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TurksLegal will be presenting an in-house seminar on the latest changes to the workers compensation scheme in early 2019 (once further commencement dates have been proclaimed and Regulations issued).

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LEGISLATIVE DEVELOPMENTS

Workers Compensation Legislation Amendment Act 2018

Link to website

The *Workers Compensation Legislation Amendment Bill 2018* was passed by the NSW Parliament on 17 October 2018 and was assented to on 26 October 2018. The date of commencement for some amendments has yet to be proclaimed, but is expected to be 1 January 2019. The table below indicates when the changes take effect - either the date of assent or a date to be proclaimed.

Most notably, the new laws will abolish the current system of review of work capacity decisions by WIRO and SIRA and restore the jurisdiction of the Workers Compensation Commission to determine all disputes, including the review of work capacity decisions - effectively creating a 'One-stop Shop' for dispute resolution.

The Commission will also have the power (subject to regulations) to determine permanent impairment disputes without referring the dispute to an Approved Medical Specialist (AMS). This may reopen the door to compromise settlements of lump sum claims where there are competing assessments of the degree of permanent impairment.

Another major change is the repeal of the current section 35 (determination of PIAWE) and the introduction of a new Schedule 3 to the 1987 Act which will simplify the definition of current weekly earnings, and remove the current exclusion of overtime and allowances from earnings after 52 weeks of weekly compensation payments.

Transitional arrangements will apply to some of the changes.

A summary of the changes is set out in the table below. An update alert will be issued following commencement of the amendments.

New or Amended Provision	Short Description	Comment	Takes Effect	Transitional Arrangements
Amendments to section 43 of the 1987 Act; repeal of section 54 and Part 3 Division 2 Subdivision 3A of the 1987 Act; repeal of section 74 of the 1998 Act	Abolishes reviews of work capacity decisions by WIRO and SIRA; restores jurisdiction of Commission to determine all disputes, including review of work capacity decisions.	Retains internal reviews by insurers, which must be determined and a decision notified to the worker within 14 days after the request for review is made by the worker.	On a date to be appointed by proclamation.	Current provisions will continue to apply to existing WCDs during transitional review period (6 months from commencement) or if subject to review immediately before expiry of the transitional review period – until the review is finally determined.
New section 289B of the 1998 Act regarding stay of disputed Work Capacity Decision (WCD)	WCD is stayed once dispute is referred to the Commission, provided the referral is made before the expiry of the relevant notice period under section 80.	The WCD will not be stayed if the dispute is referred to the Commission after a WCD takes effect.	On a date to be appointed by proclamation.	
Repeal of section 65(3) of the 1987 Act; new section 321A; and amendment to section 322A of the 1998 Act	Allows Commission to determine a claim for WPI without first referring the assessment to an AMS.	Subject to new regulations regarding when a dispute about WPI must or may be referred to an AMS. Note: *The determination of a dispute regarding WPI by the Commission without referral to an AMS will be treated as the 'one assessment' allowed under section 322A.*	On a date to be appointed by proclamation.	

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New or Amended Provision	Short Description	Comment	Takes Effect	Transitional Arrangements
New Schedule 3 to the 1987 Act and repeal or amendment of sections regarding calculation of weekly payments	Simplifies the calculation of PIAWE and amends other aspects of calculating weekly payments.	Provides new definition for PIAWE as: The weekly average gross earnings received by the worker in any employment in the relevant period before the injury (usually 52 weeks). And defines *earnings* in a week as: The income of the worker received for work performed in any employment during the week.	On a date to be appointed by proclamation.	*Earnings amendments* do not apply to injury sustained by a worker before commencement of the amendments (except a limited application to weekly benefits for injuries sustained between the date of assent and date of commencement of the amendments).
New Part 7 of Chapter 2 of the 1998 Act	Deals with the collection, sharing and use of personal and other information by insurers and the Authority. Introduces a scheme for the mandatory notification of breaches of the Workers Compensation Acts.	Subject to new regulations.	On 26 October 2018.	
New Division 3 of Part 2 Chapter 4 of the 1998 Act	Deals with notification of insurer decisions to worker and the period of notice required. Effect of stay of decision on the notice period.	Provides for a single form of notice whether disputing liability for a claim or reducing weekly payments; period of notice to be given to worker of decision by insurer; sections 54 and 74 repealed and replaced with new sections 78, 79 and 80.	On a date to be appointed by proclamation.	
New section 87EAA of the 1987 Act	Commutation of medical expenses compensation is not permitted for worker with catastrophic injury.	Definition of *catastrophic injury* is to be included in Workers Compensation Guidelines.	On a date to be appointed by proclamation.	
Amendment to section 231 of the 1998 Act	Requirement for employer to post in the workplace a summary of the Acts and insurance details.	This obligation may be satisfied by posting the required information on a website 'or by any other method authorised by the regulations'.	On a date to be appointed by proclamation.	
Amendments to *Motor Accident Injury Act 2017*	A claimant who receives workers compensation benefits as well as CTP damages for the same injury will only need to repay the amount of weekly payments received (not medical, rehab or other treatment expenses).		On 26 October 2018.	Extends to compensation or damages paid or payable before commencement in respect of MVA occurring on or after 1.12.17.

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New or Amended Provision	Short Description	Comment	Takes Effect	Transitional Arrangements
Amendments to *Motor Accident Injury Act 2017*	A claimant who recovers CTP damages as well as permanent impairment lump sum compensation under Section 66 of the WCA will only need to repay the section 66 sum if that worker has recovered damages for Non-Economic Loss (i.e. pain and suffering and loss of amenities of life).		On 26 October 2018.	Extends to compensation or damages paid or payable before commencement in respect of MVA occurring on or after 1.12.17.
	Workers injured in a motor vehicle accident who are entitled to receive workers compensation benefits maintain an entitlement to reasonable and necessary medical, treatment and care expenses from the CTP insurer should workers compensation entitlements cease.		On 26 October 2018.	Extends to compensation or damages paid or payable before commencement in respect of MVA occurring on or after 1.12.17.

The amendments, with a few exceptions, do not apply 'exempt workers' - i.e. police, fire fighters, ambulance paramedics, rescue workers and coal miners.

Note: Information current as at 19.11.2018.

TurksLegal will be presenting an in-house seminar on the latest changes to the workers compensation scheme in early 2019 (once further commencement dates have been proclaimed and Regulations issued).

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New laws to establish presumptive rights to compensation for firefighters in respect of certain cancers

Link to website

The *Workers Compensation Legislation Amendment (Firefighters) Bill 2018* was passsed by the NSW Parliament on 22 November and presently awaits assent.

The changes will enable eligible firefighters diagnosed with one of 12 specified cancers, and who meet applicable employment periods, to be automatically presumed to have acquired that cancer because of their firefighting work. The presumption will apply to all eligible firefighters with cancers diagnosed on or after 27 September 2018. A firefighter who has previously had a claim for one of the specified cancers denied on the basis that the firefighter was unable to prove a link to employment may also bring a new claim under the presumption legislation.

The Bill is expected to be passed by both houses and enacted as law in the very near future.

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RECENT DECISIONS

Presidential decision confirming principles to be applied to appeals against arbitral determinations

Marshall v Skilled Group Ltd [2018] NSWWCCPD 44

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Background

The worker commenced proceedings in the Workers Compensation Commission (WCC) claiming weekly payments and medical expenses as a result of an alleged injury on 9 January 2015.

Injury had been disputed outright.

The matter was fully contested before Senior Arbitrator Capel who accepted the worker's claim that there was an incident at work on 9 January 2015 but was not convinced the worker was injured as a result of that incident. Arbitrator Capel entered an award in favour of the employer on the basis that the worker had not discharged the onus of proving that he had suffered an injury arising out of or in the course of his employment on 9 January 2015.

Decision

Below is a summary of some of the legislation, case law and principles referred to and applied by DP Wood in her 224 paragraph decision:

- Time can be extended to appeal a WCC decision 'if a party satisfies the Presidential member, in exceptional circumstances, that to lose the right to appeal would work demonstrable and substantial injustice' (Rule 16.2(12) of the 2011 Rules).
- On the above issue, DP Wood found the worker's circumstances to be exceptional (paragraph 28), however, she then had to determine whether a failure to extend time would result in a substantial injustice, which means I must assess the merits of the appeal. To do so, it is necessary to consider whether the new evidence sought to be relied on in the appeal by Mr Marshall ought to be admitted' (paragraph 29).
- 'The Commission is not to grant leave unless the [new] evidence was not available to and could not have been reasonably obtained by the party seeking to adduce the evidence, or that a failure to grant leave would cause a substantial injustice in the case' (section 352(6) of the 1998 Act).
- An appeal brought pursuant to section 352 of the 1998 Act is not a re-hearing. It is limited to the identification of error of fact, law or discretion on the part of the arbitrator.
- 'Arbitrations are not a trial run, and the parties must live with the consequences of the forensic choices they make at first instance, including those of their legal representatives' (paragraph 207 and *Super Retail Group Services Pty Ltd v Uelese* [2016] NSWWCCPD 4 at 92).
- DP Wood approved Arbitrator Capel's conclusion 'that he must feel an actual persuasion that Mr Marshall was involved in an accident on 9 January 2015 and that he suffered an injury as a result of that accident' (paragraph 157).
- DP Wood quoted the plurality in the High Court of Australia matter of *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 that 'A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances…it is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial' (paragraph 208).
- 'The restriction in s352(6) on the admission of new evidence on the appeal distinguishes a presidential appeal from a review or re-hearing. The legislative intention of the provision was to limit the scope of such an appeal' (paragraph 209 and per Basten JA in *Inghams Enterprises Pty Ltd v Sok* [2014] NSWCA 217).
- 'Mr Marshall seeks to have the Senior Arbitrator's decision revoked and the matter remitted to the same Senior Arbitrator for reconsideration. This is not the role of the Presidential member. If the requirement to establish error is satisfied, I may revoke the determination and either re-determine the matter or remit the matter for re-determination by an Arbitrator' (paragraph 210).

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- 'The onus is on the person who seeks to overturn the decision to establish that there are sufficient grounds to do so (paragraph 21 and *Singh v Ginelle Pty Ltd* [2010] NSWCA 310 at 45).
- 'It is not sufficient that a different result might have been preferred' (paragraph 211 and Basten JA in *Northern New South Wales Local Health Network v Heggie* [2013] NSWCA 255).
- 'In order to establish error on the part of the Senor Arbitrator in respect of his factual findings, what is required to be shown is that the Arbitrator either:
  - Ignored material facts;
  - Made a critical finding of fact which has no basis on the evidence;
  - Showed a demonstrable misunderstanding of relevant evidence; or
  - Demonstrably failed to consider relevant evidence' (paragraph 212).
- As described by Barwick CJ in *Whiteley Muir & Zwanenburg Ltd v Kerr* [(1966) 39 ALJR 505)], what is required to demonstrate error on the part of the Arbitrator, is to establish that other probabilities so outweigh the Arbitrator's conclusion that it can be said his conclusion was wrong' (paragraph 213).

Ultimately, DP Wood concluded that the worker had failed to establish any error on the part of Arbitrator Capel. On that basis, even if leave to extend time to appeal was granted (it was not), DP Wood would have arrived at the same conclusion as the arbitrator i.e. that the worker had failed to show a substantial injustice.

Perhaps the main point to be extracted from DP Wood's well-reasoned decision is the 'finality of a decision' concept. The decision is a timely reminder for workers to ensure that, when they elect to fully contest a matter in the WCC, they have all the evidence available to support their claim.

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RECENT DECISIONS

When Motor Accidents meet Workers Compensation – fixing the *"unintended consequences"*

Summary

Our July 2017 Newsletter included an article on "How changes to the Motor Accidents Scheme affect workers compensation in NSW"

The article looked at how the *Motor Accident Injuries Act 2017* ('the MAIA') which introduced a hybrid model providing access to both statutory no-fault benefits and modified damages, might affect workers compensation rights and entitlements; and whether those changes might cause workers to act differently when pursuing claims for work injuries suffered as a result of motor vehicle accidents.

Now almost one year since the MAIA commenced (1 December 2017) questions still remain as to the interplay between the motor accidents and workers compensation schemes in NSW.

Enter the *Workers Compensation Legislation Amendment Bill 2018* ('the Bill').

The Intent of the Bill

In the second reading speech of the Bill in the Legislative Council on 19 September 2018, Mr Scot MacDonald on behalf of the Hon Don Harwin noted:

"Schedule 6 to the bill seeks to address unintended consequences arising from the implementation of the new compulsory third party [CTP] scheme and the interaction between the Motor Accident Injuries Act 2017 and the Workers Compensation Act 1987 in circumstances where a person injured in a motor accident also has workers compensation rights arising from the same injury."

He then went on to say:

"The bill aims to clarify the nature and extent of the workers compensation benefits that may be deducted from CTP damages, and that those injured in motor accidents in the course of their employment have an entitlement to claim ongoing treatment and care, payable by the CTP insurer even after they recover damages ….

These amendments support a fair and equitable outcome and seek to provide workers injured in motor accidents with similar rights to CTP compensation under the Motor Accident Injuries Act 2017 as other people injured in motor accidents. The amendments will be retrospective to cover motor accidents involving workers with concurrent motor accident and workers compensation rights that occurred from the commencement of the Motor Accident Injuries Act 2017, on and from 1 December 2017, to ensure that those workers are not disadvantaged."

The Changes in the Bill

So which of the "unintended consequences" have been addressed?

The position was that a worker injured in a motor accident on and after 1 December 2017 would receive weekly compensation and medical expenses from the workers compensation insurer first. If they then recovered damages under the CTP scheme (being restricted to damages for Non-Economic Loss and past or future economic loss due to loss of earnings or earning capacity), they would be required to repay all the compensation received out of the damages.

This meant that the worker was not entitled to any statutory benefits under the MAIA for ongoing treatment and care expenses, or for any further benefits under the Workers Compensation Act 1987 (their entitlement to compensation having been extinguished by the receipt of damages).

The change now introduced that perhaps brings most clarity to the interplay between the motor accidents scheme and the workers compensation scheme is the new section 3.35(8) in the MAIA which states:

"Workers injured in motor accidents are entitled to claim statutory benefits under MAIA for ongoing treatment and care expenses, after they cease to be entitled to workers compensation statutory benefits and/or after they have recovered CTP damages."

Some further changes have been introduced so that if a worker recovers damages under the CTP scheme, he/she will need to repay to a workers compensation insurer:

1. Only weekly payments of compensation and they will not have to repay compensation for medical, hospital, and rehabilitation and care expenses; and

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2. Permanent impairment compensation (pursuant to sections 66 and 67) but only if damages are recovered for Non-Economic Loss.

When does it take effect?

Schedule 6 commenced on 26 October 2018 (the date of assent) and is retrospective to cover motor accidents involving workers that occurred from the commencement of the MAIA, that is, on and from 1 December 2017.

The Consequences

Some of the potential consequences of these changes may be that:

1. Workers will now comfortably pursue their workers compensation entitlements first, knowing that they retain their rights to claim statutory benefits under MAIA, for ongoing treatment and care expenses;
2. CTP damages claims will become more attractive to worker's because:
    a. They remain entitled to ongoing treatment and care under the MAIA after they recover CTP damages;
    b. Only weekly payments of compensation will need to repaid to the workers compensation insurer out of any CTP damages they recover; and
    c. Permanent impairment compensation (under sections 66 and 67) will only have to repaid to the workers compensation insurer if damages are recovered for Non-Economic Loss.
3. Workers who can bring CTP damages claims (i.e. not a "minor injury" under MAIA, and able to prove fault) will do so in almost every claim because of the reduced payback required to be made to the workers compensation insurer, and because of the ability to claim ongoing entitlements to treatment and care under the MAIA after they recover CTP damages;
4. If CTP damages are paid, then the workers compensation claim can be finalised once and for all; and
5. Section 151Z recoveries brought directly against CTP insurers will also be reduced by virtue of the restrictions that apply to workers (noted in 2 above), on what they are required to repay to the workers compensation insurer.

This is by no means an exhaustive list and we invite feedback based on any first hand experiences arising from these changes.

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