

South Australia

**Workers Rehabilitation and Compensation
(Reinstatement of Entitlements) Amendment
Bill 2010**

A BILL FOR

An Act to amend the *Workers Rehabilitation and Compensation Act 1986*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Workers Rehabilitation and Compensation (Reinstatement of Entitlements) Amendment Act 2010*.

5 2—Commencement

This Act will come into operation 12 months after the day on which it is assented to by the Governor unless brought into operation on an earlier day fixed by proclamation.

3—Amendment provisions

- 10 In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Workers Rehabilitation and Compensation Act 1986*

4—Amendment of section 3—Interpretation

- 15 Section 3(1)—after the definition of *dependant* insert:

designated common law liability means a liability at common law within the ambit of section 54(1)(b);

5—Amendment of section 30—Compensability of disabilities

- (1) Section 30(5)—delete "only"
- (2) Section 30(5)(b)—after subparagraph (i) insert:
- (ia) a place of employment at which the worker is employed by
1 employer and a place of employment at which the worker is
employed by another employer (in which case the journey will be
taken to form part of the employment of the worker by that other
employer); or
- (3) Section 30(5)—delete "and there is a real and substantial connection between the
employment and the accident out of which the disability arises"
- (4) Section 30(6)—delete subsection (6) and substitute:
- (6) For the purposes of this section—
- (a) a journey that commences at a worker's residence will not be
regarded as having commenced until the worker has
progressed beyond land appurtenant to the house or other
structure in which the worker resides unless the Corporation
determines in the circumstances of a particular case that the
journey should fairly be regarded as having commenced at
an earlier point; and
- (b) a journey that terminates at a worker's residence will be
regarded as having terminated when the worker reaches land
appurtenant to the house or other structure in which the
worker resides unless the Corporation determines in the
circumstances of a particular case that the journey should
fairly be regarded as having terminated at a later point.

6—Amendment of section 36—Discontinuance of weekly payments

- (1) Section 36(4) to (5c)—delete subsections (4) to (5c) (inclusive) and substitute:
- (4) If a worker lodges a notice of dispute disputing a decision by the
Corporation to discontinue or reduce weekly payments under this
section within 1 month after the worker receives notice of the
decision, the following provisions apply (unless the worker indicates
on the notice of dispute that he or she does not wish for the operation
of the decision to be suspended):
- (a) the operation of the decision is suspended, and the weekly
payments must continue or, if the decision has already taken
effect, be reinstated (to their previous level), until the
dispute first comes before a conciliator under Part 6A;
- (b) the Tribunal may further suspend the operation of the
decision (from time to time) to allow a reasonable
opportunity for resolution of the dispute by conciliation or
judicial determination (as the case requires) without
prejudice to the worker's financial position in the meantime.

(5) However, if the dispute is resolved by the Corporation's decision on reconsideration of the disputed decision, the suspension terminates at the end of the period allowed for the worker to express dissatisfaction with the result of the reconsideration.

5 (5a) If the dispute is ultimately resolved in favour of the Corporation, the Corporation may, at the Corporation's discretion (but subject to the regulations)—

10 (a) recover amounts that were paid because of suspension of the operation of the Corporation's decision from the worker as a debt; or

(b) set off the amounts against liabilities of the Corporation to make payments to the worker under this Act.

(2) Section 36(5c)—delete "or (15)"

(3) Section 36(15) to (17)—delete subsections (15) to (17) (inclusive)

15 **7—Amendment of section 54—Limitation of employer's liability**

(1) Section 54(1)—delete "subsection (2)" and substitute:

this section

(2) Section 54(1)—after paragraph (a) insert:

or

20 (b) a liability at common law for—

(i) loss of earning capacity on the part of a disabled worker; or

(ii) non-economic loss suffered by a disabled worker.

(3) Section 54—after subsection (1) insert:

(1a) A liability will only arise under subsection (1)(b) if—

25 (a) the occurrence of the compensable disability is wholly or substantially attributable to—

(i) an act or omission of negligence on the part of the employer; or

(ii) an intentional tort on the part of the employer; or

30 (iii) an act or omission constituting a breach of statutory duty on the part of the employer where the employer knew that his or her act or omission would constitute the breach, or was recklessly indifferent about whether his or her act or omission would constitute the breach; and

35 (b) the compensable disability results in permanent impairment as assessed in accordance with section 43A; and

- (c) the worker's degree of permanent impairment on account of the occurrence of the compensable disability (as so assessed) equals or exceeds 15% (as a degree of impairment of the whole person).

5 (4) Section 54(2)—delete "Subsection (1) does not" and substitute:

Subsections (1) and (1a) do not

(5) Section 54(3)—after "being a disability that" insert:

gives rise to a designated common law liability or

(6) Section 54(4b)—after "contribution from the employer" insert:

10 unless it is proved that the employer contributed to the occurrence of the compensable disability on account of an act or omission of negligence on the part of the employer

(7) Section 54(5)(b)—delete "other than the employer" and substitute:

(including the employer)

15 (8) Section 54(7)(a)—after "this Act" insert:

(not being compensation on account of a designated common law liability)

(9) Section 54(7)(b)—after "this Act" insert:

(including damages on account of a designated common law liability)

20 **8—Amendment of section 105—Insurance of registered employers against other liabilities**

Section 105—after subsection (3) insert:

- (4) The insurance provided by subsection (1) does not extend to any designated common law liability under this Act.

25 **9—Insertion of sections 105A, 105B and 105C**

After section 105 insert:

105A—Obligation to be insured for common law liability

- (1) No employer may employ a worker in employment to which this Act applies unless the employer is fully insured by an insurer against the employer's liability to pay damages on account of any designated common law liability to or in respect of all workers employed in such employment by the employer.

Maximum penalty: \$20 000 for each worker so employed not covered by a policy of insurance required by this subsection.

- (2) Despite any other Act or law, a policy of insurance entered into for the purposes of subsection (1) may not be avoided or abrogated on the ground that—

- (a) the policy was obtained by a misstatement or non-disclosure; or

- (b) the employer has committed a breach of, or has failed to comply with, a term, condition or warranty of the policy; or
- (c) the employer has failed to comply with a provision of this Act or any other Act or enactment.

5 (3) An insurer who is by reason of subsection (2) liable under a policy of insurance may, in addition to any other remedy the insurer may have, recover from the employer liable to pay damages on account of any designated common law liability—

10 (a) such sums as the insurer has paid in payment, settlement or compromise of a claim or judgment against the employer; and

(b) any costs or expenses incurred by the insurer in relation to the payment, settlement or compromise.

15 (4) If a policy of insurance has been issued or renewed for the purposes of this section, the employer must, if so required by the insurer—

20 (a) supply the insurer, before the expiration of 1 month from the date of issue or renewal of the policy, with a written statement, in the prescribed form, containing an estimate of the total remuneration to be paid by the employer during the period for which the policy has been issued or renewed to workers covered by the policy; and

25 (b) supply the insurer, within 2 months after the expiration of a period for which the policy was issued or renewed, with a written statement, in the prescribed form, of the total remuneration actually paid by the employer during that period to workers covered by the policy.

Maximum penalty: \$ 5 000.

(5) This section does not apply to—

30 (a) the Crown; or

(b) any agency or instrumentality of the Crown.

(6) No employer or insurer may directly or indirectly take or receive any money from a worker, whether by way of deduction from wages or otherwise, in respect of a liability of an employer to take out insurance under this section, or to pay damages on account of any designated common law liability under this Act.

35 (7) A person who contravenes subsection (6)—

(a) is guilty of an offence; and

(b) is liable to compensate a worker for any monetary loss suffered by virtue of that contravention.

105B—Assistance to employers with insurance

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- (1) If an employer or prospective employer, after making reasonable attempts to do so, is unable to obtain the insurance required by section 105A, or not at rates commensurate with the risk, the employer may apply to the Corporation for assistance.
- (2) If an application is made under subsection (1), the Corporation must attempt to find an insurer prepared to accept the risk for what is, in the Corporation's opinion, a reasonable premium.
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- (3) If the attempts made by the Corporation under subsection (2) prove unsuccessful, the Corporation must offer the applicant a policy of insurance in respect of the relevant risk at a premium approved by the Minister and, if the employer accepts the offer, must issue such a policy to the employer.
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- (4) The Corporation is entitled to recoup losses made in respect of policies of insurance issued by it under this section from the Compensation Fund.

105C—Corporation insurer of last resort

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- (1) If an employer does not have the insurance required by section 105A (not being an employer within the ambit of section section 105A(5)), the Corporation will be taken to be the employer's insurer on terms and conditions prescribed by the regulations.
- (2) The premium for insurance provided under subsection (1) will be prescribed by the regulations.
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- (3) The Corporation is entitled to make payments from the Compensation Fund to cover any liabilities (at first instance) under the insurance provided under subsection (1).
- (4) The Corporation is entitled to recover as a debt from an employer for which the Corporation is an insurer under subsection (1)—
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- (a) any premium payable under subsection (2); and
- (b) such sums as the Corporation has paid in payment, settlement or compromise of a claim or judgment against the employer on account of a designated common law liability; and
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- (c) any other costs or expenses incurred by the Corporation in relation to a payment, settlement or compromise or otherwise in connection with insurance provided by this section.

Schedule 1—Transitional provisions

1—Discontinuance of weekly payments

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The amendments effected by section 6 of this Act apply in relation to any discontinuance or reduction of weekly payments effected by a notice of the *WorkCover Corporation of South Australia* given to a worker under section 36(3) of the *Workers Rehabilitation and Compensation Act 1986* on or after the day on which this clause comes into operation.