New South Wales

Workers Compensation Legislation Amendment Act 1995 No 30

Contents

Contents

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Act No 30, 1995

An Act to amend the *Workers Compensation Act 1987* with respect to policies of insurance, interest on lump sums, interim payment of damages, contribution and apportionment, and structured settlements, and for other purposes; to amend the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*, the *Workers' Compensation (Dust Diseases) Act 1942* and the *Law Reform (Miscellaneous Provisions) Act 1965;* and for other purposes. [Assented to 19 June 1995]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Workers Compensation Legislation Amendment Act 1995*.

2 Commencement

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

3 Amendment of Workers Compensation Act 1987 No 70

The *Workers Compensation Act 1987* is amended as set out in Schedules 1–12.

4 Amendment of Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987 No 83

The *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* is amended as set out in Schedule 13.

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

The *Workers' Compensation (Dust Diseases) Act 1987* is amended as set out in Schedule 14.

6 Amendment of Law Reform (Miscellaneous Provisions) Act 1965 No 32

The *Law Reform (Miscellaneous Provisions) Act 1965* is amended as set out in Schedule 15.

Schedule 1 Amendments relating to policies of insurance

(Section 3)

[1] Section 155 Compulsory insurance for employers

Section 155 (1)

Omit "independently of this Act (being a liability under a law of New South Wales)".
Insert instead "independently of this Act (but not including a liability for compensation in the nature of workers compensation arising under any Act or other law of another State, a Territory or the Commonwealth or a liability arising under the law of another country)".

[2] Section 155 (3) (a)

Insert "(or to supply particulars, specified in the notice, of)" after "produce for inspection".

[3] Section 155 (3) (a)

Insert "(or so supplied specified particulars of)'' after "produced".

[4] Section 155 (3) (b)

Omit "stated in the notice for production".
Insert instead "for compliance with the notice".

Explanatory note (items (1)–(4))

Item (1) of the proposed amendments extends the insurance cover required to be provided by a workers compensation policy for liability arising independently of the Act by removing the existing restriction which limits cover to a liability arising under a law of New South Wales. Cover will not extend to liability arising under any workers compensation law of another State, a Territory or the Commonwealth or to liability arising under the law of another country. The effect of this will be that cover will extend to any liability that is not a workers compensation type of liability wherever in Australia the liability arises (for example, common law liability arising under a law of another State or Territory). Items (2)–(4) of the proposed amendments are consequential on items (7)–(9).

[5] Section 158 Insurance for trainees

Omit "independently of this Act (being a liability under a law of New South Wales)" from section 158 (3).
Insert instead "independently of this Act (but not including a liability for compensation in the nature of workers compensation arising under any Act or other law of another State, a Territory or the Commonwealth or a liability arising under the law of another country)".

Explanatory note (item (5))
Item (5) of the proposed amendments parallels the amendment made by item (1).

[6] Section 159 Provisions of policies of insurance

Insert after section 159 (1):

(1A) The regulations may prescribe different provisions for different classes of policies. The regulations may also authorise the Authority to approve different provisions for policies of insurance issued by a specialised insurer in respect of domestic or similar workers.

Explanatory note (item (6))
The proposed amendment to section 159 makes it possible for the Authority to approve alternative forms for policies of insurance in respect of domestic and similar workers and in other circumstances as may be prescribed.

[7] Section 161 Inspection of policies

Omit section 161 (1). Insert instead:

(1) The Authority or a person authorised by the Authority may, by notice in writing, require an employer to do either or both of the following:

(a) to produce for inspection (or to supply specified particulars of) the policy of insurance obtained by the employer and in force at a specified date or between specified dates,

(b) to supply such particulars of matters relating to the policy as the Authority or person may consider necessary.

[8] Section 161 (3)

Omit "notice.". Insert instead:

notice:

(a) within 21 days after service or such longer period as may be specified, or

(b) if the Authority otherwise than in the notice allows a further period for compliance—within the further period.

[9] Section 161 (5)

Omit the definitions of ***representative*** and ***union.***
Insert instead:

representative means an officer of an industrial organisation of employees for the time being authorised under section 733 of the *Industrial Relations Act 1991* to exercise powers under that section.

specified means specified in the notice concerned.

union means an industrial organisation of employees registered or recognised as such under Chapter 5 of the *Industrial Relations Act 1991*.

Explanatory note (items (7)–(9))

At present, section 161 of the Act empowers the Workcover Authority (or a person authorised by the Authority) to require an employer to produce the employer's insurance policy for inspection.

Item (7) of the proposed amendments allows the Authority, as an alternative, to require the employer merely to provide specified particulars of the policy. Item (8) specifies the period within which the employer must comply with the requirement. Item (9) updates superseded references and makes a consequential amendment.

[10] Section 216 Application and refund of deposit

Omit "independently of this Act (being liabilities under a law of New South Wales)" from section 216 (4).

Insert instead "independently of this Act (but not including a liability for compensation in the nature of workers compensation arising under any Act or other law of another State, a Territory or the Commonwealth or a liability arising under the law of another country)".

Explanatory note (item (10))
Item (10) of the proposed amendments is consequential on item (1).

[11] Schedule 6 Savings, transitional and other provisions

Part 15 Provisions relating to insurance

Insert after clause 19 (2):

(3) On and from the commencement of this subclause, the provisions of subclause (1) (b) and (c) do not have effect in relation to a liability referred to in subclause (1) unless the liability was the subject of legal proceedings that have been determined by a court before that commencement.

[12] Schedule 6, Part 15, clause 19A

Insert after clause 19:

19A Extent of cover provided by workers compensation policies issued before 1.2.90

(1) A policy of insurance obtained during the period between 4 pm on 30 June 1987 and the end of 31 January 1990 by an employer under section 155 of this Act is taken to have covered the employer:

(a) for the full amount of the employer's liability under this Act in respect of all workers employed by the employer, and

(b) for an unlimited amount in respect of the employer's liability independently of this Act (being a liability under a law of New South Wales), and

(c) for the full amount of the indemnity provided by the policy as in force when it was obtained,

for any injury to any worker employed by the employer during that period.

(2) Subclause (1) has effect irrespective of any regulation under this Act that was in force during the period referred to in that subclause.

(3) However, subclause (1) does not have effect in relation to a liability that was the subject of legal proceedings that have been determined by a court before the commencement of this clause.

(4) In this clause, ***injury*** includes a dust disease (as defined in the *Workers' Compensation (Dust Diseases) Act 1942)* and the aggravation, acceleration, exacerbation or deterioration of a dust disease (as so defined).

[13] Schedule 6, Part 15, clause 21

Insert after clause 20:

21 Coverage of policy—liabilities arising independently of the Act

(1) The amendments made by Schedule 1 (l), (5) and (10) to the *Workers Compensation Legislation Amendment Act 1995* do not apply so as to affect the validity of a policy of insurance issued or renewed or deemed to have been held before the commencement of those amendments.

(2) However, a policy of insurance issued or renewed or deemed to have been held under this Act before the commencement of those amendments is taken to cover (and always to have covered) the employer for an unlimited amount in respect of the employer's liability independently of this Act (but not including a liability for compensation in the nature of workers compensation arising under any Act or other law of another State, a Territory or the Commonwealth or a liability arising under the law of another country) for any injury received at or after 4 pm on 30 June 1993 by a worker or trainee employed by the employer.

Explanatory note (items (11)–(13))

The *Workers Compensation Act 1987* took effect on 30 June 1987. As originally enacted, it abrogated certain liabilities that employers previously had at common law in relation to their employees. As a consequence of amendments to the Act that took effect on 1 February 1990, those common law liabilities were restored in a modified form, both prospectively and retrospectively (see now Part 5 of the Act).

Under the Act, employers are required to obtain insurance for their liabilities as employers (see section 155). The form of the insurance policy, and consequently the nature and extent of the cover it provides, are prescribed by regulations under the Act.

Item (11)

Prior to the general restoration of common law liability, the prescribed insurance policy covered employers for their liabilities under the Act and for certain specified common law liabilities only. When common law liability was generally restored, the policy was amended to extend to an employer's liability independently of the Act, but excluding (among other things) liability with respect to motor accidents within the meaning of the *Motor Accidents Act 1988.*

By means of a regulation that took effect on 1 October 1991, the exclusion of liability with respect to motor accidents was omitted from the policy, and by means of a subsequent amendment to the Act, insurance policies obtained under section 155 of the Act were deemed to have provided motor accident cover (but only for accidents not on public streets involving uninsured motor vehicles) for the period between 1 February 1990 and 30 September 1991.

Item (11) of the proposed amendments is intended to extend motor accident cover for that period to all motor accidents, whether or not involving an uninsured motor vehicle and whether or not occurring on public streets. The proposed amendment is not intended to affect any liability the subject of legal proceedings that have been determined by a court before the commencement of the amendment.

Item (12)

By virtue of section 151X of the Act, an insurance policy obtained by an employer under section 155 of the Act for the period prior to 1 February 1990 extends to any liability independently of the Act for which the employer is required to obtain an insurance policy. However, it has been judicially determined in the case of *Marmo Terrazzo Products v FAI Workers Compensation* (Court of Appeal, 23 December 1994, unreported) that such a policy is to be construed as if it were in the terms of the prescribed policy as it was at 1 February 1990, that is, in terms that exclude certain specified liabilities.

Item (12) of the proposed amendments is intended to ensure that those liabilities are not excluded. The proposed amendment is not intended to affect any liability the subject of legal proceedings that have been determined by a court before the commencement of the amendment.

Item (13)

Item (13) of the proposed amendments provides that the amendments made by items (1), (5) and (10) (the amendments that remove the "liabilities under a law of New South Wales" restriction on the extended cover provided by workers compensation insurance) apply only to insurance policies issued after the commencement of the amendments but also provides that all existing and past insurance policies are to be read as extending cover to employers (in the way that the amendment requires for new policies) for injuries received at or after 4 pm on 30 June 1993.

Schedule 2 Amendments relating to interest on lump sums

(Section 3)

[1] Section 67 Compensation for pain and suffering

Insert after section 67 (3):

(3A) For the purposes of calculating interest on compensation payable under this section (whether or not the maximum amount of compensation is payable), the Compensation Court is to apportion the pain and suffering for which the compensation is payable between pain and suffering attributable to the period before the order to pay compensation has effect and pain and suffering attributable to any future period.

Explanatory note (item 1)

The object of the proposed amendment is to ensure that where the Compensation Court awards the maximum compensation for pain and suffering under the Act, the Court apportions the pain and suffering for which the compensation is payable in terms of past and future pain and suffering.

The proposed amendment seeks to clarify the operation of section 67 as a consequence of the decision of the majority in *Lexington Constructions Pty Ltd v Coyne* (1992) 8 NSWCCR 625. In that case it was suggested that in cases where the maximum amount of compensation was payable, the pain and suffering for which that compensation was payable was to be treated as wholly in the past for the purpose of calculating interest.

The proposed amendment will not affect the Compensation Court's general discretion under sections 19 and 19A of the *Compensation Court Act 1984* concerning the award of interest on past pain and suffering. It merely makes it clear that cases where the maximum amount of compensation is payable and cases where a lesser amount is payable are to be treated on the same basis as regards reasonable apportionment between past pain and suffering (for which the Court may award interest) and, if relevant, future pain and suffering (for which interest cannot be awarded except where compensation remains unpaid after the Court's order). However, the Court will not be compelled to award interest where, in its discretion, it would otherwise not award interest for past pain and suffering.

[2] Schedule 6 Savings, transitional and other provisions

Part *6* Provisions relating to compensation for non-economic loss (Table of Disabilities)

Insert after clause 2:

2A Transitional—interest on compensation for pain and suffering

Section 67 (3A), as inserted by the *Workers Compensation Legislation Amendment Act 1995*, does not affect the calculation of interest on compensation in respect of any injury received before the commencement of the subsection.

Explanatory note (item 2)

The proposed amendment ensures that the amendment to section 67 applies only to future payments of compensation.

Schedule 3 Amendments relating to interim payment of damages

(Section 3)

[1] Section 151A Election—damages or "Table of Disabilities" compensation

Insert after section 151A (3):

(3A) A person does not accept payment of damages for the purposes of subsection (3) (a) if the damages paid are only of an interim or advance nature and are paid by or on behalf of the worker for out-of-pocket expenses or comprise such other forms of damages paid in such circumstances (if any) as may be prescribed by the regulations.

[2] Section 151B Effect of recovery of damages from employer on payment of compensation

Insert after section 151B (2):

(3) A person does not cease to be entitled to compensation, or any further compensation, under this Act if the damages recovered are only of an interim or advance nature and are paid by or on behalf of the worker for out-of-pocket expenses or comprise such other forms of damages paid in such circumstances (if any) as may be prescribed by the regulations.

[3] Section 151Z Recovery against both employer and stranger

Insert after section 151Z (4):

(4A) A worker does not cease to be entitled to recover compensation, or any further compensation, under this Act as referred to in subsection (1) (b) or (c) if the damages recovered by the worker in respect of the injury are only of an interim or advance nature and are paid by or on behalf of the worker for out-of-pocket expenses or comprise such other forms of damages paid in such circumstances (if any) as may be prescribed by the regulations.

(4B) If:

(a) before the worker recovers compensation under this Act, or

(b) after the worker recovers compensation but before the worker recovers final damages,

the worker has recovered damages that are only of an interim or advance nature as referred to in subsection (4A), the worker is liable to repay the amount of any compensation that a person has paid in respect of the worker's injury under this Act out of the worker's final damages when the worker recovers the final damages, and the worker, after recovering those final damages, is not entitled to any further compensation.

[4] Schedule 6 Savings, transitional and other provisions

Part 14 Provisions relating to common law remedies

Insert after clause 3:

4 Transitional—sections 151A, 151B and 151Z

Sections 151A (3A), 151B (3) and 151Z (4A) and (4B), as inserted by the *Workers Compensation Legislation Amendment Act 1995* extend to claims for compensation under this Act that have not been determined before the commencement of those subsections and in respect of which a payment of damages of an interim or advance nature of the kind referred to in those subsections has been made before the commencement of those subsections.

Explanatory note (items (1)–(4))

On 16 December 1993, the Compensation Court decided in *Sanders v Nadow* that, under section 151Z (1) (c), the receipt of any form of damages (as widely defined in section 149 (1)) by a worker from a person, other than the worker's employer, who had a liability for the worker's injury disentitled the worker from any, or any further, workers compensation.

Items (1)–(4) of the proposed amendments reverse this decision in so far as the damages received are only of an interim or advance nature and relate to out-of-pocket expenses (that is, hospital, medical, pharmaceutical, rehabilitation or similar expenses) or other forms of damages that may be identified in the regulations.

Schedule 4 Amendments relating to apportionment of liability and contribution orders

(Section 3)

[1] Section 15 Diseases of gradual process—employer liable, date of injury etc

Omit section 15 (1) (b). Insert instead:

(b) compensation is payable by the employer who last employed the worker in employment to the nature of which the disease was due.

[2] Section 15 (2A)

Insert after section 15 (2):

(2A) The Compensation Court is to determine the contributions that a particular employer is liable to make on the basis of the following formula, or on such other basis as the Court considers just and equitable in the special circumstances of the case:

$$C = T \times \frac{A}{B}$$

where:

C is the contribution to be calculated for the particular employer concerned,

T is the amount of compensation to which the employer is required to contribute,

A is the total period of employment of the worker with the employer during the 12 month period concerned, in employment to the nature of which the injury was due,

B is the total period of employment of the worker with all employers during the 12 month period concerned, in employment to the nature of which the injury was due.

[3] Section 15 (4A)

Insert after section 15 (4):

(4A) In this section, a reference to employment to the nature of which a disease was due includes a reference to employment the nature of which was a contributing factor to the disease.

[4] Section 16 Aggravation etc of diseases—employer liable, date of injury etc

Omit section 16 (1) (b). Insert instead:

(b) compensation is payable by the employer who last employed the worker in employment that was a contributing factor to the aggravation, acceleration, exacerbation or deterioration.

[5] Section 16 (2A)

Insert after section 16 (2):

(2A) The Compensation Court is to determine the contributions that a particular employer is liable to make on the basis of the following formula, or on such other basis as the Court considers just and equitable in the special circumstances of the case:

$$C = T \times \frac{A}{B}$$

where:

C is the contribution to be calculated for the particular employer concerned,

T is the amount of compensation to which the employer is required to contribute,

A is the total period of employment of the worker with the employer during the 12 month period concerned, in employment that has been a contributing factor to the aggravation, acceleration, exacerbation or deterioration concerned,

B is the total period of employment of the worker with all employers during the 12 month period concerned, in employment that has been a contributing factor to the aggravation, acceleration, exacerbation or deterioration concerned.

Explanatory note (items (1)–(5))

Sections 15 and 16 of the Act deal with death and incapacity arising from diseases of gradual process and aggravation of disease. The sections provide for relevant employers over the 12 months preceding the worker's death or incapacity to contribute to the compensation payable by the final employer. The amount of contribution is arrived at by agreement or, failing agreement, by determination of the Compensation Court.

Items (2) and (5) of the proposed amendments will provide a standard method of calculating the level of contribution, as a means of guiding the parties to agreement and minimising litigation. The parties will still be able to agree to some other contribution level and the Compensation Court will be entitled to adopt such other basis of determination of the level of contribution as the Court considers just and equitable because of the special circumstances of the case. The standard method of calculation is based on the relative length of the worker's employment of a relevant kind with each employer and is consistent with the method currently provided by section 17 in the case of contribution in industrial deafness claims and the method provided for by the proposed amendment in item (5) for apportioning liability in multiple injury cases.

Item (1) amends section 15 to make it clear that the employer liable to pay compensation in a case of disease of gradual onset is the employer who last employed the worker in "employment to the nature of which the disease was due" (that is, in work involving a risk of contracting the disease). This is intended merely to confirm the interpretation that has generally been placed on the section.

Item (3) amends section 15 to provide that a reference in the section to employment "to the nature of which a disease was due" includes employment the nature of which was (in accordance with the general requirements applicable to disease claims under the existing definition of "injury" in the Act) a contributing factor to the disease. This overrules a recent Court of Appeal decision to the effect that the section applies only where the disease concerned was solely due to the nature of the employment concerned.

Item (4) amends section 16 to provide specifically for cases where employment with one employer has been the contributing factor in the exacerbation etc of a disease. The amendment will address concerns that the section currently provides only for cases where employment with 2 or more employers has been a contributing factor.

[6] Section 17 Loss of hearing—special provisions

Insert after section 17 (2):

(3) Compensation is payable by an employer as referred to in subsection (1) (c) in respect of the injury to which the notice given to the employer relates even if the worker, before claiming or receiving that compensation, commences employment (to the nature of which that kind of injury can be due) with another employer.

Explanatory note (item (6))

Section 17 contains special provisions about compensation for gradual loss of hearing suffered by workers in noisy industries. In particular, it requires that compensation for such a loss be paid by the employer who is employing the worker at the time the worker gives notice of the injury (if the worker is still employed in "noisy" employment) or the worker's last "noisy" employer (if the notice is given after the worker has left that employment). Item (6) of the proposed amendments puts it beyond doubt that once a worker has given notice of injury, the employer liable at that time remains liable for the compensation even if the worker obtains new employment in a noisy industry before the claim has been finalised and paid. Without such an arrangement, other "noisy" employers might be reluctant to employ workers who have already suffered hearing loss because of concerns about their potential compensation liability for existing deafness.

[7] Section 18 Special insurance provisions relating to occupational diseases

Omit section 18 (1). Insert instead:

(1) If an employer has become liable under section 15 (1) (b) or 16 (1) (b) to pay compensation to a worker in respect of an injury and the time at which the injury is deemed to have happened is after the worker ceased to be employed by the employer, the liability of the employer is, despite sections 15 and 16, taken to have arisen immediately before the worker ceased to be employed by the employer. This subsection operates only for the purpose of determining whether any insurer or which of 2 or more insurers is liable under a policy of insurance in respect of that compensation.

Explanatory note (item (7))

Section 18 (1) currently provides that the liability of the employer who is primarily liable for compensation under the special provisions of sections 15 and 16 (diseases of gradual onset and aggravation of disease) is deemed to have arisen immediately before the worker left employment with the employer. The provision operates for the purpose of identifying which insurer is liable for the compensation if the worker has left employment with the employer when liability would otherwise have arisen (the time of the worker's death or incapacity or when the claim for compensation was made). It is not appropriate for the cases where the worker has not left employment with the employer. Item (7) of the proposed amendments makes it clear that section 18 (1) only operates in the situation where the worker has left employment with the employer before the liability for compensation arises.

[8] Section 18 (3)

Insert after section 18 (2):

(3) In a case to which section 15, 16 or 17 applies, if each of the employers who is liable to pay the compensation or to make a contribution under the section concerned is insured in respect of that liability by an insurer who is an insurer within the meaning of Division 4 of Part 7 and the entitlement of the worker (or other claimant) to receive compensation is not disputed:

(a) a contribution that would otherwise be payable by an employer under section 15, 16 or 17 in respect of the claim is not payable, and

(b) for the purposes of calculating an insurance premium payable by any of those employers, their claims histories are to be determined on the assumption that any contribution that would have been payable but for paragraph (a) was payable.

Explanatory note (item (8))

Item (8) of the proposed amendments provides a streamlined procedure for "statutory fund" insurers when dealing with a claim in which contribution is payable between them under section 15 (Diseases of gradual onset), 16 (Aggravation of disease) or 17 (Loss of hearing) of the Act if there is no dispute as to the entitlement to compensation. Under the new procedure there is to be no actual contribution between insurers but there is to be "notional" contribution for the purpose of calculating the claims histories of the employers concerned.

[9] Section 22 Compensation to be apportioned where more than one injury

Section 22 (1A)

Insert after section 22 (1):

(1A) Death, incapacity, loss or liability that results partly from one injury and partly from one or more other injuries is taken to have resulted from more than one injury.

[10] Section 22 (2) (d)

Omit section 22 (2) (d). Insert instead:

(d) in the case of a worker who is partially incapacitated for work, a liability that arises because the worker is entitled to be compensated under this Act as if totally incapacitated.

[11] Section 22 (5)

Omit "The determination of the Compensation Court has effect despite any agreement on apportionment.".
Insert instead "The determination of the Compensation Court has effect despite any agreement on apportionment if the application for determination was made by an employer (in the employer's own right) or the Authority.".

[12] Section 22 (6)

Omit section 22 (6).

[13] Sections 22A–22B

Insert after section 22:

22A Further provisions concerning apportionment of liability under section 22

(1) The apportionment of liability under section 22 is:

(a) in the case of the apportionment of liability between employers—to be on the basis of the relative length of the worker's employment with

each employer concerned (not including any period of employment after the last relevant injury was received), or on such other basis as the Court considers just and equitable in the special circumstances of the case, and

(b) in the case of the apportionment of liability between insurers of the same employer—to be on the basis of the relative length of the employer's period of insurance with each insurer concerned during which the worker concerned was employed by the employer (not including any period of insurance after the last relevant injury was received), or on such other basis as the Court considers just and equitable in the special circumstances of the case.

(2) If a worker's partial incapacity for work results from more than one injury to the worker and consequently more than one person would be liable to pay compensation in respect of that incapacity were the worker not entitled to compensation under section 38 of this Act or section 11 (2) of the former Act (as applied by Schedule 6 to this Act), those persons are nevertheless liable for the compensation so payable and accordingly that liability may be apportioned under section 22.

(3) Liability may be apportioned under section 22 even if the liability has been discharged.

(4) When liability to pay compensation is apportioned under section 22 between 2 or more persons, the Compensation Court may order that the compensation is payable to the worker by one of those persons and that the other persons are to pay (by way of contribution) their apportioned share of that compensation to that person.

(5) The person ordered under subsection (4) to pay compensation to the worker is to be:

(a) in the case of apportionment between employers—the employer who most recently employed the worker, or such other of the employers as the Court considers reasonable in the special circumstances of the case, and

(b) in the case of apportionment between insurers—the insurer of the employer at the time of the last injury, or such other of the insurers as the Court considers reasonable in the special circumstances of the case.

(6) An order is not to be made under subsection (4) if the parties concerned have agreed as to the payment by one of them of the compensation concerned.

(7) In this section a reference to an insurer includes a reference to a self-insurer and a reference to a period of insurance includes a reference to a period of self-insurance. A liability under the Uninsured Liability and Indemnity Scheme is for the purposes of this section taken to be a liability of the insurer of the employer concerned during the period that is relevant to that liability.

(8) In a case to which section 22 applies, if all of the insurers concerned (being either insurers of the same employer or of the different employers concerned) are insurers within the meaning of Division 4 of Part 7 and the entitlement of the worker (or other claimant) to receive compensation is not disputed:

(a) the compensation is (despite subsection (5)) payable by the last insurer or the last employer (as relevant to the case), with no apportionment of liability under section 22, and

(b) for the purposes of calculating an insurance premium payable by any of those employers, their claims histories are to be determined on the assumption that liability had been apportioned under section 22 (without the need for a determination of, or agreement as to, that apportionment).

22B Determination as to which injury gave rise to compensation liability

(1) The Compensation Court may, on the application of an employer (in the employer's own right) or of the Authority, determine a dispute as to which injury, from among 2 or more alleged injuries, has given rise to a liability to pay compensation under this Act.

(2) Such a determination may be made irrespective of any agreement and irrespective of whether the payment of any contribution is ordered under section 15 or 16 or any apportionment of liability is ordered under section 22.

22C Certain injuries not to be dealt with under sections 15 and 16

(1) This section applies to an injury that is of a kind, or that occurs in circumstances, prescribed by the regulations for the purposes of this section.

(2) The regulations may provide that either or both of sections 15 and 16 is or are not to apply to an injury to which this section applies and that instead section 22 is to apply to the injury.

(3) The regulations may provide that section 15 (1) (a) or 16 (1) (a) is, for the purposes of all or specified provisions of this Act, to apply in respect of an injury to which this section applies.

(4) A regulation made for the purposes of this section extends to apply to an injury that happened before the commencement of the regulation, but only if:

(a) death, incapacity, loss or liability as referred to in section 22 results from that injury and one or more other injuries, and

(b) at least one of those other injuries happened after the commencement of the regulation.

(5) A regulation made for the purposes of this section does not (despite subsection (4)) affect any liability of an employer or insurer to pay compensation or a contribution, or any liability of an insurer to indemnify an employer, that arose before the commencement of the regulation, unless the Compensation Court otherwise orders.

Explanatory note (items (9)–(13))

Section 22 of the Act enables the Compensation Court to apportion the liability to pay compensation where incapacity or death of a worker, non-economic loss or a liability for medical or other health related expenses results from more than one injury. The following difficulties have been encountered with this section (arising from various Compensation Court and Supreme Court decisions):

(a) There is a view that incapacity, death, loss or liability only "results from more than one injury" if it results fully from each of the worker's injuries and not where an earlier injury contributed to the incapacity etc arising from a later injury from which the incapacity etc arose.

(b) Apportionment cannot be made of the liability to compensate a partially incapacitated worker at the special notional ("deemed") total incapacity rate applicable where the worker is not provided with suitable duties.

(c) Because the difficulties in (a) and (b) generally result in full liability being allocated to the most recent employer, or to an employer's most recent period of insurance, employers may be deterred from employing workers previously injured elsewhere or from re-employing their own injured workers.

(d) Liability may not be able to be apportioned if the compensation concerned has already been paid, with the result that employers or insurers who would be entitled to apportionment may be discouraged from meeting a compensation claim until the Compensation Court makes an apportionment order.

(e) The apportionment of liability can, in the case of compensation payable periodically, result in the worker concerned being paid parts of the compensation Concerned by different employers or insurers.

(f) There may be difficulties in determining whether an injury should be dealt with under the provisions for contribution to compensation for injuries consisting of diseases of gradual onset or aggravation of disease (sections 15 and 16) or under the apportionment provisions of section 22 for multiple injuries.

Items (9)–(13) of the proposed amendments deal with these difficulties by amending section 22 and inserting new section 22A–22C thereby making the following changes:

1 A worker's incapacity etc will be considered to have resulted from more than one injury if it resulted partly from each of the injuries concerned, thus making it clear that the apportionment provisions can cover situations where successive injuries to a worker have contributed to his or her eventual incapacity etc.

2 Liability can be apportioned among employers even in a case of deemed total incapacity arising from the failure of one of the employers to provide suitable employment.

3 Liability can be apportioned even if the liability has been discharged.

4 The Court is given power to order one of the employers (usually the last) among whom liability is apportioned to pay the whole amount of compensation due to the worker and to order the other employers to then pay their apportioned share of that compensation to that employer. The parties can also agree to such an arrangement without the need to go to the Court for an order.

5 A standard method of apportioning liability will be specified, as a means of guiding the parties to agreement and minimising litigation. The parties will still be able to agree to some other apportionment of liability and the Compensation Court will be entitled to adopt such other basis of determination of the level of apportionment as the Court considers just and equitable because of the special circumstances of the case. The standard method will be based on the relative length of the worker's employment with each employer concerned or, in the case of apportionment between different insurers of the same employer, based on the relative length of the period each insurer has been "on risk". The proposed standard method is consistent with the approach already prescribed by the Act for calculating contributions to industrial deafness claims and with the proposed amendments relating to other disease claims in items (1)–(5).

6 Existing section 22 (6) is deleted and re-enacted as a separate section dealing with the separate issue of disputes as to which injury from among 2 or more injuries has given rise to a liability to pay compensation. The opportunity has been taken to make clarifying amendments.

7 A new section 22C is inserted to enable the regulations to specify gradual onset and aggravation etc type injuries that are to be dealt with by way of apportionment under section 22 rather than contribution under section 15 or 16. The new section also authorises the making of regulations that retain for those injuries the provisions of sections 15 and 16 that deem those injuries to have happened at a particular time (usually the time of death or incapacity).

8 A new section 22A (8) is inserted to provide a streamlined procedure for "statutory fund" insurers when dealing with a claim in which liability is required to be apportioned under section 22 if there is no dispute as to the entitlement to compensation. Under the new procedure there is to be no actual apportionment between insurers but there is to be "notional" apportionment for the purpose of calculating the claims histories of the employers concerned.

[14] Section 51 Commutation in certain cases of weekly payments

Insert after section 51 (8):

(9) Payment of a lump sum to which liability in respect of any weekly payment of compensation has been wholly or partially commuted under this section or redeemed under section 15 of the former Act (as applied by Schedule 6 to this Act) is taken for the purposes of sections 15, 16, 22A, 122, 151Z and 273 of this Act and section 64 of the former Act (as so applied) to be payment of the compensation concerned in pursuance of the liability to pay the compensation concerned.

Explanatory note (item (14))

Item (14) of the proposed amendments overcomes one of the effects of the High Court decision in *Gosper and Another v Christopherson and Others* (1986) 160 CLR 423 whereby an employer was not entitled to recover contributions from previous employers of an injured worker when the employer had paid a lump sum in redemption of the liability to pay compensation. The Court held that lump sum redemption (now referred to as "commutation") did not constitute "compensation" within the meaning of the Act and so did not give rise to an entitlement to contribution. The proposed amendment provides that amounts paid in commutation (or redemption under the former Act) of compensation entitlements are to be regarded as payments of compensation for the purposes of those provisions of the Act dealing with liabilities to contribute to the payment of compensation, the apportionment of liability and the recovery of costs by lawyers in respect of compensation awards.

[15] Section 65 Definitions

Omit "for the purposes of those sections" from section 65 (3). Insert instead "for the purposes of determining the amount of compensation payable under those sections".

Explanatory note (item (15))

Item (15) of the proposed amendments amends a transitional provision that deals with how an adjustment of an amount of compensation payable under the Table of Disabilities is to apply to a loss that resulted both from an injury received before and an injury received after the adjustment is made. Currently the provision requires that the loss be treated as having resulted solely from the injury received after the adjustment is made. The amendment provides that this applies only for the purpose of calculating the amount of compensation payable, so as to make it clear that it does not negate the operation of other provisions such as section 22 under which liability for compensation where more than one injury is concerned is apportioned between the employers concerned.

[16] Table to Division 4 of Part 3 Compensation for permanent injuries

Insert at the end of paragraph (g) of the interpretation provisions following the Table "This does not affect any requirement for payment of a contribution under section 15 or 16 or for apportionment of liability under section 22 and does not affect the operation of section 71.".

Explanatory note (item (16))

Item(16) of the proposed amendments makes it clear that liability for lump sum compensation payable to a worker for permanent injury of the back, neck or pelvis is, on the same basis as liability for other compensation, subject to the general provisions of the Act on apportionment or contribution between employers or insurers if the impairment is attributable to employment with a series of employers or successive injuries during the one employment. The amendment addresses the concern that employers might be unwilling to employ or re-employ workers who have suffered previous back injuries because of concern about potential liability for the whole of the lump sum for impairment arising from a future aggravating injury. The amendment also makes it clear that lump sum compensation of that kind is also subject to the existing provision that prevents double compensation where an injury is further loss of a thing and some compensation has already been paid for part of that loss.

[17] Section 112 Interim awards

Section 112 (1) (a)

Insert "'between a self-insurer and an insurer" after "insurers,".

[18] Section 112 (1) (a1)

Insert after section 112 (1) (a):

(a1) there is a dispute between employers or insurers, or between a self-insurer and an insurer, as to the apportionment between them of liability as referred to in section 22 (Compensation to be apportioned where more than one injury etc),

[19] Section 112 (2) (a)

Insert ", the appropriate apportionment of liability for the compensation" after "the amount of the compensation".

Explanatory note (items (17)–(19))

Items (18) and (19) of the proposed amendments extend the power of the Compensation Court to make interim awards of compensation to the situation where the Court is satisfied compensation is payable but a dispute as to the apportionment of liability is still to be determined.

Item (17) makes a minor change to the interim awards provision to make it clear that it extends to disputes between an insurer and a self-insurer.

[20] Section 148A

Insert after section 148:

148A Authority's right of subrogation

If the Authority has paid or is liable to pay an amount as compensation for which an employer is liable under this Act or the former Act, the Authority is subrogated to any right of the employer and any insurer of the employer to recover any amount from any other person in respect of that payment (had the payment been made by the employer or insurer), whether the right arises by way of a liability for contribution, apportionment of liability or otherwise.

Explanatory note (item (20))

Item (20) of the proposed amendments will enable the WorkCover Authority to recover from employers and insurers the contributions and other amounts payable by them to an employer on whose behalf the Authority has paid compensation under the Uninsured Liability and Indemnity Scheme.

[21] Schedule 6 Savings, transitional and other provisions

Part 2 Provisions relating to liability for compensation

Insert at the end of Part 2:

5 Transitional—amendments to sections 15 and 16

The amendments made by Schedule 4 (1), (3) and (4) to the *Workers Compensation Legislation Amendment Act 1995* are made for the purpose of avoiding doubt and accordingly those amendments are taken to extend to injuries that happened before the commencement of those amendments, but not so as to affect any decision of a court made before the commencement of those amendments.

6 Transitional—apportionment and contribution

(1) Section 22A and the amendments made to section 22 by Schedule 4 to the *Workers Compensation Legislation Amendment Act 1995* extend to a situation where one or more of the injuries concerned was received before the commencement of the Act and one or more of those injuries was received after that commencement, but not to a situation where all the injuries concerned were received before that commencement and not so as to affect any decision of a court made before the commencement of section 22A.

(2) Section 22B extends to injuries received by a worker before the commencement of that section (even before the commencement of this Act), but not so as to affect any decision of a court made before the commencement of that section.

Explanatory note (item (21))

Item (21) of the proposed amendments enacts transitional provisions under which:

(a) the amendments proposed to be made by this Schedule that amend section 22 and insert section 22A will extend to apply to a situation involving injuries received before the commencement of the Principal Act but not to a situation where all the injuries concerned were received before that commencement, and

(b) proposed new section 22B extends to apply to injuries received before its commencement, and

(c) the amendments proposed to be made by items (1), (3) and (4) extend to apply to injuries received before the commencement of the amendments.

[22] Schedule 6, Part 4 Provisions relating to weekly payments of compensation

Insert after clause 8:

9 Apportionment, contribution and recoveries—commuted compensation

Section 51 (9) (as inserted by the *Workers Compensation Legislation Amendment Act 1995)* extends to apply to a payment of a lump sum made before the commencement of that subsection, but not so as to affect any decision made by a court before that commencement.

Explanatory note (item (22))

Item (22) of the proposed amendments enacts a transitional provision under which the clarification amendment proposed to be made by this Schedule to section 51 (which declares lump sum commutations to be regarded as compensation for certain purposes) is taken to have had effect from the commencement of the Act.

[23] Schedule 6, Part 6 Provisions relating to compensation for non-economic loss (Table of Disabilities)

Insert after clause 7:

8 Apportionment, contribution and prior injuries

(1) The amendment made by the *Workers Compensation Legislation Amendment Act 1995* to paragraph (g) of the interpretation provisions following the Table to Division 4 of Part 3 is made for the purpose of avoiding doubt and accordingly that paragraph is taken to have been so amended from the commencement of this Act, but not so as to affect any decision of a court made before the commencement of the amendment or any compensation that a worker has received or agreed to receive before that commencement.

(2) The amendment made to section 17 by Schedule 4 (6) to the *Workers Compensation Legislation Amendment Act 1995* is made for the purpose of avoiding doubt, and accordingly section 17 is taken to have been so amended from the commencement of this Act (but not so as to affect any decision made by a court before commencement of the amendment).

Explanatory note (item (23))

Item (23) of the proposed amendments enacts a transitional provision under which the clarification amendments proposed to be made by this Schedule to section 17 and paragraph (g) of the interpretation provisions following the Table to Division 4 of Part 3 is taken to have had effect from the commencement of the Act.

[24] Schedule 6, Part 13 Provisions relating to the Uninsured Liability and Indemnity Scheme

Insert after clause 5:

6 Authority's right of subrogation for apportionment and contribution

Section 148A extends to apply to a payment made by the Authority as referred to in that section before the commencement of that section.

Explanatory note (item (24))

Item (24) of the proposed amendments enacts a transitional provision under which proposed section 148A (Authority's right of subrogation) extends to a payment made by the Authority before the commencement of the section.

Schedule 5 Amendments relating to structured settlements

(Section 3)

Section 151Q

Omit the section. Insert instead:

151Q Structured settlements

(1) This section applies to an award of damages if the plaintiff and the defendant have agreed that it will apply.

(2) If this section applies to an award of damages, the court:

(a) may separately determine the amount of damages for non-economic loss, the amount of damages for future economic loss and the amount of damages for past economic loss, and

(b) may order that any damages determined by the court for future economic loss (other than damages for impairment of earning capacity), including:

(i) reasonable hospital, medical, pharmaceutical and rehabilitation expenses, and

(ii) any compensation payable under section 151K,

are to be paid in accordance with such arrangements as the court determines or approves, and

(c) may order that any damages determined by the court for impairment of earning capacity are to be paid in accordance with such arrangements as the court determines or approves.

(3) In making an order under this section, the court is required to have regard to the following matters:

(a) the ability of the plaintiff to manage and invest any lump sum award of damages,

(b) the need to ensure that expenses incurred by the plaintiff that the defendant is required to meet:

(i) are not unreasonable having regard to the circumstances of the plaintiff, and

(ii) are properly verified, and

(iii) relate to the injury caused by the fault of the defendant,

(c) the principle that costs and expenses are recoverable by the plaintiff from the defendant in relation to hospital, medical, pharmaceutical and rehabilitation services, services of a domestic nature and services relating to nursing and attendance only if the provision of those services is likely to, or is reasonably likely to, be of advantage to the plaintiff,

(d) the views of the defendant in relation to the proposed order,

(e) such other matters as the court considers appropriate.

(4) In making an order under subsection (2) (c) relating to damages for impairment of earning capacity, the court may order the damages to be used to purchase an annuity for the plaintiff on such terms as the court considers appropriate.

(5) The court may make an order under subsection (2) (c) only if it considers there is good cause for making the order.

(6) Arrangements determined or approved under subsection (2) (c) may include provision that payments of damages for impairment of earning capacity are to be made at intervals of not more than 12 months.

(7) A party to any arrangements determined or approved under this section may apply to the court at any time for an order varying or terminating the arrangements.

(8) The court may, on an application under subsection (7), make such order as it considers appropriate, having regard to the provisions of this section.

(9) The regulations may make provision for or with respect to any matter dealt with in this section and, in particular, may impose conditions or limitations on the orders that may be made under this section or otherwise regulate the making of those orders.

Explanatory note

The proposed amendment replaces section 151Q, which provides for structured settlements. Under the substituted section, a structured settlement in respect of an award of damages will be possible only if the parties agree. The substituted section follows the provisions for structured settlements contained in the *Motor Accidents Act 1988.*

Schedule 6 Amendments relating to liability for workers compensation

(Section 3)

[1] Section 9

Omit the section. Insert instead:

9 Liability of employers for injuries

(1) A worker who as a worker of this State receives an injury anywhere in Australia (and, in the case of the death of the worker, his or her dependants) are to receive compensation from the worker's employer in accordance with this Act. Compensation is payable whether the injury was received by the worker at or away from the worker's place of employment.

(2) A worker is a worker of whichever State is:

(a) the State in which the worker usually carries out the work of the employment concerned, or

(b) if no State or no one State is identified by paragraph (a)—the State in which the worker's base for the purposes of that employment is located, or

(c) if no State or no one State is identified by paragraph (a) or (b)—the State in which the worker was hired for or otherwise taken into that employment.

(3) If a worker usually carries out the work of his or her employment in one State ("the home State") but pursuant to a temporary arrangement that is part of that employment carries out work in another State or other States, the worker is nevertheless to be regarded as a worker of the home State while carrying out that work in the other State or States. An arrangement is temporary if (and only if) it may reasonably be thought likely to be of less than 6 months duration.

(4) A worker who is not otherwise a worker of this State is taken to be a worker of this State if the worker:

(a) receives an injury in this State, and

(b) is not a worker of any other State, and

(c) is not entitled to compensation in respect of the injury under the enacted law of a place outside Australia.

(5) An injury received by a worker of this State while outside Australia is taken, for the purposes of this section, to have been received in this State.

(6) In this section, ***State*** includes a Territory.

[2] Section 13

Omit the section. Insert instead:

13 Effect of compensation entitlements in other jurisdictions

(1) Compensation is not payable under this Act to the extent to which in respect of any injury received by a worker while outside New South Wales the worker has (and in the case of the death of the worker, his or her dependants have):

(a) received workers compensation under the laws of any country, any State (other than New South Wales), the Commonwealth or any Territory of the Commonwealth, or

(b) obtained judgment against the worker's employer independently of this Act.

(2) If a person (being a worker or, in the case of the death of the worker, any of his or her dependants) receives compensation under this Act in respect of any injury

received by the worker while outside New South Wales and subsequently in respect of the injury receives workers compensation under the laws of any country, any State (other than New South Wales), the Commonwealth or any Territory of the Commonwealth or obtains judgment against the worker's employer independently of this Act, the employer is entitled to recover from that person an amount equal to the lesser of the following amounts:

(a) the amount of compensation paid by the employer under this Act,

(b) the amount of workers compensation received by the person or of the judgment obtained by the person otherwise than under this Act.

Explanatory note (items (1) and (2))

Items (1) and (2) of the proposed amendments repeal and re-enact sections 9 and 13 of the Act. Section 9 creates the liability to pay the compensation for which the Act provides. Currently the effect of that section is that a worker in this State who receives a work related injury in this State is entitled to compensation from his or her employer. Section 13 creates a supplementary entitlement to compensation in the case of a worker who while outside this State receives an injury in circumstances in which compensation would have been payable had the injury been received in this State, but only if the employer has a place of employment in this State or is temporarily present in this State. Since the other States and Territories each have similar provisions in their workers compensation legislation, an employer whose worker performs work in 2 or more States/ Territories is generally required to obtain workers compensation insurance in each of those places. However, a worker who receives an injury while covered by insurance in 2 or more States/Territories cannot claim double compensation and the additional expense that the employer will have incurred by having obtained multiple coverage is undesirable. The effect of the proposed amendments is as follows:

(a) A worker will be entitled to compensation only if he or she is a "worker of the State" (see (b)) but will be entitled to that compensation wherever the injury is received in Australia. It is envisaged that each Australian State and Territory will enact the same provision and the result will be that a worker is entitled to compensation in only one State and the worker's employer will have a liability to insure in only one State.

(b) New section 9 provides a means for determining which State is the worker's State for compensation purposes. Generally it is the State in which the worker usually carries out the work of the employment concerned or (if no State satisfies that test) the State in which the worker's base for employment purposes is located. If neither of the first 2 tests is conclusive, it is the State in which the worker was hired. Temporary employment away from the worker's home State is to be ignored in determining where the worker is usually employed. As a means of ensuring that an injured worker will not miss out on compensation in all States and Territories (because he or she is not a worker of any particular State/territory), a worker who receives an injury in this State is taken to be a worker of this State if the worker is not a worker of any other State and is not entitled to compensation in respect of the injury under the enacted law of any other country. This will also cover a worker from another country who is injured in this State and does not qualify as a worker of any Australian jurisdiction. The overseas employer of the worker will therefore be required in those circumstances to take out workers compensation insurance in New South Wales.

(c) Currently section 13 (1) of the Act confers an entitlement to compensation on workers who are injured outside the State in circumstances where they would have been entitled to compensation if injured in the State and the employer has a place of employment in or is present in the State. The proposed new section 9 makes section 13 (1) redundant to the extent that it covers injuries received in Australia (because a worker injured anywhere in Australia should now be covered by the State of which he/she is a worker). The proposed amendment replaces section 13 (1) with a new provision in section 9 that will limit its operation to injuries received outside Australia. The requirement for a place of employment or employer's presence in the State has been deleted on the basis that if a worker is a worker of the State, presence of the employer in the State should not be a precondition to an entitlement to compensation in the State. The remainder of section 13 contains provisions to prevent double dipping where compensation is paid or damages recovered in another jurisdiction. Those provisions are re-enacted with consequential changes.

[3] Section 21 Sailors

Insert "(whether or not a worker of this State within the meaning of section 9)" after "worker" in section 21 (1).

Explanatory note (item (3))

item (3) of the proposed amendments is consequential on items (1) and (2) and makes it clear that the special provisions covering sailors are applicable whether or not a sailor is a worker of this State.

[4] Section 145 Employer or insurer to reimburse Authority

Insert after section 145 (2):

(2A) The Authority must waive the liability of an employer under subsection (1) to reimburse the Workcover Authority Fund an amount paid in respect of a worker if the Authority is satisfied that at the relevant time the employer believed on reasonable grounds that the worker was a worker of some other State or a Territory (within the meaning of section 9).

Explanatory note (item (4))

Item (4) of the proposed amendments is a flow on from the proposed new section 9 which is intended to result in an employer only having to take out one insurance policy on any one worker. The amendment will require the Workcover Authority to waive an employer's liability to reimburse the Uninsured Liability and Indemnity Scheme for a payment made in respect of a worker if the Authority is satisfied that at the relevant time the employer believed on reasonable grounds that the worker was a worker of some other State or a Territory (within the meaning of proposed new section 9).

[5] Section 155 Compulsory insurance for employers

Insert after section 155 (3):

(4) It is a defence to a prosecution for an offence under this section concerning an employer's liability in respect of a worker if the court is satisfied that at the time of the alleged offence the employer believed on reasonable grounds that the employer did not have a liability under this Act in respect of the worker because the worker was a worker of some other State or a Territory (within the meaning of section 9).

Explanatory note (item (5))

Item (5) of the proposed amendments is a further flow on from the proposed new section 9. The amendment will make it a defence to a prosecution for the offence of failing to take out the necessary workers compensation insurance if the court is satisfied that at the time of the alleged offence the employer believed on reasonable grounds that the employer did not have a liability under this Act in respect of the worker because the worker was a worker of some other State (within the meaning of proposed new section 9).

[6] Schedule 6 Savings, transitional and other provisions

Part 2 Provisions relating to liability for compensation

Insert after clause 3:

4 Liability in respect of "workers of this State"

(1) The amendments made by Schedule 6 to the *Workers Compensation Legislation Amendment Act 1995* (referred to in this clause as "the liability amendments") do not apply in respect of an injury received before the commencement of those amendments, and this Act applies in respect of such an injury as if those amendments had not been made.

(2) If the death of a worker results from both an injury received before the commencement of those amendments and an injury received after that commencement, the worker is, for the purposes of the application of the liability amendments to and in respect of the death of the worker, to be treated as having died as a result of the injury received after that commencement.

(3) If a period of incapacity for work resulted both from injury received before the commencement of those amendments and an injury received after that commencement, the incapacity is, for the purposes of the application of the liability amendments to and in respect of that incapacity for work, to be treated as having resulted from the injury received after that commencement.

(4) If a loss mentioned in the Table to Division 4 of Part 3 of this Act resulted both from an injury received before the commencement of those amendments and an injury received after that commencement, the loss is, for the purposes of the application of the liability amendments to and in respect of that loss, to be treated as having resulted from the injury received after that commencement.

(5) The liability amendments and subclauses (2)–(4) do not affect the following:

(a) the liability of an employer or insurer in respect of an injury received before the commencement of those amendments, including a liability to make a contribution under section 15, 16 or 17 in respect of compensation payable for an injury received after that commencement,

(b) the apportionment of liability under section 22, or the operation of section 71, in a case where one or more of the injuries (or losses as referred to in section 71) concerned were received or suffered before, and one or more received or suffered after, that commencement.

Explanatory note (item (6))

Item (6) of the proposed amendments is a transitional provision that makes it clear that the amendments proposed to be made by this Schedule do not apply to injuries received before the commencement of the amendments.

[7] Schedule 6, Part 15 Provisions relating to insurance

Insert after clause 21:

22 Liability in respect of "workers of this State"

To remove doubt it is declared that a policy of insurance obtained by an employer and in force at the commencement of the amendments made by Schedule 6 to the *Workers Compensation Legislation Amendment Act 1995* is taken to cover the employer for the full amount of the employer's liability under this Act as so amended.

Explanatory note (item (7))

Item (7) of the proposed amendments is a transitional provision that makes it clear that insurance policies in force when the amendments proposed to be made by this Schedule commence fully cover employers for their workers compensation liabilities under the Act as so amended.

Schedule 7 Amendments relating to compensation for non-economic loss

(Section 3)

[1] Table to Division 4 of Part 3 Compensation for permanent injuries

Insert after paragraph (d2) in the interpretation provisions following the Table:

(d3) Loss of an arm below the elbow includes the loss of the hand and is to be compensated as a loss, or a proportionate loss, of a single item only (namely, the loss of the arm below the elbow).

(d4) Loss of a leg below the knee includes the loss of the foot and is to be compensated as a loss, or a proportionate loss, of a single item only (namely, the loss of the leg below the knee).

Explanatory note (item (1))

Item (1) of the proposed amendments follows up on certain amendments already made by the *Workers Compensation Legislation (Miscellaneous Amendments) Act 1994* to the interpretation notes to the Table to Division 4 of Part 3 (the Table of Disabilities). Those earlier amendments clarified the operation of the Table to prevent "double-dipping" in a case of loss of a leg above the knee or loss of an arm above the elbow. In those instances the potential for double-dipping arose because court decisions at the time indicated the injury could be compensated as a combination of losses (namely loss of the upper part of the limb and loss of the lower part of the limb). The proposed amendment extends the clarification to loss of the lower limb, to prevent such a loss being compensated as both a loss of the lower limb and as a loss of the extremity of the limb (the hand or the foot).

[2] Section 151B Effect of recovery of damages from employer on payment of compensation

Insert at the end of section 151B:

(4) A person who recovers damages for economic loss in respect of an injury but does not recover any damages for non-economic loss in respect of that injury because of the operation of section 151G (Damages for non-economic loss) is not prevented from recovering, and is not required to deduct under this section, any

compensation under Division 4 (Compensation for non-economic loss) of Part 3 except compensation under section 67 (Compensation for pain and suffering).

Explanatory note (item (2))

The Act imposes a "serious injury" threshold (generally requiring a disability level of at least 25%) before a worker can recover common law damages for economic loss from his or her employer. The part of a worker's common law claim involving damages for non-economic loss is subject to a separate eligibility threshold in monetary terms (presently $38,300 as indexed), below which no such damages are payable. Item (2) of the proposed amendments addresses the situation where a worker who has suffered a sufficiently serious injury to be awarded damages for economic loss, nevertheless fails, because of a difference in the respective thresholds, to recover common law damages for non-economic loss. Under a general provision of the Act (s 151B), all further rights to compensation under the Act are terminated when a worker recovers common law damages from his or her employer. Accordingly a worker in the situation mentioned may suffer a double forfeiture (namely, forfeiture of entitlement to non-economic loss common law damages because of the threshold provisions, and forfeiture of the corresponding entitlement to lump sum compensation because those compensation rights are included in the compensation rights terminated by s 151B). The proposed amendment provides that a worker who recovers common law damages for economic loss but who fails to recover common law damages for non-economic loss (because the amount to be awarded fails to exceed the minimum threshold set by the Act for recovery of non-economic loss damages) does not forfeit the right to a lump sum compensation for non-economic loss (except compensation for pain and suffering). The amendment operates as an exception to the general provision (s 151B) for forfeiture of all entitlements to compensation under the Act if damages are recovered at common law. There is already an exception to this provision in the reverse situation where a worker recovers damages for non-economic loss but fails to recover damages for economic loss (because the minimum economic loss threshold is not met).

[3] Schedule 6 Savings, transitional and other provisions

Part 6 Provisions relating to compensation fer non-economic loss (Table of Disabilities)

Clause 6 (2)

Omit clause 6 (2). Insert instead:

(2) However, no compensation is payable in accordance with this Part and this Schedule for the part of the loss resulting from the injury received before that commencement if compensation has already been paid under section 16 of the former Act for that part of the loss.

[4] Schedule 6, Part 6, clause 6 (3)

Omit *"Workers Compensation Legislation (Miscellaneous Amendments) Act 1994"*.
Insert instead *"Workers Compensation Legislation Amendment Act 1995"*.

[5] Schedule 6, Part 6, clause 7 (1)

Insert "and Schedule 7 (1) and (2) to the *Workers Compensation Legislation Amendment Act 1995" after "Act 1994"*.

[6] Schedule 6, Part 6, clause 7 (2)

Omit clause 7 (2). Insert instead:

(2) However, an amendment made by Schedule 2 (5) (d) to the *Workers Compensation Legislation (Miscellaneous Amendments) Act 1994* or Schedule 7 (1) to the *Workers Compensation Legislation Amendment Act 1995* does not affect:

(a) any award of compensation made before the date of commencement of the amendment, or

(b) any compensation that a worker has received or agreed to receive before that date, or

(c) any award of, or compromise or settlement of a claim for, damages made before that date, or

(d) any court proceedings commenced by a worker for damages from the worker's employer (or other person referred to in section 150 of this Act) before that date.

Explanatory note (items (3)–(6))

Items (3) and (4) of the proposed amendments clarify the operation of a transitional provision inserted by the *Workers Compensation Legislation (Miscellaneous Amendments) Act 1994* dealing with lump sum entitlements under the Table of Disabilities where the loss results from an injury under the former Act and an injury under the current Act. The provision is amended so that a worker

who has already received lump sum compensation under the former Act for the earlier part of the loss will receive compensation under the new Act for the further loss only. This is consistent with section 71 of the current Act which prevents double payment in cases where the worker's loss involves an industrial disease by providing that additional lump sum payment to a worker who has already been paid lump sum compensation for part of the loss is only to be for that further loss.

Items (5) and (6) of the proposed amendments extend to the amendment made by item (1) an existing transitional provision that applies to the earlier amendments referred to in the explanatory note to that amendment. This provides that the amendment is made for the purpose of avoiding doubt and accordingly is taken to have operated from the commencement of the Act.

[7] Schedule 6 Savings, transitional and other provisions

Part 14 Provisions relating to common law remedies

Insert at the end of the Part:

5 Compensation for non-economic loss—prevention of forfeiture

(1) The amendment made by Schedule 7 (2) to the *Workers Compensation Legislation Amendment Act 1995* extends to an injury received before the commencement of the amendment.

(2) However, that amendment does not affect any award of, or compromise or settlement of a claim for, damages made before commencement of the amendment.

Explanatory note (item (7))

Item (7) of the proposed amendments provides that the amendment made by item (2) extends to existing injuries.

Schedule 8 Amendments relating to weekly payments during incapacity

(Section 3)

[1] Section 34 Definition of first 26 weeks of incapacity

Insert after section 34 (2):

(3) For the avoidance of doubt, the first 26 weeks of incapacity does not include any period during which there is no weekly compensation payable in accordance with this Division, whether because of the operation of section 40 or otherwise.

Explanatory note (item (1))

Item (1) of the proposed amendments removes any doubt as to when the "first 26 weeks" of a period of incapacity for work resulting from an injury begins (and continues) to run. Those first 26 weeks are expressed to commence when the worker concerned "becomes entitled" to weekly payments of compensation in respect of the injury. There could be an argument that the entitlement arises at the time of the injury. Further, it may be some time after the injury that the "entitlement" gives rise to any payment of compensation (if, for example, the worker obtains temporary work, at the same salary, of a kind for which the injury is not incapacitating, or because of the limit on the amount of weekly compensation imposed by section 40 of the Act).

[2] Section 37 Weekly payment during total incapacity—after first 26 weeks

Insert after section 37 (1):

(1A) Despite subsection (1), for a maximum of 26 weeks the weekly payment of compensation to an injured worker in respect of any period of total incapacity for work (whether the period is during or after, or partly during and partly after, the first 26 weeks of incapacity) is the amount specified in section 36. This subsection applies even if the injury concerned resulted in any period of partial incapacity for work in respect of which the worker received or receives weekly payments of compensation.

[3] Section 37 (7)

Omit the definition of ***average weekly earnings.*** Insert instead:

> ***appropriate period,*** for the purposes of the calculation of "average weekly earnings" in relation to a worker, means the period of 12 months or, if the worker has been employed with the employer concerned for less than 12 months at the time of the injury, that lesser period.
>
> ***average weekly earnings,*** in relation to a worker, means the average weekly earnings of the worker determined in accordance with section 43 during the appropriate period before whichever of the following times produces the higher average weekly earnings:
>
> (a) the time of the injury concerned,
>
> (b) the time at which the relevant weekly payment of compensation is due,
>
> with the determination under paragraph (b) made on the assumption that the worker had been earning the wage or salary which the worker would probably have been earning if the worker had remained uninjured and continued to be employed in the same or some comparable employment.

Explanatory note (items (2) and (3))

Payments of weekly compensation for total incapacity for work resulting from an injury are made at a higher rate during the first 26 weeks of a period of incapacity than subsequently. The first 26-week period relates to incapacity that is total or partial or both. Accordingly, a worker who, for example, continues at or returns to work though partially incapacitated and whose partial incapacity later becomes total may (at present) be disadvantaged by receiving compensation at the higher rate only in respect of so much of the first 26-week period as has not expired at the time the incapacity becomes total.

The effect of item (2) of the proposed amendments is to ensure that if an injury results in partial incapacity for work followed by total incapacity, the worker will receive up to 26 weekly payments of compensation for the total incapacity at the higher rate, even if during part (or all) of the first 26-week period he or she received compensation for partial incapacity.

Item (3) of the proposed amendments alters the meaning of ***average weekly earnings*** for the purposes of the calculation of the weekly payments of compensation payable to certain workers during total incapacity after the first 26

weeks of incapacity. Currently, average weekly earnings is determined on the basis of earnings over a period prior to the date of the worker's injury. The effect of the proposed amendment will be that average weekly earnings will take account of any likely rise from time to time in the worker's wage or salary (assessed on the assumption that the worker had not been injured and continued to be employed in the same or some comparable employment).

[4] Section 42 Current weekly wage rate

Omit the definition of average weekly earnings from section 42 (8). Insert instead:

> ***appropriate period,*** for the purposes of the calculation of "average weekly earnings" in relation to a worker, means the period of 12 months or, if the worker has been employed with the employer concerned for less than 12 months at the time of the injury, that lesser period.
>
> ***average weekly earnings,*** in relation to a worker, means the average weekly earnings of the worker determined in accordance with section 43 during the appropriate period before whichever of the following times produces the higher average weekly earnings:
>
> (a) the time of the injury concerned,
>
> (b) the time at which the relevant weekly payment of compensation is due,
>
> with the determination under paragraph (b) made on the assumption that the worker had been earning the wage or salary which the worker would probably have been earning if the worker had remained uninjured and continued to be employed in the same or some comparable employment.

Explanatory note (item (4))

Item (4) of the proposed amendments alters the meaning of ***average weekly earnings*** for the purposes of the calculation of ***current weekly earnings.*** Current weekly earnings are a component in the calculation of the compensation payable under sections 36 and 37 of the Act during periods of total incapacity. At present, average weekly earnings are determined on the basis of earnings over a period prior to the date of the worker's injury. The effect of the proposed amendment will be that average weekly earnings will take account of any likely rise from time to time in the worker's wage or salary (assessed on the assumption that the worker had not been injured and continued to be employed in the same or some comparable employment).

[5] Section 43 Computation of average weekly earnings

Insert "36, 37," after "section" in section 43 (2) (c).

Explanatory note (item (5))

Item (5) of the proposed amendments is ancillary to the amendments proposed to be made by items (3) and (4).

[6] Schedule 6 Savings, transitional and other provisions

Part 4 Provisions relating to weekly payments of compensation

Insert at the end of the Part:

10 Indexation of average weekly earnings

The amendments made by Schedule 8 (3), (4) and (5) to the *Workers Compensation Legislation Amendment Act 1995* apply for the purposes of weekly payments of compensation in respect of any period of incapacity for work occurring after the commencement of that Schedule even if the incapacity resulted from an injury received before that commencement.

11 Transitional—section 37 (1A)

Section 37 (1A), as inserted by Schedule 8 (2) to the *Workers Compensation Legislation Amendment Act 1995*, does not apply in respect of injuries received before the commencement of that subsection.

Explanatory note (item (6))

Item (6) of the proposed amendments inserts 2 transitional provisions. Proposed clause 10 applies the amendments made by items (3), (4) and (5), to compensation in respect of any period of incapacity occurring after the commencement of the amendments even if the injury concerned was received before that commencement. Proposed clause 11 provides that the new section 37 (1A) (as inserted by item (2) of the amendments) does not apply in respect of injuries sustained before the commencement of that subsection.

Schedule 9 Amendments relating to conciliation

(Section 3)

[1] Section 95 Definition of dispute

Insert "on whom the claim has been served under section 92A (3) or" after "the insurer" in paragraph (a) of the definition of ***dispute.***

Explanatory note (item (1))

Item (1) of the proposed amendments is a minor amendment that reflects the fact that claims for compensation can in some circumstances be served directly on an employer's insurer. Currently the provision being amended provides only for claims being made on employers and then being forwarded to the employer's insurer.

[2] Section 101 Definitions

Insert "on whom the claim has been served under section 92A (3) or" after "an insurer" in section 101 (2).

Explanatory note (item (2))

Item (2) of the proposed amendments makes a similar amendment to that proposed to be made by item (1).

[3] Section 104 Direction by conciliation officer—commencement or continuation of weekly payments

Insert after section 104 (2):

(2A) There is considered to be no genuine dispute with respect to a liability if there is no sufficient basis or no reasonable basis for dispute (but this does not limit the circumstances in which there can be considered to be no genuine dispute).

Explanatory note (item (3))

Item (3) of the proposed amendments amends the provision of the Act that allows a conciliation officer to direct payments of compensation if satisfied that there is no genuine dispute as to liability to make the payments. The amendment provides that there is considered to be no genuine dispute if there is no sufficient basis or no reasonable basis for dispute. The amendment makes it clear that a conciliation officer is entitled to consider the reasonableness and sufficiency of the grounds of any alleged dispute and is not bound to find that there is a genuine dispute merely because there is some evidence which if accepted by the Court could result in either party succeeding.

[4] Section 106 Revocation of directions of conciliation officer

Insert after section 106 (2):

(2A) The applicant must serve a copy of the application on the Authority within 7 days (or such other period as the rules of the Compensation Court may specify) after the application is made. The Compensation Court must not hear or determine the application until a copy of the application has been served on the Authority.

[5] Section 106 (4) (e)

Insert after section 106 (4) (d):

(e) those payments are to be excluded from any determination of the claims experience of the employer for the purposes of calculating the premium payable by the employer for a policy of insurance.

Explanatory note (items (4) and (5))

Item (4) of the proposed amendments requires that when an application is made to the Compensation Court for revocation of a conciliation officer's direction that compensation be paid, a copy of the application must be served on the Workcover Authority within 7 days, or such other period as the rules of the Compensation Court may provide, and the Compensation Court must not hear or determine the application until a copy of it has been served on the Workcover Authority.

Item (5) of the proposed amendments requires payments of weekly compensation made at the direction of a conciliation officer to be excluded from the determination of the employer's claims experience if the Compensation Court has subsequently decided that there was no liability to make the payments concerned.

[6] Section 106C

Insert after section 106B:

106C Direction under section 104 not to be challenged on technicality

The validity of a direction under section 104 is not affected merely because the referral of the dispute to which the direction relates contained, or was done on a basis containing, a defect of manner or form.

Explanatory note (item (6))

Item (6) of the proposed amendments provides that a technical defect in the referral to a conciliation officer of a dispute concerning liability to make weekly payments of compensation does not affect the validity of a direction of the conciliation officer to pay compensation.

Schedule 10 Amendments relating to damages for economic loss

(Section 3)

[1] Section 151I Damages for economic loss—loss of past or future earnings etc

Omit section 151I (2). Insert instead:

(2) In the case of any such award, the court is to disregard the amount (if any) by which the injured or deceased worker's net weekly earnings would (but for the injury or death) have exceeded the amount that is the maximum amount of weekly payments of compensation under section 35 (even though that maximum amount under section 35 is a maximum gross earnings amount).

Explanatory note (item (1))

Item (1) of the proposed amendments amends a provision that requires a court when awarding damages for loss of earnings for a work related injury to disregard any amount by which the worker's weekly earnings exceed the maximum weekly payment of compensation under section 35 of the Act. The amendment makes it clear that the limit being imposed by the section is a limit on net earnings even though the limit is imposed by reference to an amount that is a gross earnings amount (ie the maximum weekly compensation amount set by section 35). For example, if a worker's net weekly earnings are greater than the amount set by section 35 (even though that maximum is a gross figure), the worker's net earnings are to be notionally reduced (for the purposes of an award of damages to which section 151I applies) to the level of the section 35 (gross) amount.

[2] Schedule 6 Savings, transitional and other provisions

Part 14 Provisions relating to common law remedies

Insert at the end of the Part:

6 Loss of future earnings—gross weekly earnings

(1) The amendment to section 151I made by Schedule 10 (1) to the *Workers Compensation Legislation Amendment Act 1995* is made for the purpose of avoiding doubt, and accordingly section 151I is taken to have been so amended from the commencement of this Act.

(2) However, that amendment does not affect any award of, or compromise or settlement of a claim for, damages made before the commencement of the amendment.

Explanatory note (item (2))

Item (2) of the proposed amendments is a transitional provision to the effect that the amendment proposed to be made by item (1) is for the purpose of removing doubt and is backdated to the commencement of the Act.

Schedule 11 Amendments relating to medical disputes

(Section 3)

[1] Section 72 Reference of matters to medical panel etc

Insert after section 72 (1):

(1A) Subsection (1) does not prevent the employer from applying under section 131 for reference of a matter to a medical panel and that subsection does not require the worker to apply if the employer has already done so.

(1B) Subsection (1) applies even if court proceedings have been commenced in respect of the claim concerned.

Explanatory note (item (1))

Item (1) of the proposed amendments makes it clear that the existing obligation in section 72 (1) of the Act to refer a dispute as to extent of hearing loss to a medical panel applies even if court proceedings have been commenced on the claim concerned. This amendment and the amendment in item (2) address the concern that current section 72 (1) leaves open the commencement of litigation at a premature stage, namely, before the insurer has had a proper opportunity to process the claim and (accordingly) before it is known whether there will be a dispute that would have to be referred to a medical panel under that provision. Item (1) also makes it clear that even though that obligation lies on the worker the employer is not prevented from referring the dispute to a medical panel.

[2] Section 72A

Insert after section 72:

72A Restrictions on commencing proceedings concerning hearing loss claims

(1) A worker to whom compensation is payable for a loss, or a further loss, of hearing due to boilermaker's deafness or any deafness of similar origin is not entitled to commence court proceedings in respect of that compensation until:

(a) 3 months after a claim for the compensation is duly made, or

(b) if the person on whom the claim is made has, within that 3 months, proceeded to deal with and decide the claim with reasonable promptness and duly applied under section 131 for reference of the matter to a medical panel—the panel has given its certificate under that section,

whichever is later.

(2) This section does not prevent the commencement of court proceedings in any of the following circumstances:

(a) if the person against whom the claim is made denies all liability in respect of the injury concerned,

(b) if the proceedings are commenced to recover weekly payments of compensation due to the worker in respect of the injury in accordance with section 102,

(c) any circumstances prescribed by the regulations.

(3) A claim for compensation to which this section applies must be dealt with and decided with reasonable promptness. If this is not done, the worker is (subject to section 67 (3A), where applicable) entitled to interest on any compensation paid in respect of the claim at the rate prescribed by the regulations for the period from when the claim was duly made until the compensation was paid, but not including any period in respect of which interest is payable under section 19 or 19A of the *Compensation Court Act 1984*.

Explanatory note (item (2))

Item (2) of the proposed amendments prevents court proceedings being commenced in respect of compensation for a hearing loss for 3 months after the claim is made or until a medical panel has certified on a medical dispute on the claim, whichever is later. However this does not prevent court proceedings being commenced where the employer has denied all liability in respect of the injury or the proceedings are to recover weekly payments of compensation due to the worker or are commenced in other circumstances prescribed by the regulations. This will give employers a reasonable opportunity to assess their liability for hearing loss claims and will also enable any disputes to be referred to a medical panel for conclusive determination as to the worker's condition. The amendment

includes an obligation to deal with claims with reasonable promptness and if this is not complied with interest is payable to the worker from when the claim for compensation was made until compensation is paid. The purpose of the amendment is, complementary with the requirement in current section 72 (1) for disputes which only concern the extent of the worker's hearing loss to be referred to a medical panel, to minimise litigation and costs in those cases.

[3] Section 131 Reference of medical disputes to referee or panel on application of worker or employer

Omit section 131 (2). Insert instead:

(2) If there is a medical dispute, the registrar of the Compensation Court must, on the application of either the worker or the employer, refer the medical dispute to a medical panel or (if subsection (2A) permits) to a medical referee, but only if

(a) the worker has submitted himself or herself for examination by a medical practitioner in accordance with a requirement of the employer under section 129 or has been examined by a medical practitioner selected by the worker, and

(b) the employer or worker (as the case may be) has furnished the other with a copy of the medical practitioner's report of the examination (being a report relevant to the medical dispute).

(2A) A medical dispute can be referred under this section to a medical referee only if the registrar is satisfied that it is not reasonably practicable in the circumstances to constitute a medical panel. A medical dispute must not in any circumstances be referred to a medical referee if the dispute concerns the extent of a loss, or a further loss, of hearing due to boilermaker's deafness or any deafness of similar origin.

[4] Section 131 (3)

Omit "7 days".
Insert instead "30 days (or such longer period as the worker and the employer may agree)".

[5] Section 131 (4)

Omit ", in accordance with the rules of the Compensation Court,".

[6] Section 131 (5A)–(5F)

Insert after section 131 (5):

(5A) The fact that court proceedings have been commenced in respect of a claim for compensation does not affect the operation of this section in respect of a medical dispute concerning the claim, except as provided by subsections (5B)–(5D).

(5B) If an application for referral of a medical dispute is made under this section after the commencement of court proceedings in respect of the compensation to which the application relates, subsection (5) does not apply to any certificate issued on the application unless:

(a) the proceedings were commenced before a claim for the compensation was duly made, or

(b) the proceedings were commenced before the other party had had a reasonable opportunity, after the medical dispute arose, to make an application under this section, or

(c) the worker and the employer agree that subsection (5) is to apply.

(5C) A reference in subsection (5B) to the commencement of court proceedings in respect of compensation includes a reference to the amendment of proceedings to include a claim for compensation.

(5D) Once the hearing (or part of the hearing) of court proceedings that deals with a medical dispute has commenced, an application may not be made under this section in respect of the medical dispute concerned unless the other party consents or the Court grants leave.

(5E) A certificate of a medical panel that because of subsection (5B) is not conclusive evidence as to the matters certified is nevertheless evidence of the matters certified but evidence may be adduced to the contrary.

(5F) A medical panel or medical referee may call for the production of such medical reports (including X-rays and the results of other tests) and other information as the panel or referee considers necessary or desirable for the purposes of the fair and proper determination of the matter.

Explanatory note (items (3)–(6))

Item (3) of the proposed amendments alters an existing provision that provides for the referral of a dispute as to a worker's condition or fitness for work to a medical panel or medical referee. The existing provision indicates that such a referral can only be applied for in circumstances where the dispute arose after the worker has been medically examined and the resulting medical report has been furnished to the other party. In response to recent court decisions adopting a more restrictive interpretation of this provision than had applied over preceding years, the amendments provide a more flexible arrangement as regards when the dispute arose, though still requiring supply of a relevant medical report to the other party. The amendments make it clear that referral must be to a medical panel (and not a medical referee) unless this is not reasonably practicable and the dispute does not concern hearing loss. It will also be made clear that referral is automatic at the request of a party to the dispute (and not at the discretion of the registrar of the Compensation Court as presently expressed). These 2 clarifications arise from recent court decisions which indicate that, contrary to the practice over preceding years, the registrar may be required to delay the requested medical panel referral until a preliminary hearing can be arranged, at which the parties may raise arguments about whether the referral should go ahead.

Item (4) of the proposed amendments' increases from 7 days to 30 days the period within which a party to a claim must provide to the other party copies of medical reports. This is in line with the procedure that applied under the former *Workers Compensation Act*.

Item (5) of the proposed amendments removes the necessity for there to be rules of the Compensation Court as to the manner in which a medical panel or referee is to give a certificate as to a worker's condition or fitness for employment. This addresses a problem arising from recent court decisions to the effect that, without such rules, certificates issued by medical panels may be invalid.

Item (6) of the proposed amendments inserts new subsections (5A)–(5F) which provide as follows:

(a) Proposed subsection (5A) provides that, with certain exceptions, pending court proceedings do not affect the operation of the medical dispute referral provisions.

(b) The first exception (proposed subsection (5B)) provides that if an application for referral of a medical dispute is made after court proceedings have commenced, the resulting certificate is not conclusive evidence unless the proceedings were commenced before the medical dispute arose or before the applicant had a reasonable opportunity to apply for the referral (or the parties otherwise agree). Proposed subsection (5C) provides that the amendment of proceedings to include a claim for compensation is to be regarded as the commencement of court proceedings for the purposes of proposed subsection (5B).

(c) The second exception (proposed subsection (5D)) provides that once the hearing of Court proceedings has commenced, an application for referral of a medical dispute may not be made unless the other party consents or the Court grants leave.

(d) Proposed subsection (5E) provides that even if a medical dispute certificate is made non-conclusive by the operation of proposed subsection (5B), the certificate is still evidence but evidence to the contrary can be adduced.

(e) Proposed subsection (5F) enables a medical panel or referee to call for medical reports that will assist the panel or referee to give fair and proper consideration to a matter.

[7] Schedule 6 Savings, transitional and other provisions

Part 12 Provisions relating to medical examinations and disputes

Insert at the end of the Part:

7 Medical disputes

(1) The amendments made by Schedule 11 (1) and (3), (4) and (6) to the *Workers Compensation Legislation Amendment Act 1995* extend to apply in respect of an injury received before, a dispute arising before (including one referred to a medical panel or a medical referee before) and court proceedings commenced before the commencement of those amendments, but not so as to affect any decision of a court made before that commencement.

(2) A certificate given or purportedly given under section 131 (4) (or under section 51 (5) of the former Act) before the commencement of the amendment made by Schedule 11 (3) to the *Workers Compensation Legislation Amendment Act 1995* is taken to have been validly given if it would have been validly given had the procedures applicable to the reference of disputes to medical panels or medical referees after that commencement been in force when the certificate was given or purportedly given. However, this subclause does not affect any decision of a court made before the commencement of this subclause.

(3) Section 72A (Restrictions on commencing proceedings concerning hearing loss claims) extends to apply in respect of an injury received before the commencement of that section, but does not apply in respect of court proceedings pending or determined as at that commencement.

(4) The amendment to section 131 (4) made by Schedule 11 (5) to the *Workers Compensation Legislation Amendment Act 1995* is taken to have commenced on the commencement of that subsection as originally enacted. Accordingly, the validity of a certificate given or purportedly given under section 131 (4) before the commencement of that amendment is not affected merely because the certificate was not given in accordance with any rules of the Compensation Court made for the purposes of section 131 or because there were no such rules at the time the certificate was given. However, that amendment does not affect any decision of a court made before the commencement of this clause.

Explanatory note (item (7))

Item (7) of the proposed amendments inserts transitional provisions that apply the amendments proposed to be made by this Schedule to existing injuries. The operation of the proposed amendment concerning the need for rules of the Compensation Court to provide for the form of a medical certificate given by a medical panel or referee is backdated to the commencement of the original provision.

Schedule 12 Amendments relating to miscellaneous matters

(Section 3)

Amendments—forms

[1] Section 73 Reimbursement for costs of medical certificate and examination

Omit section 73 (1) (a). Insert instead:

(a) that a worker has suffered a loss, being a loss mentioned in the Table to this Division, or

Explanatory note

The amendment to section 73 ensures that the requirements of the Act as to the contents of medical certificates reflects the contents of medical certificates in practice.

[2] Section 92 Making of claim for compensation

Insert "or contain such information" after "in such form" in section 92 (1) (b).

Explanatory note

The amendment to section 92 makes it clear that the form of application for compensation can be prescribed or approved by reference to the information it must contain.

Amendment—specialised insurers

[3] Section 3 Definitions

Omit "Commonwealth Steamship Insurance Co Pty Ltd" from paragraph (a) of the definition of ***specialised insurer*** in section 3 (1).

Explanatory note

The amendment to section 3 updates the list of current specialised insurers.

Amendment—agreements for compensation for occupational diseases

[4] Section 66A Registration of agreements for compensation for occupational diseases

Insert after section 66A (4):

(4A) Without limiting subsection (4), the Authority may refuse to register an agreement if the Authority is not satisfied that the loss to which the agreement relates is an occupational disease (within the meaning of section 71).

Explanatory note

Section 66A of the Act provides for the registration of agreements, between injured workers and their employers, for the payment of compensation for "losses" that are occupational diseases (as defined in section 71). If such an agreement is registered, the worker is not entitled to any additional compensation for the loss under an award of the Compensation Court. The WorkCover Authority is empowered to refuse to register an agreement if the Authority considers that the agreement is inaccurate or that the agreed amount of compensation is inadequate.

Item (4) of the proposed amendments makes it clear that the Authority may refuse to register an agreement if it is not satisfied that the loss to which the agreement relates is an occupational disease within the meaning of section 71.

Amendments—claims for compensation

[5] Section 38A Section 38—determination of whether worker seeking suitable employment

Omit section 38A (2) (b). Insert instead:

(b) the worker has supplied the employer (or the insurer who is liable to indemnify the employer) with a medical certificate with respect to the worker's partial incapacity for work, being a medical certificate that is in or to the effect of a form approved by the Authority, or that is in any other form and contains information that is reasonably sufficient in the circumstances to assist in determining what is suitable employment for the worker, and

[6] Section 92 Making of claim for compensation

Section 92 (1) (c), (c1)

Omit section 92 (1) (c). Insert instead:

(c) in the case of a claim for weekly payments of compensation—accompanied by a medical certificate that is in or to the effect of the approved form, or that is in any other form and contains information that is reasonably sufficient in the circumstances to assist in the determination of the claim,

(c1) accompanied by such additional medical certificates or other documents as may be prescribed by the regulations.

[7] Section 92 (1A)

Omit section 92 (1A). Insert instead:

(1A) A claim for compensation need not be accompanied by a medical certificate or other document under this section if the medical certificate or document relates to information that is substantially available to the person on whom the claim is made from other appropriate documentation given or served by or on behalf of the claimant.

[8] Section 92 (3)

Omit section 92 (3). Insert instead:

(3) If a claim for compensation and any medical certificate or other document required to accompany the claim are not given or served at the same time, the claim for compensation is taken not to have been made until the day on which the last of those documents is given or served. In that case, all of those documents are taken to have accompanied the claim.

[9] Section 92 (5)

Omit section 92 (5). Insert instead:

(5) In this section, ***approved form,*** in relation to a medical certificate, means a form in or to the effect of

(a) a form approved by the Authority for the purposes of this section or any form previously approved by the Authority for the purposes of this section, or

(b) any form previously prescribed by the regulations for the purposes of this section.

[10] Schedule 6 Savings, transitional and other provisions

Part 4 Provisions relating to weekly payments of compensation

Insert at the end of clause 5C:

(2) A medical certificate that is in or to the effect of a form that was prescribed under the *Workers Compensation (General) Regulation 1987* for the purposes of section 38A (2) (b) is taken to be in a form approved by the Authority for the purposes of that subsection.

Explanatory note

Items (5), (6) and (9) of the proposed amendments require a medical certificate that is needed for a determination of whether a worker is seeking suitable employment or that accompanies a claim for compensation to be in a form approved by the WorkCover Authority or in any other form that contains reasonably sufficient information for the purposes for which the certificate is provided. The amendments transfer from the regulations the requirements as to the form of medical certificates.

Item (7) of the proposed amendments removes the requirement to show reasonable cause before a person may be excused from giving or serving a medical certificate or other document required to accompany a claim. However, the information that the document would provide must be otherwise available from other documentation given or served by or on behalf of the claimant.

Section 92 (3) contemplates the possibility that not all of the required documents will be served at the same time, and, at present, "deems" the claim not to have been made until the day on which the last document is served. Item (8) of the proposed amendments makes it clear that the claim is then duly made despite the fact that the documents did not accompany the claim.

Amendments—false statements

[11] Section 92B False claims etc

Omit "accompanies" from section 92B (1) (c).
Insert instead "relates to".

[12] Section 92B (2) (c)

Omit section 92B (2) (c). Insert instead:

(c) made in any document or information in any case in which the person who made the statement did not know that the document or information was to be given, served or furnished in connection with a claim for compensation, or

Explanatory note

After a claim for compensation has been made, it may be necessary for further medical certificates or other documents to be furnished in relation to the claim. Item (11) of the proposed amendments removes any doubt that a person who makes a statement knowing that it is false or misleading in a material particular in such a document is guilty of an offence. Item (12) ensures that there is no offence if the person concerned did not know that the relevant document was to be furnished in relation to the claim.

At present, a person who makes a statement knowing that it is false or misleading in a material particular when furnishing information concerning a claim for compensation to any person is guilty of an offence. Item (12) also ensures that there is no offence if the person concerned did not know that the information was to be furnished in relation to a claim.

Amendments—duty to seek suitable employment and mitigate damages

[13] 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:

(a) whether the worker was made aware of the worker's obligation to take those steps, and

(b) circumstances of the kind referred to in section 38A (5).

[14] Section 151L Mitigation of damages

Insert "However, the person claiming damages does not have the onus of establishing that the steps referred to in paragraphs (b)–(d) of subsection (2) have been taken, and the court assessing damages does not have to take the matters referred to in those paragraphs into account, unless it is established that before those steps could reasonably be expected to have been taken the worker was made aware by the employer or insurer that the worker was required to take those steps.'' at the end of section 151L (3).

Explanatory note

Item (13) amends section 39 which deals with the "odd-lot" rule for the compensation of an injured worker as if he or she were totally incapacitated for work (ie where the worker seeks employment of a kind not commonly available and has unsuccessfully taken all reasonable steps to obtain such employment). The proposed amendment specifies that, in determining whether the worker has taken those steps, the court has a discretion to consider whether the worker was made aware of the need to take them.

Item (14) provides that an injured worker claiming common law damages does not have the onus of proving that employment-seeking and related steps by way of mitigation of damage have been taken by the worker, and that the courp assessing damages does not have to take those steps into account, unless the worker has been made aware of the need to take those steps.

The proposed amendments in items (13) and (14) are intended to be consistent with existing provisions of the Act, which state that before a worker's entitlement to compensation can be made conditional on employment-seeking or rehabilitation activities by the worker, he or she must first be informed accordingly.

Amendment—Ministers of religion

[15] Schedule 1 Deemed employment of workers

Insert after clause 17:

17A Ministers of religion covered by policies

(1) For the purposes of this Act, if a policy of insurance covers a minister of religion, that minister of religion is taken to be a worker and the person insured under the policy is taken to be the minister's employer.

(2) A minister of religion is considered to be covered by a policy of insurance if the policy provides (whether on its own terms or in some other document recognised by or referred to in the policy) that the coverage provided by the policy extends to the minister or to ministers of a class of which that minister is a member.

(3) A religious body or organisation, and any official of the body or organisation, is taken to have an insurable interest for the purpose of enabling the body, organisation or official to obtain and maintain in force a policy of insurance that covers a minister of religion of that body or organisation.

(4) If there is a conflict between the operation of this clause and clause 17 in respect of a particular minister of religion, this clause prevails.

(5) In this clause:

official of a religious body or organisation includes a person or body who or which holds an office or position, or exercises official functions, within the religious body or Organisation.

Explanatory note

Clause 17 of Schedule 1 to the Act currently provides a power for the regulations to "deem" ministers of religion to be workers for the purposes of the Act. Item (15) adds a new provision which provides that a minister of religion is taken to be a worker if a workers compensation insurance policy is obtained by or on behalf of the minister's religious body or organisation to cover the minister. The person who obtained the policy is taken to be the employer.

Amendment—savings and transitional regulations

[16] Schedule 6 Savings, transitional and other provisions

Part 20 Savings and transitional regulations

Insert at the end of clause 1 (1):

Workers Compensation Legislation Amendment Act 1995

Amendments—minor amendments and amendments by way of statute law revision

[17] Section 58 Refund of weekly payments paid after return to work etc

Insert "(including under the former Act)" after "under this Act" in section 58 (1) (b).

[18] Section 58 (5)

Insert after section 58 (4):

(5) In this section:

(a) a reference to the worker's return to employment includes a reference to the worker's commencing employment, and

(b) a reference to employment includes a reference to employment in the worker's own business.

[19] Section 112 Interim awards

Omit section 112 (2) (a) (i) and (ii). Insert instead:

(i) for compensation by an insurer or self-insurer, or

(ii) for indemnity by an insurer, or

[20] Section 147 Miscellaneous provisions

Omit "sections 436, 471 and 500" from section 147 (5). Insert instead "sections 471B and 500".

[21] Section 151B Effect of recovery of damages from employer on payment of compensation

Insert "or otherwise paid" after "awarded" in section 151B (1) (b).

[22] Schedule 1 Deemed employment of workers

Schedule 1, clause 9 (3) (b)

Omit "a commissioner".
Insert instead "the Compensation Court".

[23] Schedule 1, clause 15 (2)

Omit "a charity registered under the *Charitable Collections Act 1934* or which is exempted from registration by or under that Act".
Insert instead "a person who holds or is taken to hold an authority granted under the *Charitable Fundraising Act 1991"*.

[24] Schedule 1, clause 15 (4)

Insert after clause 15 (3):

(4) If 2 or more persons conduct or hold a contest or public or other performance, those persons are liable to contribute to any compensation payable under this Act for the injury in such proportion as, in default of agreement, the Compensation Court determines.

[25] Schedule 6 Savings, transitional and other provisions

Part 4 Provisions relating to weekly payments of compensation

Insert at the end of clause 8:

(2) The amendments to section 58 of this Act by Schedule 12 (17) and (18) to the *Workers Compensation Legislation Amendment Act 1995* extend to weekly payments of compensation made before the commencement of those amendments. However, those amendments do not apply to enable an order under that section (as so amended) to be made in respect of any

case in which a court has, before that commencement, made or refused to make an order in the circumstances referred to in that section (as so amended) or to enable an order to be made in respect of court proceedings commenced before that commencement.

Explanatory note (items (17)–(25))

Items (17)–(19) make amendments by way of statute law revision.

Item (20) makes a minor amendment to update a cross-reference to provisions of the Corporations Law.

Item (21) makes a minor amendment to recognise that damages may be paid under a settlement as well as under an award.

Items (22)–(24) make 3 minor amendments to Schedule 1 to the Act (Deemed employment of workers). The first 2 amendments are in the nature of statute law revision. The third amendment amends clause 15 of the Schedule (which deems boxers, wrestlers and others to be workers for the purposes of the Act) to provide for liability for a contribution to be shared where an injured worker has 2 or more "deemed" employers under the clause. (Other clauses of the Schedule already provide for the sharing of similar liabilities.)

Item (25) inserts a transitional provision that extends the operation of the amendments to be made by items (17) and (18) to payments of compensation made before the commencement of the amendments.

Schedule 13 Amendment of Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987

(Section 4)

[1] Section 8 Associated operation or work

Omit *"State Emergency Services and Civil Defence Act 1972"* from section 8 (1) (d).
Insert instead *"State Emergency Service Act 1989"*.

[2] Section 23 Definitions

Omit "section 8 (1) of the *State Emergency Services and Civil Defence Act 1972*" from paragraph (a) (i) of the definition of emergency service worker.
Insert instead "section 15, 16 or 17 of the *State Emergency Service Act 1989*".

[3] Section 23

Omit paragraph (a) (ii) of the definition of emergency service worker.

Explanatory note

The proposed amendments to sections 8 and 23 update those sections by removing a reference to an Act that has been repealed and inserting instead a reference to the Act replacing the repealed Act.

Schedule 14 Amendment of Workers' Compensation (Dust Diseases) Act 1942

(Section 5)

Section 8 Certificate of medical authority and rates of compensation

Insert after section 8 (2A):

(2AA) If a person dies with dependants, being a child or children, to whom no award may be made under subsection (2B) but who are entitled to an award made under subsection (1), the prescribed rate of compensation payable under any such award is as specified in subsection (2).

Explanatory note

The proposed amendment to section 8 clarifies the application of the section in circumstances where a deceased worker leaves a dependent child or children but no widowed spouse (and therefore the provisions of subsection (2B) do not apply). It makes it clear that the surviving dependent children, if entitled to an award under subsection (1), are to receive the compensation benefits (prescribed by the *Workers Compensation Act)* specified in subsection (2).

Schedule 15 Amendment of Law Reform (Miscellaneous Provisions) Act 1965

(Section 6)

Section 10 Apportionment of liability in cases of contributory negligence

Omit "section 150" wherever occurring from section 10 (1). Insert instead "section 151Z".

Explanatory note

The proposed amendment to section 10 updates a cross-reference to a provision of the *Workers Compensation Act 1987* dealing with recovery of common law damages against both the employer and any other person liable to the worker.

[Minister's second reading speech made in-
Legislative Council on 31 May 1995
Legislative Assembly on 7 June 1995]