WORKERS COMPENSATION LEGISLATION (AMENDMENT) ACT 1994 No. 10

NEW SOUTH WALES

TABLE OF PROVISIONS

WORKERS COMPENSATION LEGISLATION (AMENDMENT) ACT 1994 No. 10

NEW SOUTH WALES

Act No. 10, 1994

An Act to amend the Workers Compensation Act 1987 relating to benefits for partially incapacitated workers, statutory funds of insurers, self-insurers and the privatisation of GIO; to amend the Workers' Compensation (Dust Diseases) Act 1942; and for other purposes. [Assented to 4 May 1994]

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Workers Compensation Legislation (Amendment) Act 1994.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Workers Compensation Act 1987 No. 70

3. The Workers Compensation Act 1987 is amended as set out in Schedules 1–5.

Amendment of Workers' Compensation (Dust Diseases) Act 1942 No. 14

4. The Workers' Compensation (Dust Diseases) Act 1942 is amended as set out in Schedule 6

Explanatory notes

5. Matter appearing under the heading "Explanatory note" in the Schedules to this Act does not form part of this Act.

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS

(Sec. 3)

(1) Sections 38, 38A:

Omit the sections, insert instead:

Partially incapacitated workers not suitably employed—special initial payments while seeking employment

38. (1) **Entitlement.** If:

(a) a worker is partially incapacitated for work as a result of an injury; and

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

(b) the worker is not suitably employed during any period of that partial incapacity for work,

the worker is to be compensated in accordance with this section during each such period as if the worker's incapacity for work were total.

(2) **Maximum period of entitlement.** The maximum total period for which the worker may be so compensated is 104 weeks.

(3) **Rate of compensation.** When a worker is so compensated, the compensation is payable at the relevant rate prescribed by this Act for the period of incapacity concerned. However, after the first 26 weeks of incapacity and until the worker has been compensated under this section for a total of 52 weeks, the rate is the greater of the following rates:

(a) 80% of the worker's current weekly wage rate (that is, 80% of the rate prescribed by this Act for the first 26 weeks of incapacity);

(b) the statutory indexed rate (that is, the rate prescribed by this Act for a period of incapacity after the first 26 weeks).

(4) **Worker to seek suitable employment.** Compensation is not payable to a worker in accordance with this section during any period unless the worker is seeking suitable employment during that period (as determined in accordance with section 38A).

Section 38—determinationof whether worker seeking suitable employment

38A. (1) **Application.** This section provides for the determination of whether a worker is seeking suitable employment for the purposes of section 38.

(2) **General requirements.** The worker is not to be regarded as seeking suitable employment unless:

(a) the worker is ready, willing and able to accept an offer of suitable employment from the employer; and

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

(b) the worker has supplied the employer (or the insurer who is liable to indemnify the employer) with a medical certificate in accordance with the regulations with respect to the worker's partial incapacity for work; and

(c) the worker has requested the employer (or such an insurer) to provide suitable employment or it is apparent from the' circumstances that the worker is ready, willing and able to accept an offer of suitable employment from the employer; and

(d) the worker is taking reasonable steps to obtain suitable employment from some other person.

Taking reasonable steps to obtain suitable employment includes seeking or receiving rehabilitation training that is reasonably necessary to improve the worker's employment prospects.

(3) **Notice of requirement relating to obtaining suitable employment from other person.** The requirement under subsection (2) (d) does not apply unless the worker has been notified of the requirement in accordance with this subsection.

Such a notice:

(a) must be given in writing by the insurer or self-insurer concerned; and

(b) must state that the worker is required to take reasonable steps to obtain suitable employment from some other person in order to remain entitled to compensation under section 38; and

(c) may set out particular reasonable steps that can be taken by the worker in order to satisfy that general requirement; and

(d) is subject to, and must comply with, any regulations and (subject to the regulations) any claims procedures notified by the Authority to insurers and self-insurers; and

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

(e) does not constitute an admission of liability by an employer or insurer under this Act or independently of this Act.

The requirement under subsection (2) (d) does not apply, and a notice is not to be given under this subsection, while action is being taken by or on behalf of the employer to arrange or explore the possibility of suitable employment with the employer.

(4) **Notice not applicable when proceedings pending etc.** If proceedings relating to the payment of compensation under section 38 are before the Compensation Court or the insurer or self-insurer has denied liability to pay any such compensation:

(a) a notice is not to be given under subsection (3), and the requirement under subsection (2) (d) applies without any such notice being given; and

(b) particular steps to satisfy that requirement that are set out in a notice previously given do not restrict the determination of the matter by the Compensation Court or a conciliation officer.

(5) **Workers treated as not seeking suitable employment.** A worker is not to be regarded—as seeking suitable employment if the worker has unreasonably refused an offer from any person of suitable employment or necessary rehabilitation training (unless the worker later demonstrates genuine efforts to seek suitable employment). A worker is also not to be regarded as seeking suitable employment if the worker:

(a) unreasonably refuses to have an assessment made of the worker's employment prospects; or

(b) unreasonably refuses to co-operate in procedures connected with the provision or arrangement of suitable employment or rehabilitation training under the employer's workplace rehabilitation program.

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

(6) **Court orders.** An order of the Compensation Court relating to the weekly payment of compensation:

(a) may be subject to conditions relating to the worker taking reasonable steps to obtain suitable employment during any weekly payments under section 38; and

(b) may include directions relating to the adjustment of the amount of weekly payments under section 38 for any future period of payments under section 40 when the worker obtains employment or when the period for payments under section 38 comes to an end.

(7) Definitions. In this section:

"employer" of a worker who is partially incapacitated for work means the employer liable to pay compensation to the worker in respect of the incapacity or, if there are 2 or more such employers, the employer so liable who last employed the worker;

"refusaI" of an offer or to do a thing includes a failure to accept the offer or to do the thing;

"rehabilitation training" means training of a vocationally useful kind, and includes vocational re-education, work-trials, occupational rehabilitation services or treatment provided by way of rehabilitation;

"suitable employment" means suitable employment within the meaning of section 43A.

Explanatory note

The amendment improves and simplifies the benefit provisions for partially incapacitated workers who are not provided with suitable employment by their employer and who are therefore compensated at the higher total incapacity rate during an initial period of job-seeking and rehabilitation training.

The existing provisions are complex. They apply for a maximum period of 52 weeks, a higher rate of compensation being payable during certain phases such as a preliminary 4 weeks employment-seeking period and a post-training employment seeking period. Under the proposed provisions:

(a) The maximum total period is extended to 104 weeks. Subject to that maximum, the totally incapacitated rate applies to any broken periods of unemployment. Accordingly, a partially incapacitated worker who finds employment retains any unused entitlement under section 38.

SCHEDULE 1—AMENDMENTSTO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

(b) The totally incapacitated rate applies to the whole of the relevant period (with one exception) and does not differ according to kinds of activity undertaken by the injured worker. The relevant totally incapacitated rate is the current weekly wage rate of the worker during the first 26 weeks of incapacity and the statutory rate after that first 26 weeks, the exception being the maintenance of a minimum rate of 80% of the current weekly wage rate until the worker has been compensated under section 38 for a total of 52 weeks.

(c) The requirement for the worker to be seeking suitable employment is simplified. Generally speaking, the injured worker should be actively seeking re-employment in a suitable position with his or her employer and undergoing any rehabilitation training provided or arranged by his or her employer. An actual request for a suitable position is not required if the worker's willingness to work is apparent from the circumstances (for example, if a partially incapacitated worker who continues working is dismissed without being guilty of misconduct).

(d) At present, if suitable employment or training with a view to such employment is not made available, the worker is required to seek employment from some other person in order to continue receiving the special higher rate of compensation payments. That requirement will no longer apply unless the worker is duly given notice of the requirement by the relevant insurer (notice is not required if court proceedings are pending). Instead of merely stating that the worker is required to take reasonable steps to obtain suitable employment, such a notice may set out, in addition, particular steps that can be taken by the worker to satisfy that general requirement. However, such particular steps must be reasonable in the circumstances and do not affect any subsequent proceedings before the Compensation Court or a conciliation officer.

(2) Section 39 **(Incapacity treated as total—"odd-lot" rule)**:

Omit section 39 (3), insert instead:

(3) The Compensation Court may, in determining whether a worker has taken all reasonable steps to obtain employment for the purposes of this section, have regard to circumstances of the kind referred to in section 38A (5).

Explanatory note

The amendment is consequential on the substitution of sections 38 and 38A and brings the terminology of section 39 (3) (which follows the existing sections) into line with the related terminology in the proposed substituted sections.

(3) Sections 40, 40A:

Omit section 40, insert instead:

Weekly payment during partial incapacity—general

40. (1) Entitlement. The weekly payment of compensation to an injured worker in respect of any period of partial

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

incapacity for work is to be an amount not exceeding the reduction in the worker's weekly earnings, but is to bear such relation to the amount of that reduction as may appear proper in the circumstances of the case.

(2) **Calculation of reduction in earnings of worker—general.** The reduction in the worker's weekly earnings is the difference between:

(a) the weekly amount' which the worker would probably have been earning as a worker but for the injury and had the worker continued to be employed in the same or some comparable employment (but not exceeding $1,000); and

(b) the average weekly amount that the worker is earning, or would be able to earn in some suitable employment, from time to time after the injury (but not exceeding $1,000).

(3) **Ability to earn in suitable employment.** The determination of the amount that an injured worker would be able to earn in some suitable employment is subject to the following:

(a) the determination is to be based on the worker's ability to earn in the general labour market reasonably accessible to the worker;

(b) the determination is to be made having regard to suitable employment for the worker within the meaning of section 43A.

(4) **Rehabilitation—unemployed (or not fully employed) workers.** An injured worker who duly undertakes rehabilitation training under section 38 is not to be disadvantaged under this section by any increase in the amount that the worker would be able to earn merely because of that training, unless the worker unreasonably refuses an offer of suitable employment for which the worker has been trained. The Compensation Court may determine any dispute about the operation of this subsection and (subject to any order of the Court) a conciliation officer dealing with the dispute may give a direction or make a recommendation

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

about that matter. The regulations under section 100C may require insurers and self-insurers to refer such disputes to conciliation officers for conciliation.

(5) **Maximum rate of compensation.** The weekly payment of compensation to an injured worker in respect of any period of partial incapacity for work is not to exceed the weekly payment that would be payable to the worker if it were a period of total incapacity for work.

(6) **Adjustment of compensation—indexation.** If it appears proper in the circumstances of the case, the weekly payment of compensation to an injured worker in respect of any period of partial incapacity for work may (subject to subsection (5)) be adjusted to take account of any adjustment because of the operation of Division 6 in the weekly payment that would be payable to the worker if it were a period of total incapacity for work.

(7) **Adjustment of maximum amounts—application.** If an amount mentioned in subsection (2):

(a) is adjusted by the operation of Division 6; or

(b) is adjusted by an amendment of this section,

the weekly payment of compensation applicable to a worker injured before the date on which the adjustment takes effect is, for any period of partial incapacity for work occurring on and ‘after that date, to be determined by reference to that amount as so adjusted. Such an adjustment does not apply to the extent that the liability to make weekly payments of compensation in respect of any such period of incapacity has been commuted under section 51.

(8) Exemption. This section does not apply to any period of partial incapacity for work during which the worker is compensated under this Act as if the worker’s incapacity for work were total.

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

Assessment of incapacitated worker's ability to earn

40A. (1) An injured worker who is partially incapacitated for work may be required by the employer to undergo an assessment of the worker's ability to earn in some suitable employment.

(2) An injured worker is not required to undergo such an assessment unless the worker has been informed about the possible entitlements of the worker under section 38 and the requirements for the worker to obtain those entitlements. The giving of that information does not constitute an admission of liability by an employer or insurer under this Act or independently of this Act.

(3) The Authority may, by notice to insurers and self-insurers, require any such information to be given in the form approved by the Authority.

(4) Any such assessment is at the cost of the person who requires it.

(5) If an injured worker fails, without reasonable excuse, to undergo any such assessment, the right to weekly compensation for partial incapacity for work is suspended while the failure continues.

Explanatory note

Section 40 of the Act presently provides for "make-up" weekly compensation payments for injured workers who are only partially incapacitated and who are not entitled to the higher rate under section 38 during job-seeking and rehabilitation training. The "make-up" payment is, generally speaking, the difference between the worker's pre-injury earnings and the amount the worker is earning or would be able to earn in some suitable employment after the injury. However, the Act presently provides that where the injured worker is unemployed (or not fully employed) the "make-up" payment is the usually lesser rate of the difference between the current weekly wage rate for the pre-injury employment and that rate for some suitable post-injury employment; the current weekly wage rate is determined by reference to the lesser award or standard rates of pay and not average actual earnings. If there are a number of positions that would provide suitable post-injury employment, the average rate for those positions may be used. Subject to the requirement for the lesser "make-up" payments for unemployed (or not fully employed) workers, section 43 provides the general rules for determining pre-injury and post-injury earnings.

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

Under the proposed provisions:

(a) The requirement for the usually lesser rate of "make-up" payments for unemployed (or not fully employed) workers is to be removed. The ordinary rules for determining pre-injury and post-injury earnings will not be qualified by that requirement. This will bring the level of weekly "make-up" payments of compensation for unemployed (or not fully employed) workers closer to the actual loss of earnings suffered by them because of the injury (subject to the normal statutory limits on the amount of weekly compensation that are applicable to injured workers who are in paid employment). Accordingly, the distinction between unemployed workers and fully employed workers with respect to the amount of compensation payable will be eliminated.

(b) Because of the different circumstances of each case, the determination of actual market earnings for potential employment by unemployed workers in accordance with the ordinary rules may be difficult. In order to assist in the determination of those earnings section 43 will provide that, if there is an ordinary rate of pay for that potential employment under an award or other common industrial provision, that rate may be used together with any overtime or other payments (by way of standard industry or other practice) that the worker could realistically expect to earn in the circumstances. The approach is consistent with the general principle of comparing like with like in the determination of pre-injury and post-injury earnings. However, the Compensation Court will retain the discretion to determine the appropriate amount of "make-up" payments having regard to the difference between pre-injury and post-injury earnings.

(c) The effect of rehabilitation training under section 38 on "make-up" payments under section 40 for unemployed (or not fully employed) workers is to be clarified. Suitable employment for a worker includes suitable employment for which the worker has received rehabilitation training under section 38. The amendments will ensure that an injured worker is not disadvantaged by any increase in the amount that the worker is able to earn because of that training. Accordingly, the amount of "make-up" payments will not be reduced merely because of any such increase in the worker's notional earning capacity, unless it is established that the worker has refused an offer of suitable employment for which the worker has been specifically retrained under section 38. Such a reduction might otherwise operate as a disincentive for injured unemployed workers to improve their employment prospects by undertaking rehabilitation training while in receipt of the totally incapacitated rate. The amendments also make special provision to deal with disputes on the matter, including the referral of those disputes to conciliation officers.

(d) Injured workers are to be given a proper opportunity to determine whether they are eligible for the higher rate under section 38 for job-seeking and rehabilitation training before they are assessed for "make-up" payments under section 40.

(e) The power to make regulations setting out guidelines for any such assessment (at present contained in section 40 (8)) is to be removed.

SCHEDULE1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

Generally, the other changes that have been made are not intended to alter the existing law—they reflect the interpretation that has been placed on the existing provisions of the Act or they are consequential changes. Those other changes include the following:

(a) The use of the expression "the reduction in the worker's weekly earnings" to recast section 40 in plainer language.

(b) An express statement that the determination of post-injury earnings is to be based on the worker's ability to earn in the general labour market reasonably accessible to the worker.

(c) An express statement that the general rules in section 43 for determining post-injury earnings apply to the determination of a worker's ability to earn in suitable employment.

(4) Section 43 **(Computation of average weekly earnings)**:

After section 43 (1), insert:

(1A) Any relevant rules provided by this section are also to be observed in determining the average weekly amount that a worker would be able to earn in suitable employment for the purposes of section 40. If there is an ordinary weekly rate of pay generally applicable to employment of that kind under industrial law, the average weekly amount is to be determined by reference to that rate of pay together with any other likely weekly payments which it would be proper to include in the circumstances of the case (such as overtime or other amounts payable under common industry or other practice).

Explanatory note

The amendment is consequential on the amendment made to section 40 and is explained in the note to that amendment.

(5) Section 43A:

After section 43, insert:

Suitable employment

43A. (1) For the purposes of sections 38, 38A and 40:

"suitable employment", in relation to a worker, means employment in work for which the worker is suited, having regard to the following:

(a) the nature of the worker's incapacity and pre-injury employment;

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

(b) the worker's age, education, skills and work experience;

(c) the worker's place of residence;

(d) the details given in the medical certificate supplied by the worker;

(e) the provisions of the employer's workplace rehabilitation program and any rehabilitation assessment of, or rehabilitation plan for, the worker;

(f) any suitable employment for which the worker has received rehabilitation training;

(g) the length of time the worker has been seeking suitable employment;

(h) any other relevant circumstances.

(2) In the case of employment provided by the worker's employer, suitable employment includes:

(a) employment in respect of which:

(i) the number of hours each day or week that the worker performs work; or

(ii) the range of duties the worker performs,

is suitably increased in stages (in accordance with a rehabilitation plan or otherwise); and

(b) if the employer does not provide employment involving the performance of work duties—suitable training of a vocationally useful kind provided:

(i) by the employer at the workplace or elsewhere; or

(ii) by any other person or body under arrangements made with the employer,

but only if the employer pays an appropriate wage or salary to the worker in respect of the time the worker attends the training concerned.

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

(3) However, in any such case, suitable employment does not include:

(a) employment that is merely of a token nature and does not involve useful work having 'regard to the employer's trade or business; or

(b) employment that is demeaning in nature, having regard to subsection (1) (a) and (b) and to the worker's other employment prospects.

(4) A worker is to be regarded as suitably employed if

(a) the worker's employer provides the worker with, or the worker obtains, suitable employment; or

(b) the worker has been reinstated to the worker's former employment under Part 7 of Chapter 3 of the Industrial Relations Act 1991.

Explanatory note

The amendment re-locates, with minor modifications, the provisions of existing section 38A relating to the definition of "suitable employment". The definition is relevant to the partial incapacity provisions of both sections 38 and 40. The power to make regulations concerning suitable employment (at present contained in section 38 (14)) has been removed.

(6) Section 54 **(Notice required before termination or reduction of payment of weekly compensation)**:

(a) In section 54 (4) (b), after "in such form", insert "(or contain such information)".

(b) After section 54 (5), insert:

(6) This section does not apply to a reduction in weekly compensation as a result only of the application of different rates of compensation after the expiration of earlier periods of incapacity for which higher rates were payable (whether under section 38 or otherwise).

(7) The notice referred to in this section is to include information about the possible entitlements of the injured worker under section 38 and the requirements for the worker to obtain those entitlements if:

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

(a) the notice relates to a reduction in the amount of the worker's weekly compensation as a result of the application of section 40; and

(b) the injured worker is not in receipt of earnings; and

(c) the information has not been supplied to the worker under section 40A.

The giving of that information does not constitute an admission of liability by an employer or insurer under this Act or independently of this Act.

Explanatory note

The amendment makes a consequential amendment to the provision relating to the giving of notice to an injured worker of a reduction in weekly compensation. The amendment makes it clear that a notice is not required for a change in the rate of weekly compensation arising from different rates for different periods of incapacity (i.e. when a worker receiving the job-seeking rate of payments obtains work or a period during which a particular rate is payable comes to an end). In addition, a reduction arising from a change to weekly payments under section 40 for an unemployed worker is not to be made unless information about the worker's entitlements under section 38 is included in the notice.

(7) Schedule 6 **(Savings, transitional and other provisions)**:

After clause 5 of Part 4, insert:

Continued operation of 1987 version of s. 38 (1)–(5) for injuries before 30 June 1989 and incapacity before 1993 amending Act

5A. (1) In this clause:

"the 1989 amending Act" means the Workers Compensation (Benefits) Amendment Act 1989;

"the 1994 amending Act" means the Workers Compensation Legislation (Amendment) Act 1994.

(2) This clause applies to a period of incapacity for work (whether occurring before or after 4.00 p.m. on 30 June 1989), if the incapacity results from an injury received before that time.

(3) However, this clause does not apply to:

(a) a period of incapacity for work to which clause 5 applies (that is, incapacity from an injury received before the commencement of this Act); or

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

(b) a period of incapacity for work occurring after the commencement of the amendments to section 38 of this Act by the 1994 amending Act (except in respect of the continued application under this clause of the maximum total period for which a worker may be compensated in accordance with section 38).

(4) For the purpose of determining the weekly payment of compensation in respect of a period of incapacity for work to which this clause applies:

(a) section 38 (1)–(7) of this Act (as in force immediately before the commencement of Schedule 2 (2) to the 1989 amending Act) continues to apply; and

(b) for the purposes of paragraph (a), section 38 (as so in force) applies as if:

(i) the word "immediately" in section 38 (2) (a) and (c) were omitted; and

(ii) the words "wholly or mainly because of the injury" in section 38 (4) were omitted; and

(iii) section 38 (4) (b)–(d) were omitted; and

(iv) the words in section 38 (7) (b) after "separate periods" were omitted.

(5) If a period of incapacity for work results both from an injury received before 4.00 p.m. on 30 June 1989 and an injury received at or after that time, the incapacity is, for the purpose of determining the amount of the weekly payment of compensation (if any) payable under section 38 of this Act, to be treated as having resulted from the injury received at or after that time.

(6) The Workers Compensation (Savings and Transitional) Regulation 1989 is repealed.

Operation of 1994 amending Act (ss. 38, 38A, 40, 40A, 43, 43A)—injuries before 1994 amending Act

5B. (1) In this clause, "the 1994 amending Act" means the Workers Compensation Legislation (Amendment) Act 1994.

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

(2) The amendments made by the 1994 amending Act to sections 38, 38A, 40, 40A, 43 and 43A of this Act apply to any period of incapacity for work occurring after (but not before) the commencement of those amendments (whether the incapacity results from an injury received before or after that commencement), except as provided by this clause.

(3) In the case of a period of incapacity for work resulting from an injury received before the commencement of those amendments:

(a) when determining the different rates of compensation payable under section 38 of this Act (as amended by the 1994 amending Act) on the expiration of particular periods of incapacity, any period of incapacity occurring before the commencement of those amendments is not to be disregarded and, accordingly, is to be taken into account in determining the rate of compensation payable for the balance of any such period of incapacity occurring after that commencement; and

(b) the maximum total period for which a worker may be compensated in accordance with section 38 of this Act is to be 52 weeks instead of 104 weeks but only if the injury was received before 1 February 1992; and

(c) if the rate of compensation for a period of incapacity to which section 38 applies would be higher if the 1994 amending Act had not been enacted, the rate is to be determined as if the amending Act had not been enacted.

(4) Sections 38, 38A, 40 and 43 of this Act (as in force immediately before the commencement of the amendments to those sections by the 1994 amending Act) continue to apply to periods of incapacity for work occurring before the commencement of those amendments if the incapacity results from an injury received at or after 4.00 p.m. on 30 June 1989, except as provided by this clause.

(5) Section 38 of this Act continues to apply, as referred to in subclause (4), as if section 38 (7A) and (7B) were omitted.

SCHEDULE 1—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO BENEFITS FOR PARTIALLY INCAPACITATED WORKERS—*continued*

(6) If a period of incapacity for work results both from an injury received before a relevant date and an injury received on or after that date, the incapacity is, for the purpose of determining the amount of the weekly payment of compensation (if any) payable under section 38 or 40 of this Act, to be treated as having resulted from the injury received on or after that date. The relevant date for the purposes of subclause (3) (b) is 1 February 1992 and for any other purpose is the date of commencement of the amendment concerned.

(7) This clause does not apply to a period of incapacity to which clause 5 or 5A applies.

Operation of regulation relating to form of medical certificates under s. 38

5C. Clause 10 (2) of the Workers Compensation (General) Regulation 1987 (as inserted by the Regulation published in the Gazette of 1 May 1992) extends to medical certificates supplied by a worker before 1 May 1992.

Explanatory note

Proposed clause 5A transfers to the Act the provisions of the Workers Compensation (Savings and Transitional) Regulation 1989 so that related provisions are located in the same place.

Proposed clause 5B provides that the changes made to weekly compensation for partial incapacity apply to future periods of incapacity, irrespective of the date of injury. However, if the injury was received before the commencement of the proposed amendments, the extension of the maximum period of section 38 special total incapacity payments is not extended from 52 weeks to 104 weeks but any unexpected reduction in the rate of compensation is not to have effect.

Proposed clause 5C extends the operation of a regulation made on 1 May 1992 relating to the form of medical certificates under section 38 about a worker's fitness for work to medical certificates given before that date. The regulation preserved the effectiveness of a certificate even though it was not given strictly in accordance with the prescribed form.

SCHEDULE 2—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO STATUTORY FUNDS OF INSURERS

(Sec. 3)

(1) Section 3 **(Definitions)**:

(a) In alphabetical order in section 3 (1), insert:

"actuarial investigation" means an investigation of the financial position of a statutory fund under section 202 (1A);

"premium income":

(a) in relation to contributions payable under this Act by an insurer (other than a specialised insurer) in respect of a financial year—means the amount the insurer receives during that financial year as premiums in respect of policies of insurance issued or renewed by the insurer (whether the policies are issued or renewed during that financial year or during a previous financial year); or

(b) in relation to contributions payable under this Act by a specialised insurer in respect of a financial year—means the amount the insurer receives, whether during or after that financial year, as premiums in respect of policies of insurance issued or renewed by the insurer during that financial year,

and, in relation to contributions payable by any insurer, includes any amount prescribed by the regulations as included for the purposes of this paragraph in relation to that financial year, but does not include any amount prescribed by the regulations as excluded for the purposes of this paragraph in relation to that financial year;

"statutory fund" of an insurer means the statutory fund maintained by the insurer under section 195;

(b) From section 3 (1), omit the definition of "periodic actuarial investigation".

SCHEDULE 2—AMENDMENTS TO WORKERS COMPENSATION ACT ELATING TO STATUTORY FUNDS OF INSURERS—*continued*

(2) Section 185 **(Assignment of policies of former insurers etc.)**:

(a) From section 185 (4), omit "to which the policies of insurance relate".

(b) From section 185 (5), omit "to which a statutory fund relates", insert instead "of the former insurer".

(c) From section 185 (5), omit "the fund", insert instead "the statutory fund of the former insurer".

(d) From section 185 (6), omit "a Statutory fund", insert instead "the statutory fund".

(3) Section 193 **(Definitions)**:

Omit the definitions of "premium income" and "statutory fund".

(4) Section 195:

Omit the section, insert instead:

Establishment of statutory fund of insurer

195. (1) An insurer must establish and maintain in accordance with this Division a single statutory fund in respect of the issue and renewal of policies of insurance by the insurer.

(2) If an insurer has, immediately before the commencement of Schedule 2 to the Workers Compensation Legislation (Amendment) Act 1994, 2 or more statutory funds, all of those funds (except its most recent fund) are to be closed and the assets and liabilities of those closed funds transferred to its most recent fund.

(5) Sections 196, 197, 198, 199, 201, 202, 208A, 208B:

From sections 196, 197 (1), 198 (1), 198 (2) (b), 198 (3), 199 (1), 199 (2), 201 (1), 201 (3), 208A (6) (b), 208B (4) (b), omit "a statutory fund", "'any statutory fund", "'statutory funds" and "each statutory fund" wherever occurring, insert instead "the statutory fund".

(6) Section 196 **(Assets of statutory funds)**:

(a) Omit section 196 (d).

(b) In section 196 (e), after "Premiums Adjustment Fund", insert "or another statutory fund".

SCHEDULE 2—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO STATUTORY FUNDS OF INSURERS—*continued*

(7) Section 197 **(Application of statutory funds)**:

(a) Omit section 197 (1) (e).

(b) From section 197 (1) (h), omit "periodic".

(c) From section 197 (1) (h1) omit "being:" and subparagraphs (i) and (ii), insert instead "being contributions relating to premium income payable into the statutory fund".

(d) From section 197 (1) (h2) and (3), omit "under this Act" wherever occurring.

(e) Omit section 197 (2).

(8) Section 198 **(Investment of statutory funds)**:

Omit section 198 (4).

(9) Section 201 **(Accounts, returns etc.)**:

(a) From section 201 (1) (a) and (3) (a), omit "and" wherever occurring, insert instead "or".

(b) In section 201 (2) and (5), after "regulations" wherever occurring, insert "or directions of the Authority".

(10) Section 202 **(Audit of accounting records, and actuarial investigation, of statutory funds)**:

(a) From section 202 (1), omit "the statutory funds", insert instead "the statutory fund".

(b) After section 202 (1), insert:

(1A) The Authority may appoint an appropriately qualified person to make an actuarial investigation of the financial position of the statutory fund of an insurer (including a valuation of its liabilities on such basis as the Authority determines), and to report on the results of the investigation.

(11) Section 204 **(Periodic actuarial investigation of statutory funds)**:

Omit the section.

(12) Section 205 **(Pooling of premiums between statutory funds of an insurer or between insurers)**:

Omit the section.

SCHEDULE 2—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO STATUTORY FUNDS OF INSURERS—*continued*

(13) Section 206:

Omit the section, insert instead:

Transfers from reserves in statutory funds

206. (1) If the Authority is satisfied (from the results of an actuarial investigation or from other information) that there are excess reserves in the statutory funds of insurers, the Authority may, by notice in writing to the insurers concerned, direct the transfer of specified amounts in the statutory funds of those insurers to the Premiums Adjustment Fund to meet future liabilities.

(2) Those future liabilities may include:

(a) liabilities of insurers who in future have insufficient money in their statutory funds, being liabilities for which payment is to be made from the Premiums Adjustment Fund under section 208A; and

(b) liabilities of insurers, and the employers they insure, that are not fully funded in future; and

(c) liabilities of the Authority that are to be funded by insurers in the future.

(3) The Authority is required to exercise its functions under this section in such equitable manner as the Authority determines having regard to the amounts standing to the credit of the statutory funds of insurers.

(4) An insurer must comply with a direction given to the insurer under this section.

(5) If an amount is not paid in accordance with a direction under this section, the amount may be recovered by the Authority as a debt in a court of competent jurisdiction.

(14) Section 207:

Omit the section, insert instead:

Funding of deficits in statutory funds generally or particular statutory funds

207. (1) If the Authority is satisfied (from the results of an actuarial investigation or from other information) that there is an overall deficit among the statutory funds of insurers or a

SCHEDULE 2—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO STATUTORY FUNDS OF INSURERS—*continued*

deficiency in particular statutory funds, the Authority may do any one or more of the following:

(a) The Authority may transfer amounts from the Premiums Adjustment Fund to any statutory fund in deficit.

(b) The Authority may, by notice in writing to the insurers concerned, direct the transfer of specified amounts in the statutory funds of insurers to the statutory funds of other insurers (being statutory funds of other insurers that are in deficit).

(c) The Authority may recommend to the Minister an additional amount to be contributed to the Premiums Adjustment Fund under section 208.

(2) The Authority is required to exercise its functions under this section in such equitable manner as the Authority determines having regard to the amounts standing to the credit of the statutory funds of insurers.

(3) An insurer must comply with a direction given to the insurer under this section.

(4) Any amount which is directed to be transferred from a statutory fund under this section is to be paid to the Authority and credited to the Premiums Adjustment Fund before being carried to the statutory fund to which it is directed to be transferred.

(5) If the amount is not so paid to the Authority, the amount may be recovered by the Authority as a debt in a court of competent jurisdiction.

(15) Section 208A **(Obligations of insurer under policies unenforceable if insurer has insufficient funds in statutory fund)**:

(a) From section 208A (1), omit "maintained by the insurer in respect of that policy", insert instead "of the insurer".

(b) From section 208A (4), omit "relevant".

(c) From section 208A (5), omit '"statutory funds", insert instead "statutory fund".

SCHEDULE 2—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO STATUTORY FUNDS OF INSURERS—*continued*

(16) Section 208B **(Obligations of insurer to make statutory contributions if insurer has insufficient funds in its statutory fund)**:

(a) From 208B (1), omit "from which the contribution is payable", insert instead "of the insurer".

(b) From section 208B (2), omit "relevant".

(c) From section 208B (3), omit "statutory funds", insert instead "statutory fund".

(17) Section 217 **(Definitions)**:

(a) Omit the definition of "premium income".

(b) Omit section 217 (2).

(18) Section 258 **(Definitions)**:

Omit the definition **of** "premium income".

(19) Schedule 6 **(Savings, transitional and other provisions)**:

After clause 19 of Part 15, insert:

Contributions by insurers—merger of statutory funds under Workers Compensation Legislation (Amendment) Act 1994

20. (1) In this clause, **"the amending Act"** means the Workers Compensation Legislation (Amendment) Act 1994.

(2) Any contribution payable by an insurer (other than a specialised insurer) under this Act, as in force immediately before the commencement of Schedule 2 to the amending Act, in relation to premium income for a financial year before that commencement is not so payable if it is received by the insurer after that commencement.

(3) However, this clause does not affect any contribution payable by the insurer under this Act (as amended by that Schedule) in relation to any such premium income.

(4) If Schedule 2 to the amending Act commences during a financial year, the regulations may modify the application of this clause in respect of that financial year.

SCHEDULE 2—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO STATUTORY FUNDS OF INSURERS—*continued*

Explanatory note

Schedule 2 provides for the amalgamation of the separate statutory funds managed by a licensed workers compensation insurer. At present, separate funds are established by an insurer (other than a specialised insurer) for premiums received in each financial year. The funds are to be amalgamated into a single fund for each insurer. As a consequence it will no longer be necessary for insurers to keep a separate account of premiums received in respect of policies issued in each year—contributions by insurers to the WorkCover Fund, the Premiums Adjustment Fund and other Funds will be based on premiums received during the relevant year irrespective of the year to which the policy relates. Items (12)–(14) make related changes to the existing provisions for determining the solvency of each separate fund of an insurer and for the pooling of premiums to cover deficiencies in funds and the distribution of excess reserves. Under the amendments, overall deficits in the various statutory funds or in a particular statutory fund will be funded (as at present) through the Premiums Adjustment Fund or from transfers from other statutory funds. Excess reserves will continue to be available for transfer to the Premiums Adjustment Fund to cover future liabilities.

SCHEDULE 3—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO SELF-INSURERS

(Sec. 3)

(1) Section 3 **(Definitions)**:

Omit the definition of "self-insurer" in section 3 (1), insert instead:

"self-insurer" means:

(a) the holder of a licence in force under Division 5 of Part 7; and

(b) a subsidiary of the licence holder covered for the time being by the licence (as provided by section 211A); and

(c) any Government employer covered for the time being by the Government's managed fund scheme (as provided by section 211B);

(2) Section 140 **(Persons eligible to make claims)**:

Omit section 140 (1) (b), insert instead:

(b) having been a self-insurer at the relevant time, has ceased to undertake liability to pay compensation to the employer's own workers (but only if the claim cannot be paid under section 216 from any money deposited

SCHEDULE 3—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO SELF-INSURERS—*continued*

with the Authority or under any arrangement relating to the refund of any such deposit).

(3) Section 210 **(Applications for licences)**:

After section 210 (1), insert:

(1A) An application may be made by a company that is not an employer if the licence is to cover subsidiaries of the company that are employers.

(4) Section 211 **(Determination of application for licence)**:

After section 211 (2), insert:

(3) The Authority may take the matters under subsection (2) into consideration in respect of both the applicant for the licence and any subsidiary to be covered by the licence.

(4) The Authority may issue guidelines relating to the matters that the Authority takes into consideration under subsection (2) in determining an application for a licence.

(5) Sections 211A, 211B:

After section 211, insert:

Endorsement of subsidiaries on self-insurer's licence

211A. (1) The Authority may endorse on a licence granted under this Division the name of one or more wholly owned subsidiaries of the licence holder. While the name of a company is endorsed on an employer's licence, the company is taken to be covered by the licence.

(2) The Authority may at any time amend such an endorsement by adding, altering or deleting the name of a company. An amendment is made by the Authority giving notice of it to the licence holder and takes effect on the day notice is given or on a later day specified in the notice.

(3) A company which holds a licence under this Division and any subsidiary covered by the licence are jointly and severally liable for any contribution required to be made to any fund under this Act by the subsidiary.

(4) The licence of a company under this Division:

(a) may be subject to conditions under this Act relating to the obligations of a subsidiary covered by the licence; and

SCHEDULE 3—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO SELF-INSURERS—*continued*

(b) may be cancelled or suspended under this Act because of the acts or omissions of the subsidiary.

(5) The meaning of "wholly owned subsidiary" is the same as in the Corporations Law.

Government employers covered by Government managed fund scheme to be self-insurers

211B. (1) Any Government employer covered for the time being by the Government's managed fund scheme is taken to be a self-insurer for the purposes of this Act.

(2) The Government's managed fund scheme is any arrangement under which the self-insurer liabilities (within the meaning of section 216) of particular Government employers covered by the arrangement are paid by the Government of the State or by the Insurance Ministerial Corporation on its behalf.

(3) The Insurance Ministerial Corporation may enter into an arrangement with the Authority under which the Corporation acts on behalf of Government employers for the purpose of paying contributions under this Act and for other purposes of this Act.

(4) The other provisions of this Division do not apply to self-insurers referred to in this section. However, the Authority may, with the approval of the Treasurer, impose conditions on the authority conferred by this section on such self-insurers (being conditions of a kind that the authority could impose on the licence of a self-insurer under this Division).

(5) This section does not apply to any Government employers who are separately licensed under this Division as self-insurers.

(6) Section 213 **(Deposit required for self-insurers)**:

(a) In section 213 (l), after "A self-insurer", insert "who is granted a licence under this Division".

(b) From section 213 (1) (a), omit "on the grant of a licence under this Division to the self-insurer", insert instead "on the grant of the licence".

SCHEDULE 3—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO *SELF-INSURERS—continued*

(7) Section 215 **(Alternative method of giving security)**:

From section 215 (7), omit "satisfying under section 216 any final judgments against the self-insurer making the deposit", insert instead "paying or satisfying under section 216 any claims, judgments or awards against a self-insurer".

(8) Section 216:

Omit the section, insert instead:

Application and refund of deposit

216. (1) The Authority is to hold every amount of money deposited under this Division on trust for the payment and satisfaction of all claims, judgments or awards (not otherwise paid or satisfied):

(a) against the self-insurer making the deposit in respect of its self-insurer liabilities; and

(b) against any other self-insurer that is a subsidiary of the self-insurer making the deposit (being a subsidiary that is covered for the time being by the licence of that self-insurer) in respect of the subsidiary's self-insurer liabilities.

(2) An amount of money deposited with the Authority under this Division is not liable to be attached or levied on or made subject to any debts of or claims against the self-insurer making the deposit, except as provided by subsection (1).

(3) A person who has deposited an amount of money with the Authority under this Division is, if the person ceases to be a self-insurer, entitled to a refund of the amount so deposited and standing to the person's credit with the Authority:

(a) on the expiration of 3 months after service on the Authority of a written request for the refund; and

(b) on satisfying the Authority that all accrued, continuing, future and contingent self-insurer liabilities of the person or the person's subsidiaries have been discharged or adequately provided for.

SCHEDULE 3—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO *SELF-INSURERS—continued*

(4) In this section:

"self-insurer liabilities" of a person means:

(a) any liabilities of the person under this Act in respect of workers employed by the person while a self-insurer; or

(b) any liabilities of the person independently of this Act (being liabilities under a law of New South Wales) for injuries received by workers employed by the person while a self-insurer.

(9) Section 269 **(Posting summary of Act)**:

From section 269 (1) (c), omit "licensed self-insurer", insert instead "self-insurer".

Explanatory note

Schedule 3 contains amendments which:

(a) extend the provisions for the licensing of self-insurers so that a holding company may be issued with a group licence to cover it and its nominated subsidiaries; and

(b) provide that Government employers covered by the Treasury managed fund scheme are to be regarded as a group of licensed self-insurers for workers compensation purposes.

At present under the Act only companies which directly employ a large number of workers are able to obtain self-insurers licences so that they can pay their own workers compensation liabilities without taking out insurance. The amendments enable a holding company to obtain aself-insurers licence to cover its own workers (if any) and also the workers employed by subsidiary companies specified in its licence. The issue of self-insurers licences will continue to be administered by the WorkCover Authority.

Under the Treasury managed fund scheme, central government agencies (generally those funded from the Consolidated Fund) are covered for their workers compensation liabilities. Prior to the privatisation of GIO, that fund was managed by GIO and the relevant central government agencies were excluded from various provisions of the Act. The fund is now under the principal control of the NSW Insurance Ministerial Corporation (with GIO dealing with claims under contractual arrangements). The amendments in the Schedule rationalise the position of central government agencies by treating them as self-insurers under the new subsidiary provisions, with the Government (or the Ministerial Corporation on its behalf) being the notional holding company.

SCHEDULE 4—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO PRIVATISATION OF GIO

(Sec. 3)

(1) Section 3 **(Definitions)**:

(a) Omit the definition of "Government Insurance Office" from section 3 (1).

(b) Insert in section 3 (1) in alphabetical order:

"Insurance Ministerial Corporation" means the NSW Insurance Ministerial Corporation constituted under the Government Insurance Office (Privatisation) Act 1991;

(2) Section 93D **(Inspection of relevant claims information etc.)**:

From the definition of "insurer" in section 93D (3), omit "Government Insurance Office", insert instead "Insurance Ministerial Corporation".

(3) Section 151Y **(Funding of self-insurers, government employers etc. for retrospective claims)**:

(a) From section 151Y (1) (c), omit "who have obtained", insert instead "insured under".

(b) From section 151Y(9), omit "Government Insurance Office", insert instead "Insurance Ministerial Corporation".

(4) Section 158 **(Insurance for trainees)**:

(a) Section 158 (3), (7) (h), (8):

Omit "Government Insurance Office" wherever occurring, insert instead "Insurance Ministerial Corporation".

(b) From section 158 (5), omit "(other than the Government Insurance Office)".

(c) After section 158 (9), insert:

(10) This section does not require the Insurance Ministerial Corporation to be a licensed insurer.

(5) Section 160 **(Recovery of excess from employer)**:

Omit section 160 (6) (a) and (7).

(6) Section 168 **(Insurance premiums orders)**:

Omit section 168 (4) (a) and (5).

SCHEDULE 4—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO PRIVATISATION OF GIO—*continued*

(7) Section 176 **(Cancellation of licences of existing insurers (except specialised insurers))**:

After section 176 (3), insert:

(3A) The licence of the Government Insurance Office (being the licence that has been transferred to the Insurance Ministerial Corporation) is cancelled on the commencement of this subsection.

(8) Section 181 **(Conditions of licences)**:

Omit section 181 (5).

(9) Section 183 **(Cancellation or suspension of licences)**:

Omit section 183 (5).

(10) Section 187 **(Liabilities on Commonwealth insurers—special condition)**:

Omit section 187 (5).

(11) Section 191 **(Power of Supreme Court to deal with insurers or former insurers unable to meet liabilities etc.)**:

Omit section 191 (10).

(12) Section 193 **(Definitions)**:

(a) Omit paragraph (a) from the definition of "policy of insurance" in section 193 (1).

(b) Omit section 193 (2).

(13) Section 194 **(Application to GIO)**:

Omit the section.

(14) Section 221 **(Payments from the Contribution Fund)**:

From section 221 (10) (b), omit "Government Insurance Office", insert instead "Insurance Ministerial Corporation".

(15) Section 223 **(Provisions affecting Government employers)**:

Omit the section.

SCHEDULE 4—AMENDMENTS TO WORKERS COMPENSATION ACT RELATING TO PRIVATISATION OF GIO—*continued*

Explanatory note

Schedule 4 contains consequential changes to the Act as a result of the privatisation of GIO. Before the privatisation, GIO managed the workers compensation liabilities of central government agencies under the Treasury managed fund scheme, and accordingly insurance arrangements for those workers were excluded from various provisions of the Act. The amendments in this Schedule remove those references—under the amendments in Schedule 3 the relevant government agencies are to be treated as self-insurers.

Under the Act, the workers compensation insurance licence of GIO was a special licence that could not be revoked or amended without the approval of the Treasurer. The orders made under the Government Insurance Office (Privatisation) Act 1991 transferred that special licence to the NSW Insurance Ministerial Corporation which was constituted under that Act to manage Government assets and liabilities excluded from the sale of GIO. Because the relevant government agencies are to be treated as self-insurers, the special licence is no longer required. Accordingly, the amendments in this Schedule cancel the licence and remove the references to that licence in the Act.

SCHEDULE 5—MISCELLANEOUS AMENDMENTS TO WORKERS COMPENSATION ACT

(Sec. 3)

(1) Section 4 **(Definitions)**:

Omit the definition of "specialised insurer" from section 3 (1), insert instead:

"specialised insurer" means:

(a) any of the following corporations:

Australian Jockey Club

Catholic Church Insurances Ltd

Commonwealth Steamship Insurance Co. Pty Ltd

The Guild Insurance Co. Ltd

Joint Coal Board

North Insurances Pty Ltd

(b) any other corporation declared by order of the Authority to be a specialised insurer, being a corporation which the Authority is satisfied has acquired the business undertaking of a corporation mentioned in paragraph (a) or a corporation which issues policies only in respect of domestic or similar workers.

SCHEDULE 5—MISCELLANEOUS AMENDMENTS TO WORKERS COMPENSATION ACT—*continued*

Explanatory note

The amendment removes the possibility of the existing group of specialised insurers being extended by regulation or order of the WorkCover Authority, unless the insurer is providing coverage for domestic or similar workers only.

(2) Sections 37, 45, 52:

From sections 37 (5) (a), 45 (1) and 52 (1), omit "Social Security Act 1947" wherever occurring, insert instead "Social Security Act 1991".

Explanatory note

The amendment updates references to a Commonwealth Act.

(3) Section 51 **(Commutation in certain cases of weekly payments)**:

After section 51 (7), insert:

(8) If a liability in respect of weekly payments of compensation is only partially commuted under this section, the balance of the weekly payments continues to be payable under and subject to this Act.

Explanatory note

The amendment makes it clear that when a worker commutes a part of his or her weekly payments of compensation into a lump sum, the balance continues to be payable as weekly compensation.

(4) Section 65 **(Definitions)**:

At the end of section 65 (2) (b), insert:

; and

(c) permanent brain damage.

Explanatory note

The amendment makes it clear that the provisions of Division 4 of Part 3 of the Act that deal with compensation for the loss of things set out in the Table of Permanent Injuries at the end of that Division apply to permanent brain damage, which is included in that Table but is not described as a "loss".

(5) Part 3, Division 4, Table **(Compensation for permanent injuries)**:

(a) From the matter relating to disfigurement (facial), omit "0–26", insert instead "0–80".

(b) From the matter relating to disfigurement (bodily), omit "0–22", insert instead "0–50".

SCHEDULE 5—MISCELLANEOUS AMENDMENTS TO WORKERS COMPENSATION ACT—*continued*

(c) At the end of the notes to the Table, insert:

(i) In the case of disfigurement caused by an injury received before the commencement of Schedule 5 (5) to the Workers Compensation Legislation (Amendment) Act 1994, the relevant percentage is the range of 0–26% in respect of severe facial disfigurement and the range of 0-22% in respect of severe bodily disfigurement.

Explanatory note

The amendment increases the maximum amount of compensation for severe facial disfigurement from a range of 0–26% of the maximum amount of compensation for permanent disabilities (currently $128,700) to 0–80% of that maximum amount. The amendment also increases the maximum amount of compensation for severe bodily disfigurement from a range of 0–22% of the maximum amount of compensation for permanent disabilities to 0-50% of that maximum amount.

(6) Section 148:

Omit section 148, insert instead:

Application of other provisions of the Act to Scheme

148. (1) For the purposes of section 13 (3), the Authority is to have the same entitlement to recover payments it has made to a worker under the Scheme as an employer has in respect of payments the employer has made to a worker under section 13.

(2) If a worker has received payments under the Scheme, the payments are to be treated as compensation recovered by the worker for the purposes of:

(a) section 64 of the former Act as continued in operation by clause 1 (2) of Part 14 of Schedule 6 to this Act; and

(b) section 151Z of this Act.

(3) The regulations may provide for the application (with such modifications as may be prescribed) of other provisions of this Act with respect to any matter arising under this Division.

Explanatory note

Section 13 of the Act provides for compensation to be paid to a worker employed in New South Wales, but who is injured while outside the State. Section 13 (3) provides that if a worker has received such compensation and subsequently recovers

SCHEDULE 5—MISCELLANEOUS AMENDMENTS TO WORKERS COMPENSATION ACT—*continued*

compensation or damages under the laws of the jurisdiction in which that person was injured, the employer is entitled to recover either the amount of compensation paid by the employer under this Act or the amount recovered in the other jurisdiction, whichever is the lesser. Section 151Z of the Act contains provisions aimed at preventing a worker from receiving double compensation in circumstances where the worker's injury can be compensated under the Act and under the general law in New South Wales.

The object of the amendment is to enable the WorkCover Authority to recover payments made by it to workers under the Uninsured Liability and Indemnity Scheme in either of these situations.

(7) Section 151D **(Time limit for commencement of court proceedings against employer for damages)**:

Omit section 151D (1).

Explanatory note

The amendment removes the requirement that a person who commences or who has commenced court proceedings for common law or other damages for a work-related injury more than 18 months after the date of the injury must give the court a full and satisfactory explanation to the court for the delay. The requirement is modelled on section 52 of the Motor Accidents Act 1988. Unlike most motor accident injuries, there are many work-related diseases or other injuries that take some time to stabilise. The existing provision that proceedings be commenced within 3 years after the date of the injury (except with the leave of the court) has been retained.

(8) Section 151L **(Mitigation of damages)**; section 152 **(Rehabilitation programs to be established by employers)**; section 154 **(Rehabilitation counsellors)**; section 154A **(Rehabilitation etc. not admission of liability)**:

(a) From sections 151L (2) (c), 152 (l), 152 (4) and 154A, omit "general rehabilitation programme" wherever occurring, insert instead "workplace rehabilitation program".

(b) From sections 152 (2), 152 (3) and 154, omit "programme" and "'programmes" wherever occurring, insert instead "program" and "programs" respectively.

Explanatory note

The amendment changes the name of general rehabilitation programmes to workplace rehabilitation programs to reflect the nature of the programs. The amendment also revises the spelling of "program".

SCHEDULE 5—MISCELLANEOUS AMENDMENTS TO WORKERS COMPENSATION ACT—*continued*

(9) Section 151Z **(Recovery against both employer and stranger)**:

(a) After section 151Z (1) (e), insert:

(e1) if any payment is made under the indemnity and, at the time of the payment, the worker has obtained judgment for damages against the person paying under the indemnity (but judgment has not been satisfied), the payment, to the extent of its amount, satisfies the judgment;

(b) After section 151Z (4), insert:

(5) For the avoidance of doubt, this section applies and is taken always to have applied to the recovery of compensation or damages, whether or not the compensation or damages were paid under an award or judgment. For example, compensation or damages may be paid under an agreement.

Explanatory note

The amendment (item (a)) makes it clear that the provisions against double payment of compensation and common law damages apply in the period between the date judgment in a common law action is given and the date payment is made. The amendment overrules a decision of the District Court in Nsair v GIO (14 December 1990).

The amendment (item (b)) makes it clear that the provisions of the section against double payment to injured workers if both workers compensation and common law damages are payable apply when payment is made voluntarily and not under a court order.

(10) Section 153A **(Second-injury scheme)**:

From section 153A (4) (a), omit "the first $500 (or other agreed amount) of my claim", insert instead "the relevant part of any weekly compensation claim".

Explanatory note

The amendment makes a consequential change to section 153A of the Act following an earlier amendment to section 160 of the Act.

(11) Section 172 **(Recovery of unpaid premiums)**:

After section 172 (4), insert:

(5) If the rate of interest under this section changes (whether by an amendment to this section or by a regulation under this section), the new rate applies to an unpaid premium for a policy of insurance whether issued or renewed

SCHEDULE 5—MISCELLANEOUS AMENDMENTS TO WORKERS COMPENSATION ACT—*continued*

before or after the change, but only in respect of any period after the change when the premium remains unpaid.

Explanatory note

The amendment makes it clear that a change in the interest rate on unpaid premiums applies to existing policies, but only in respect of any period of non-payment occurring after the change is made.

(12) Section 184 **(Cancellation of policies following cancellation or suspension of insurer's licence)**:

After section 184 (13), insert:

(14) This section does not apply to any policies of insurance assigned to another insurer under section 185.

Explanatory note

The amendment makes it clear that the provisions for cancelling policies of former insurers do not apply when those policies are assigned to another insurer by the WorkCover Authority.

(13) Schedule 6, Part 4 **(Savings and transitional provisions relating to weekly compensation)**:

(a) After clause 4 of Part 4, insert:

Post-26 week payments covered by the former Act not affected by the Workers Compensation (Benefits) Amendment Act 1991

4A. (1) This clause applies to a period of incapacity for work occurring after the date of commencement of the Workers Compensation (Benefits) Amendment Act 1991:

(a) if the incapacity results from an injury received before the commencement of Division 2 of Part 3 of this Act; or

(b) if the period of incapacity is one referred to in Part 18 of this Schedule.

(2) For the purpose of determining the weekly payment of compensation in respect of a period of incapacity to which this clause applies (whether clause 4 or 5 of Part 4 of this Schedule applies to the case), section 37 of this Act applies:

(a) as if the amount of $235.20 in section 37 (1) (a) (i) were $196.00; and

SCHEDULE 5—MISCELLANEOUS AMENDMENTS TO WORKERS COMPENSATION ACT—*continued*

(b) as if the amount of $187.10 in section 37 (1) (a) (ii) were $155.90; and

(c) as if the amount of $170.00 in section 37 (1) (a) (iii) were $141.60 and the mount of $153.00 in that subparagraph were $127.50.

(3) Division 6 of Part 3 of this Act applies as if the amounts of:

(a) $196.00; and

(b) $155.90; and

(c) $141.60 and $127.50,

were adjustable amounts.

(4) The Workers Cornpensation (Savings and Transitional) Regulation 1992 is repealed.

(b) After clause 7 (3) of Part 4, insert:

(4) Division 6 of Part 3 of this Act (Indexation of amounts of benefits) applies as if the amount of $341.30 were an adjustable amount.

Explanatory note

Item (a) transfers to the Act the provisions of the Workers Compensation (Savings and Transitional) Regulation 1992 so that related provisions are located in the same place.

Item (b) provides for the automatic indexation of the amount of the current weekly wage rate which applies to the determination of weekly compensation payments for certain former incapacitated workers.

(14) Schedule 6, Part 6 **(Savings and transitional provisions relating to compensation for permanent disabilities)**:

After clause 3 of Part 6, insert:

Determination of amount of compensation for existing occupational diseases not compensated before commencement of Act

3A. (1) This clause applies to a loss of a thing as the result of an injury received before the commencement of Division 4 of Part 3 of this Act, being:

(a) a loss which is an occupational disease within the meaning of section 71 of this Act; and

SCHEDULE 5—MISCELLANEOUS AMENDMENTS TO WORKERS COMPENSATION ACT—*continued*

(b) a loss for which the worker concerned had not, before that commencement, been awarded, or received or agreed to receive, compensation in accordance with section 16 of the former Act.

(2) If any such loss is taken (by section 15, 16, 17 or any other provision of this Act) to have happened before the commencement of Division 4 of Part 3 of this Act, the amount of compensation payable for the loss under that Division is to be determined as if the relevant maximum amount under section 66 (1) of this Act were the maximum amount applicable on the commencement of that Division (namely, $80,000).

(3) This clause is enacted to avoid doubt and, accordingly, is taken to have applied from the commencement of Division 4 of Part 3 of this Act.

Explanatory note

The amendment clarifies the application of the compensation provisions for permanent disabilities resulting from injuries received before the commencement of the Act.

(15) Schedule 6, Part 13 **(Savings and transitional provisions relating to Uninsured Liability and Indemnity Scheme)**:

After clause 4 of Part 13, insert:

Section 148—date of operation of substitution of section

5. Section 148 of this Act, as substituted by the Workers Compensation Legislation (Amendment) Act 1994, applies to, payments made under the Scheme before as well as after the substitution of that section.

Explanatory note

The amendment is consequential on the amendment made by item (5).

(16) Schedule 6, Part 14 **(Savings and transitional provisions relating to common law remedies)**:

After clause 1 (3) of Part 14, insert:

(4) For the avoidance of doubt, those provisions of the former Act apply and are taken always to have applied to the recovery of compensation or damages, whether or not the compensation or damages were paid under an award or

SCHEDULE 5—MISCELLANEOUS AMENDMENTS TO WORKERS COMPENSATION ACT—*continued*

judgment. For example, compensation or damages may be paid under an agreement.

(5) If any payment is made under the indemnity referred to in section 64 (1) (b) of the former Act and, at the time of payment, the worker has obtained judgment for damages against the person paying under the indemnity (but judgment has not been satisfied), the payment, to the extent of its amount, satisfies the judgment.

(6) Subclauses (4) and (5) do not apply to the matter that was the subject of the decision of the District Court on 14 December 1990 in *Nsair* v. *GIO*.

Explanatory note

The amendment makes it clear that certain former preserved provisions against double payment to injured workers before commencement of the Act if both workers compensation and common law damages are payable apply when payment is made voluntarily and not under a court order.

The amendment also extends the amendment made by Schedule 5 (9) (a) to claims under the former Act.

(17) Schedule 6, Part 20 **(Savings and transitional regulations)**:

At the end of clause 1 (1) of Part 20, insert:

the Workers Compensation Legislation (Amendment) Act 1994.

Explanatory note

The amendment enables savings and transitional regulations to be made as a consequence of the enactment of this Act.

SCHEDULE 6—MISCELLANEOUS AMENDMENTS TO WORKERS' COMPENSATION (DUST DISEASES) ACT

(Sec. 4)

(1) Section 5 **(Worker's Compensation (Dust Diseases) Board)**:

(a) In section 5 (1) (c) (i) omit "a term of 3 years", insert instead "such period (not exceeding 3 years) as is specified in their instruments of appointment".

SCHEDULE 6—MISCELLANEOUS AMENDMENTS TO WORKERS' COMPENSATION (DUST DISEASES) ACT—*continued*

(b) At the end of section 5 (1) (c) (i), insert:

Any member appointed to the board before the amendment of this section by the Workers Compensation Legislation (Amendment) Act 1994 is taken to have been appointed for a period of 3 years.

Explanatory note

The amendment allows appointments to the Dust Diseases Board to be synchronised.

(2) Section 5A **(Board may use its services and facilities for other purposes)**:

From section 5A (1), omit "With the approval of the Minister, the" insert instead "The".

Explanatory note

The amendment allows the Dust Diseases Board to use its services for other purposes without Ministerial approval.

(3) Section 6 **(Constitution of Fund)**:

(a) From section 6 (2A), omit "approved by the Minister".

(b) From section 6 (7A) (c), omit "the Government Insurance Office of New South Wales", insert instead "an insurer licensed under the Principal Act".

Explanatory note

Item (3) (a) allows the board to make grants for the purpose of clinical or research work into dust diseases without Ministerial approval.

Item (3) (b) is consequential on the privatisation of the GIO.

(4) Section 7 **(Medical authority)**:

(a) Omit section 7 (1A), insert instead:

(1A) A member of the medical authority holds office for such period (not exceeding 3 years) as is specified in the member's instrument of appointment and is eligible for reappointment.

SCHEDULE 6—MISCELLANEOUS AMENDMENTS TO WORKERS' COMPENSATION (DUST DISEASES) ACT—*continued*

(1B) A member appointed to the medical authority before the amendment of this section by the Workers Compensation Legislation (Amendment) Act 1994 is taken to have been appointed for a period of 3 years.

(b) Omit section 7 (4), insert instead:

(4) If a medical practitioner has given evidence or agreed to give evidence as a medical practitioner in connection with any legal proceedings taken by or on behalf of a worker or by any employer of the worker, the medical practitioner must not act as a member of a medical authority in connection with. any case involving those proceedings.

Explanatory note

Item (4) (a) allows appointments to the medical authority to be synchronised.

Item (4) (b) makes it clear that a medical practitioner is disqualified from acting as a medical authority in a particular case only if the medical practitioner has been employed by either the worker or the worker's employer to give evidence in legal proceedings concerning the case.

(5) Section 8 **(Certificate of medical authority and rates of compensation)**:

After section 8 (2B) (ba), insert:

(bb) The payment referred to in paragraph (b) (ii) is not to be made to a person during any period when the person lives with another person on a permanent and bona fide domestic basis, although not legally married to that other person.

Explanatory note

At present, the weekly benefit provided to the widow or widower of a worker ceases on re-marriage. The amendment applies the same rule to de facto relationships so that the benefit is not payable during any period that the recipient enters into a de facto relationship.

SCHEDULE 6—MISCELLANEOUS AMENDMENTS TO WORKERS' COMPENSATION (DUST DISEASES) ACT—*continued*

(6) Section 8I **(Appeals)**:

Omit section 8I (2A).

Explanatory note

This repeals a provision no longer necessary because of the transfer of workers compensation commissioners to the Compensation Court.

[Minister's second reading speech made in—

Legislative Council on 18 November 1992

Legislative Assembly on 27 October 1993]