6a), ”.

- (2) After section 93E(6) the following subsection is inserted —

“

- (6a) Despite subsection (5) and even though subsection (6) does not apply, if the Director gives the worker notice under section 93EA(5)(b)(i) or 93EB(5)(b)(i) that this subsection applies an election can be made under subsection (3)(b) within 14 days after the Director subsequently gives the worker notice in writing that an agreement or determination of the question has been recorded.

”.

**10. Sections 93EA, 93EB, and 93EC inserted**

After section 93E the following sections are inserted —

“

**93EA. Referring questions with fresh evidence in particular cases**

- (1) Unless it does not apply because of subsection (2), subsection (3) applies if —
  - (a) on or before 30 September 2001, a worker —
    - (i) sought to refer a question to the Director under section 93D(5); and
    - (ii) in order to satisfy section 93D(6), produced to the Director anything that, even though it may not have constituted evidence of the kind required by that subsection, was accepted by the Director as evidence of that kind;and
  - (b) the Director treated the question as having been referred under section 93D(5), after which, for a reason based on a failure to satisfy the requirements of section 93D(6) for a referral under section 93D(5) —
    - (i) a review officer did not deal with the substance of the question; or
    - (ii) a court set aside or quashed a decision of a review officer that dealt with the substance of the question.
- (2) If the question is whether the worker's degree of disability is not less than 16%, subsection (3) does not apply unless the production of what was produced as referred to in subsection (1)(a)(ii) and the purported referral of the question both occurred —

- (a) not less than 21 days before the termination day; or
  - (b) before a day fixed under section 93E(7) by the Director.
- (3) If this subsection applies, the worker may, within the time limited by subsection (4)(b) and otherwise in accordance with subsection (4), refer to the Director under section 93D(5) the same question as is mentioned in subsection (1)(a)(i), relating to the same disability and only that disability.
- (4) A question can only be referred under subsection (3) if —
- (a) the referral is made in writing in a form specified in the regulations stating that the worker is also acting under subsection (3);
  - (b) the referral is made —
    - (i) within the period of 3 months commencing after the day on which section 10 of the *Workers' Compensation (Common Law Proceedings) Act 2004* comes into operation (called the “**commencement day**” in subparagraph (ii)); or
    - (ii) if subsection (1)(b)(ii) applies and the decision is set aside or quashed after the commencement day, within the period of 3 months commencing after the day on which the decision is set aside or quashed;
- and
- (c) when referring the question to the Director, the worker produces to the Director evidence relating to the disability that complies with

section 93D(6), or satisfies the Director that complying evidence has already been produced to the Director.

- (5) If a worker seeks to make a referral under section 93D(5) stating that it is also made under subsection (3) of this section, the Director is required, as soon as practicable, to notify the worker and the employer, in accordance with the regulations —
- (a) whether or not the Director is of the opinion that evidence complying with section 93D(6) has been produced and in all other respects the referral is properly made; and
  - (b) if the Director —
    - (i) is of that opinion, that the referral is accepted and section 93E(6a), if relevant, and section 93EC apply;
    - (ii) is not of that opinion, that the referral sought to be made by the worker is not accepted.

**93EB. Referring questions in certain other cases**

- (1) Unless it does not apply because of subsection (2), subsection (3) applies if —
- (a) before the coming into operation of section 10 of the *Workers' Compensation (Common Law Proceedings) Act 2004*, a worker sought to refer a question to the Director under section 93D(5);
  - (b) on or after 4 December 2003, on the basis that Part IV Division 2 as in force before it was amended by section 32 of the *Workers' Compensation and Rehabilitation Amendment Act 1999* applied to proceedings for the awarding of the damages concerned —

- (i) a review officer did not deal with the substance of the question; or
    - (ii) a court set aside or quashed a decision of a review officer that dealt with the substance of the question;
  - and
  - (c) after the coming into operation of section 10 of the *Workers' Compensation (Common Law Proceedings) Act 2004*, section 93D(5) applies and the worker wishes to refer the question to the Director under that section.
- (2) If the question is whether the worker's degree of disability is not less than 16%, subsection (3) does not apply unless the purported referral of the question occurred —
- (a) not less than 21 days before the termination day; or
  - (b) before a day fixed under section 93E(7) by the Director.
- (3) If this subsection applies, the worker may, within the time limited by subsection (4)(b) and otherwise in accordance with subsection (4), refer to the Director under section 93D(5) the same question as is mentioned in subsection (1)(a), relating to the same disability and only that disability.
- (4) A question can only be referred under subsection (3) if —
- (a) the referral is made in writing in a form specified in the regulations stating that the worker is also acting under subsection (3);
  - (b) the referral is made —

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- (i) within the period of 3 months commencing after the day on which section 10 of the *Workers' Compensation (Common Law Proceedings) Act 2004* comes into operation (called the “**commencement day**” in subparagraph (ii)); or
    - (ii) if subsection (1)(b)(ii) applies and the decision is set aside or quashed after the commencement day, within the period of 3 months commencing after the day on which the decision is set aside or quashed;

and

  - (c) when referring the question to the Director, the worker produces to the Director evidence relating to the disability that complies with section 93D(6), or satisfies the Director that complying evidence has already been produced to the Director.
- (5) If a worker seeks to make a referral under section 93D(5) stating that it is also made under subsection (3) of this section, the Director is required, as soon as practicable, to notify the worker and the employer, in accordance with the regulations —
- (a) whether or not the Director is of the opinion that evidence complying with section 93D(6) has been produced and in all other respects the referral is properly made; and
  - (b) if the Director —
    - (i) is of that opinion, that the referral is accepted and section 93E(6a), if relevant, and section 93EC apply;

- (ii) is not of that opinion, that the referral sought to be made by the worker is not accepted.

**93EC. Extended time for commencing proceedings**

If —

- (a) under section 93EA(5)(b)(i) or 93EB(5)(b)(i), the Director notifies a worker that the referral of a question relating to a disability is accepted and that this section applies; and
- (b) the time limited by any written law for the commencement of an action seeking damages in respect of the disability —
  - (i) has elapsed before the day on which the Director notifies the worker (the “**notification day**”); or
  - (ii) is due to elapse on the notification day or before the expiry of a period of 2 years after the notification day,

an action seeking damages in respect of the disability may, despite that written law, be commenced at any time before the expiry of a period of 2 years after the notification day.

”.

**11. Section 154AC inserted**

Before the heading to Part IX the following section is inserted —

“

**154AC. Regulations for subsidy from Supplementation Fund**

- (1) The regulations may authorise the Commission to approve an application by an employer for

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reimbursement of the cost of paying an award of damages to which Part IV Division 2 applies in a case in which a question as to the worker's degree of disability was referred under section 93EA(3) to the extent, if any, to which the cost exceeds the amount ascertained in accordance with regulations made for the purposes of this section.

- (2) The amount of any reimbursement approved under the regulations is to be paid by the Commission to the employer and charged against the Employers' Indemnity Supplementation Fund established under section 5(1) of the *Employers' Indemnity Supplementation Fund Act 1980*.

”.

**12. *Employers' Indemnity Supplementation Fund Act 1980*  
amended**

- (1) The amendment in this section is to the *Employers' Indemnity Supplementation Fund Act 1980*\*.

[\* *Reprint 2 as at 16 May 2003.*]

- (2) Section 10(fa) is amended by inserting before the semicolon at the end of the paragraph —

“

or section 154AC of the *Workers' Compensation and Rehabilitation Act 1981*

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