

MLL315 PERSONAL INJURY COMPENSATION SCHEMES – EXAM NOTES

Legislation

AC Act – *Accident Compensation Act 1985 (Vic)*

ACWI Act – *Accident Compensation (WorkCover Insurance) Act 1993 (Vic)*

RS Regs – *Road Safety (Vehicles) Regulations 2009 (Vic)*

RS Act – *Road Safety Act 1986 (Vic)*

TA Act – *Transport Accident Act 1986 (Vic)*

WC Act – *Workers' Compensation Act 1958 (Vic)*

WIRC Act – *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)*

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Topic 1 – Introduction to WIRC Act

Introduction to WIRC Act

- *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)
- Scheme of compensation for persons injured at work on or after 1 July 2014
- Dual system:
 1. No-fault compensation for:
 - Income loss or loss of the capacity to earn income
 - Lump sum payment for 'permanent impairment'
 - Medical and like expenses ('MLE')
 - Death benefits
 2. Restricted common law rights—2 steps
 - Application for 'serious injury' threshold
 - Proceedings for damages (usually greater amounts than under WIRC)
- Replaced the *Accident Compensation Act 1985* (Vic) (AC Act), which still applies to pre-1 July 2014 injuries

Historical Background

- Kevin Purse 2005 identifies 4 'nodal points of policy development' (p. 9)
 - 18th century to end of 19th century (pp. 9-): Laissez-faire, CL, & 'Unholy Trinity'
 - 1900-1925 (pp. 11-12): profound and rapid change
 - Mid-920s to 1979 (pp. 12-): 'incrementalist interregnum'
 - 1970 to mid-1990s (pp 13-): 'reform and counter-reform'
- Industrial revolution 18th-19th cc
- Problems in common law at this time—Unholy Trinity of:
 - Common employment
 - Voluntary assumption of risk
 - 'Contributory negligence'
- *Workmen's Compensation Act 1897* (UK)
 - Employer liable to pay worker for 'personal injury by accident'
 - No-fault system introduced for the first time—no need for worker to show fault by employer
 - ie, breach of contract (no negligence at this time)
 - Cause of action arose as a 'statutory duty' (policy of insurance), i.e. no default of employer: *McGuire v Union Steamship Company of NZ* (1920) 27 CLR 570, 582-84 (Isaac and Rich JJ)
 - Duty on employer by statute, not tort or contract
 - Akin to insurance
 - Remedial
- First Aus legislations c 1900 - 1925:
- Australian jurisdictions adopted UK legislation between 1897 and 1914:
 - *Workmen's Compensation Act 1900* (SA)
 - *Workers Compensation Act 1914* (Vic)
 - change
 1. from 'out of AND in the course of employment' (i.e., out of – because of 'causal' **AND** in the course - temporal nexus to employment)
 2. to 'out of **OR** in the course of employment'—i.e., conjunctive to disjunctive
- Background to AC Act: pressures to reform
 1. WC Act 1958 problems: costs of scheme becoming unviable (transaction costs: lawyers/medical services etc), especially dramatic increase in insurance premiums payable by employers
 2. 1970s committees advocating no-fault insurance
 1. Especially Woodhouse Committee 1974 (Cth) – no fault scheme would mean removal of all CL rights (NZ legislation – no fault scheme for any injury anywhere for any reason – not just at work)
 2. Harris Report 1977 (Vic)
- 1984: AC Bill
 - Envisaged 'pure' no-fault scheme—abolition of CL rights

- 1985: AC Act passed
 - Compromise: limited CL rights retained plus no-fault benefits, i.e. 'dual' scheme
- Post-1985: multiple amendments
 - VWA replaced ACC
 - Journey claims abolished

WIRC Act

- Background
 - Hanks Report 2008: suggested streamlining and clarifying required of the AC Act, i.e. that it be 'recast' into a new Act [1.24]
 - Long legislative history and multiple amendments had led to complex structure and difficulties in interpreting AC Act
- Minister's 2nd Reading Speech indicated 2 aims:
 - Recast AC Act and ACWI Act into a single piece of legislation
 - Simplify and clarify provisions of AC Act, without changing benefits to workers
- WIRC Act came into effect 1 July 2014

Which Act applies?

- No real change in substance to the provisions or the entitlements to compensation, however. Irrespective of which act the injury falls under, procedural steps need to be dealt with as per WIRC Act.
 - Injuries prior to 31 August 1985 — WC Act
 - Injuries after 31 August 1985 and prior to 1 July 2014 – AC Act s 2
 - Injuries after 1 July 2014 — WIRC Act

S 5 WIRC Act

Application of this Act to injuries

- 1) Except as otherwise expressly provided in this Act, this Act applies to the entitlement of a worker to compensation under this Act in respect of—
 - a) an injury to the worker arising out of, or in the course of, or due to the nature of, employment on or after 1 July 2014; and
 - b) an injury arising—
 - i. out of, or in the course of, or due to the nature of, employment; and
 - ii. by way of gradual process over a period beginning before, and continuing on or after 1 July 2014—

but does not apply to or in relation to an injury arising out of, or in the course of, or due to the nature of, employment solely before 1 July 2014.

Aims and rationales of WIRC

- This can be established from the WIRC Act itself, and other documents: as statutory principles of interpretation provide
- So, we need to work out:
 - What are the relevant principles of statutory interpretation?
 - What are the aims/objects of the WIRC Act?
 - What are the aims/objects of VWA?
 - What principles apply in cases of uncertain interpretation?

Principles of statutory interpretation

Cook et al 2012, 8th ed.: **13-step checklist guide to statutory interpretation**

What's in the text of the statute:

1. Establish whether the legislation was in force at the relevant time. If it only commenced operation at a later time, check whether it nevertheless applies retrospectively to the problem.
2. Use the table of contents and headings to check through the whole piece of legislation seeking relevant provisions.
3. When you find a relevant provision, read it carefully and note any words or phrases that appear significant.

4. Check whether any of those words or phrases are defined in the legislation.
5. If necessary, check the meaning of any words in a dictionary.
6. Consider whether any provisions of the relevant legislation are in point.
7. Consider whether any of the adjacent provisions in the legislation throw light on a relevant provision, remembering that words are normally used consistently.

How have cases in the past interpreted the provision you are trying to apply?

8. If appropriate, check whether any relevant provision has been given judicial interpretation.
9. Attempt to interpret the words according to their ordinary meaning or, where appropriate, their technical or legal meaning, and try to apply them to the problem.
10. Attempt to identify the purpose of the legislation, or of a particular provision, by looking at the whole of the legislation, and try to interpret the words consistently with that purpose.
11. If the provision is ambiguous or obscure or, taking account of its context and underlying purpose or object, its ordinary meaning leads to an absurd or unreasonable result, reference may be made to parliamentary, executive, and related materials to determine the meaning of the provision.
12. If the preconditions referred to in 11 are not present, reference may be made to relevant extrinsic materials to discover the mischief or defect addressed (2nd reading speeches, explanatory memorandum).
13. Interpret a provision against a background of any relevant common law presumptions.

Beneficial/remedial legislation?

- Yes, it is a 'well-known principle': Hill and Bingeman, *Principles of the Law of Workers' Compensation Particularly in Victoria* (1981), 3
- Remedial/beneficial – meaning/interpretation should always be given that is beneficial to the worker
- Workers' comp legislation 'should not be construed in any narrow spirit' b/c it is 'akin to insurance' and is 'remedial' legislation: **McGuire v Union Steamship (HCA, 1920)**, at 583-84 (Isaacs and Rich JJ)
- 'where two constructions of a Workers' Compensation Act are possible, that which is favourable to the worker should be preferred': **Wilson v Wilson's Tile Works (HCA, 1960)**, at 335 (Fullagar J).
 - **Dodd v Executive Air (VSC, 1975)**: cited Fullagar J's comments as an 'established principle'
 - **Mulvany & Typaldos**, [450-8000]
 - **Hegedis v Carlton & United Breweries [2000] 4 VR 296**, 301-302, at [32] (Ashley JA): In construction of workers compensation legislation, which has been regarded as being remedial in character, there is a long-established principle that in the event of ambiguity a construction favourable to the worker should be adopted: Wilson v Wilson's Tile Works Pty. Ltd. (1960) 104 CLR 328 per Fullagar J at 335; Dodd v Executive Air Services Pty. Ltd. [1975] VR 668 at 679 per Newton J. and at 682 per Norris J. That approach has continued until modern times: Bird v The Commonwealth (1988) 165 CLR 1 at 6 per Mason CJ, Brennan and Toohey JJ, and at 9 per Deane and Gaudron JJ. (who dissented in the result, but not upon the point of principle); Borovac v Corporate Ventures Pty. Ltd. (1995) 12 NSWCCR 84 at 89 per Mahoney JA. It has continued notwithstanding a tendency across jurisdictions to reduce the ambit of compensability of injury. It is not a vehicle for discovering ambiguity where none exists. It could not be used to set at nought the effect of s.35(a) of the Interpretation of Legislation Act 1984. But unless and until a court of the highest authority decides that the principle is irreconcilable with the modern conception of workers' compensation legislation, it appears to me that the principle continues to have a legitimate area of operation.
- But compare recent judicial commentary, in context of TA Act (Topic 5): **Byrne v TAC [2008] VSC 92,[46]** (Cavanough J *obiter* [46])

The TAC drew to my attention the following passage from the judgment of Winneke P (with whom Batt JA and Warren AJA agreed) in *Transport Accident Commission v Lincoln* [23]: "It is true that, over the years, courts which have been called upon to interpret compensation statutes have repeatedly said that the underlying scheme of those Acts is 'beneficial' and ought to be interpreted broadly in favour of the applicant. In this State those words are achieving a 'hollow ring' because one of the primary objects of the present legislation is to 'reduce the cost to the Victorian community of compensation for transport

accidents.”^[24] I note the following comment by Judge Bowman in *Robb v Transport Accident Commission*^[25]: “The observations of Winneke P in *Lincoln* have been brought to my attention and it may be that words such as ‘beneficial’ in relation to legislation such as this now have a ‘hollow ring’ about them. However, with respect, I do not interpret the words of His Honour as meaning that such a general approach to the interpretation of compensation statutes no longer exists or has forever departed. I understand him to be saying that, in this state, such an approach is no longer in the robust condition that it once was. It may also be that an approach based upon the beneficial interpretation of compensation statutes is becoming an argument of last resort ...”

- **Interpretation of Legislation Act 1984 (Vic) s 35**
 - **Principles of and aids to interpretation**
In the interpretation of a provision of an Act or subordinate instrument—
(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) **shall** be preferred to a construction that would not **promote that purpose or object;**

Aims of the WIRC Act – s 10

The objectives of this Act are to—

- (a) reduce the incidence of accidents and diseases in the workplace; and
- (b) make provision for the effective occupational rehabilitation of injured workers and their early return to work; and
- (c) increase the provision of suitable employment to workers who are injured to enable their early return to work; and
- (d) **ensure appropriate compensation under this Act or the Accident Compensation Act 1985 is paid to injured workers in the most socially and economically appropriate manner, as expeditiously as possible;** and
- (e) ensure workers compensation costs are contained so as to minimise the burden on Victorian businesses; and
- (f) establish incentives that are conducive to efficiency and discourage abuse; and
- (g) enhance flexibility in the system and allow adaptation to the particular needs of disparate work situations; and
- (h) maintain a fully-funded scheme; and
- (i) in this context, to improve the health and safety of persons at work and reduce the social and economic costs to the Victorian community of accident compensation.

Aims of the VWA – s 492

The objectives of the Authority are to—

- a) manage the accident compensation scheme as effectively, efficiently and economically as is possible; and
 - b) manage the accident compensation scheme in a financially viable manner; and
 - c) ensure that appropriate compensation is paid to injured workers in the most socially and economically appropriate manner and as expeditiously as possible; and
 - d) develop such internal management structures and procedures as will enable the Authority to perform its functions and exercise its powers effectively, efficiently and economically; and
 - e) administer this Act, the Accident Compensation Act 1985, the Workers Compensation Act 1958, the Occupational Health and Safety Act 2004, the Equipment (Public Safety) Act 1994 and the Dangerous Goods Act 1985.
- VWA is regulator and claims manager.
 - Every employer over threshold pays WorkCover premium which is then in turn used to pay claims.

Victorian WorkCover Authority

- What is it?
- What does it do?
 - Manages scheme, administers act, litigates.

- How does it do it?
 - Party will sue VWA where dispute arises in management of claim or if party decides to bring serious injury claim, appeal of termination of compensation etc – all judicial review of administration decisions.

WIRC Act – s 491 & 492

The Authority

- (1) The Victorian WorkCover Authority established under section 18 of the Accident Compensation Act 1985 as in force immediately before 1 July 2014 continues in existence.

Objectives of the Authority

The objectives of the Authority are to—

- a) manage the accident compensation scheme as effectively, efficiently and economically as is possible; and
- b) manage the accident compensation scheme in a financially viable manner; and
- c) ensure that appropriate compensation is paid to injured workers in the most socially and economically appropriate manner and as expeditiously as possible; and
- d) develop such internal management structures and procedures as will enable the Authority to perform its functions and exercise its powers effectively, efficiently and economically; and
- e) administer this Act, the Accident Compensation Act 1985, the Workers Compensation Act 1958, the Occupational Health and Safety Act 2004, the Equipment (Public Safety) Act 1994 and the Dangerous Goods Act 1985.

Functions of the Authority – s 493

- (1) The functions of the Authority are to—

- a) receive and assess and accept or reject claims for compensation; and
- b) pay compensation to persons entitled to compensation under this Act or the Accident Compensation Act 1985; and
- ...
- d) promote the effective occupational rehabilitation of injured workers and their early return to work; and
- ...
- f) provide insurance in accordance with this Act and to determine, collect and recover premiums in accordance with this Act; and
- g) ensure that the accident compensation scheme is competitive and fully-funded; and
- h) regulate and make recommendations to the Minister in relation to self-insurers; and
- ...
- j) administer the WorkCover Authority Fund; and
- k) implement measures to deter and detect fraudulent workers compensation claims; and
- l) conduct or defend proceedings before a court or tribunal; and
- m) defend actions against employers under this Act or the Accident Compensation Act 1985 and at common law; and
- ...
- zc) carry out other functions specified under this Act, the Accident Compensation Act 1985 or the Workers Compensation Act 1958, or the regulations or under any other Act or regulations under any other Act.

WIRC Act – s 494, 495 and 502

Powers of the Authority

- (1) Subject to this Act, the Authority has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions and to enable it to achieve its objectives.

Accountability of the Authority

- (1) The Authority is subject to—
- (a) the general direction and control of the Minister; and
 - (b) any specific directions given by the Minister.

Establishment of Board

- (1) The Board of Management of the Authority established under section 24 of the Accident Compensation Act 1985 as in force immediately before 1 July 2014 continues in existence.
- (2) The Board—
- (a) may exercise all the powers of the Authority; and

- (b) must give general directions as to the carrying out of the objectives and functions of the Authority; and
- (c) must ensure that the Authority is managed and operated in an efficient and economic manner.

WIRC Act – s 6

Claims for compensation

- 1) On and after 1 July 2014, a claim for compensation under this Act or under the Accident Compensation Act 1985 (other than a claim for compensation for maims or pain and suffering under section 98 or 98A of that Act) is to be given, served or lodged in accordance with Divisions 1 and 2 of Part 2 of this Act, unless specific provision to the contrary is made in this Act or the Accident Compensation Act 1985.
 - 2) If the Authority receives a claim from a person for compensation under the Workers Compensation Act 1958 in respect of an injury occurring before 4 p.m. on 31 August 1985, the Authority may, in its discretion, provide guidance to the person as to how to make such a claim.
- Claims actually managed by agents (panel insurers) such as:
 - CGU
 - Allianz
 - Gallagher Bassett
 - QBE
 - Xchanging
 - Some companies also self-insure:
 - BHPBilliton
 - RACV
 - Toyota
 - Woolworths
 - Ingham
 - Qantas
 - Unilever

WIRC Act – s 20

Claim for compensation

- (1) A claim for compensation under this Act or the Accident Compensation Act 1985 must be in a form approved by the Authority in respect of that type or class of claim.
- (2) A claim for compensation in the form of weekly payments must—
 - a) state the date on which the worker ceased work because of the injury; or
 - b) be accompanied by a medical certificate in accordance with section 25; or
 - c) be supplemented at a later date by a medical certificate in accordance with section 25.
- (3) A claim for compensation (other than a claim arising from the death of a worker) must include an authority, signed by the worker, authorising a provider of a medical service or hospital service to the worker in connection with the injury to which the claim relates to give to the Authority, self-insurer or employer information regarding the service relevant to the claim.

WIRC Act – s 71 and 72

71 Authority to indemnify employer

- (1) The Authority is liable to indemnify an employer in respect of the employer's liability as an employer of a worker to pay compensation and damages in accordance with this Act or the Accident Compensation Act 1985, and liability to make contribution under section 23B of the Wrongs Act 1958 or a corresponding provision of an Act of the Commonwealth, another State or a Territory, for injuries suffered by the worker arising out of, or in the course of, or due to the nature of employment by the employer.

72 Employer's excess

- (1) The Authority's indemnity to an employer under this Act is subject to an employer's excess in respect of each claim equal to—
 - a) in the case of weekly payments in respect of a full-time worker who—
 - i. has no current work capacity; or
 - ii. has a current work capacity—the first 10 days of the period of incapacity resulting from the relevant injury; and
 - b) the proportion of the weekly payments in respect of a worker who is not a full-time worker of that employer and who—

- i. has no current work capacity; or
 - ii. has a current work capacity—
- for the first 10 days of the period of incapacity resulting from the relevant injury; and
- c) payment of the first \$642 (indexed figure) of the reasonable costs referred to in section 224(1)(a) in relation to the relevant injury (medical or hospital services).

Outline of the WIRC Act

- Eligibility for no-fault compensation
 - Injury: physical or mental
 - Employment nexus (connection)
 - Worker
 - injury arises 'out of' or 'in the course of' employment
- Types of compensation
 - Lump sum
 - Periodic payments of PIAWE (pre-injury average weekly earnings)
 - MLE (medical and like expenses – lump sum)
 - benefits following death (claims available to dependents)
- Deals with common law damages in 2 ways:
 - (1) it provides for a threshold requirement, i.e. that the worker suffered a 'serious injury' via 1 of the 'gateways': see Topic 4
 - (2) if threshold satisfied, separate proceedings can be brought seeking CL damages, dealing with
 - Issues of negligence
 - Quantum of damages: restrictions on quantum and type of common law damages

(We do not deal with this 2nd matter in this unit.)

Types of compensation

- Medical and like benefits
 - Part 5, Div 7, s 224
 - Reasonable cost of listed services received 'because of' the injury
- Weekly payments
 - Part 5, Div 2, ss 161-3
 - Payment based on 'pre-injury average weekly earnings'
 - Three entitlement periods with different rates
- Impairment/non-economic loss benefits
 - Part 5, Div 5, ss 211-14
 - Lump sum based on a percentage impairment rating
- Common law
 - Part 7, s 326
 - Must have a 'serious injury', s 327
 - Damages reduced for compensation paid, ss 342-3

