

**2009**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**WORKERS COMPENSATION (DEFAULT INSURANCE FUND)  
AMENDMENT BILL 2009 (NO 2)**

**EXPLANATORY STATEMENT**

**Presented by  
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## **Workers Compensation (Default Insurance Fund) Amendment Bill 2009 (No 2)**

### **OUTLINE**

The *Workers Compensation Act 1951* (the WC Act) establishes a statutory workers' compensation scheme for the Territory's private sector (the ACT Scheme) that obliges employers to compensate workers who suffer an injury arising 'out of, or in the course of' their employment (a compensable injury).

Since its enactment, the WC Act has undergone significant amendment in 2001 and more recently, in 2006. Under the pre-2006 arrangements the workers' compensation:

- Supplementation Fund operated under the *Workers Compensation Supplementation Fund Act 1980* and indemnified those employers who held a current workers' compensation policy with a collapsed insurer; and
- Nominal Insurer operated within the auspices of Chapter 8 of the WC Act and provided insured workers with access to compensation payable under that Act where the employer was not covered by a compulsory workers' compensation policy. The Nominal Insurer did not indemnify uninsured employers.

The Default Insurance Fund (the DI Fund) was created following legislative amendments in 2006 which merged these two entities into the one function.

The DI Fund meets the costs of workers' compensation claims where a worker suffers a compensable injury but their employer:

- does not have a workers' compensation insurance policy (the Uninsured Employer arm of the DI Fund, previously the Nominal Insurer); or
- has a policy, but the insurer has collapsed (the Collapsed Insurer arm of the DI Fund, previously the Supplementation Fund).

The sole purpose of the DI Fund (Uninsured Employer arm) is to provide a safety net to ACT workers to ensure that they have access to timely and appropriate medical treatment, rehabilitation and compensation in the event that they suffer a compensable injury.

However, the amalgamation and amendment of various provisions of the WC Act has resulted in some unintended consequences in relation to the operation of the Uninsured Employer arm of the DI Fund. In particular, the class of persons who are eligible to claim against the DI Fund has, over time, being widened beyond injured workers and their dependents or representatives. Consequently, the DI Fund has become subject to claims for:

- indemnity in respect of the cost of workers' compensation claims made to principal contractors by injured employees of uninsured subcontractors; and
- satisfaction of judgements made against an uninsured employers.

For these reasons, the *Workers Compensation (Default Insurance Fund) Amendment Bill 2009 (No 2)* proposes a range of improvements the ACT Scheme that will restore

the Uninsured Employer arm of the DI Fund to its intended role – that of a safety net to ensure that injured workers have access to adequate and timely compensation benefits. The proposed amendments will assist to ensure those employers who do not comply with their workers' compensation obligations under law will not receive an advantage over those employers who do comply with their obligations.

In doing so, the Government intends to improve the efficient and effective management of the DI Fund and, by extension, reduce the cost to employers of participating in the ACT Scheme. To further this goal, the *Workers Compensation (Default Insurance Fund) Amendment Bill 2009 (No 2)* also introduces amendments that will implement a revised funding model through which the DI Fund raises capital. The amendments will bring the funding model into line with standard insurance practice and ensure that it operates in a manner that is sustainable and consistent with principles of robust prudential management.

At the cornerstone of the proposed funding model for the DI Fund are the following principles:

- appropriate governance and accountability;
- solvency – maintenance of adequate assets to discharge liabilities;
- application of levies for the purpose of funding the operations of the DI Fund and liabilities arising from the Uninsured arm of the DI Fund;
- incremental transition;
- annual calculation of ongoing contributions taking into account assets, existing and expected liabilities of the Fund and any other relevant factors; and
- capacity to call upon insurers and self-insurers, in exceptional circumstances, where the DI Fund has insufficient assets with which to discharge its statutory functions.

The *Workers Compensation (Default Insurance Fund) Amendment Bill 2009 (No 2)* will assist to ensure the DI Fund operates in a fair and equitable manner across the employer market and remains a viable safety net for injured workers well into the future.

## **Workers Compensation (Default Insurance Fund) Amendment Bill 2009 (No 2)**

### **Detail**

#### **Clause 1 — Name of Act**

This is a technical clause that names the Act. This Act is the *Workers Compensation (Default Insurance Fund) Amendment Act 2009 (No 2)*.

#### **Clause 2 — Commencement**

This Act commences on a staged basis, as follows:

- Clauses 3-6, 10 and 15-19 commence on the day after notification of the Act;
- The remaining provisions commence on a day fixed by the Minister by written notice. Commencement of the provisions regarding the DI Fund contributions will align with the insurer rate and premium notification cycle.

#### **Clause 3 — Legislation amended**

This clause identifies the Act to be amended, namely the *Workers Compensation Act 1951*.

#### **Clause 4 — Liability of principal for uninsured contractor's injured worker - section 13**

Previously, the WC Act made provision for a principal to seek indemnity from the DI Fund in circumstances where a subcontractor engaged by the principal was uninsured and a worker employed by the subcontractor suffered a compensable injury.

On a practical level, this meant that a principal who had not fulfilled their due diligence obligations in respect of their subcontractor's insurance arrangements was not penalised for that failure - the principal simply recovered their costs from the Uninsured Employer arm of the DI Fund and the Fund bore the consequences of the subcontractor's actions.

Endowing the DI Fund with responsibility for responding to these claims undermines the compliance objectives and principles of individual employer responsibility that underpin the governance framework on which the ACT Scheme is based.

As amended, section 13 refines the circumstances in which a principal can seek indemnity from the DI Fund Manager in relation to workers' compensation claims made by employees of an uninsured subcontractor. The section will return responsibility for conducting due diligence checks, and the consequences of failing to do so, to principals by limiting their avenues to seek indemnity from the DI Fund to circumstances where:

- the principal has a compulsory insurance policy in force that applies to the injured worker in relation to the compensable injury; but

- the policy was issued by an insurer that cannot provide the indemnity required to be provided under the policy or the insurer has been wound up.

#### **Clause 5 — DI Fund Manager required to pay weekly compensation – section 30**

Section 30 will be repealed and a revised form of the repealed provision inserted in Chapter 8 of the WC Act to align with the functions and purpose of the DI Fund.

#### **Clause 6 — Purpose of DI fund – section 166A**

Consistent with the amendments to section 13 and the repeal of section 30, this clause amends s166A to reinforce the original statutory purpose of the DI Fund as the default insurer where:

- the employer of the injured worker does not have a compulsory insurance policy to cover the worker for the claim; or
- the employer of the injured worker had a compulsory insurance policy (or was a self-insurer) that applied to the worker for the claim but the issuing insurer has either been wound up under the Corporations Act or cannot provide the indemnity required to be provided under the policy.

#### **Clause 7 — Payments out of the DI Fund – section 166B(1)(d)**

This section will be omitted.

#### **Clause 8 — Borrowing for DI Fund – section 167B(2)(b)**

This section is amended to take into account new section 168AA.

#### **Clause 9 — Assessment of liabilities – New section 167E**

This clause inserts a new section that articulates the process that the DI Fund Manager must undertake in assessing the financial position of the fund. Relevantly, the new section 167E requires that the DI Fund Manager assess the Fund's liabilities having regard to:

- the DI Fund actuary's advice on the Funds existing and expected liabilities - which takes account of variable contingencies related to predicted market conditions for the period of the actuary's assessment. Practically, in any given period, the contingencies factored into the DI Fund actuary's assessment may eventuate in whole or in part;
- the DI Fund's assets – which arise from investment returns, settlements less than anticipated, greater compliance activity, recoveries of contributions from other parties and unexpended contributions; and
- any other relevant information.

#### **Clause 10 – Determination that policy in force despite absence of record – New section 167F**

This clause inserts a new section, based on repealed section 30(e), that provides for the DI Fund manager to determine if a policy of insurance exists if the policy cannot be produced.

The section allows the DI Fund to treat an employer as having a compulsory insurance policy that applied to an injured worker for a claim if for example the issuing insurer has either been wound up under the Corporations Act or cannot provide the indemnity required to be provided under the policy and there is no record of the policy.

#### **Clause 11 – Contributions to DI fund approved insurers and self-insurers – section 168A(1) to (4) and note**

This clause inserts new subsections that incorporate the DI Fund Manager's assessment of the *gross written premium* for each approved insurer and *the notional gross written premium* for each self-insurer, in determining the level of contributions to the Fund required by insurers and self-insurers.

Adoption of this approach will allow for clear and accurate reporting and monitoring of workers' compensation costs, in addition to ensuring that those costs are applied in an equitable manner across the market.

#### **Clause 12 — New Section – section 168A(9)**

This clause introduces statutory definitions for the concepts of *gross written premium* and *notional gross written premium* for the purposes of the DI Fund Manager's assessment under s 168A. Introduction of these definitions facilitates transparency and certainty in the process adopted by the DI Fund Manager in determining the level of contributions to the Fund required by insurers and self-insurers.

#### **Clause 13 — New Section – section 168AA**

This clause recognises the potential for unexpected or exceptional claims to be made to the DI Fund which result in additional expenses for the Fund that were not reasonably foreseeable at the time of the DI Fund Manager's determination of annual insurer contributions for a particular year.

The clause is intended to facilitate sustainable operation of the DI Fund by providing a mechanism for the DI Fund manager to meet the cost of any such unexpected claims through the determination and apportionment of a supplementary annual insurer contribution payable by approved insurers and self-insurers. The mechanism is only available to be called upon in respect of unexpected claims that the DI Fund Manager considers will be settled within the year in respect of which insurer contributions have already been paid. If the DI Fund Manager considers that the unexpected claim will not settle within the year for which contributions have already been made, the DI Fund Manager is to account for expenses arising in connection with the claim in assessing the Fund's liabilities for the following period.

**Clause 14 — Surplus from excess annual insurer contributions – section 168B**

Section 168B will be repealed.

**Clause 15 — Who may make a claim for payment - section 170**

Section 170 deals with the class of persons who are eligible to access benefits in relation to the compensable injury in circumstances where the DI Fund is the mechanism for that access. As amended, the section will assist to restore the Uninsured Employer arm of the DI Fund its intended role by allowing a worker or their representative, dependent or estate (if they are deceased) to make a claim for payment of benefits against the DI Fund.

This clause amends section 170 to clarify who may make a claim for compensation, and is consistent with the improvements made to section 13 (see clause 4) and section 166A, and reflects the governments intentions to restore the Uninsured Employer arm of the DI Fund to its intended purpose, while pushing back responsibility for due diligence to principals and insurers.

**Clause 16 — Claim for payment – self insurers– New section 170HA and 170HB**

This clause inserts two new sections to clarify the operation of the DI Fund with regard to self-insurers.

**Clause 17 — DI fund paying claims for payment if liability not completely recovered by a compulsory insurance policy and settlement approved – section 171D(1)(a) and note**

This clause amends section 171D to reflect amendments made to section 170 and the class of persons who are eligible to make a claim for payment of benefits to the DI Fund.

**Clauses 18 & 19 —DI fund paying claims for payment against approved insurers settlement approved – section 171E(1)(a)**

These clauses amend section 171E to reflect amendments made to section 170 and the class of persons who are eligible to make a claim for payment of benefits to the DI Fund.