

## EXPLANATORY MEMORANDUM

### Firefighters and Emergency Volunteers Legislation Amendment (Compensation) Bill 2016

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#### Introduction

Currently under the *Workers' Compensation and Injury Management Act 1981* (WC&IM Act), a current member or officer of a permanent fire brigade, as defined in the *Fire Brigades Act 1942*, who contracts any one of 12 cancers currently prescribed for the purpose has the benefit of a rebuttable presumption to facilitate access to compensation entitlements.

The purpose of this Bill is to expand the current presumption to include State-employed firefighters, volunteer firefighters and former members and officers of a permanent fire brigade who contract any one of the prescribed cancers, so they may access compensation entitlements under the WC&IM Act or the *Fire and Emergency Services Act 1998*.

The Bill also equalises insurance coverage for emergency services volunteers acting under the *Fire and Emergency Services Act 1998*, the *Bush Fires Act 1954* or the *Fire Brigades Act 1942*.

#### PART 1 – PRELIMINARY

##### Clause 1 Short title

This clause sets out the name of the Act.

##### Clause 2 Commencement

This clause provides for the Act to come into operation as follows:

- a) Part 1 on the day the Act receives the Royal Assent; and
- b) the rest of the Act on a day fixed by proclamation, and different days may be fixed for different provisions.

#### PART 2 – BUSH FIRES ACT 1954 AMENDED

##### Clause 3 Act amended

This clause sets out the name of the Act to be amended in this Part.

##### Clause 4 Section 35A amended

This clause deleted the definition of “loss or damage” from the *Bush Fires Act 1954* as the only place it is referenced is section 37, which is to be deleted by the next clause.

##### Clause 5 Section 37 deleted

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This clause deletes the current section 37 as that section sets out the insurance provisions with regard to volunteer fire fighters under the *Bush Fires Act 1954*. As part of the equalisation of volunteer insurance, similar provisions will be inserted into the *Fire and Emergency Services Act 1998* to cover all emergency services volunteer firefighters.

#### **PART 3 – FIRE AND EMERGENCY SERVICES ACT 1998 AMENDED**

##### **Clause 6 Act amended**

This clause sets out the name of the Act to be amended in this Part.

##### **Clause 7 Part 6B inserted**

The proposed Part 6B sets out new provisions for volunteers regarding compensation for injury, loss or damage. This part also allows State-employed firefighters to use a period of volunteer service to meet the qualifying requirements for prescribed cancers in order to gain the benefit of the rebuttable presumption.

#### **Division 1 – Preliminary**

##### **Section 36ZM. Terms Used**

The proposed section 36ZM defines terms used in the new Part 6B.

**appropriate changes** means changes to the WC&IM Act which are prescribed by regulations or are necessary or convenient to give effect to the proposed Part 6B, as allowed by the proposed section 36ZP.

**benchmark weekly earnings** is defined in relation to a volunteer who receives compensation for an injury, and provides a reference for the rate that shall be used when an amount for weekly earnings needs to be determined.

**BFA volunteer** is inserted to make reference to both local government-appointed bush fire control officers and registered members of a bush fire brigade established by a local government. This definition is used to assist in the interpretation of the terms **registered volunteer**, **responsible agency** and **volunteer activities**.

**compensable injury** is defined so it has the same meaning as used in section 159 of the WC&IM Act.

**date of injury** is defined in relation to a person who has contracted a “specified disease”, which is any one of the 12 cancers currently prescribed in relation to the rebuttable presumption. The term **date of injury** is used to

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mean either when the person becomes either totally or partially incapacitated for work as a result of the disease, or is first diagnosed by a medical practitioner as having the disease.

***injury*** is defined so as to have the same meaning as given in subsection 5(1) of the WC&IM Act.

***injury policy*** means an insurance policy effected by a responsible agency in relation to volunteers for which it has responsibility, as referenced in proposed subsection 36ZQ(2).

***medical practitioner*** is defined so as to have the same meaning as given in subsection 5(1) of the WC&IM Act.

***Part 6B commencement day*** is inserted to make reference to the day on which proposed Part 6B comes into operation.

***registered volunteer*** means persons who are officers or members of a volunteer fire brigade under the *Fire Brigades Act 1942*, BFA volunteers, or registered members of a SES Unit, VMRS Group or FES Unit. This definition is also used to assist in the interpretation of the definition of ***responsible agency***, ***unregistered volunteer***, ***volunteer*** and ***volunteer activities*** in the proposed section 36ZM, and ***volunteer service*** in the proposed section 36ZN.

***responsible agency*** is defined to specify the person or entity with responsibility for a particular class of volunteer.

***specified disease*** is defined so as to have the same meaning as currently given in section 49A of the WC&IM Act.

***unregistered volunteer*** is defined to provide that a person must be acting under the direction of a registered volunteer or a member of operational staff in order to be classified as an unregistered volunteer.

***vehicle*** is defined to include rail vehicles, vessels and aircraft and any other means of transport.

***volunteer*** means registered volunteers and unregistered volunteers.

***volunteer activities*** is defined to set out the circumstances in which a BFA volunteer, registered volunteer or unregistered volunteer is deemed to be engaged in volunteer activities.

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**volunteer unit** means a brigade, group or unit established under the *Bush Fires Act 1954*, the *Fire Brigades Act 1942* or the *Fire and Emergency Services Act 1998*.

**WC&IM Act** means the *Workers' Compensation and Injury Management Act 1981*.

#### **Section 36ZN. When specified disease taken to be injury caused while engaged in volunteer activities**

The proposed section 36ZN makes provision for a rebuttable presumption, subject to certain criteria, for specified diseases claims which include a component of volunteer service.

If a current or former registered volunteer contracts a specified disease after meeting the qualifying period for the specified disease and the requirements for hazardous firefighting service, then the undertaking of volunteer activities is taken to have been the cause of that disease unless a responsible agency can prove the contrary.

The proposed subsection 36ZN(1) defines terms used in the proposed section 36ZN.

**FES employment** is defined so as to have the same meaning as given in section 49A of the WC&IM Act (as amended by clause 9 of this Bill).

**firefighting employment** is defined so as to have the same meaning as given in section 49A of the WC&IM Act (as amended by clause 9 of this Bill).

**firefighting service** means firefighting employment or volunteer service.

**hazardous fire** is defined so as to have the same meaning as given in section 49A of the WC&IM Act (as amended by clause 9 of this Bill).

**hazardous firefighting service** sets out that a claimant may use FES employment, non-FES employment where they have attended an average of at least five hazardous fires per year, or volunteer service where they have attended an average of at least five hazardous fires per year, or a combination of any of them to be deemed as having undertaken hazardous firefighting service.

**non-FES employment** is defined so as to have the same meaning as given in section 49A of the WC&IM Act (as amended by clause 9 of this Bill).

**qualifying period** is defined so as to have the same meaning as currently given in section 49A of the WC&IM Act.

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**volunteer service** is defined in relation to a specified diseases claim to be service as a registered volunteer which involves or involved responding to hazardous fires.

Proposed subsections 36ZN(2) and (3) provide that if a volunteer has contracted a specified disease, it is presumed that the disease was caused to the volunteer while engaged in volunteer activities:

- if the volunteer has undertaken a period or periods of firefighting service equal to or greater than the qualifying period for the specified disease; and
- if during that period of firefighting service the volunteer has been exposed to the hazards of a fire scene by undertaking a period or periods of hazardous firefighting service, i.e.
  - FES employment,
  - non-FES employment during which they attended an average of at least five hazardous fires per year, and/or
  - volunteer service during which they attended an average of at least five hazardous fires per year),amounting to either five years, or the qualifying period for the disease if the qualifying period is less than five years.

#### **Section 36ZO. Application of provisions of WC&IM Act under this Part**

The proposed section 36ZO provides that where a provision of the WC&IM Act is to be applied within the proposed Part 6B, then references in the WC&IM Act to “a worker”, “a worker’s employer”, and “a worker’s employment” should be read as “a volunteer”, “a volunteer’s responsible agency” and “a volunteer’s service as a volunteer” respectively.

#### **Section 36ZP. Appropriate changes to WC&IM Act**

The proposed section 36ZP specifies that references to “appropriate changes to the WC&IM Act” means any changes to the WC&IM Act that are prescribed by the regulations for the purposes of this Part, and any other changes necessary or convenient to give effect to this Part.

### **Division 2 – Insured compensation**

#### **Section 36ZQ. Duty to insure**

The proposed subsection 36ZQ(1) provides that loss or damage when referred to in section 36ZQ does not include loss or damage caused by

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reasonable wear or tear, mechanical or electrical breakdown, failure or breakage.

The definition of “loss or damage” deleted from section 35A of the *Bush Fires Act 1954* also excluded loss or damage by theft. This meant that previously local governments were not required to provide insurance against such loss or damage. This exclusion has been removed in order to align the insurance benefits for BFA volunteers with those available to other volunteers.

The proposed subsection 36ZQ(2) requires responsible agencies to maintain a policy of insurance for current and former volunteers who suffer an injury when engaged in volunteer activities. This will only be applicable if the injury is not compensable under the WC&IM Act, and occurred after the Part 6B commencement day.

The proposed subsection 36ZQ(3) requires responsible agencies to maintain a policy of insurance for loss of or damage to vehicles, appliances, equipment and apparatus of their volunteer units. This provision will apply to loss or damage which occurred after the Part 6B commencement day.

The proposed subsection 36ZQ(4) requires responsible agencies to maintain a policy of insurance for loss of or damage to privately owned vehicles, appliances, equipment, apparatus and items of personal property when being used for volunteer activities. This will be applicable if the volunteer activities are being engaged in by a registered volunteer of the responsible agency or an unregistered volunteer, and the loss or damage occurred after the Part 6B commencement day.

#### **Section 36ZR. Amount of insured compensation**

The purpose of the proposed subsection 36ZR(1) is to provide that volunteers who are injured are entitled to the same level of compensation as a worker under the WC&IM Act, unless otherwise prescribed.

The proposed subsection 36ZR(2) provides the mechanism to calculate weekly wages when required for the purposes of Part 6B. It provides a minimum amount by reference to the greater of:

- the benchmark weekly earnings as defined; or
- if the volunteer is self-employed or unemployed, their actual weekly earnings; or
- in any other case, the volunteer’s weekly earnings calculated in accordance with the WC&IM Act.

The proposed subsection 36ZR(3) provides that the WC&IM Act clauses specified in that subsection apply as if they were set out in the injury policy.

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The proposed subsection 36ZR(4) allows for regulations to limit the level of insurance required in relation to an injury to an individual volunteer or volunteers generally.

The proposed subsection 36ZR(5) allows for regulations to limit the level of insurance required in relation to loss or damage to vehicles, appliances, equipment, and apparatus either owned by the brigades or privately owned, and, in addition, items of personal property. The limitations may be prescribed to apply to either a single claim or to claims generally.

The proposed subsection 36ZR(6) gives a responsible agency the ability to maintain a policy of insurance which provides a greater amount of compensation than required by the proposed section 36ZR.

#### **Section 36ZS. Terms of insurance**

The proposed subsection 36ZS(1) sets out that the time limitations for claims by worker under the WC&IM Act also apply to injured volunteers. This proposed subsection also requires that an injury policy must set out that a volunteer may be required to provide medical evidence or submit to medical examinations or the like for the purposes of the injury policy.

The proposed subsection 36ZS(2) allows for regulations to modify, limit or exclude any of the requirements relating to insurance under the proposed Division 2.

The proposed subsection 36ZS(3) allows for regulations to prescribe the terms and conditions of insurance.

The proposed subsection 36ZS(4) allows for regulations to prescribe the form of a policy of insurance.

#### **Division 3 – Uninsured compensation**

##### **Section 36ZT. Uninsured compensation for specified diseases**

The proposed section 36ZT allows a volunteer who contracts a specified disease and whose date of injury falls between 13 November 2013 and the Part 6B commencement date to rely on the presumption under proposed subsection 36ZN(2), and the volunteer will be entitled to the same amount of compensation as would be payable if the date of injury was on or after the Part 6B commencement day. The intent is that the presumption under proposed subsection 36ZN(2) is to have retrospective application from 13 November 2013 onwards.

##### **Section 36ZU. Additional compensation for specified injuries**

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The proposed subsection 36ZU(1) defines terms used in the proposed section 36ZU.

***prescribed amount*** is defined so as to have the same meaning as given in section 5(1) of the WC&IM Act.

***specified injury*** sets out a list of injuries which attract a further amount of payment in addition to that normally payable under an injury policy.

The proposed subsection 36ZU(2) makes provision for a top up amount after a volunteer who has suffered a specified injury has received the other payments to which they are entitled under an injury policy. A volunteer is entitled to their normal payments plus any top up amount which would be required in order to reach a total of the prescribed amount multiplied by 2.36.

#### **Section 36ZV. Source of compensation under this Division**

The proposed section 36ZV provides that any compensation payable under proposed sections 36ZT and 36ZU shall be paid by a responsible agency out of monies appropriated by Parliament.

For payments under proposed section 36ZT, it is intended that the responsible agency would pay the compensation to the injured volunteer as costs arise rather than as a lump sum at the conclusion of the claim. This is to ensure the volunteer does not suffer financial hardship by having to fund costs themselves and only be reimbursed when the claim is finalised. The responsible agency would then be reimbursed out of monies appropriated by Parliament.

#### **Division 4 – General**

#### **Section 36ZW. Payment of compensation**

The proposed subsection 36ZW(1) stipulates that any amounts payable under an injury policy, or pursuant to sections 36ZT or 36ZU (i.e. uninsured compensation for specified diseases or additional compensation for specified injuries), are payable to a person or persons who would be entitled to them if the injured volunteer was a worker under the WC&IM Act.

The proposed subsection 36ZW(2) provides that for the purposes of the section, a spouse or de facto partner of an injured volunteer is taken to be wholly dependent on the volunteer's earnings.

The proposed subsection 36ZW(3) allows for regulations to prescribe how payments should be apportioned if more than one person has an entitlement



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to an amount under an injury policy or under proposed sections 36ZT and 36ZU (i.e. uninsured compensation for specified diseases or additional compensation for specified injuries).

#### **Section 36ZX. Specified diseases disputes**

The proposed subsection 36ZX(1) defines “specified disease dispute” for the purpose of the section to mean a dispute in connection with proposed sections 36ZN or 36ZT which deal with specified disease claims.

The proposed subsection 36ZX(2) provides that the dispute resolution procedures under the WC&IM Act Parts XI and XIII will apply (with the appropriate changes) to a specified disease dispute as if it were a dispute under the WC&IM Act.

It is intended that this subsection will apply in cases such as where the responsible agency is not satisfied a volunteer has completed the required period of hazardous firefighting service as stipulated by proposed subsection 36ZN(3), and the volunteer does not agree with the agency’s decision.

The proposed subsection 36ZX(3) provides that the decision of an arbitrator in relation to a specified disease dispute is not final or binding on parties in relation to an action for damages not covered by the Act.

#### **PART 4 – WORKERS’ COMPENSATION AND INJURY MANAGEMENT ACT 1981 AMENDED**

The purpose of this Part is to expand the current presumption under *Division 4A – Injury: specified diseases contracted by firefighters* of the WC&IM Act to include former members and officers of a permanent fire brigade and current and former State-employed firefighters who contract any one of the prescribed cancers.

#### **Clause 8 Act amended**

This clause sets out the name of the Act to be amended in this Part.

#### **Clause 9 Section 49A amended**

The current section 49A of the WC&IM Act sets out definitions applicable to *Division 4A — Injury: specified diseases contracted by firefighters* of the WC&IM Act. Clause 9 provides for additional definitions to be included in section 49A, as follows:

***FES employment*** when used in relation to a worker is defined to mean any period of firefighting employment (as defined) during which the worker is

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engaged as a member or officer of a permanent fire brigade under the *Fire Brigades Act 1942*.

**firefighting employment** is defined to mean employment by the State, with a substantial part of which consists of firefighting duties. These firefighting duties must either be:

- covered by an industrial award or industrial agreement applicable to firefighting; or
- prescribed in regulations as firefighting employment for the purposes of the WC&IM Act.

This definition is used to assist in the interpretation of the definition of **FES employment** and **non-FES employment**.

**hazardous fire** sets out the types of fires which are deemed to be hazardous fires and allows for regulations to prescribe additional types of fires if required. This definition is used to assist in the interpretation of the definition of **hazardous firefighting employment**.

**hazardous firefighting employment** is defined to mean:

- FES employment, and
- non-FES employment where the worker attends an average of at least five hazardous fires per year.

**non-FES employment** when used in relation to a worker is defined to mean any period of firefighting employment which is not FES employment. This definition is used to assist in the interpretation of the definition of **hazardous firefighting employment**.

#### Clause 10 Section 49B amended

Section 49B(b) of the WC&IM Act currently requires a worker to be currently employed as an officer or member of a permanent fire brigade. This current provision is removed and replaced with the proposed section 49B(b) which requires a worker to be currently or formerly employed in firefighting employment at the date of injury.

#### Clause 11 Section 49C amended

Clause 11(1)(a) amends section 49C(1)(a) to reflect the expansion of the presumption to former firefighters, as allowed for in the proposed section 49B(b). It also allows a worker to aggregate periods of firefighting service to meet the qualifying period for a specified disease, as currently set out in subsection 49C(2) which is proposed to be deleted by clause 11(2) of this Bill.

Clause 11(1)(b) deletes the current section 49C(1)(b) and replaces it with wording to reflect the proposed amendments to subsection 49C(2), which

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provides circumstances in which a worker is taken to have been exposed to the hazard of a fire scene.

Clause 11(1)(c) inserts the word “firefighting” before the second occurrence of the word “employment” to reflect the new definition of ***firefighting employment*** inserted into section 49A.

Clause 11(2) deletes the current subsections 49C(2) and (3), and inserts a new proposed subsection providing that a worker is taken to have been exposed to the hazards of a fire scene if the employer is satisfied they have undertaken a period or periods of hazardous firefighting service (as defined) amounting to either five years, or the qualifying period for the disease if the qualifying period is less than five years.

It is intended that in cases where the employer is not satisfied a worker has completed the required period of hazardous firefighting service as stipulated by proposed subsection 49C(2), and the worker does not agree with the employer’s decision, the dispute resolution provisions of the WC&IM Act will be applicable.