

WEEK 1:

- Workers' Compensation Legislation in Victoria
- Introduction to Workers' Compensation Legislation in Victoria

WEEK 2

- Who is a worker?
- What is an injury?

WEEK 3

- Nexus b/n Injury and Employment

WEEK 4

- Types of Workers' Compensation

WEEK 5

- Common Law 'Serious Injury' Claims for work injury
- Claims and Dispute Resolution
- Reform, Trends and Developing issues

WEEK 6

- Transport Accident Compensation
- Claims and Dispute Resolution
- Reform, Trends, and Developing Issues

WEEK 7

- Intro to Transport Accident Compensation Legislation in Victoria
- Entitlement to Transport Accident Compensation

WEEK 8

- Types of Transport Accident Compensation

WEEK 9

- Common Law 'Serious Injury' Claims for Transport Accident Injury Both Acts

WEEK 10

- Interaction with Other Schemes and Financial Support

Revision

## TOPIC 1: INTRODUCTION TO WORKERS' COMPENSATION LEGISLATION IN VICTORIA

(2 X texts that this half of the trimester will rely on – in beginning of lecture 1)

### WHAT ARE STATUTORY COMPENSATION SCHEMES? (ch1 prescribed text)

e.g.

- Transport accident schemes
- NDIS
- COVID compensation schemes
- **Legislative framework** the defines claimant eligibility and level of available benefits.
- **No-fault benefits plus limited common law damages entitlement**
  - Don't have to prove fault (e.g. negligence?) or any other breach of the law (e.g. misleading conduct/breach of contract) – no cause of action or fault > either by the person claiming or by the person whom or which they are claiming against.
  - "Fault neutral/Fault-free zone"
  - Doesn't matter who is or isn't at fault!
- **Involvement of government / State as scheme regulator**
  - Distributive justice – pay insurance/pay a premium, etc. / if one person gets injured then all those resources will go to that person.
- **Application process for claimant to get benefits.**
  - If you are injured – you have a series of steps to go through to be entitled.
- **Claims management system**
  - To work safe itself or to claims agents.
- **Public accountability**, e.g. annual reports
  - WorkSafe produces an annual report and the activities it has been engaging in

### WHY ARE STATUTORY SCHEMES IMPORTANT?

- They represent the dominant means by which the law responds to injury.
- Chief means of financial support to injured persons.
- Burden of injury in society is significant.
  - In 2017/8, 536,000 people in Australia injured at work.
  - These occur against a background of existing claims, so numbers increase significantly each year.
- 11 workers' compensation schemes in Australia:
  - 3 x Cth
  - 8 x states/territories
  - 9 transport accident schemes in Australia

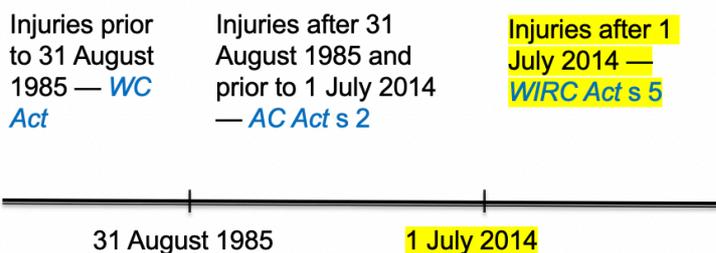
### Comcare v PVYW [2013] HCA 41 – 'Light Fitting Case'

- Woman was on a 2-day work trip for a conference and had to stay overnight at a hotel.
- She engaged in intercourse with another person whilst in the hotel room.
- A light fitting became dislodged, injuring the woman.
- Woman made a claim for workers' compensation.
- **HELD:** High Court said she was not entitled to compensation
  - Question was whether she was injured 'in the course of employment' – can be temporal or circumstantial connection.
  - Interval Test: circumstances possibly where it could be said that there was an entitlement – even if someone was not actually doing work, but if they were engaging in an activity or in a place that was encouraged by the employer.
  - Similar case: Hatzimamolis v VWA?
  - Claimant argued that she fell within the organising/interval test. The HC however disagreed.
  - The injury arose from the activity she was engaging in. Which she was not doing by the inducement or encouragement of her employer

## INTRODUCTION

- The 'two Acts'
  1. **Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) = WIRC Act**
  2. **Accident Compensation Act 1985 (Vic) = AC Act, its predecessor**
- **Scheme of compensation for workplace injuries**
  - Both of them are: Hybrid, dual, or 'add-on' schemes, ie:
    - No-fault compensation; and
    - BUT ALSO; 'Added-on' common law rights. *(In very limited circumstances)*
- Which Act applies? AC Act or WIRC Act

**WHICH ACT APPLIES? (We will only be assessed on the WIRC ACT) or eligibility between the two acts.**



**WHICH ACT APPLIES? – s 5 WIRC Act**

### Application of this Act [WIRC 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**.

### OUTLINE OF THE LEGISLATION

- Provides for **no-fault compensation AND common law damages**
- **No-fault** compensation
  - Eligibility/entitlement:
  - Injury
  - Employment nexus
    - ⇒ injury 'arising out of' or 'in the course of' employment, etc
    - ⇒ 'worker'

- Types:
  - **Income** benefits
  - **Lump sum** impairment benefits
  - **Medical** and like benefits
  - **benefits** following **death**
- **Restricts** entitlement to **CL damages**
  - **Threshold** requirement of '**serious injury**': Topic 4
  - If SI threshold **satisfied**, then claimant can **bring separate proceedings** seeking **CL damages**
- **Restricts** quantum and kinds of CL damages
  - Eg, 'caps', **minimum thresholds**, rates for calculating, etc
  - **We do not deal with this in this unit.**

### OUTLINE OF THE TWO ACTS

WIRC Act	AC Act
<i>Part 1 — Preliminary</i> Section 3 — <b>Definitions</b> Section 10 — <b>Objectives</b> of Act Sections 39 — <b>Entitlement</b> to compensation	<i>Part I — Preliminary</i> Section 5 — Definitions Section 3 — Objects of Act Section 82 — Entitlement to compensation
<i>Part 4 — Return to work</i>	<i>Part VII B — Return to work</i>
<i>Part 5 — <b>Benefits</b></i> Division 2 — Weekly <b>payments</b> Divisions 4 and 5 — Compensation for <b>non-economic loss</b> Division 7 — Compensation for <b>medical</b> and like services	<i>Part IV — Payment of Compensation</i> Division 2 — Benefits [weekly payments] Division 2A — Compensation for maims, pain and suffering and non-economic loss Division 2B — Compensation for medical and like services
<i>Part 6 — <b>Dispute resolution</b> (designed not to be a legal zone originally...)</i>	<i>Part III — Dispute resolution</i> [now repealed]
<i>Part 7 — Actions and proceedings for <b>damages</b></i> Division 2 — Actions for damages (serious injury)	<i>Part IV — Payment of compensation</i> Division 8A — Actions for damages
<i>Part 11 — Victorian <b>WorkCover Authority</b></i>	<i>Part II — Victorian WorkCover Authority</i> [now repealed]

### TYPES OF COMPENSATION

Medical and Like Benefits	Weekly Payments	Impairment/Non-Eco Loss Benefits	Common Law Damages
<ul style="list-style-type: none"> <li>• <b>Part 5, Div 7: s 224</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Part 5, Div 2: ss 161-3</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Part 5, Div 5: ss 211-214</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Part 7: s 326</b></li> </ul>

<ul style="list-style-type: none"> <li>• <b>Reasonable</b> cost of listed <b>services received</b> 'because of' the <b>injury</b></li> </ul>	<ul style="list-style-type: none"> <li>• Payment based on 'pre-<b>injury average</b> weekly earnings'.</li> <li>• Three <b>entitlement periods</b> with different rates (depending on how long those payments last)</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Lump sum</b> based on a percentage <b>impairment</b> rating</li> </ul>	<ul style="list-style-type: none"> <li>• Must have a '<b>serious injury</b>': s 327.</li> <li>• <b>Damages reduced</b> for compensation paid : ss 342-3 (you can't be doubly compensated for the same thing)</li> </ul>
----------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

## HISTORY OF THE LEGISLATION

### 4 distinct stages

- (1) Early History: from Common Law to First Workers' Compensation Statutes in 19<sup>th</sup> c
- (2) WC Act and its Background
- (3) AC Act and its Background
- (4) WIRC Act and its Background

## EARLY HISTORY: FROM COMMON LAW TO FIRST WORKERS' COMPENSATION STATUTES IN 19<sup>TH</sup> CENTURY

- Industrial revolution 18<sup>th</sup>-19<sup>th</sup> cc: **many injuries** to workers. **Real absence of corrective justice**
- Problems in common law at this time—'Unholy Trinity' of:
  1. Common employment
  2. Voluntary assumption of risk
  3. 'Contributory negligence'
- **Bismarck's Germany 1883-1889**
  - Sickness, accident, and disability funds
- *Workmen's Compensation Act 1897* (UK) and successors
  - **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.
    - ⇒ i.e., **breach** of contract (**no negligence** at this time)
- **Cause of action** arose as a 'statutory duty' [**arose in the statute not tort**], 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 AUSTRALIAN WORKERS' COMPENSATION STATUTES FROM 1900 ONWARDS

- Australian jurisdictions adopted 1897 Act and successor legislation:
  - *Workmen's Compensation Act 1900* (SA): 1<sup>st</sup>

- *Workers Compensation Act 1915* (Vic)
- Victoria
  - 1915 Act: **allowed** the worker to **elect statutory compensation** or **common law rights**, but not both
  - 1946: amendments to allow for an injury arising either 'out of' or 'in the course of' employment

### WORKERS COMPENSATION ACT 1958 AND ITS BACKGROUND

- Various iterations and amendments to WC Act between 1914 and 1953
  - Highlighted by changes to WC Act in 1946 which.
    - ⇒ Allowed for injury to arise **either 'out of or in course of employment'**.
    - ⇒ Included **'journey claims'**. **Travel between your residence and place of work (vice versa)**
    - ⇒ Injury **widened** to include **aggravations**.
- WC Act 1958 was a **consolidation**.
  - Retained right to **elect statutory compensation** or **common law rights**, but not both.
  - **Employers** compelled to take out **insurance**.
  - **Injury** to arise 'out of or in course of employment'.

### ACCIDENT COMPENSATION ACT 1985 (VIC) AND ITS BACKGROUND

- **Pressures to reform** WC Act in 1970s and 1980s
  - De-stabilisation of financial base of scheme in 1980s due to **economic stagnation** 1973-4 and **rising costs of claims**
  - **Whitlam** ALP Federal Government entered office in 1972 with **reformist agenda**, i.e. Woodhouse Committee 1973
    - ⇒ Harris Report 1977 (Vic)
- Victorian Cain ALP Government
  - 1983 Cooney **Inquiry**: divided
  - 1984 **White Paper** [**government position on what they were going to do**]: advocated 'pure' no-fault scheme—abolition of CL rights, based on Woodhouse Report
  - **At the last minute, agreed to a compromise with the opposition to retain some common law rights – that retention we still have today > serious injury threshold**

### AC ACT AND ITS BACKGROUND (CONTINUED)

- 1985 AC Act 'WorkCare'
  - a political 'compromise' b/n govt and unions/LNP: **limited CL rights retained** plus no-fault benefits, ie 'dual' scheme
  - 'WorkCare' characterised by 3 new institutions:
    - AC Commission collected premiums, assessed claims, paid benefits
    - AC Tribunal to decide on disputes
    - Accident Rehab Council to oversee rehab
  - Dual scheme: no-fault compensation plus CL for P&S (pecuniary damages limited)
- Post-1985: multiple amendments

- Scheme became 'WorkCover' in 1992
- VWA replaced ACC in 1992
- 'Journey claims' abolished post 1 Dec 1992
- Abolished CL rights for period 12 Nov 1992 – 19 Oct 1999

## WORKPLACE INJURY REHABILITATION AND COMPENSATION ACT 2013 (VIC) AND ITS BACKGROUND

- Hanks Report 2008: suggested **streamlining** and **clarifying** AC Act, ie that it be 'recast' into a new Act [1.24] – *They thought it was difficult to understand, thus should be re-drafted to be clearer, more logical, but with no changes to entitlements (didn't want anyone to lose entitlements)*
- Because its long legislative history and multiple amendments had led to a **complex structure** and **difficulties in interpreting** AC Act
- New WIRC Act: Minister's 2<sup>nd</sup> Reading Speech indicated 2 aims:
  1. **Recast** AC Act and ACWI Act into a single piece of legislation
  2. **Simplify** and clarify provisions of AC Act
  3. **Without changing benefits** to workers
- WIRC Act **passed** and came into **effect 1 July 2014**

## UNIQUE CHARACTER OF WORKERS' COMPENSATION LEGISLATION

- Nature of workers' compensation legislation is distinctive.
- ***McGuire v Union Steamship* (HCA, 1920), at 583-84 (Isaacs and Rich JJ) illustrates this**
  - **Enacted to remedy 'evils' of the common law and to meet hardships of injured workers**, i.e. remedial.
  - **No-fault** in nature
  - **Cause of action is statutory duty.**
  - **Therefore, workers' comp legislation 'should not be construed in any narrow spirit' b/c it is 'akin to insurance' and is 'remedial' legislation.**

## BENEFICIAL / REMEDIAL?

- **Supported** by 2 lines of **HC authority**
  - *McGuire v Union Steamship* (HCA, 1920) per Isaacs and Rich JJ above: beneficial
  - Fullagar J in *Wilson v Wilson's Tile Works* (HCA, 1960), at 335: 'where two constructions of a Workers' Compensation Act are possible, that which is favourable to the worker should be preferred'
  - Fullagar J in *Thompson v Armstrong* (HCA, 1950): aim of statute is to benefit worker
- Fullagar J's position has become an 'established principle': *Dodd v Executive Air* (VSC, 1975); *Hegedis v Carlton & United Breweries* (VSCA, Ashley JA):
- But always subject to underlying purpose and object of legislation: Mulvany & Typaldos, [450-8000]

## RETREAT FROM BENEFICIAL / REMEDIAL REVIEW?

- In light of consideration of 'objects' of Act
  - *TAC v Lincoln* (VSC, 2003): beneficial view has 'hollow ring' in light of objects of TA Act to reduce costs to Vic community
  - *Robb v TAC* (VCAT, 2004) per Bowman J: agreed that beneficial approach no longer in the robust condition that it was
  - *Byrne v TAC* (VSC, 2008) per Cavanough J: noted other objects in TA Act

## WHAT ARE THE 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) 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.**

## BENEFICIAL AIMS?

- Difficult to say with certainty
- 'Balance' b/n **financial responsibility** and adequate/**just compensation** for injured workers?
- **Dissonance** b/n two **competing** and **inconsistent** principles? (Churilov)

## ADMINISTRATION AND MANAGEMENT OF THE LEGISLATION

- Key functions need to be carried out in workers' compensation:
  - **Claims management** and paying compensation.
  - **Collecting** insurance **premiums**
  - Dispute **resolution**
- These are carried out by:
  - VWA
  - Authorised agents
  - Self-insurers
  - Employers
  - Workers