

## House of Assembly

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South Australia

# Workers Rehabilitation and Compensation (Territorial Application of Act) Amendment Bill 2006

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 (Territorial Application of Act) Amendment Act 2006*.

### **2—Commencement**

This Act will come into operation on a day to be fixed by proclamation.

### **3—Amendment provisions**

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—Substitution of section 6**

Section 6—delete the section and substitute:

#### **6—Territorial application of Act**

- (1) This Act applies to a worker's employment if (and only if) that employment is connected with this State.
- (2) The fact that a worker is outside this State when a disability occurs does not prevent an entitlement to compensation arising under this Act in respect of employment that is connected with this State.
- (3) A worker's employment is connected with—
  - (a) the State in which the worker usually works in that employment; or
  - (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.
- (4) In the case of a worker working on a ship, if no State or no one State is identified by subsection (3), 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 1 State) the State in which the ship most recently became registered.

- (5) If no State is identified by subsection (3) or (if applicable) (4), 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.
- (6) In deciding whether a worker usually works in a State—
- (a) regard must be had to the worker's work history with the employer over the preceding 12 months and the intentions of the worker and employer; but
  - (b) 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.
- (7) Subject to subsection (6), in determining 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.
- (8) 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.
- (9) In this section—
- 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;
- State* includes a Territory and, in a geographical sense, a State's or Territory's relevant adjacent area as described in Schedule 4.

#### **6A—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 the Tribunal or a court in relation to a claim for compensation under this Act, the Tribunal or court must—
- (a) determine the State with which the worker's employment is connected in accordance with section 6; and
  - (b) cause that determination to be entered in its records.

- (2) The Tribunal must, in determining a question under subsection (1), be constituted of 1 or more presidential members and if the question arises in proceedings that are not before a presidential member (or presidential members) then the question is to be referred, on an interlocutory basis, to a presidential member of the Tribunal.
- (3) Subsection (1) does not apply if there is a determination that is to be recognised under section 6B.

### **6B—Recognition of previous determinations**

- (1) If a determination of the State with which a worker's employment is connected has been made—
  - (a) by the Tribunal or a court under section 6A; or
  - (b) by a designated court under a provision of a law that corresponds with section 6A, or under another provision of a law prescribed by the regulations for the purposes of this provision; or
  - (c) by a court of this State or another State in the course of proceedings that are relevant to the application of this Act or a corresponding law, or that relate to a claim for compensation or damages,

the State so determined is to be recognised for the purposes of this Act as the State with which the worker's employment is connected.

- (2) This section does not prevent any appeal relating to any such determination and if the determination is altered on appeal, the altered determination is to be recognised under subsection (1).
- (3) In this section—

*designated court* means—

  - (a) the Supreme Court of a State in which a corresponding law is in force; or
  - (b) a court, tribunal or other decision-making body of a State in which a corresponding law is in force that is declared by the regulations to be a designated court for the purposes of this section;

*State* includes a Territory.

### **5—Insertion of heading**

Part 4 Division 9—after the heading to Division 9 insert:

#### **Subdivision 1—Limitations on liability**

## **6—Amendment of section 55—Prohibition of double recovery of compensation**

Section 55(1) and (2)—delete subsections (1) and (2) and substitute:

- (1) Compensation under this Act is not payable in respect of a disability to the extent that compensation has been received in respect of the same disability under the laws of a place other than this State (whether within or outside Australia).
- (2) If a person receives compensation under this Act in respect of a disability and, in respect of the same disability, subsequently receives compensation under the laws of a place other than this State (whether within or outside Australia), the person from whom compensation under this Act is received may, in a court of competent jurisdiction, sue and recover (as a debt) from the person the amount described in subsection (2a).
- (2a) 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 the place other than this State,

whichever is less.

## **7—Insertion of Part 4 Division 9 Subdivision 2**

Part 4 Division 9—After section 58 insert:

### **Subdivision 2—Choice of law**

#### **58AA—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
  - (b) if it can be made, the determination of the claim.
- (2) This Subdivision does not apply if compensation is payable in respect of the disability under the statutory workers compensation scheme of more than 1 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.
- (5) In this Subdivision—  
*State* includes a Territory.

### **58AB—Claims to which Subdivision applies**

- (1) This Subdivision 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 Subdivision 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 Subdivision 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.

### **58AC—What constitutes disability and employment**

For the purposes of this Subdivision—

- (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.

### **58AD—Claim in respect of death included**

For the purposes of this Subdivision, 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.

### **58AE—Meaning of "substantive law"**

In this Subdivision—

*a State's legislation about damages for a work related disability* means—

- (a) for this State—this Part and any other provision of this Act providing for the interpretation of anything in this Part; and
- (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.

### **58AF—Availability of action in another State not relevant**

- (1) It makes no difference for the purposes of this Subdivision 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.

## **8—Insertion of heading**

Part 4 Division 9—before section 58A insert:

### **Subdivision 3—Other matters**

## **9—Amendment of section 59—Registration of employers**

Section 59—after subsection (3) insert:

- (4) It is a defence to a prosecution for an offence under subsection (1) in respect of the employment of a particular worker if the court is satisfied that at the time of the alleged offence the employer believed on reasonable grounds that the worker's employment was not connected with this State by virtue of the operation of section 6.
- (5) If the employer's belief on reasonable grounds was that under section 6 the worker's employment was connected with another State, subsection (4) 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.
- (6) In this section—
- State* includes a Territory;
- 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.

## **10—Insertion of section 72A**

After section 72 insert:

### **72A—Reasonable mistake about application of Act**

- (1) Despite any other provision of this Division, if the Corporation is satisfied that the reason for an employer failing to pay the correct amount of levy is that the employer believed on reasonable grounds that the employer would not be required to pay levy in respect of a particular worker because that worker's employment was not connected with this State by virtue of the operation of section 6, the employer is not liable to pay a fine or penalty interest on account of that particular failure.



- (2) However, if the employer's belief on reasonable grounds under subsection (1) was that under section 6 the particular worker's employment was connected with another State, subsection (1) does not apply unless at the time of the relevant failure the employer had workers compensation cover in respect of the worker under the law of that other State.
- (3) In this section—
- State* includes a Territory;
- workers compensation cover* means insurance or registration under the law of a State in respect of liability for statutory workers compensation under that law.

## 11—Insertion of Schedule 4

After Schedule 3 insert:

### Schedule 4—Adjacent areas

#### 1—Interpretation

- (1) 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) If the Petroleum Act is repealed and re-enacted (with or without modifications), a reference in this Schedule to that Act, or to a provision or Schedule of that Act, will be taken to include a reference to the new Commonwealth Act, or to the corresponding provision or Schedule in the new Commonwealth Act, (as the case requires).

#### 2—Adjacent areas

- (1) The *adjacent area* for South Australia, New South Wales, Victoria 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; and
- (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; and

- (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
  - (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; and
  - (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.

## **Schedule 1—Transitional provisions**

### **1—Interpretation**

In this Schedule—

***amendments*** means amendments made to the principal Act by this Act;

***commencement day*** means the day on which this Schedule comes into operation;

***principal Act*** means the *Workers Rehabilitation and Compensation Act 1986*,

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

### **2—Application of amendments**

The amendments do not apply in respect of a disability that occurred before the commencement day except to the extent prescribed by this Schedule.

### 3—Cases where disabilities occur before and after commencement of this Act

- (1) 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.
- (2) 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.
- (3) Subclauses (1) and (2) do not affect any apportionment of liability or responsibility under the principal Act in a case where 1 or more of the disabilities occurred before the commencement day and 1 or more occurred on or after that day (but any such apportionment will only apply to the extent that a disability was compensable under the principal Act before the commencement day).

### 4—Claims made before the commencement of this Act

- (1) If—
  - (a) a person suffered a disability before the commencement day; and
  - (b) a claim for compensation in respect of the disability (the *original claim*) was made under the principal Act but rejected (by notice in writing under the principal Act) on account of the operation of section 6 of the principal Act as in force at the time of the occurrence of the disability; and
  - (c) the original claim would have given rise to—
    - (i) an entitlement to compensation in the form of weekly payments under section 35 or 44 of the principal Act; or
    - (ii) an entitlement in the form of a funeral benefit under section 44(1)(a) of the principal Act; or
    - (iii) an entitlement to compensation in the form of a lump sum under section 44(1)(b)(i) of the principal Act,had the amendments been in force at the time of the occurrence of the disability; and
  - (d) the disability was not (and is not) compensable under a corresponding law, then the person who made the original claim will, on application to the Corporation made within 6 months after the commencement of this clause, be entitled to any relevant benefit under subclause (2).
- (2) A benefit under this subclause is any of the following (depending on what is relevant in the circumstances of the particular case):
  - (a) —

- (i) if the original claim was in respect of a disability that resulted in an incapacity for work—a payment of compensation represented by weekly payments for a period not exceeding 12 months of incapacity for work, based on—
      - (A) the extent and duration of the incapacity for work; and
      - (B) the worker's notional weekly earnings at the time of the incapacity (adjusted in accordance with any provision made by the regulations); and
      - (C) any other factor that would otherwise apply under section 35 of the principal Act that is applied by regulations made for the purposes of this subparagraph (modified in any manner prescribed by the regulations);
    - (ii) if the original claim was in respect of a disability that resulted in the death of a worker—a payment of compensation represented by weekly payments for a period not exceeding 12 months for loss of support, based on—
      - (A) the relationship between the worker and the claimant (as would apply under section 44 of the principal Act); and
      - (B) the worker's notional weekly earnings at the time of death (adjusted in accordance with any provision made by the regulations); and
      - (C) any other factor that would otherwise apply under section 44 of the principal Act that is applied by regulations made for the purposes of this subparagraph (modified in any manner prescribed by the regulations);
  - (b) compensation for any costs of a kind described in section 32(2) of the principal Act incurred by a worker in consequence of having suffered a relevant disability;
  - (c) compensation in the form of a funeral benefit under section 44(1)(a) of the principal Act (as determined at the time of death of the worker and adjusted in accordance with any provision made by the regulations);
  - (d) compensation in the form of a lump sum under section 44(1)(b)(i) of the principal Act (as determined at the time of death of the worker and adjusted in accordance with any provision made by the regulations).
- (3) The Corporation may, pursuant to an agreement between the person who has an entitlement under this clause and the Corporation, make any payment with respect to that entitlement—
- (a) in instalments (with each instalment being an amount fixed under the agreement); or
  - (b) in a lump sum (representing the total amount of the entitlement adjusted to take into account any factor prescribed by the regulations).
- (4) The Corporation may, in connection with an application under this clause, require a person seeking a payment to provide any information that the Corporation thinks fit.

- (5) The Corporation may delay making a payment on an application under this clause until any information required under subclause (4) has been provided.

### 5—*Ex gratia* payments

- (1) In addition to a preceding clause, the Corporation has an absolute discretion to make an *ex gratia* payment (of an amount determined by the Corporation) to a person in connection with the enactment of this Act if—
- (a) —
    - (i) the person did not make a claim under the principal Act in respect of a disability suffered before the commencement of this Act and, if he or she has made such a claim, the claim would have been rejected on account of the operation of section 6 of the principal Act as in force at the time of the occurrence of the disability; or
    - (ii) the person did make a claim under the principal Act in respect of a compensable disability suffered before the commencement of this Act but the claim did not (or does not) give rise to an entitlement under the principal Act on account of the operation of section 6 of the principal Act as in force at the time of the occurrence of the disability; and
  - (b) the Corporation is satisfied—
    - (i) that the person would have had an entitlement to compensation under the principal Act had the amendments been in force at the time of the occurrence of the disability; and
    - (ii) that the disability was not (and is not) compensable under a corresponding law; and
    - (iii) that the person suffered substantial hardship on account of the disability; and
    - (iv) taking into account any other matter as the Corporation thinks fit, that it is appropriate in the circumstances of the particular case that an *ex gratia* payment be made.
- (2) A person seeking an *ex gratia* payment under this clause must make an application to the Corporation, in a manner and form determined by the Corporation, within the period prescribed by the regulations.
- (3) The Corporation may, in connection with an application under this clause, require a person seeking a payment to provide any information that the Corporation thinks fit.
- (4) The Corporation may delay making a determination on an application under this clause—
- (a) until any period that applies under subclause (2) has expired; or
  - (b) until any information required under subclause (3) has been provided.
- (5) The making of a payment under this clause will not affect any entitlement that a person may have with respect to another disability under the principal Act (and will not be taken into account for the purposes of any claim under the principal Act).

- (6) The Corporation may make a payment under this clause on such conditions as the Corporation thinks fit (and a person who contravenes or fails to comply with a condition may be required to repay any amount that has been paid by the Corporation (and any such amount will be recoverable as a debt)).
- (7) A decision of the Corporation to make, or not to make, an *ex gratia* payment, or the amount of an *ex gratia* payment, under this clause is final and cannot be subject to review by a court or tribunal in any respect.

## **6—Related matters**

- (1) Any payment under clause 4 or 5 will be taken from the Compensation Fund (and the Corporation is authorised by force of this clause to apply the relevant amount from the Compensation Fund).
- (2) The Corporation is not entitled to recover the amount of any payment made under clause 4 or 5 from a person who was the employer of the relevant worker at the time of the occurrence of the disability (including in a case where the employer was an exempt employer).
- (3) The Governor may make such regulations as are contemplated by this Schedule, or as are necessary or expedient for the purposes of this Schedule.