



WORKERS' COMPENSATION LEGISLATION AMENDMENT ACT 2005

WORKING DIRECTORS, FORCED INCORPORATION OF WORKERS AND SOME INTERESTING TRANSITIONAL PROVISIONS

Application

This newsletter is of interest if you need to consider insurance for working directors, the forced incorporation of workers and death benefits. It also contains minor technical and drafting amendments to the *Workers' Compensation and Injury Management Act 1981* (the Act).

Insurance for Working Directors

The *Workers' Compensation Reform Act 2004* introduced an amendment to s.10A whereby certain working directors were excluded from obtaining workers' compensation insurance. That amendment was due to commence on 14 November 2005.

The *Workers' Compensation Legislation Amendment Act 2005* (The Amendment Act) restores the ability for working directors to be covered with workers' compensation. Specifically the amendment, which takes effect from 14 November 2005, provides a definition for a "working director" as follows:

"working director" in relation to a company, means a director of the company, whether or not the director would be a worker:

- (a) who executes work for or on behalf of the company; and
- (b) whose earnings as a director of the company by whatever means are in substance for personal manual labour or services."

Unlike the previous s.10A of the Act, the definition for a working director obviates the need for directors to meet the definition of a worker in s.5 of the Act. Provided the working director satisfies the definition, an insurer is not able to dispute the status of a worker as a working director. Any disputes in relation to the status of a working director are to be determined by an arbitrator. The arbitrator cannot refuse the claim for indemnity in respect of the employer's liability to the working director unless the employer made a material false or misleading representation at the time the request for insurance for the working director was made.

Forced Incorporation of Workers

According to the second reading speech, the Amendment Act directly addresses the practice of some employers in certain industries requiring workers to form companies and undertake work as directors, as a condition of obtaining work.

This is a provision which attempts to deter contrived "avoidance arrangements" and provide compensation to affected workers.

Generally speaking, an avoidance arrangement is a situation where a person ("W") executes work for another person ("E") if:

- (a) the work executed under the arrangement is contrived to enable E to have the benefit of W's services without having liabilities and duties as W's employer under the Act;
- (b) W executes work principally for E on behalf of a company which W is an employee or director; and
- (c) the work is directly a part or process in the trade or business of E.

The Amendment Act looks at the circumstances of obtaining and completing work to identify instances of employers requiring workers to accept an avoidance arrangement as a condition of obtaining work.

If E suffers an injury and an arbitrator determines that an avoidance arrangement existed at the time of the injury E is liable to pay compensation and the insurer is entitled to an indemnity from E.

Further, no indemnity can be given by W to E either by W or on W's behalf. If an indemnity is given E is liable for a penalty of \$2,000.

E commits an offence and is liable to a penalty of \$5,000 if E makes employment conditioning on the avoidance arrangement.

Death Benefits

The Amendment Act introduces a retrospective provision that enables the death benefit of \$200,000 to apply as of 1 July 2005.

Appeals to Compensation Magistrate

The Amendment Act introduces a further transitional provision to the Act to ensure that matters are on appeal before a Compensation Magistrates Court on 14 November 2005 are remitted to an arbitrator under the new dispute resolution provisions.

Commentary

Whilst the amendments to the working director provisions are welcomed, we anticipate there will be disputes regarding avoidance arrangements.

The increase to death benefits and appeals procedure are simply transitional provisions which are also welcomed.

We will produce another publication when the regulations are published, which we expect will be shortly before the commencement of the amendments on 14 November 2005.

A Publication by the Jackson McDonald Insurance Team:



John Mengler
 Partner
 T: (08) 9426 6637
 E: jmengler@jacmac.com.au



Phil Lansell
 Partner
 T: (08) 9426 6730
 E: plansell@jacmac.com.au



Tim Mason
 Partner
 T: (08) 9426 6644
 E: tmason@jacmac.com.au



Jenny Hawkins
 Partner
 T: (08) 9426 6624
 E: jhawkins@jacmac.com.au



Michael Schwikkard
 Partner
 T: (08) 9426 6850
 E: mschwikkard@jacmac.com.au



Alex Lustig
 Partner
 T: (08) 9426 6733
 E: alustig@jacmac.com.au



David Carter
 Consultant
 T: (08) 9426 6672
 E: dcarter@jacmac.com.au



Wendy Rowlands
 Senior Associate
 T: (08) 9426 6793
 E: wrowlands@jacmac.com.au



Laine Bartholomaeus
 Senior Associate
 T: (08) 9426 6834
 E: lbartholomaeus@jacmac.com.au



Fiona Dempster
 Associate
 T: (08) 9426 6760
 E: fdempster@jacmac.com.au



Su-Ming Chng
 Associate
 T: (08) 9426 6818
 E: schng@jacmac.com.au



Rob Marando
 Solicitor
 T: (08) 9426 6639
 E: rmarando@jacmac.com.au



Bree Lawrence
 Solicitor
 T: (08) 9426 6828
 E: blawrence@jacmac.com.au



Kate Morrow
 Solicitor
 T: (08) 9426 6843
 E: kmorrow@jacmac.com.au



Andrea McCulloch
 Advocate
 T: (08) 9426 6722
 E: amcculloch@jacmac.com.au



Jo Aberin
 Advocate
 T: (08) 9426 6629
 E: jaberin@jacmac.com.au



Vicki Fubbs
 Advocate
 T: (08) 9426 6748
 E: vfubbs@jacmac.com.au