

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

**WORKERS COMPENSATION AMENDMENT BILL 2006
AMENDMENTS TO THE *WORKERS COMPENSATION ACT 1951***

REVISED EXPLANATORY STATEMENT

Circulated by authority of
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Overview

The ACT private sector workers' compensation scheme provides compensation to injured workers for injuries arising out of or in the course of their employment. The purpose of the Workers Compensation Amendment Bill 2006 is to amend the *Workers Compensation Act 1951* (the Act) to:

- ensure all family day care and in-home care carers in the ACT are covered by the Act;
- address an anomaly relating to pre-incapacity weekly earnings;
- include rehabilitation treatment as part of the compensation an injured worker is entitled to; and
- enable access to workers compensation for women up until the age of 65 years.

Family day care and in-home care carers

There are currently five Australian Government approved family day care services and two Australian Government approved in-home care services operating in the ACT. Four of the family day care services and one of the in-home care services employ carers under the *Family Day Care (Australian Capital Territory) Award 1999*. The carers who work in these services are employees and are covered by the Act.

Family day care and in-home care carers who are not employed under the award are considered self employed. Responsibility for obtaining workers' compensation coverage for these carers has not been clear. To clarify the responsibility, the Bill will introduce amendments which will allow the Minister to declare that people engaged by approved services will be treated as workers of the service under the Act. The declaration as "workers" will only apply for the purposes of the Act. This will ensure that all ACT family day care and in-home care carers registered with Australian Government approved services will have access to workers' compensation entitlements.

Ceasing access to compensation at pension age – ensuring equality of access for women

Currently the Act defines pension age by reference to the *Social Security Act 1991* (Commonwealth). Men qualify for the pension at age 65 years. For women born before 1948 the pension age ranges between 60 years and 64 years and six months. The effect of this is that a woman born before 1948 who is injured more than two years before her pension age will have a shorter period of entitlement to workers compensation benefits than a man of the same age with a similar level of injury or incapacity. Replacing the words "pension age" with "65" will remove this inconsistency from the Act.

Anomaly between section 39 and 42

There is currently an anomaly between sections 39 and 42 of the Act as amended by the *Workers Compensation Amendment Act 2006*. Under section 39, for the first 26 weeks of partial incapacity the worker is entitled to receive compensation equal to the difference between the worker's average pre-incapacity weekly earnings and the average weekly amount that the worker is being paid for working or could earn in reasonably available suitable employment.

Section 42 provides for payment of weekly compensation to a worker after 26 weeks of partial incapacity. This provision refers only to the “weekly amount the worker is being paid for working” with no provision for taking into account an amount that could be earned in reasonably available employment. The Bill will make amendments to ensure consistency between these sections.

Definition of compensation – ensuring rehabilitation is included

An ACT Supreme Court decision in 2004 questions the liability of an insurer to pay rehabilitation expenses under the Act. (*Cassandra Ann Andrikis v Nominal Defendant* (2004) ACTSC 243 (11 June 2004)). The decision found that as costs incurred for rehabilitation of a worker are not compensation costs for which an employer is liable, it is not a recoverable cost under the Act. This ruling has the potential to make insurers hesitant to commence meaningful rehabilitation treatment for injured workers. This could affect the integrity of the ACT workers’ compensation scheme and increase the duration of injury and costs to both employers and injured workers. To ensure that rehabilitation continues to be available to injured workers, the Bill will amend the Act to include rehabilitation as a cost that employers and insurers are liable for.

Notes on Clauses

1. Name of the Act

This clause establishes the name of the Act as the *Workers Compensation Amendment Act 2006 (No 2)*.

2. Commencement

This is a formal provision specifying when the Act commences. The Act will commence with the commencement of the *Workers Compensation Amendment Act 2006*. That Act will commence on a day fixed by the Minister in writing. If the Act has not commenced by 1 July 2006, it will automatically commence on that day.

3. Legislation amended

This is a formal provision specifying the name of the Act that is amended. This Act amends the *Workers Compensation Act 1951*.

4. Meaning of worker Chapter 3 heading, note 1

This clause adds “family day care carer (s 16A)” to note 1 under the Chapter 3 heading. This is a consequential amendment from the amendment made by clause 6 of the Bill.

5. Chapter 3 heading, note 2

This clause adds “s 16A (Family day care carers)” to note 2 under the Chapter 3 heading. This is a consequential amendment from the amendment made by clause 6 of the Bill.

6. New Section 16A

This clause inserts a new section 16A to allow the Minister authorised under the Act (currently the Minister for Industrial Relations) to declare that people engaged by approved family day care and in-home care services should be treated as workers for

the purposes of the Act. A declaration will allow a class of individuals to be taken to be workers employed by the person stated in the declaration to be the employer. An individual's employment will be taken to be as stated in the declaration. The Minister may make such a declaration following a request by the family day care or in-home care service. The Minister may also make a declaration under this section on the Minister's own initiative. This will be allowed where the Minister considers that people engaged by an approved family day care or in-home care service should be treated as workers.

The declaration of an employment relationship will only apply for the purposes of the Act.

An anomaly exists between the workers' compensation coverage provided for under different family day care and in-home care services in the ACT. This amendment will address this anomaly and ensure that all family day care and in-home care carers registered with Australian Government approved services will have the same entitlements to workers' compensation across the ACT.

7. Religious workers Section 17(1)

This is a technical amendment omitting the words "in writing" from section 17(1). The *Legislation Act 2001* provides that declarations must be in writing.

8. Compensation for death or incapacity through disease Section 27(2)

This clause deletes the existing subsection 27(2) and replaces it with a new subsection. The clause reorganises the wording in the existing subsection to improve clarity and replaces the word "obtained" with "received" in relation to medical treatment to ensure consistency throughout the Act.

9. Entitlement to weekly compensation for first 26 weeks of incapacity Section 39(3)

This clause removes the words "pension age" and replaces them with "65". Currently the Act defines pension age by reference to the *Social Security Act 1991* (Commonwealth). Men qualify for the pension at age 65 years. For women born before 1948 the pension age ranges between 60 years and 64 years and six months.

The effect of this is that a woman born before 1948 who is injured more than two years before her pension age will have a shorter period of entitlement to workers compensation benefits than a man of the same age with a similar level of injury or incapacity. Replacing the words "pension age" with "65" in section 39(3) of the Act as amended by *Workers Compensation Amendment Act 2006* will remove this inconsistency from the provision which sets out a worker's entitlement to weekly compensation in the first 26 weeks of incapacity.

10. Entitlement to weekly compensation after 26 weeks of incapacity Section 40(4)

This clause proposes to make the same amendment to section 40(4) of the Act as amended by the *Workers Compensation Amendment Act 2006* as the amendment proposed to section 39(3) by clause 9. Replacing the words "pension age" with "65" in section 40(4) will ensure that men and women of the same age, with similar levels

of injury or incapacity, will have the same entitlement to compensation after 26 weeks of incapacity.

11. Entitlement to weekly compensation after 26 weeks of partial incapacity

Section 42(1)

This clause inserts “or could earn in reasonably available suitable employment” after “the weekly amount the worker is being paid for working”. This addresses an anomaly between sections 39 and 42 of the Act as amended by the *Workers Compensation Amendment Act 2006*.

Under section 39, for the first 26 weeks of partial incapacity the worker is entitled to receive compensation equal to the difference between the worker’s average pre-incapacity weekly earnings and the average weekly amount that the worker is being paid for working *or could earn in reasonably available suitable employment*.

Section 42 provides for payment of weekly compensation to a worker after 26 weeks of partial incapacity. This provision refers only to the “weekly amount the worker is being paid for working” with no provision for taking into account an amount that could be earned in reasonably available employment.

This amendment will ensure consistency between the two sections.

12. New Section 42(3)

This clause moves the existing section 42(3) of the Act as amended by the *Workers Compensation Amendment Act 2006* to section 42(4) and inserts a new section 42(3). The new section 42(3) clarifies that, in working out the average weekly income the worker could earn in reasonably available suitable employment, the following matters could be considered:

- suitable employment the worker unreasonably rejects;
- suitable employment that the worker obtains but unreasonably discontinues.

This reflects the language of subsection 39(5) and will ensure consistency in the treatment of suitable employment before and after 26 weeks of incapacity.

13. Section 70

This clause amends section 70 to include the cost of rehabilitation services received by the worker, as outlined in the worker’s personal injury plan, as costs employers are liable to pay.

An ACT Supreme Court decision in 2004 questioned the liability of an insurer to pay rehabilitation expenses under the Act (*Cassandra Ann Andrikis v Nominal Defendant* (2004) ACTSC 43 (11 June 2004)). The decision found that as costs incurred for the rehabilitation of a worker are not compensation costs it is not a recoverable cost for an insurer.

This amendment ensures that employers are liable for costs incurred for rehabilitation services provided to injured workers under their personal injury plan.

14. Claim for compensation for pt 4.5 Section 71(1)

This clause omits “A worker” and substitutes “The worker”. This is a technical amendment that ensures the narrative of the case set out in section 69 of the Act continues through into section 71.

15. Section 73 heading

This clause amends the language of the heading to bring it into line with the rest of the Act.

16. Transport costs other than private car Section 74(1)

This clause omits “to undergo medical treatment” and substitutes “to receive medical treatment or rehabilitation services”. This amendment is consequential to the amendments made by clause 13 of the Bill.

17. Working out transport costs for private cars Section 75(1)

This clause omits “to undergo medical treatment” and substitutes “to receive medical treatment or rehabilitation services”. This amendment is consequential to the amendments made by clause 13 of the Bill.

18. Costs of accommodation and meals Section 76(1), note

This clause removes the note under subsection 76(1). The note refers to a tax ruling for the year 2000-2001, which is no longer relevant.

19. Section 76(3)

This clause amends section 76(3) to include “rehabilitation services” and is consequential to the amendment made by clause 13 of the Bill.

20. Section 86

This clause substitutes the existing section 86 with a new section. The new section 86 extends the application of the definition of “personal injury plan” to the Act. This is consequential to the amendments made by clause 13 of the Bill. The new section also omits the definition of “insurer” as this term is defined in section 86A of the Act as amended by the *Workers Compensation Amendment Act 2006* and in the Dictionary to the Act.

21. Worker’s personal injury plan obligations Section 101(2)

This clause amends section 101(2) to ensure consistency in the use of the terms “medical treatment” and “rehabilitation services” throughout the Act.

22. Section 107

This clause omits everything before subsection 107(2) and substitutes it with a new subsection 107(1). The new subsection 107(1) includes rehabilitation services as a cost the insurer may be required to pay under the worker’s personal injury plan. The clause also replaces the reference to “treatment” in the current subsection with “medical treatment”. This ensures consistency in the use of the term throughout the Act. These amendments clarify that a worker’s personal injury plan may provide for the insurer to pay for both “medical treatment” and “rehabilitation services”.

23. Liability not affected Section 115(b)

This clause omits “rehabilitation, retraining” and substitutes “rehabilitation services”. This amendment is consequential to the inclusion of a new definition for “rehabilitation services” in the Dictionary for the Act through clause 25 of the Bill. The definition of “rehabilitation services” includes training and retraining.

24. Regulation-making power Section 223(2)(f)(iii)

This clause replaces “retraining services” with “rehabilitation services. This amendment is consequential to the inclusion of a new definition for “rehabilitation services” in the Dictionary for the Act through clause 25 of the Bill. The definition of “rehabilitation services” includes training and retraining.

25. Dictionary, definition of pension age

This clause removes the definition of *pension age*. This amendment is consequential to the amendments made by clauses 9 and 10 of the Bill.

26. Dictionary, new definition of rehabilitation services

This clause inserts a definition of *rehabilitation services* into the Act. A new definition for “rehabilitation services” has been introduced as a consequence of amendments made by clause 13 of the Bill. Rehabilitation services include training and retraining services.