

# Summary of changes to the *Return to Work Act 1986* and *Return to Work Regulations 1986* resulting from the *Return to Work Legislation Amendment Act 2020*

## Return to Work Legislation Amendment Act 2020

### Commentary as at 24 June 2020

Northern Territory Legislative Assembly has passed amendments to the *Return to Work Act 1986* and *Return to Work Regulations 1986*.

This Act will commence on a day fixed by the Administrator by Gazette notice.

The *Return to Work Legislation Amendment Act 2020* reverses a number of changes made to the legislation in 2015 and improves the operation of the NT Workers Compensation Scheme.

This document has been prepared by NT WorkSafe.

A copy of the *Return to Work Legislation Amendment Bill 2020* can be accessed here:

<https://legislation.nt.gov.au/LegislationPortal/Bills/~link.aspx?id=D4363782021B4C0DA86AAB454E9D5ECA&z=z>

Parliamentary records (Hansard) and minutes of proceedings can be accessed at:

<https://parliament.nt.gov.au/business/parliamentary-records>

Throughout the document, sections of the principal Act are referenced using a small 's'. For example, section 78A will be shown as s78A.

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## Part 1 – Preliminary

### Section 1

#### Citation of the Act

This Act may be cited as the *Return to Work Legislation Amendment Act 2020*.

### Section 2

#### Commencement

This Act will commence on a day fixed by the Administrator by Gazette notice.

## Part 2 – Amendment of Return to Work Act 1986

### Section 3

#### Act amended

This is a formal clause which provides that amendments are made to the *Return to Work Act 1986* (the Act').

### Section 4

#### Interpretation

This section amends s3 of the Act, by inserting specific definitions for key words and phrases relating to the workers compensation provisions of the Act.

### Section 5

#### Meaning of worker

Section 5 creates new s3B of the Act which provides for the meaning of worker (moved from s3) for the purposes of workers compensation coverage under the *Return to Work Act 1986*. Further it:

- clarifies that a person is a worker if they are an employee for PAYG purposes even if the employer is not complying with the PAYG provisions.
- clarifies that an Australian Business Number is not a determinant factor in establishing whether or not a person is a worker.
- deems that all individuals who work for a labour hire organisation are workers under the Act.

- expands the definition of worker so that any immediate family member who is not living with the employer will be covered for workers compensation whether named on the policy or not.
- expands the categories of domestic workers that can be covered for workers compensation.

***This change is not retrospective***

## **Section 6**

### **Inclusion of journey claims**

This section reinstates the coverage for journey claims as applicable prior to the 2015 amendments.

Accordingly, injuries sustained involving a motor vehicle are excluded from coverage. Such injuries are covered under the Motor Accidents Compensation (MAC) scheme.

However, there are the following exceptions to the motor vehicle exclusions:

- A journey to or from a workplace, other than the workers normal workplace at the request of the employer will be covered.
- Workers who are traveling from home to work as a result of a call out by an employer whether paid for the call out travel or not will be covered.

This amendment also reaffirms other scenarios where journey claims (except for those involving the use of a motor vehicle) can be made:

- to and from work or home and an educational facility as part of their training as expected by their employer
- on a journey from the workplace of one employer, on a working day, to the workplace of another if the claimant works for both employers
- when travelling for the purposes of a workers compensation claim.

***This change is not retrospective***

## **Section 7**

### **Labour hire definitions**

This provides new s4A and s4B of the Act providing the definitions of 'Labour Hire Arrangement' and 'Provider of labour hire services' which are terms needed to ensure individuals under a labour hire arrangement are deemed workers for the purposes of this Act.

**Labour hire arrangements** – provides that a labour hire arrangement is a contract or an arrangement under which an individual is engaged by a labour hire provider to work for someone other than the provider (a client); as long as there is no contract to perform the work or service between the individual and the client, and the individual personally performs the work.

**Provider of labour hire services** – provides that if, in the course of conducting a business, the person supplies to another person (the **client**) an individual to perform work or services in and as part of a business or commercial undertaking of the client. This includes where:

- a contract is entered into between the individual (the **worker**) and the provider
- a contract is entered into between the provider and the client
- the worker is supplied by the provider to a client directly or indirectly through one or more agents or intermediaries
- the work or services performed by the worker is under the control of the provider, the client or another person

## Section 8

### Settling of journey claims

The current legislation references 'accident' as having the same meaning as in the Motor Accidents (Compensation) Act 2014 (the MAC Act). As there is no definition in the MAC Act of 'accident', this Section amends the reference to 'motor accident' in s61 (as defined by the MAC Act).

## Section 9

### Normal weekly earnings

Currently after 26 weeks of paid incapacity a cap on normal weekly earnings applies. The cap is 250% of average weekly earnings.

The amendment will remove this cap on normal weekly earnings

***This change is not retrospective***

## Section 10

### Refusal to pay for medical treatment

One of the key amendments introduced in 2015 was that an insurer must not refuse to pay for medical treatment unless supporting medical opinion existed and a copy of that opinion was supplied to the worker together with a statement of rights of appeal.

Unfortunately s73(4) is premised on the basis of 'costs incurred', leaving it open for an employer/insurer to argue that future or imminent treatment has not been "incurred".

The amendment made will ensure the employer/insurer can't avoid liability for 'proposed treatment' unless they have supporting opinion.

***This change is not retrospective***

## **Section 11**

### **Recovery from worker**

This amendment provides a new s74 of the Act, which sets out that if an overpayment is made under the Act, overpayments cannot be recovered from the worker to whom the overpayments were made if:

- the benefit payable was incorrectly calculated by the employer or insurer who made the payment
- the payment was made in respect of a period more than six months before the date on which recovery of the overpaid amount was sought

unless otherwise ordered by the Court.

***This change is not retrospective***

## **Section 12**

### **Attendant care services**

Currently the definition for Attendant Care Services sits in s78. This is to be moved to new s74A and makes it relevant to all of PART 5, Division 3 of the Act.

The change in the wording of the definition reflects this.

## **Section 13**

### **Return to work plans**

In 2015 a change was made to improve return to work outcomes by imposing an obligation on an employer to develop a proposal for a return to work plan if the worker was likely to be incapacitated for more than 28 days. The legislation should have been amended to allow for this proposal to be developed by employers without the mandated use of vocational rehabilitation providers.

This amendment inserts new subsection (6A) and note into s75A to the effect that an employer may, but is not required, to use an accredited vocational rehabilitation provider for the purpose of providing a proposal for a return to work plan as per s75A(1)(c).

***This change is not retrospective***

## **Section 14**

### **Other rehabilitation**

This amendment removes the definition of 'attendant care services' because section 12 has moved that definition to s74A. It also creates a new s78(4) that expands what is allowed under reasonable and necessary household services to include the reasonable costs of childcare in certain circumstances.

***This change is not retrospective***

## Section 15

### Settlements

s78A was introduced into the Act in 2015 to allow for negotiated settlements on workers' compensation claims. Some issues have been identified in the wording of several sections which has created uncertainty for stakeholders over settlements for disputed claims.

This amendment sets out:

**s78A(1)** – the reference to the Regulations has been removed

**s78A(1A)** - by creating section 78A(1A) any settlement for a catastrophically injured person is void if that settlement involves an amount that finalises a claim for any of the following expenses:

- medical treatment (including pharmaceutical)
- dental treatment
- rehabilitation
- ambulance transportation
- respite care
- attendant care services
- domestic assistance
- aids and appliances
- artificial members, eyes and teeth
- education and vocational training
- home, transport and workplace modification

This criteria meets the minimum benchmarks of the NIIS ensuring that the Territory would not be liable under the NDIS agreement with the Commonwealth for workplace injury compensation.

This does not prevent the settlement of the weekly wages component.

**s78A(3)** - by amending this section, it allows for settlements to be reached before a court.

**s78A(4) and s78A(4A)** – s78A(4) is reworded and a new s78A(4A) added to clarify that the workers reasonable legal costs are met by the employer regardless of whether an agreement is entered into.

**s78A(5)** – This amendment clarifies the settlement arrangements for disputed claims to ensure that the 'cooling-off' period (six months from settlement day) allowed under the Act for settlements is also allowed where liability is disputed by the employer.

The new sections provide:

- s78A(5A) - that a settlement of a disputed claim is made 'without prejudice' and is not an admission of fault or acceptance of further liability
- s78A(5B) - that if the claimant withdraws from a settlement within the 6 month cooling off period, then any payment made by the employer is repayable by the claimant to the employer and is a debt due on demand
- s78A(5C) – if claimant fails to repay the employer within the specified timeframe, the employer can set-off the debt against any further entitlement to compensation or initiate legal proceedings to recover the debt

**s78A(6)** - The amendment provides the definition of 'catastrophic injury', with reference to the Regulations for details of the definition.

***These changes are not retrospective***

## **Section 16**

### **Lump sum agreement for particular period**

This amendment to s78B ensures that a lump sum payable under this section is not required to be for 'all amounts otherwise payable'.

The intention is that the employer should be able (by agreement with the worker) to make a lump sum payment for part of a claim in advance to allow the worker to self-manage certain aspects. For example, but not limited to, treatment, retraining, workplace modifications, medications or payment of carers.

***This change is not retrospective***

## **Section 17**

### **Mediation - Legal representation or legal advice**

This amendment clarifies that the amount payable for legal representation and legal advice at mediation is a combined total, not a separate amount for each component.

***This change is not retrospective***

## **Sections 18 and 19**

### **Nominal Insurer funding**

The Nominal Insurer is established under the Act to manage and pay for claims from workers who are injured whilst working for an uninsured employer. The cost of these claims is funded by insurers and self-insurers contributions.

These amendments moves the current methodology for contributions set out in s164(1)(d) and s164A of the Act into Regulation to make it easier to amend the methodology to allow for more flexible funding arrangements for the future.

## **Section 20**

### **Nominal Insurer claims management**

The current Act has the potential for an employer to self-manage a claim. The intent of the changes made in 2015 were that the claim must be passed to the Nominal Insurer.

This amendment ensures that an uninsured employer cannot self-manage a claim from an injured worker and that the Nominal Insurer has full rights to manage the claim.

## **Section 21**

### **Transitional arrangements**

Transitional arrangements have been addressed throughout this document under applicable Sections.

## **Section 22**

### **Statement of fitness for work**

This amendment gives effect to Schedule 1 of the amendment Act. The schedule identifies the words 'statement of fitness for work' wherever occurring in the principal Act and replaces them by the words 'medical certificate of capacity'.

There is sometimes confusion among employers and workers about whether the "statement of fitness for work" is in fact a medical certificate. The change in name will clarify that it is a medical certificate.

## **Part 3 – Amendment of Return to Work Regulations 1986**

## **Section 23**

### **Regulations amended**

This is a formal section, which sets out Part 3 of the amendment Act as amending the Return to Work Regulations 1986.

## **Section 24**

### **First-responder**

This section amends Regulation 3 to provides a new definition for first-responders.

A first responder is defined as a person with specialised training (such as a paramedic, police officer, fire-fighter, or other emergency personnel), who attends the site of an incident and provides assistance in:

- involving actual or potential injury to persons or damage to property
- risk to the first responder
- where time may be of the essence to save lives and property

The definition is required for the deemed diseases related to post-traumatic stress disorder (PTSD).

## **Section 25 and Section 26**

### **Regulation 3A and Regulation 4**

These sections provide amendment to the regulations consequential to the changes made to the definition of 'worker' in the Act.

## **Section 27**

### **Domestic employees and prescribed amount**

Regulation 4A is amended to refer to an individual who is employed or engaged by a householder and provides the prescribed rate as being 20% of average weekly earnings.

It also has the effect of removing the current limitation of types of domestic employees to be covered for workers compensation

## **Section 28.**

This section provides amendment to the regulations consequential to changes made to the definition of 'worker' in the Act.

## **Section 29**

### **Presumptive legislation for firefighters**

The Northern Territory introduced presumptive legislation for fire fighters on 1 July 2015 for 12 cancers. This amendment expands the number of diseases to include:

- Asbestos related diseases
- Skin cancer
- Lung cancer
- Liver cancer

A qualifying period of 15 years is required for the newly added diseases.

## **Section 30**

### **Catastrophic injury**

This amendment sets out the detail of the definition of 'catastrophic injury' established in Section 15 of the amending Act It does this by referencing a new Schedule 2A which defines in great detail 'catastrophic injury' as any of the following:

- spinal cord injury
- traumatic brain injury
- amputation of a leg through or above the femur
- amputation of more than one limb or parts of different limbs
- full thickness burn to all or part of the body
- inhalation burn resulting in permanent respiratory impairment
- permanent blindness caused by trauma

## **Section 31**

### **Nominal insurer**

This amendment provides the mechanism for determining contributions to the Nominal Insurer Fund. This is consequential to sections 18 and 19 of the amendment Act where those mechanisms were moved from the principal Act to the Regulations.

## **Section 32**

### **Nominal Insurer**

This amendment is for housekeeping purposes only. It makes editorial changes to the title of regulation 18 but does not change its intent.

## **Section 33**

### **Post-traumatic stress disorder**

This amendment is consequential to Section 29 of the amendment Act. It amends Schedule 2 of the Regulations to include post-traumatic stress disorder (PTSD) for first responders.

## **Section 34**

### **Schedule 2A - Catastrophic injury**

This amendment adds Schedule 2A to the Regulations to give the detail to the definition of 'Catastrophic Injury' as established by Section 30 of the amendment Act.

### **Schedule 3 – Prescribed provisions for compulsory insurance**

It also amends Schedule 3 to modernise the language and permit insurers to cancel a policy without the requirement for prior consent of the Work Health Authority, where the request for cancellation is made by the employer in the following circumstances:

- the employer is no longer employing a worker as defined by the Act;
- there are no Territory workers required to be covered by the Act; or
- the employer has another Policy with an Approved Insurer covering the same liability.

## **Section 35**

### **Schedule 2**

This amendment gives effect to Schedule 2 of the Bill. The schedule identifies the words 'statement of fitness for work' where ever occurring in the regulations and replaces them by the words 'medical certificate of capacity'.

## **Section 36**

### **Repeal of Act**

This is a formal section which provides that the *Return to Work Legislation Amendment Act 2020* is repealed on the day after it commences.

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