Update to WHS Law in Australia No 3

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Since the book was finalised, there have been a number of changes to the legislation governing workers’ compensation in NSW, the *Workers Compensation Act 1987* (NSW). This update mentions the most important ones, and suggests that you note these changes next to the relevant paragraphs in the book as published. I also take the opportunity to mention a recent case on the important s 9A issues.

The changes were foreshadowed in the book at 11.6 where it was noted that a Parliamentary Joint Select Committee had handed down a recent report. Most (though not quite all) of the recommendations of the Committee were implemented in the *Workers Compensation Legislation Amendment Act 2012* (No 53 of 2012) (the “2012 Amending Act”), which received the Royal Assent on 27 June 2012; most of the amendments we will be discussing apply retrospectively to injuries occurring on or after 19 June 2012 (presumably when the legislation was introduced into Parliament)- for the specific commencement provisions see the following clauses in Sched 6 Part 19H of the WCA 1987:

- Lump sum amendments (including abolition of “pain and suffering” awards), under Sched 2 to the 2012 Amending Act: cl 15 of Part 19H
- Nervous shock amendments (already discussed in Update No 1, 2012), under Sched 3: cl 16 of Part 19H
- Journey claims, under Sched 5: cl 18 of Part 19H
- Heart attack and stroke amendments, Sched 6 (new s 9B): cl 19 Part 19H
- Disease definition, Sched 7: cl 20

Note that for whatever political reasons, the amendments (which seem on their face to cover all workers) are specifically said in clauses 25 and 26 of Part 19H of the WCA 1987 not to apply to police officers, paramedics, firefighters or coal miners! This means that the legislation as it operated prior to 27 June 2012 will be applied to claims by that select group of workers.

The main amendments (you will need to read the whole amending Act to see them all, but these are the main ones that relate to matters discussed in the book) are as follows (along with references to part of the book that should be noted up.)

### 1. Change to the connecting factor required for a disease claim

Section 4, 1987 Act (as amended from 27 June 2012)¹ :

> "injury":
> (a) means personal injury arising out of or in the course of employment;
> (b) includes a "disease injury", which means: (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or

¹ See the 2012 Amending Act, Sched 7 item [1], which in accordance with cl 20, Part 19H of Sched 6 to the WCA 1987 applies to injuries received on or after 19 June 2012.

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(c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers' Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined.

Prior to 27 June 2012 para (b) read as follows

Former s 4(1) WCA 1987) (b) includes-
(i) a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor; and
(ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration ; and

This amendment should be noted near paras 11.17, 11.29 of the book. The effect is that there is now a different “connecting factor” where there is a “disease” as opposed to a “personal injury”. In the case of a disease, the employment concerned now must have been “the main contributing factor” to the disease- para (b)(i); in the case of the aggravation etc of a pre-existing disease, again the employment must have been “the main contributing factor” to the aggravation etc-para (b)(ii).

Previously (prior to June 2012) the contracting of the disease (or aggravation) must have simply been "contributed to" by the employment- former paras (b)(i), (ii).

What difference does this make? In effect, under the old law, the employment need only have been one causal factor; now it is necessary for the court to sort out the whole range of causal factors, presumably, to make a judgment about which was the “main” causal factor. So a condition which was sparked off by a work situation, but which was “mainly” caused by an underlying condition of the worker, might not meet the new requirement.

In future, then, there will need to be examination of what “main contributing factor” means. Interestingly, this “raising of the bar” for disease injuries is likely to make all the more relevant the old debate that seemed to have died out for a few years: can a “disease” be an “injury” too? (Discussed in the book at 11.20-11.29.) That is because it will now be in the interests of a worker to show that what they have suffered is a para (a) “personal injury”, not a para (b) “disease injury”, so as not to have to jump the higher hurdle of “main connection”. Whether this argument is still tenable given the different wording of the provision awaits to be seen.

However, whether this argument is worth making or not may be doubtful, given the fact that most cases where a worker wanted to use the argument involved heart attacks and strokes- and these are now dealt with by another, new, exclusionary provision.

2. New law: exclusion of heart attack and stroke claims

While there is now more incentive (since the June 2012 amendments) to claim that harm suffered is a "personal injury" and not a "disease injury", any attempt to argue that a heart attack or a stroke amounts to a personal injury will now be met by new s 9B.²

² Inserted by the 2012 Amending Act Sched 6, applying to injuries suffered on or after 19 June 2012- see cl 19 of Part 19H, Sched 6 to the WCA 1987.
9B No compensation for heart attack or stroke unless nature of employment results in significantly greater risk

(1) No compensation is payable under this Act in respect of an injury that consists of, is caused by, results in or is associated with a heart attack injury or stroke injury unless the nature of the employment concerned gave rise to a significantly greater risk of the worker suffering the injury than had the worker not been employed in employment of that nature.

(2) In this section:
"heart attack injury" means an injury to the heart, or any blood vessel supplying or associated with the heart, that consists of, is caused by, results in or is associated with:
(a) any heart attack, or
(b) any myocardial infarction, or
(c) any myocardial ischaemia, or
(d) any angina, whether unstable or otherwise, or
(e) any fibrillation, whether atrial or ventricular or otherwise, or
(f) any arrhythmia of the heart, or
(g) any tachycardia, whether ventricular, supra ventricular or otherwise, or
(h) any harm or damage to such a blood vessel or to any associated plaque, or
(i) any impairment, disturbance or alteration of blood, or blood circulation, within such a blood vessel, or
(j) any occlusion of such a blood vessel, whether the occlusion is total or partial, or
(k) any rupture of such a blood vessel, including any rupture of an aneurism of such a blood vessel, or
(l) any haemorrhage from such a blood vessel, or
(m) any aortic dissection, or
(n) any consequential physical harm or damage, including harm or damage to the brain, or (o) any consequential mental harm or damage.

"stroke injury" means an injury to the brain, or any of the blood vessels supplying or associated with the brain, that consists of, is caused by, results in or is associated with:
(a) any stroke, or
(b) any cerebral infarction, or
(c) any cerebral ischaemia, or
(d) any rupture of such a blood vessel, including any rupture of an aneurism of such a blood vessel, or
(e) any subarachnoid haemorrhage, or
(f) any haemorrhage from such a blood vessel, or
(g) any harm or damage to such a blood vessel or to any associated plaque, or
(h) any impairment, disturbance or alteration of blood, or blood circulation, within such a blood vessel, or
(i) any occlusion of such a blood vessel, whether the occlusion is total or partial, or
(j) any consequential physical harm or damage, including neurological harm or damage, or
(k) any consequential mental harm or damage.

So in order to succeed in a claim for a heart attack or stroke, the worker now needs to show a “significantly greater risk” of such an event due to the nature of the employment concerned, in comparison to other employment.

This amendment should be noted after para 11.29 of the book.
3. The "out of or in the course of" test changed for disease claims

While it has not been discussed much in the comment on the new amendments, it seems that we have seen an overall "tightening up" of the connection for the definition of "disease injury"- note that, as seen in the extract above, that the disease must arise "in the course of employment".

This seems to now exclude the "causal" link of "out of", and for diseases to only leave the "temporal" link. It is hard to predict what the outcome of this might be; presumably in future it will not be enough to show that a disease was contracted as a result of work, but you will need to show it was contracted while at work?

This amendment should be noted after para 11.40 of the book.

4. Limitation on Journey claims

Since 27 June 2012 the operation of s 10 dealing with journey claims:

(3A) A journey referred to in subsection (3) to or from the worker’s place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

This seems to be intended to be a further serious restriction on the right to recover compensation- a “real and substantial” connection needs to be shown between the employment and the actual incident (on the road, usually.)

A WorkCover information sheet suggests that such a connection might exist where a nurse stops on her way to work to assist at a motor accident, and then is subsequently injured on her way to work. But to my mind this does not even come within the provision! Even if we assume that using your medical skills on the way to work creates a “connection” between the employment and the incident, why is there a connection with a later accident?

It would seem that almost the only thing that would be covered would, perhaps, be an accident resulting from the boss demanding you take a mobile phone call while driving to work! No doubt however other connections will be explored as time goes on.

Some other jurisdictions have had similar restrictive limits placed on journey claims in recent years, and decisions from those jurisdictions may provide some guidance for courts in NSW: for a recent example see the discussion of the issues by the Full Court of the Supreme Court of South Australia in Wheeler v State of SA [2012] SASCFC 111 (25 Sept 2012).

This amendment should be noted after para 11.59 of the book.

{Note: the 2012 NSW Parliamentary Report recommended that ‘recess’ claims under s 11 should also be restricted to those where the employment is ‘the’ significant factor in causing the injury; as far as I can tell this was one of the few areas where the Government chose not to follow the Report!}

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3 See the 2012 Amending Act, Sched 5, which applies to injuries occurring on or after 19 June 2012- cl 18 of Part 19H of Sched 6 to the WCA 1987.
5. **Change to application of s 9A**

Since 12 Jan 1997, s 9A has provided for a close connection to work by including a requirement that the employment be a "substantial contributing factor"; since 27 June 2012 the section now provides:

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9A(1) No compensation is payable under this Act in respect of an injury (other than a
disease injury) unless the employment concerned was a substantial contributing
factor to the injury.
Note: In the case of a disease injury, the worker’s employment must be the main contributing
factor. See section 4.
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The additional words in bold were added (along with the explanatory note) by the *2012 Amending Act*, Schedule 7 items [2] & [3], applying to injuries suffered after 19 June 2012- see cl 20, Sched 6, Part 19H WCA 1987. The intention seems to be that "a substantial" factor is a less strict requirement than "the main contributing" factor.

This amendment should be noted after para 11.83 of the book.

6. **Amendments to Benefits**

Amendments changing the way that weekly payments will be made were included in Sched 1 to the *2012 Amendment Act*, which commenced from 1 October 2012.

WorkCover’s latest *Benefits Guide* summarises these as:

- a simplified method for calculating workers entitlements based on the worker’s pre-injury average weekly earnings
- a step down in weekly payments after 13 weeks
- **130 week limit - for all workers except where workers meet specified requirements**
  - workers who are fit to do some work and are not performing at least 15 hours of paid work per week by the 130th week of incapacity payment will not be entitled to payments after the 130th week
  - workers who do achieve an actual return to work of more than 15 hours, or have no capacity for work, or have an impairment of more than 30% of the whole person are not subject to this time limit
- **5 year limit (claims where the level of impairment is <20%)**
  - workers with a whole person impairment of 20% or less may only receive up to 260 weeks (5 years) worth of weekly payments
  - workers with permanent impairment of more than 20% are not subject to this time limit

- Under the changes, payments for medical and related treatment will end at whichever occurs last:
  - Where no weekly payments for compensation are payable, 12 months after the claim for compensation is made, or
  - 12 months after the last payment of weekly benefits.
  - This restriction does not apply to workers with a permanent impairment of over 30 per cent. For these workers, medical cover will continue.


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Benefits will cease altogether after 5 years unless the worker has more than 20% permanent impairment.

These amendments should be noted after para 11.102 of the book.

7. Amendments to lump sum provisions

The 2012 amendments, applicable to injuries incurred on or after 19 June 2012, mean that no s 66 permanent impairment amount can be awarded unless the worker has an assessed degree of permanent impairment greater than 10%- s 66(1).

In addition, for injuries incurred on or after 19 June 2012, s 67 has now been repealed and there is no provision for a pain and suffering component at all.

These amendments should be noted after paras 11.107, 11.108 of the book.

8. Rehabilitation

There are new and tougher provisions under the 2012 amendments requiring workers to comply with return to work obligations (see new s 48A under Sched 1 of the 2012 Amending Act, 1.2 [4]).

This amendment should be noted after para 11.123 of the book.

Recent case on s 9A

Finally, note that there has been another recent decision on the interpretation of the s 9A requirement that employment be a "significant contributing factor" to a compensable injury. The new decision is Pioneer Studios Pty Ltd v Hills [2012] NSWCA 324(26 Sept 2012) now available online. (Section 9A is discussed in the book at 11.83-11.99; this case should be noted after 11.99.)

The worker fell off a balcony on her way home from a birthday party for a fellow worker that had been held in the employer's premises. In the end the case was sent back to the Commission for further fact-finding because there had not been an explicit determination as to whether the accident arose "in the course of employment", and there needed to be more evidence about whether the party was in fact "work-related". That there is still room for debate on these issues can be seen in the comments of Allsop P at [25] (agreed with by other members of the Court):

In Badawi, the Court was concerned with the correctness of the expression of views of Mason P (Meagher and Beazley JJA agreeing) in Mercer v ANZ Banking Group Ltd [2000] NSWCA 138; 48 NSWLR 740. In one respect, the majority in Badawi (Allsop P, Beazley JA and McColl JA) was of the view that Mercer was wrong: the relationship between "arise out of" and "a substantial contributing factor", and Mason P's view that the former was more stringent than the latter (see generally Badawi at 516-520 [49]-[71]). In other respects, Mercer read with Badawi remains binding authority.

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5 See 2012 Amendment Act, Sched 2, item [13]; applied to injuries occurring on or after 19 June 2012 by cl 15 of Part 19H of Sched 6 to the WCA 1987.

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