



New South Wales

# Workers Compensation Legislation Further Amendment Act 2001 No 94

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New South Wales

# **Workers Compensation Legislation Further Amendment Act 2001 No 94**

Act No 94, 2001

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*An Act to amend the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998* to make further provision with respect to common law damages, lump sum compensation, attendant care services, savings and transitional matters, private insurance arrangements and miscellaneous matters; and for other purposes. [Assented to 6 December 2001]*

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**The Legislature of New South Wales enacts:****1 Name of Act**

This Act is the *Workers Compensation Legislation Further Amendment Act 2001*.

**2 Commencement**

- (1) This Act commences on a day or days to be proclaimed, except as provided by this section.
- (2) The following provisions of this Act (and section 3 in its application to those provisions) are taken to have commenced at 9.00 am on the day on which the Bill for this Act was introduced into Parliament:
  - (a) Schedule 1.1 (Amendments to the *Workers Compensation Act 1987* relating to common law damages),
  - (b) Schedule 4 [14] to the extent that it inserts clauses 9–11 of Part 18C of Schedule 6 to the *Workers Compensation Act 1987*.

**3 Amendments**

- (1) Each Act specified in the Schedules to this Act is amended as set out in those Schedules.
- (2) The amendments made by this Act to the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998* are amendments to those Acts as amended by the *Workers Compensation Legislation Amendment Act 2001* whether or not the amendments made by the *Workers Compensation Legislation Amendment Act 2001* have commenced as at the date of assent to this Act.

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## Schedule 1 Amendments relating to common law damages

(Section 3)

### 1.1 Workers Compensation Act 1987 No 70

#### [1] Section 149 Definitions

Omit the definition of *non-economic loss* from section 149 (1).

#### [2] Sections 151A, 151B

Omit the sections. Insert instead:

##### 151A Effect of recovery of damages on compensation

- (1) If a person recovers damages in respect of an injury from the employer liable to pay compensation under this Act then (except to the extent that subsection (2), (3) or (4) covers the case):
  - (a) the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid), and
  - (b) the amount of any weekly payments of compensation already paid in respect of the injury concerned is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the compensation, and
  - (c) the person ceases to be entitled to participate in any injury management program provided for under this Act or the 1998 Act.
- (2) If damages in respect of an injury are recovered from the employer liable to pay compensation under this Act, pursuant to a cause of action that survives for the benefit of the estate of a deceased worker under the *Law Reform (Miscellaneous Provisions) Act 1944*, the following amounts of compensation

are to be repaid out of the estate of the deceased worker to the person who paid the compensation:

- (a) the amount of any weekly payments of compensation already paid in respect of the injury concerned,
  - (b) the amount of any permanent impairment compensation and pain and suffering compensation already paid in respect of the injury concerned.
- (3) If damages are recovered in an action under the *Compensation to Relatives Act 1897* in respect of the death of a worker from the employer liable to pay compensation under this Act in respect of the death:
- (a) the amount of any compensation under Division 1 of Part 3 paid in respect of the death is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the compensation, and
  - (b) a person recovering those damages ceases to be entitled to any further compensation under this Act in respect of the death of the worker.
- (4) If a person recovers motor accident damages in respect of an injury from the employer liable to pay compensation under this Act:
- (a) the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid), and
  - (b) the amount of any compensation already paid in respect of the injury concerned is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the compensation.

**[3] Section 151C 6-months delay before commencing court proceedings against employer for damages**

Omit section 151C (2) (a). Insert instead:

- (a) the employer wholly denies liability in respect of the injury,

**[4] Section 151C (3)**

Insert after section 151C (2):

- (3) This section does not limit or otherwise affect the operation of Part 6 of Chapter 7 of the 1998 Act.

**Note.** Part 6 of Chapter 7 of the 1998 Act imposes restrictions on the commencement of court proceedings for damages.

**[5] Section 151D Time limit for commencement of court proceedings against employer for damages**

Omit section 151D (1).

**[6] Section 151DA**

Insert after section 151D:

**151DA Time not to run for commencement of proceedings in certain cases**

- (1) Time does not run for the purposes of section 151D:
- (a) while a medical dispute as to whether the degree of permanent impairment of the injured worker is at least 15%, or whether the degree of permanent impairment of the injured worker is fully ascertainable, is the subject of a referral for assessment under Part 7 of Chapter 7 of the 1998 Act, or
- (b) while a pre-filing statement served in accordance with section 315 of the 1998 Act in respect of the claim concerned remains current.
- (2) A pre-filing statement remains current from the time it is served until it is struck out under this section on the application of the person (*the defendant*) on whom it was served or it is withdrawn by the person who served it, whichever happens first.
- (3) The defendant may apply to the President to have the pre-filing statement struck out by order of the President. Such an application may not be made until at least 6 months have elapsed after the defendant served on the claimant a defence to the claim in accordance with section 316 of the 1998 Act.

- (4) The President may order that a pre-filing statement be struck out but must not do so if satisfied that the degree of permanent impairment of the injured worker is not yet fully ascertainable and the matter is the subject of a referral under Part 7 of Chapter 7 of the 1998 Act for assessment of the degree of permanent impairment of the injured worker.
- (5) A medical dispute is considered to be the subject of a referral for assessment under Part 7 of Chapter 7 of the 1998 Act even if the approved medical specialist has declined to make an assessment of the degree of permanent impairment of the injured worker until satisfied that the degree of permanent impairment is fully ascertainable.

**[7] Sections 151G–151IA**

Omit sections 151G–151I. Insert instead:

**151G Only damages for past and future loss of earnings may be awarded**

- (1) The only damages that may be awarded are:
  - (a) damages for past economic loss due to loss of earnings, and
  - (b) damages for future economic loss due to the deprivation or impairment of earning capacity.
- (2) This section does not apply to an award of damages in an action under the *Compensation to Relatives Act 1897*.

**151H No damages unless permanent impairment of at least 15%**

- (1) No damages may be awarded unless the injury results in the death of the worker or in a degree of permanent impairment of the injured worker that is at least 15%.

**Note.** Section 322 of the 1998 Act provides that the assessment of the degree of permanent impairment is to be made in accordance with WorkCover Guidelines. That section also provides that impairments that result from the same injury are to be assessed together.
- (2) In assessing whether the 15% threshold has been met (that is, whether the degree of permanent impairment resulting from an injury is at least 15%):

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- (a) impairment resulting from physical injury is to be assessed separately from impairment resulting from psychological injury, and
  - (b) in assessing impairment resulting from psychological injury, no regard is to be had to impairment that results from a secondary psychological injury, and
  - (c) the 15% threshold is not met unless the degree of permanent impairment resulting from physical injury is at least 15% or the degree of permanent impairment resulting from psychological injury is at least 15%.

**Note.** This does not prevent an award of damages in respect of both psychological and physical injuries together once the 15% threshold has been met for one or the other.

- (3) In assessing the degree of permanent impairment that results from a physical injury, no regard is to be had to any impairment or symptoms resulting from a psychological injury.
- (4) The degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical assessment) of Chapter 7 of the 1998 Act.
- (5) In this section:

*psychological injury* includes psychiatric injury.

*secondary psychological injury* means a psychological injury to the extent that it arises as a consequence of, or secondary to, a physical injury.

#### **151I Calculation of past and future loss of earnings**

- (1) In awarding damages, 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).
- (2) The maximum amount of weekly payments of compensation under section 35 for a future period is to be the amount that the court considers is likely to be the amount for that period having regard to the operation of Division 6 of Part 3 (Indexation of amounts of benefits).



- (3) This section applies even though weekly payments of compensation to the worker concerned are not subject to the maximum amount prescribed under section 35.

**151IA Retirement age**

In awarding damages for future economic loss due to deprivation or impairment of earning capacity or (in the case of an award of damages under the *Compensation to Relatives Act 1897*) loss of expectation of financial support, the court is to disregard any earning capacity of the injured worker after age 65.

**[8] Section 151J Damages for future economic loss—discount rate**

Omit section 151J (1). Insert instead:

- (1) For the purposes of an award of damages, the present value of future economic loss is to be qualified by adopting the prescribed discount rate.

**[9] Section 151K Damages for economic loss—maximum amount for provision of certain home care services**

Omit the section.

**[10] Section 151KA Respite care**

Omit the section.

**[11] Section 151M Payment of interest**

Omit section 151M (2) and (3).

**[12] Section 151M (4)**

Omit:

**Other heads of damages**

The following provisions apply to damages, other than damages to which subsection (2) or (3) applies:

**[13] Section 151M (4) (a)**

Omit “such damages”.  
Insert instead “damages”.

**[14] Section 151Q Structured settlements**

Omit section 151Q (1). Insert instead:

- (1) This section applies to an award of damages if the plaintiff requests that it apply. In making an order under this section the court is to give preference to the views of the injured worker.

**[15] Section 151Q (2)**

Omit section 151Q (2). Insert instead:

- (2) If this section applies to an award of damages, the court:
  - (a) may separately determine 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 are to be paid in accordance with such arrangements as the court determines or approves.

**[16] Section 151Q (3) (b) and (c)**

Omit the paragraphs.

**[17] Section 151Q (4) and (6)**

Omit “subsection (2) (c)” wherever occurring.  
Insert instead “this section”.

**[18] Section 151Q (5)**

Omit the subsection.

## **1.2 Workplace Injury Management and Workers Compensation Act 1998 No 86**

### **[1] Section 4 Definitions**

Insert in alphabetical order in section 4 (1):

*mediator* means a person appointed as a mediator under section 318F.

### **[2] Section 280A**

Insert before section 281:

#### **280A Claim for lump sum compensation a pre-condition to damages claim**

A claim for work injury damages in respect of an injury cannot be made unless a claim for lump sum compensation in respect of the injury is made before or at the same time as the claim for work injury damages.

### **[3] Section 281 Liability to be accepted and settlement offer made**

Insert after section 281 (2):

(2A) The determination of a claim cannot be delayed beyond 2 months after the claimant has provided to the insurer all relevant particulars about the claim (that delay being on the basis that the degree of permanent impairment of the injured worker resulting from the injury is not fully ascertainable), unless the insurer has within that 2-month period notified the claimant that the degree of permanent impairment of the injured worker resulting from the injury is not fully ascertainable.

(2B) When the person on whom a claim is made accepts or disputes liability, the person must notify the claimant as to whether or not the person accepts that the degree of permanent impairment of the injured worker resulting from the injury is sufficient for an award of damages.

**[4] Section 281 (6)**

Insert “, except as the WorkCover Guidelines may otherwise provide” after “person”.

**[5] Section 282 Relevant particulars about a claim**

Omit section 282 (1) (d).

Insert instead:

- (d) in the case of a claim for work injury damages, details of the economic losses that are being claimed as damages and details of the alleged negligence or other tort of the employer,

**[6] Chapter 7, Part 6**

Omit the Part. Insert instead:

**Part 6 Court proceedings for work injury damages**

**Division 1 Preliminary**

**311 Interpretation**

In this Part:

*claimant* means a claimant for work injury damages.

*defendant* means the person against whom proceedings for the recovery of work injury damages are commenced or are to be commenced.

**312 Forum for court proceedings**

Proceedings in respect of a claim for work injury damages may be taken in any court of competent jurisdiction, subject to this Part.

## **Division 2      Threshold for award of damages**

### **313    Threshold dispute prevents service of pre-filing statement and commencement of court proceedings**

If there is a dispute as to whether the degree of permanent impairment of the injured worker resulting from an injury is sufficient for an award of damages, the claimant cannot commence court proceedings for the recovery of work injury damages and cannot serve a pre-filing statement under Division 3 unless the degree of permanent impairment has been assessed by an approved medical specialist under Part 7.

### **314    What constitutes threshold dispute**

- (1) For the purposes of this Part, there is considered to be a dispute as to whether the degree of permanent impairment of the injured worker resulting from an injury is sufficient for an award of damages if:
  - (a) the person on whom the claim is made has not accepted that the degree of permanent impairment of the injured worker resulting from the injury is at least 15%, or
  - (b) there is a dispute as to whether the degree of permanent impairment resulting from the injury is fully ascertainable.

**Note.** Under section 322 (4), an approved medical specialist may decline to make an assessment of the degree of permanent impairment of an injured worker until satisfied that the degree of permanent impairment is fully ascertainable.

- (2) There is considered to be no dispute as to whether the degree of permanent impairment of the injured worker resulting from an injury is sufficient for an award of damages if:
  - (a) the person on whom the claim is made has accepted that the degree of permanent impairment of the injured worker is at least 15%, or
  - (b) an approved medical specialist has given a medical assessment certificate certifying that the degree of permanent impairment of the injured worker is at least 15%.

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### Division 3      Pre-filing statements

#### 315 Requirement for pre-filing statement before commencing court proceedings

- (1) Before a claimant can commence court proceedings for the recovery of work injury damages, the claimant must serve on the defendant a *pre-filing statement* setting out such particulars of the claim and the evidence that the claimant will rely on to establish or in support of the claim as the Rules may require.

**Note.** Section 314 prevents a pre-filing statement being served if there is a dispute as to whether the degree of permanent impairment is sufficient for an award of damages.

- (2) The pre-filing statement cannot be served unless:
  - (a) the person on whom the claim is made wholly disputes liability for the claim, or
  - (b) the person on whom the claim is made has made an offer of settlement to the claimant pursuant to the determination of the claim as and when required by section 281 and 1 month has elapsed since the offer was made, or
  - (c) the person on whom the claim is made has failed to determine the claim as and when required by section 281.

**Note.** The determination of a claim in accordance with section 281 requires the making of a reasonable offer of settlement (if liability is wholly or partly accepted). Failure to make a reasonable offer of settlement constitutes a failure to determine the claim. Section 74 requires notice of a dispute as to liability to be given.

#### 316 Defendant must respond to pre-filing statement

- (1) The defendant must, within 28 days after the pre-filing statement has been served on the defendant, respond to the pre-filing statement by:
  - (a) accepting or denying liability (wholly or in part), and
  - (b) (to the extent, if any, that the defendant does not accept liability) serving on the claimant a defence to the claim

setting out such particulars of the defence and evidence that the defendant will rely on to defend the claim as the Rules may require.

**Note.** A defence can be filed after 28 days but after 28 days the claimant can refer the claim to mediation under Division 4.

- (2) If the defendant fails to respond to the pre-filing statement as required by this section within 42 days after it is served on the defendant, the claimant can commence court proceedings for the recovery of work injury damages.

**Note.** If the defendant fails to respond within 42 days, the defendant is prevented from filing a defence (see section 318) and the claimant can proceed to obtain summary judgment on the question of liability. If the defendant responds to the pre-filing statement within 42 days, the matter is required to proceed to mediation under Division 4 before court proceedings can be commenced.

### 317 Defective pre-filing statement

- (1) The defendant is not entitled to assert that a pre-filing statement served by the claimant is defective (by reason of incompleteness or otherwise) unless the defendant has notified the claimant, giving details of any alleged defects, within 7 days after the pre-filing statement is served by the claimant.
- (2) A dispute as to whether a pre-filing statement served by the claimant is defective may be referred to the Registrar for determination.
- (3) The Registrar may give a direction to the claimant as to the action necessary to cure any defect in the pre-filing statement served by the claimant. If the claimant fails to comply with the Registrar's direction within the time allowed for compliance, the pre-filing statement served by the claimant is taken not to have been served.

**Note.** The effect of such a failure is that the claimant must serve the pre-filing statement again.

- (4) If the documents and information that comprise the pre-filing statement are furnished to the defendant at different times, the pre-filing statement is not considered to have been served on the defendant until the last of the required documents and information is served.

**318 Parties limited to pre-filing statement and defence**

- (1) For the purposes of court proceedings on a claim for work injury damages:
  - (a) the claimant is not entitled to file a statement of claim that is materially different from the proposed statement of claim that formed part of the pre-filing statement served by the claimant, except with leave of the court, and
  - (b) the defendant is not entitled to file a defence that is materially different from any defence served on the claimant in response to the claimant's pre-filing statement within 42 days after service of the pre-filing statement, except with leave of the court, and
  - (c) the defendant is not entitled to file a defence that wholly or partly disputes liability for the claim if the defendant has failed to serve on the claimant a defence to the claim as required by this Division within 42 days after the claimant served the pre-filing statement on the defendant, and
  - (d) a party to the proceedings is not entitled to have any report or other evidence admitted in the proceedings on the party's behalf if the report or other evidence was not disclosed by the party in a pre-filing statement or defence served under this Division, except with leave of the court.
- (2) The court is not to grant leave under this section unless satisfied that:
  - (a) the material concerned was not reasonably available to the party when the pre-filing statement or defence was served, and
  - (b) the failure to grant leave would substantially prejudice the party's case.
- (3) The regulations may provide for exceptions to this section.



## **Division 4 Mediation**

### **318A Mediation of claim before commencement of court proceedings**

- (1) A claimant must refer a claim for work injury damages for mediation under this Division before the claimant can commence court proceedings for recovery of those work injury damages. The claim cannot be referred for mediation until at least 28 days after the pre-filing statement has been served on the defendant under Division 3.
- (2) The claimant need not refer a claim for work injury damages for mediation if the defendant has failed to respond to the claimant's pre-filing statement as required under Division 3 within 42 days after it is served on the defendant.

**Note.** A defence can still be filed in the 28–42 day period. A defence can be filed after 42 days but such a defence cannot dispute liability. A defence filed after 42 days can deal with such matters as quantum of damages or contributory negligence.

- (3) The defendant may decline to participate in mediation of the claim if the defendant wholly disputes liability in respect of the claim, but in any other case the defendant cannot decline to participate in mediation.
- (4) Court proceedings for recovery of work injury damages cannot be commenced while the claim is the subject of mediation in the Commission.
- (5) A claim is referred for mediation by being referred to the Registrar for mediation by a mediator. The Registrar is to give directions as to which mediator is to mediate on a particular claim referred for mediation.
- (6) The Rules may make provision for or with respect to mediation under this Division.

### **318B Mediator to bring parties to agreement**

- (1) The mediator must use the mediator's best endeavours to bring the parties to agreement on the claim.
- (2) Failing agreement, the mediator is to issue a certificate certifying as to the final offers of settlement made by the parties in the mediation.

**318C Legal and other assistance at mediation**

At the mediation of a claim, an injured worker is entitled to be accompanied by a person (whether or not a legal adviser or agent) to act as the injured worker's advocate and assist him or her to present his or her case to the mediator.

**318D Powers of mediators**

- (1) For the purposes of and in connection with the mediation of a claim, a mediator has all the functions of the Commission under sections 357–359 and those sections apply in respect of the mediation of a claim in the same way as they apply in respect of proceedings on a dispute before the Commission.
- (2) A mediator may award costs in connection with the mediation of a claim.

**318E Offers made at mediation not to be disclosed to court**

The amount of any offer of settlement made by a party in the course of mediation of a claim is not to be specified in any pleading, affidavit or other document filed in or in connection with court proceedings on the claim, and is not to be disclosed to or taken into account by the court, before the court's determination of the amount of damages in the proceedings.

**318F Appointment of mediators**

- (1) The President is, in accordance with criteria developed by the Minister, to appoint persons to be mediators for the purposes of this Act to mediate on claims for work injury damages as and when required to do so by the Registrar.
- (2) Mediators are in the exercise of their functions subject to the general control and direction of the Registrar.
- (3) Subject to this section, a mediator holds office for such period (not exceeding 5 years) as may be specified in the instrument of appointment of the mediator, but is eligible for re-appointment.
- (4) A mediator is entitled to be paid such remuneration (including travelling and subsistence allowances) in respect of work done as a mediator as the Minister may from time to time determine in respect of the mediator.

- (5) A mediator is taken to have vacated office if the mediator:
- (a) dies, or
  - (b) completes a term of office and is not re-appointed, or
  - (c) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
  - (d) becomes a mentally incapacitated person, or
  - (e) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or
  - (f) resigns the office by instrument in writing addressed to the President, or
  - (g) is removed from office by the President.
- (6) The President may at any time remove a mediator from office.
- (7) Part 2 of the *Public Sector Management Act 1988* does not apply to a mediator.

**318G Protection of mediators**

- (1) A matter or thing done or omitted to be done by a mediator in the exercise of the mediator's functions does not, if the matter or thing was done or omitted in good faith, subject the mediator personally to any action, liability, claim or demand.
- (2) A mediator is, in any legal proceedings, competent but not compellable to give evidence or produce documents in respect of any matter in which he or she was involved in the course of the exercise of his or her functions as a mediator.

**318H Mediation fees**

- (1) The regulations may make provision for or with respect to the fees to be paid in connection with mediation under this Division.

- (2) In particular, the regulations may specify any such fee or the method by which the fee is to be calculated, and may specify by whom and in what circumstances the fee is payable.
- (3) Fees payable under the regulations under this section are payable into the WorkCover Authority Fund.

## **Division 5      General**

### **318I   Orders for access to information and premises**

- (1) If there is no dispute that the degree of permanent impairment of an injured worker is sufficient for an award of damages, the Registrar may on the application of the claimant give either or both of the following written directions to the defendant:
  - (a) a direction directing the defendant to produce to the claimant within a specified period specified reports and other documents in the defendant's possession,
  - (b) a direction directing the defendant to provide or allow the claimant access to specified premises within a specified period for a purpose relevant to the claimant's claim.
- (2) A person who fails without reasonable excuse to comply with a direction given to the person under this section is guilty of an offence.

Maximum penalty: 50 penalty units.

**Note.** The Commission also has power under section 357 to require the production of documents and the furnishing of information by the parties.

### **[7]   Section 319 Definitions**

Omit the definition of *medical dispute*. Insert instead:

*medical dispute* means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim:

- (a) the worker's condition (including the worker's prognosis, the aetiology of the condition, and the treatment proposed or provided),

- (b) the worker's fitness for employment,
- (c) the degree of permanent impairment of the worker as a result of an injury,
- (d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,
- (e) the nature and extent of loss of hearing suffered by a worker,
- (f) whether impairment is permanent,
- (g) whether the degree of permanent impairment of the injured worker is fully ascertainable.

**[8] Section 322 Assessment of impairment**

Insert “, as in force when the injury concerned was received” after “purpose” in section 322 (1).

**[9] Section 322 (4)**

Insert “and that the degree of permanent impairment is fully ascertainable” after “impairment is permanent”.

**[10] Section 322 (4)**

Insert “a court or” after “Proceedings before”.

**[11] Section 325 Medical assessment certificate**

Omit “opinion” from section 325 (2) wherever occurring.  
Insert instead “assessment”.

**[12] Section 326 Status of medical assessments**

Omit “opinion” wherever occurring.  
Insert instead “assessment”.

**[13] Section 326 (1)**

Insert “a court or” after “proceedings before” in section 326 (1).

**[14] Section 326 (1) (e)**

Insert at the end of section 326 (1):

- (e) whether the degree of permanent impairment is fully ascertainable.

**[15] Section 327 Appeal against medical assessment**

Insert “a court or” after “proceedings before” in section 327 (2).

**[16] Section 327 (2)**

Omit “opinion”. Insert instead “assessment”.

**[17] Section 327 (7)**

Insert “a court or” after “determination by”.

**[18] Section 329 Referral of matter for further medical assessment**

Insert “a court or” before “the Commission” in section 329 (1) (b).

**[19] Section 340**

Omit the section. Insert instead:

**340 Application of Division**

This Division applies to costs payable by a party in or in relation to a claim for compensation.

**[20] Section 346 Claims assessment fees**

Omit the section.

**[21] Chapter 7 Part 8 Division 3A**

Insert after Division 3 of Part 8 of Chapter 7:

**Division 3A Special provisions for costs in work injury damages proceedings**

**346 Costs**

- (1) This section applies to costs (including disbursements) payable by a party in or in relation to a claim for work injury damages, including court proceedings for work injury damages.
- (2) The regulations may make provision for or with respect to the awarding of costs to which this section applies. The regulations may provide for the awarding of costs on a party and party basis, on a practitioner and client basis, or on any other basis.
- (3) A party is not entitled to an award of costs to which this section applies, and a court may not award such costs, except as prescribed by the regulations under this Act or by the rules of the court concerned.
- (4) In the event of any inconsistency between the provisions of the regulations under this section and rules of court, the provisions of the regulations prevail to the extent of the inconsistency.

**1.3 District Court Act 1973 No 9**

**[1] Section 4 Definitions: general**

Insert in alphabetical order in section 4 (1):

*work injury damages claim* means a claim for an award of damages to which Division 3 (Modified common law damages) of Part 5 of the *Workers Compensation Act 1987* applies.

**[2] Section 44 Actions**

Insert after section 44 (1) (d):

- (d1) any work injury damages claim, irrespective of the amount claimed,

**[3] Section 79 Motor accident and work injury damages claims**

Insert at the end of section 79 (2) (a):

- (a1) damages are claimed under a work injury damages claim, or

**[4] Section 79 (2) (b)**

Insert “or (a1)” after “paragraph (a)”.

**[5] Section 79 (4)**

Omit the subsection.

**[6] Section 143 Transfer of proceedings from Supreme Court**

Insert “or work injury damages claim” after “motor accident claim” in section 143 (5) (a).

**[7] Section 145 Transfer of proceedings to Supreme Court**

Insert “or work injury damages claim” after “motor accident claim” in section 145 (2).

**[8] Section 145 (3)**

Insert “or work injury damages claim” after “motor accident claim”.



## **Schedule 2 Amendments relating to lump sum compensation**

(Section 3)

### **Workers Compensation Act 1987 No 70**

#### **[1] Section 65A Special provisions for psychological and psychiatric injury**

Omit section 65A (1) (including the note to that subsection).

Insert instead:

- (1) No compensation is payable under this Division (either as permanent impairment compensation or pain and suffering compensation) in respect of permanent impairment that results from a secondary psychological injury.

**Note.** This does not prevent a secondary psychological injury from being compensated under section 67 as pain and suffering resulting from permanent impairment (but only if that permanent impairment results from a physical injury or a primary psychological injury).

#### **[2] Section 65A (3)**

Omit the subsection (not including the note to that subsection).

Insert instead:

- (3) No compensation is payable under this Division (either as permanent impairment compensation or pain and suffering compensation) in respect of permanent impairment that results from a primary psychological injury unless the degree of permanent impairment resulting from the primary psychological injury is at least 15%.

#### **[3] Section 66 Entitlement to compensation for permanent impairment**

Omit section 66 (2). Insert instead:

- (2) The amount of permanent impairment compensation is to be calculated as follows:

- 
- (a) if the degree of permanent impairment is not greater than 10%, the amount of permanent impairment compensation is to be calculated as follows:

$$D \times \$1,250$$

- (b) if the degree of permanent impairment is greater than 10% but not greater than 20%, the amount of permanent impairment compensation is to be calculated as follows:

$$\$12,500 + [(D - 10) \times \$1,500]$$

- (c) if the degree of permanent impairment is greater than 20% but not greater than 40%, the amount of permanent impairment compensation is to be calculated as follows:

$$\$27,500 + [(D - 20) \times \$2,500]$$

- (d) if the degree of permanent impairment is greater than 40% but not greater than 75%, the amount of permanent impairment compensation is to be calculated as follows:

$$\$77,500 + [(D - 40) \times \$3,500]$$

- (e) if the degree of permanent impairment is greater than 75%, the amount of permanent impairment compensation is \$200,000,

where *D* is the number derived by expressing the degree of permanent impairment as D%.

- (3) The amount of permanent impairment compensation is to be calculated under this section as it was in force at the date the injury was received.

**[4] Section 67 Compensation for pain and suffering**

Omit “greater than that prescribed by the regulations for the purposes of this section” from section 67 (1).

Insert instead “of 10% or more”.

**[5] Section 67 (1), note**

Omit “greater than the degree of permanent impairment prescribed by the regulations for the purposes of that section”.

Insert instead “15% or more”.

**[6] Section 67 (4A)**

Omit the subsection.

**[7] Section 70 Loss of hearing due to age**

Omit the section.

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## **Schedule 3 Amendments relating to compensation for domestic assistance**

(Section 3)

### **Workers Compensation Act 1987 No 70**

**[1] Section 59 Definitions**

Insert after paragraph (f) of the definition of *medical or related treatment*:

(f1) domestic assistance services,

**[2] Section 60 Compensation for cost of medical or hospital treatment and rehabilitation etc**

Insert “(other than domestic assistance)” after “treatment” in section 60 (1) (a).

**[3] Section 60 (1), note**

Insert at the end of section 60 (1):

**Note.** Compensation for domestic assistance is provided for by section 60AA.

**[4] Section 60AA**

Insert after section 60:

**60AA Compensation for domestic assistance**

- (1) If, as a result of an injury received by a worker, it is reasonably necessary that any domestic assistance is provided for an injured worker, the worker’s employer is liable to pay, in addition to any other compensation under this Act, the cost of that assistance if:
  - (a) a medical practitioner has certified, on the basis of a functional assessment of the worker, that it is reasonably necessary that the assistance be provided and that the necessity for the assistance to be provided arises as a direct result of the injury, and

- (b) the assistance would not be provided for the worker but for the injury (because the worker provided the domestic assistance before the injury), and
  - (c) the injury to the worker has resulted in a degree of permanent impairment of the worker of at least 15% or the assistance is to be provided on a temporary basis as provided by subsection (2).
- (2) Assistance is provided on a temporary basis if it is provided in accordance with each of the following requirements:
  - (a) it is provided for not more than 6 hours per week,
  - (b) it is provided during a period that is not longer than, or during periods that together are not longer than, 3 months,
  - (c) it is provided pursuant to the requirements of the relevant injury management plan.
- (3) Compensation is not payable under this section for gratuitous domestic assistance unless the following requirements are also satisfied:
  - (a) the person who provides the assistance must have lost income or forgone employment as a result of providing the assistance,
  - (b) the assistance must be provided in accordance with a care plan established by the insurer in accordance with the WorkCover Guidelines.
- (4) Compensation payable under this section for gratuitous domestic assistance is payable as if the cost of that assistance were such sum as may be applicable under section 61 (2) in respect of the assistance concerned.
- (5) The following requirements apply in respect of payments under this section:
  - (a) payments are to be made as the costs are incurred or, in the case of gratuitous domestic assistance, as the services are provided,
  - (b) payments are only to be made if those costs and the provision of the assistance is properly verified (and the WorkCover Guidelines may make provision for how the performance of those services is to be verified),

(c) payments for gratuitous domestic assistance are to be made to the provider of the assistance.

(6) In this section:

*gratuitous domestic assistance* means domestic assistance provided to an injured worker for which the injured worker has not paid and is not liable to pay.

## **Schedule 4 Amendments relating to savings and transitional matters**

(Section 3)

### **Workers Compensation Act 1987 No 70**

**[1] Schedule 6 Savings, transitional and other provisions Part 2A Provisions relating to compensation generally**

Omit the Part.

**[2] Schedule 6 Part 18 Special provision relating to coal miners**

Omit clause 3 (1). Insert instead:

- (1) Subject to this clause, the 2001 amendments do not apply to or in respect of coal miners and this Act and the 1998 Act (and the regulations under those Acts) apply to and in respect of coal miners as if the 2001 amendments had not been enacted.

**[3] Schedule 6 Part 18 clause 3 (2)**

Omit “2001 amending Act”. Insert instead “*Workers Compensation Legislation Amendment Act 2001*”.

**[4] Schedule 6 Part 18 clause 3 (3) (a)**

Omit “before the commencement of court proceedings”.

Insert instead “before or after the commencement of court proceedings”.

**[5] Schedule 6 Part 18 clause 3 (3)**

Insert at the end of clause 3 (3):

- (d) providing for the exercise by officers of the Compensation Court of functions in connection with the conciliation, mediation or other review of a claim or any dispute in connection with a claim,

- (e) providing for the employment under the *Public Sector Management Act 1988* of officers of the Compensation Court to exercise the functions conferred or imposed on officers of the court pursuant to regulations under this clause.

**[6] Schedule 6 Part 18 clause 3 (4)**

Omit the definition of *the 2001 amending Act*. Insert instead:

*the 2001 amendments* means the amendments made by the *Workers Compensation Legislation Amendment Act 2001* and Schedules 1, 2, 3 and 8 to the *Workers Compensation Legislation Further Amendment Act 2001*.

**[7] Schedule 6 Part 18C**

Omit the heading to the Part. Insert instead:

**Part 18C Provisions consequent on enactment of 2001 amending Acts**

**[8] Schedule 6 Part 18C**

Omit the definition of *the 2001 amending Act*. Insert instead:

*lump sum compensation amendments* means the amendments made by Schedule 3 to the *Workers Compensation Legislation Amendment Act 2001* and Schedule 2 to the *Workers Compensation Legislation Further Amendment Act 2001*.

**[9] Schedule 6 Part 18C clause 2 Operation of amendments generally**

Omit clause 2 (1). Insert instead:

- (1) The Workers Compensation Acts apply to and in respect of an existing claim as if the *Workers Compensation Legislation Amendment Act 2001* and the *Workers Compensation Legislation Further Amendment Act 2001* had not been enacted.



**[10] Schedule 6 Part 18C clause 3 Lump sum compensation amendments**

Omit clause 3 (1). Insert instead:

- (1) The lump sum compensation amendments do not apply in respect of an injury received before the commencement of the amendments (even if the injury is the subject of a claim made after the commencement of the amendments) except as follows:
  - (a) the amendments to section 66A apply in respect of an injury received before the commencement of the amendments (even if the injury is the subject of a claim made after the commencement of the amendments) and so apply:
    - (i) subject to such modifications to that section as may be prescribed by the regulations, and
    - (ii) as if an agreement registered before that commencement by the Authority were registered by the Commission,
  - (b) the repeal of section 72 applies in respect of an injury received before the commencement of the amendments, but only to the extent that the injury is the subject of a new claim.

**[11] Schedule 6 Part 18C clause 3 (2)–(4)**

Omit “2001 amending Act” wherever occurring. Insert instead “lump sum compensation amendments”.

**[12] Schedule 6 Part 18C clause 4 Disputes concerning lump sum compensation claims**

Omit clause 4 (1). Insert instead:

- (1) In the case of a new claim in respect of an injury received before the commencement of the lump sum compensation amendments, compensation under Division 4 of Part 3 (as in force before the commencement of those amendments) may not be awarded by the Commission if there is an impairment dispute unless the dispute has been assessed by an approved medical specialist under Part 7 of Chapter 7 of the 1998 Act.

**[13] Schedule 6 Part 18C clause 4 (2)**

Omit “opinion”. Insert instead “assessment”.

**[14] Schedule 6 Part 18C**

Omit clause 9. Insert instead:

**9 Amendments relating to common law damages**

- (1) An amendment made by Schedule 1 to the *Workers Compensation Legislation Further Amendment Act 2001* applies in respect of the recovery of damages after the commencement of the amendment (and so applies even if the injury concerned was received before the commencement of the amendment) but does not apply in respect of the recovery of damages if proceedings for their recovery were commenced in a court before the commencement of the amendment.
- (2) The following transitional arrangements apply in respect of proceedings for the recovery of damages commenced in a court after the commencement of Schedule 1.1, and before the commencement of Schedule 1.2, to the *Workers Compensation Legislation Further Amendment Act 2001*:
  - (a) the proceedings are to be adjourned until after the commencement of Schedule 1.2 to that Act, and
  - (b) after the commencement of Schedule 1.2 to that Act, Division 2 of Part 6 of Chapter 7 of the 1998 Act applies to the proceedings but so applies as if a reference to the commencement of proceedings were a reference to the continuation of proceedings.
- (3) An amendment made by Schedule 1.1 to the *Workers Compensation Legislation Further Amendment Act 2001* does not apply in a case where a person has elected to claim permanent loss compensation under section 151A before the commencement of the amendment.

**Note.** This will enable such an election to be revoked in the circumstances provided by section 151A and common law damages recovered on the basis of the law as in force at the time of the original election.

- (4) In this clause:

*damages* has the same meaning as in Part 5 of this Act.

**Note.** Schedule 1.1 to the *Workers Compensation Legislation Further Amendment Act 2001* is taken to have commenced at 9.00 am on the day the Bill for that Act was introduced into Parliament.

#### **10 Compensation for domestic assistance**

The amendments made by Schedule 3 (Amendments relating to compensation for domestic assistance) to the *Workers Compensation Legislation Further Amendment Act 2001* extend to domestic assistance provided after the commencement of the amendments (whenever the injury concerned was received) but do not so extend in a case where damages (within the meaning of Part 5 of this Act) have been recovered from the employer liable to pay compensation under this Act in respect of the injury.

#### **11 Commutations**

- (1) Section 51 (Exit payments by commutation of weekly payments) is taken to have been repealed on the commencement of this clause.
- (2) Section 51 continues to apply, as if it had not been repealed, to the commutation of a liability if:
  - (a) an application for a determination under that section in respect of the liability is pending immediately before the commencement of this clause, but only so as to authorise the determination of such an application before 31 March 2002, or
  - (b) an application for determination of a dispute in respect of the liability is pending before the Compensation Court immediately before the commencement of this clause, but only so as to authorise the commutation of a liability before 31 March 2002.
- (3) Except as provided by subclause (2), Division 9 (Commutation of compensation) of Part 3 applies to the commutation of a liability arising in respect of an injury received before or after the commencement of that Division.

- (4) A liability may be commuted under Division 9 of Part 3 even if the Compensation Court refused, before the repeal of section 51, to make a determination under that section or under section 15 of the former Act.
- (5) Clauses 6–6B of Part 4 of this Schedule do not apply in respect of the commutation or redemption of a liability after the commencement of this clause (except for the purposes of the continued operation of section 51 pursuant to subclause (2)).

**12 Seniority of Compensation Court judges appointed to District Court or Supreme Court**

- (1) If the Chief Judge of the Compensation Court is appointed as a judge of the Supreme Court, the judge is to have seniority, rank and precedence as a judge of the Supreme Court as if the date of his or her commission as a judge of the Supreme Court were:
  - (a) the date of his or her commission as Chief Judge of the Compensation Court, unless paragraph (b) applies, or
  - (b) the date of his or her original commission as a judge of the Supreme Court if the judge was a judge of the Supreme Court immediately before being appointed as Chief Judge of the Compensation Court.
- (2) If a judge of the Compensation Court is appointed as a judge of the District Court, the judge is to have seniority, rank and precedence as a judge of the District Court as if the date of his or her commission as a judge of the District Court were the date of his or her commission as a judge of the Compensation Court.

**13 Operation of conciliation provisions—existing claims**

The regulations may make provision for or with respect to disapplying or modifying the application or operation of any of the provisions of Divisions 3–5 of Part 2 of Chapter 4 of the 1998 Act in respect of existing claims or any class of existing claims.

**14 Disclosure of information to Commission**

- (1) The Authority or an authorised officer may disclose to the Commission or to a member or member of staff of the Commission information obtained in connection with the administration or execution of this Act or the 1998 Act that is reasonably necessary to enable the Commission to carry out its functions.
- (2) A disclosure of information pursuant to this clause is not prevented by section 243 (Disclosure of information) of the 1998 Act.
- (3) The Authority or an authorised officer is authorised to not comply with a provision of the *Privacy and Personal Information Protection Act 1998* to the extent necessary to enable the disclosure of information pursuant to this clause.
- (4) In this clause:  
*authorised officer* means an officer of the Authority, the Department of Industrial Relations or the Compensation Court authorised by the Commission for the purposes of this clause.

**15 Expiration of current insurer licences**

- (1) A licence granted under Division 3 of Part 7 of the 1987 Act and in force immediately before the commencement of this clause remains in force as if the period specified in the licence as the period during which it is to be in force were an indefinite period that ends on the expiration date for the licence notified under this clause.
- (2) The Authority may by notice in writing to the holder of such a licence notify the expiration date for the licence.

**[15] Schedule 6 Part 20 Savings and transitional regulations**

Insert at the end of clause 1 (1):

*Workers Compensation Legislation Further Amendment Act 2001*

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## **Schedule 5 Amendments relating to jurisdiction of Commission**

(Section 3)

### **5.1 Workers Compensation Act 1987 No 70**

#### **[1] Schedule 6 Savings, transitional and other provisions Part 18C Provisions consequent on enactment of 2001 amending Acts**

Insert “or specified provisions of those Acts” after “Workers Compensation Acts” in clause 5 (1).

#### **[2] Schedule 6 Part 18C clause 5 (2)**

Insert “or those specified provisions” after “Workers Compensation Acts”.

#### **[3] Schedule 6 Part 18C**

Omit clause 8. Insert instead:

#### **8 New procedures for making a claim**

- (1) Division 2 of Part 2 (sections 259–264) and Divisions 2–5 of Part 3 (sections 274–286), except section 284, of Chapter 7 of the 1998 Act extend (subject to any modifications prescribed by the regulations for the purposes of this clause) to the making of a claim after the commencement of those sections even if the claim is an existing claim.
- (2) This clause has effect despite section 251 of the 1998 Act.

## **5.2 Workplace Injury Management and Workers Compensation Act 1998 No 86**

### **[1] Section 4 Definitions**

Omit the definition of *claim* from section 4 (1). Insert instead:

*claim* means a claim for compensation or work injury damages that a person has made or is entitled to make.

### **[2] Section 4 (1)**

Insert in alphabetical order:

*existing claim matter* has the same meaning as in Chapter 7 (New claims procedures).

*new claim matter* has the same meaning as in Chapter 7 (New claims procedures).

### **[3] Section 105**

Omit the section. Insert instead:

#### **105 Jurisdiction of Commission and Compensation Court**

- (1) Subject to this Act, the Commission has exclusive jurisdiction to examine, hear and determine all matters arising under this Act and the 1987 Act.
- (2) The Commission does not have that jurisdiction in respect of matters arising under Part 5 (Common law remedies) of the 1987 Act except for the purposes of and in connection with the operation of Part 6 of Chapter 7 of this Act.
- (3) The Commission does not have jurisdiction in respect of matters that the Compensation Court has jurisdiction to examine, hear and determine.
- (4) Subject to this Act and the *Compensation Court Act 1984*, the Compensation Court has exclusive jurisdiction to examine, hear and determine all existing claim matters except matters arising under Part 5 of the 1987 Act.

- (5) Despite section 17 (4) of the *Compensation Court Act 1984*, the Compensation Court does not have jurisdiction to reconsider a matter, or to rescind, alter or amend any decision previously made or given by the Court in relation to a matter, once the matter has become a new claim matter.
- (6) References in this Act to the Commission are, for the purposes of giving effect to subsection (4), to be read as references to the Compensation Court to the extent that the reference is in respect of an existing claim matter.

**Note.** Provision is made in the 1987 Act for regulations to require existing claims to be treated as new claims (*transferred claims*). The Compensation Court ceases to have jurisdiction in respect of transferred claim matters and the Commission acquires exclusive jurisdiction in respect of transferred claim matters.

**[4] Section 111A**

Omit the section. Insert instead:

**111A Costs provisions apply only to existing claim matters**

Sections 112–116 apply only in respect of existing claim matters.

**Note.** Chapter 7 (New claims procedures) provides for costs in respect of new claim matters.

**[5] Section 250 Interpretation**

Omit the definitions of *existing claim* and *new claim* from section 250 (1).

Insert instead:

*existing claim* means a claim for compensation that is made before the commencement of this section or a related claim that is made or entitled to be made (whether before or after the commencement of this section).

**Note.** Part 18C of Schedule 6 to the 1987 Act provides for the transfer of existing claims, so that the claims transferred will be treated as new claims.

*existing claim matter* means any matter arising under the Workers Compensation Acts in respect of an existing claim.

*new claim* means any claim (made or entitled to be made) that is not an existing claim.



*new claim matter* means any matter arising under the Workers Compensation Acts in respect of a new claim.

**[6] Section 251**

Omit the section. Insert instead:

**251 Application of Chapter**

Except as otherwise specifically provided in this Chapter, this Chapter applies to and in respect of new claim matters only.

**Note.** Part 18C of Schedule 6 to the 1987 Act provides for the transfer of existing claims, so that the claims transferred will be treated as new claims.

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## **Schedule 6 Amendments to repeal private insurance arrangements**

(Section 3)

### **6.1 Workers Compensation Act 1987 No 70**

**[1] Part 7, Division 1A Commencement of insurance arrangements under the 1998 Act**

Omit the Division.

**[2] Section 156A Misleading conduct by insurers and insurance intermediaries**

Omit section 156A (7).

**[3] Section 158 Insurance for trainees**

Omit section 158 (11).

**[4] Section 224B Declaration of defaulting insurers**

Omit section 224B (3).

**[5] Section 226 Insolvent insurers**

Omit section 226 (2).

### **6.2 Workplace Injury Management and Workers Compensation Act 1998 No 86**

**[1] Section 4 Definitions**

Omit the definitions of *Guarantee Fund*, *licensed insurer*, *private insurance start time*, *Rating Bureau*, *self-insurer* and *specialised insurer* from section 4 (1).

**[2] Section 4 (1), definition of “policy of insurance”**

Omit “this Act,”.

**[3] Section 4 (1), definition of “premium income”**

Insert “or the 1987 Act” after “this Act” wherever occurring.

**[4] Section 4 (1), definition of “Uninsured Liability and Indemnity Scheme”**

Omit the definition. Insert instead:

*Uninsured Liability and Indemnity Scheme* means the scheme established under Division 6 of Part 4 of the 1987 Act.

**[5] Section 9 Agreements with the insurance industry**

Omit the section.

**[6] Section 23 Specific functions**

Omit “, the Rating Bureau” from section 23 (1) (r).

**[7] Chapter 2 Part 3 Workers Compensation Premiums Rating Bureau of New South Wales**

Omit the Part.

**[8] Section 35 Payments into and from Fund**

Omit section 35 (2) (c).

**[9] Section 37 Definitions**

Omit the definition of *deemed risk premium income*.

Insert instead:

*deemed premium income*, in relation to the contribution payable by a self-insurer under this Division for any period during a financial year, means the amount that the self-insurer would have been liable to pay (in such circumstances as may be prescribed by the regulations) to a licensed insurer as premiums on policies of insurance that would otherwise be required under the 1987 Act during that period if the person were not a self-insurer, and:

- (a) includes any amount prescribed by the regulations for the purposes of this paragraph in relation to that financial year, and
- (b) does not include any amount prescribed by the regulations for the purposes of this paragraph in relation to that financial year.

**[10] Section 37 definition of “risk premium”**

Omit the definition.

**[11] Section 39 Contributions to Fund by insurers and self-insurers**

Omit section 39 (2). Insert instead:

- (2) The contribution to be paid by an insurer in respect of each financial year is an amount equal to the percentage (determined by the Authority in accordance with this section) of the premium income of the insurer in respect of that financial year.

**[12] Section 39 (4) (c)**

Omit the paragraph.

**[13] Section 39 (6A), (6B)**

Insert after section 39 (6):

- (6A) The Authority may, at any time during or after a financial year, re-determine the percentages determined pursuant to subsections (2) and (3) in respect of the financial year if the estimated total amount of premium income and deemed premium income for the financial year is less than the previously estimated amount on which the original determination of the percentage was based.
- (6B) If a percentage is re-determined, the Authority is to make the necessary adjustments to the contributions payable by insurers and self-insurers.

**[14] Section 42 Definitions**

Omit “, under this Act or the 1987 Act” from the definition of *insurer*.

**[15] Section 51 Second-injury arrangements**

Omit the section.

**[16] Section 54 Second-injury scheme**

Omit “The second-injury scheme under this section does not apply in respect of injuries that happen at or after the private insurance start time.” from section 54 (1).

**[17] Section 56 Compliance by employer**

Omit “Subsections (1)–(4) apply only to employers insured under policies of insurance issued or renewed by licensed insurers under this Act.” from section 56 (5).

**[18] Section 70 Definitions**

Omit “under this Act or the 1987 Act” from the definition of *insurer*.

**[19] Section 117 Admissibility of statements by injured workers**

Omit “under this Act or the 1987 Act” from the definition of *insurer* in section 117 (3).

**[20] Section 126 Copies of certain medical reports to be supplied to worker**

Omit “under this Act or the 1987 Act” from the definition of *insurer* in section 126 (1).

**[21] Chapter 5 Workers compensation insurance**

Omit the Chapter.

**[22] Section 230A Premium Discount Schemes**

Omit section 230A (6) and (7).

**[23] Sections 237 (1) and 240 (1)**

Omit “, the Council or the Rating Bureau” from the definition of *body* wherever occurring.

Insert instead “or the Council”.

**[24] Section 241 Seals**

Omit section 241 (2).

**[25] Section 243 Disclosure of information**

Omit section 243 (2) (b).

**[26] Section 250 Interpretation**

Omit “under this Act or the 1987 Act,” from the definition of *insurer* in section 250 (1).

**[27] Schedule 4 Provisions relating to Rating Bureau**

Omit the Schedule.

## **Schedule 7 Amendments relating to Industrial Magistrates**

(Section 3)

### **Industrial Relations Act 1996 No 17**

#### **[1] Section 382 Jurisdiction of Chief and other Industrial Magistrates**

Insert after “*Entertainment Industry Act 1989*” in section 382 (1):

*Building and Construction Industry Long Service Payments Act 1986*

*Essential Services Act 1988*

*Occupational Health and Safety Act 2000*

*Shops and Industries Act 1962*

*Workers Compensation Act 1987*

*Workplace Injury Management and Workers Compensation Act 1998*

#### **[2] Section 383A**

Insert after section 383:

#### **383A Recovery of amount ordered to be paid by Industrial Magistrate under other legislation**

Any amount ordered to be paid by a Local Court constituted by an Industrial Magistrate under any of the following provisions may be recovered as if it were a judgment of the Local Court for the payment of a debt of the same amount (whether or not the Local Court has jurisdiction to give judgment for the payment of a debt of that amount under the *Local Courts (Civil Claims) Act 1970*):

- (a) section 114 (Orders regarding costs and expenses of investigation) of the *Occupational Health and Safety Act 2000*,

- (b) section 156 (5) (Recovery of double premiums from employer not obtaining policy of insurance) of the *Workers Compensation Act 1987*,
- (c) section 175 (7) (Employers evading payment of correct premiums) of the *Workers Compensation Act 1987*.

**[3] Schedule 4 Savings, transitional and other provisions**

Insert at the end of clause 2 (1):

*Workers Compensation Legislation Further Amendment Act 2001*

**[4] Schedule 4**

Insert after clause 43:

**44 Validation of exercise of jurisdiction by Industrial Magistrates**

- (1) For the avoidance of doubt, any exercise or purported exercise of jurisdiction by the Chief Industrial Magistrate or other Industrial Magistrate under any of the following Acts (or regulations under those Acts) before the commencement of this clause is as valid as it would have been had the amendments made by Schedule 7 to the *Workers Compensation Legislation Further Amendment Act 2001* been in force at the time of the exercise or purported exercise of the jurisdiction:

*Building and Construction Industry Long Service Payments Act 1986*

*Essential Services Act 1988*

*Occupational Health and Safety Act 2000*

*Shops and Industries Act 1962*

*Workers Compensation Act 1987*

*Workplace Injury Management and Workers Compensation Act 1998*



- (2) For the avoidance of doubt, any exercise or purported exercise of jurisdiction by the Chief Industrial Magistrate or other Industrial Magistrate under any of the following Acts (or regulations under those Acts) before the repeal of the Act concerned is as valid as it would have been had that Act been specified in section 382 (1) at the time of the exercise or purported exercise of the jurisdiction:

*Construction Safety Act 1912*

*Occupational Health and Safety Act 1983*

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## **Schedule 8 Amendments relating to commutation**

(Section 3)

### **Workers Compensation Act 1987 No 70**

#### **Section 87EA**

Insert after section 87E:

#### **87EA Preconditions to commutation**

- (1) A liability in respect of an injury may not be commuted to a lump sum under this Division unless the Authority is satisfied that, and certifies that it is satisfied that:
  - (a) the injury has resulted in a degree of permanent impairment of the injured worker that is at least 15% (assessed as provided by Part 7 of Chapter 7 of the 1998 Act), and
  - (b) permanent impairment compensation and pain and suffering compensation to which the injured worker is entitled in respect of the injury has been paid, and
  - (c) a period of at least 2 years has elapsed since the worker's first claim for weekly payments of compensation in respect of the injury was made, and
  - (d) all opportunities for injury management and return to work for the injured worker have been fully exhausted, and
  - (e) the worker has received weekly payments of compensation in respect of the injury regularly and periodically throughout the preceding 6 months, and
  - (f) the worker has an existing and continuing entitlement to weekly payments of compensation in respect of the injury (whether the incapacity concerned is partial or total), and

- (g) the injured worker has not had weekly payments of compensation discontinued under section 52A or reduced under section 38A.
- (2) The Authority may give directions as to the circumstances in which it will be considered that all opportunities for injury management and return to work for an injured worker have or have not been fully exhausted.
- (3) For the purposes of determining the degree of permanent impairment of an injured worker, the Authority may refer the matter for assessment under Part 7 of Chapter 7 of the 1998 Act. That Part applies in respect of such an assessment as if the matter referred for assessment were a dispute.
- (4) The Authority may delegate to an insurer any of the Authority's functions under this section in respect of an injury that is an injury for which the insurer is liable to pay compensation.
- (5) This section does not apply to the commutation of a liability in respect of compensation under the former Act.

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## Schedule 9 Amendments relating to Uninsured Liability and Indemnity Scheme

(Section 3)

### Workers Compensation Act 1987 No 70

#### [1] Section 140 Persons eligible to make claims

Omit section 140 (1) and (2). Insert instead:

- (1) A claim under the Scheme may be made as provided by this section by any person who considers he or she has a claim against an employer for compensation under this Act or work injury damages in respect of an injury to a worker, if:
  - (a) the employer is uninsured, or
  - (b) the person claiming the compensation has been unable, after due search and inquiry, to identify the relevant employer.
- (2) An employer is considered to be *uninsured* if the employer:
  - (a) had not obtained, or was not maintaining in force, a policy of insurance for the full amount of the employer's liability under this Act in respect of the injured worker at the relevant time, or
  - (b) having been a self-insurer at the relevant time, has ceased to undertake liability to pay compensation to the employer's own workers (but only if the claim cannot be paid under section 216 from any money deposited with the Authority or under any arrangement relating to the refund of any such deposit).
- (2A) A claim may not be made and payment cannot be made under the Scheme in respect of a claim for work injury damages against a person who is an employer as a result of being a principal within the meaning of section 20 who is liable to pay compensation to the worker.

- (2B) The regulations may prescribe the searches and inquiries necessary to constitute due search and inquiry to identify an employer for the purposes of this section.

**[2] Section 141A**

Insert after section 141:

**141A Special provisions for claims for work injury damages**

- (1) Subject to this section and the regulations, the provisions of this Act and the 1998 Act apply to and in respect of a claim under the Scheme for work injury damages as if the Authority were the insurer under this Act of the relevant employer at the relevant time.
- (2) The regulations may prescribe modifications to the provisions of this Act and the 1998 Act for the purposes of their application under this section to and in respect of a claim under the Scheme for work injury damages.
- (3) A claim under the Scheme for work injury damages cannot be made until a claim under the Scheme for lump sum compensation in respect of the injury has been made and determined.

**[3] Section 142 Publication of claims etc**

Omit “under this Act” from section 142 (2).

Insert instead “in respect of the claim”.

**[4] Section 143 Determination of claim by Authority**

Insert “or work injury damages” after “Act” in section 143 (1) (a).

**[5] Section 144 Appeal against Authority’s decision on claim for compensation**

Omit “in respect of the claim” from section 144 (1).

Insert instead “in respect of a claim for compensation”.

**[6] Section 144A**

Insert after section 144:

**144A Court proceedings for work injury damages following determination of claim**

- (1) A claimant for work injury damages under the Scheme who is dissatisfied with a decision of the Authority in respect of the claim may take proceedings in respect of the claim in any court of competent jurisdiction. Part 6 (Court proceedings for work injury damages) of Chapter 7 of the 1998 Act does not apply to any such proceedings.
- (2) When those proceedings are commenced:
  - (a) the claimant must name the employer by whom the claimant alleges work injury damages are payable and the Authority as defendants in the proceedings, and
  - (b) the Authority may, by service of a notice on any person who, in the opinion of the Authority, may be liable to pay work injury damages to the claimant (or may have insured that liability), join that person as a party to the proceedings.
- (3) The court hearing and determining the proceedings may make such orders in relation to the proceedings as the court thinks fit. An order may provide for the reimbursement of the WorkCover Authority Fund under section 145.

**[7] Section 145 Employer or insurer to reimburse Authority**

Omit “liability under this Act” from section 145 (3).

Insert instead “liability in respect of the payment concerned”.

**[8] Section 145 (5)**

Insert “or work injury damages” after “compensation under this Act” in section 145 (5) (b).

**[9] Section 147 Miscellaneous provisions**

Omit “the application for an award of compensation” from section 147 (1) (a).

Insert instead “the proceedings for an award of compensation or work injury damages”.

**[10] Section 147 (1) (b)**

Omit “compensation”. Insert instead “compensation or work injury damages”.

**[11] Section 147 (2)**

Omit the subsection. Insert instead:

- (2) The Commission or a court before which the proceedings are taken may adjourn proceedings referred to in subsection (1) or, if an award has been made, may reopen the proceedings and order some fit person to take and defend the proceedings in substitution for the employer, and for those purposes all the rights of the employer are subrogated to that person.

**[12] Section 147 (3)**

Insert “or a court” after “Commission”.

**[13] Section 147 (4)**

Insert “or a court” after “Commission” where firstly occurring.

**[14] Section 147 (4)**

Insert “or court” after “Commission” where secondly occurring.

**[15] Section 147 (5) and (6)**

Insert “or work injury damages” after “compensation” wherever occurring.

**[16] Section 148 Application of other provisions of the Act to Scheme**

Insert “or work injury damages (as appropriate)” after “compensation” in section 148 (2).

**[17] Section 148A Authority’s right of subrogation**

Insert “or an amount of work injury damages for which an employer is liable” after “former Act”.



## **Schedule 10 Miscellaneous amendments**

(Section 3)

### **10.1 Workers Compensation Act 1987 No 70**

#### **[1] Section 192A Claims administration manual**

Insert at the end of section 192A (3) (d):

, and

- (e) procedures to be followed before a claim is made, such as procedures in connection with early notification of injury and provisional acceptance of liability.

#### **[2] Section 280 Regulations and orders**

Insert “or order under this Act or the 1998 Act” after “regulation” in section 280 (3).

#### **[3] Section 280 (4)**

Insert “under this Act or the 1998 Act” after “A regulation or order”.

### **10.2 Workplace Injury Management and Workers Compensation Act 1998 No 86**

#### **[1] Section 15 Board of Directors**

Omit section 15 (2). Insert instead:

- (2) The Board is to consist of 8 directors, being:
  - (a) the General Manager of the Authority, and
  - (b) 7 part-time directors appointed by the Governor on the recommendation of the Minister.

**[2] Section 15 (5)**

Omit the subsection. Insert instead:

- (5) A person cannot be a member of both the Council and the Board at the same time unless the person is the General Manager of the Authority or the Chairperson of the Council.

**[3] Section 245A**

Insert after section 245:

**245A Evidence—criminal proceedings under OHS legislation**

- (1) An admission of liability by an employer in common law work injury proceedings against the employer cannot be relied upon in any proceedings against the employer for an offence under occupational health and safety legislation.
- (2) An admission of guilt by an employer in proceedings against the employer for an offence under occupational health and safety legislation may be relied upon in common law work injury proceedings against the employer.
- (3) In this section:  
*common law work injury proceedings* means proceedings for the recovery of damages to which Division 3 (Modified common law damages) of Part 5 of the 1987 Act applies.

**[4] Section 248A Review of Act**

Insert “and the *Workers Compensation Legislation Further Amendment Act 2001*” after “*Workers Compensation Legislation Amendment Act 2001*” in section 248A (1).

**[5] Section 248A (2)**

Omit the subsection. Insert instead:

- (2) The review is to be undertaken as soon as possible after the period of 12 months from the date of assent to the *Workers Compensation Legislation Further Amendment Act 2001*, and is to be completed by 27 April 2003.

**[6] Section 248A (3) (a)**

Insert “before 27 April 2003” after “House of Parliament”.

**[7] Section 248A (4)**

Insert “and before 27 April 2003” after “copy of the review”.

**[8] Section 268 Insurer must notify worker of reasonable excuse for not commencing weekly payments**

Omit “early notification”. Insert instead “initial notification”.

**[9] Section 287 Disputes to which Part applies**

Insert at the end of the section:

- (2) This Part extends to a dispute that concerns failure to commence provisional weekly payments of compensation as required by Division 1 of Part 3 (even though no claim has been made for that compensation) and so extends as if:
  - (a) a reference in this Part to weekly payments included a reference to provisional weekly payments, and
  - (b) initial notification of injury (as defined in Part 3) constituted a claim for the compensation.

**[10] Section 290 Information exchange between parties**

Omit section 290 (3). Insert instead:

- (3) Any document or information that a party to a dispute has failed to provide in contravention of this section cannot be admitted on behalf of the party in proceedings on the dispute before the Commission.

**[11] Section 290 (5)**

Insert “or information” after “document”.

**[12] Section 290 (6) (b)**

Insert “or information” after “documents”.

**[13] Section 291 Duties of insurer when dispute referred to Commission**

Insert “WorkCover” before “Guidelines”.

**[14] Section 294A**

Insert after section 294:

**294A Rules and regulations concerning medical evidence**

- (1) The Rules and the regulations may make provision for or with respect to:
  - (a) the disclosure, by the furnishing of copies of reports or otherwise, of the nature of the expert medical evidence to be given in evidence before the Commission (including the exclusion of any such evidence for non-compliance with any requirement for the disclosure of the nature of the evidence), and
  - (b) the disclosure of medical reports (including X-rays and the results of other tests) to approved medical specialists (including the exclusion of any such medical report for non-compliance with any requirement for the disclosure of the medical report), and
  - (c) limiting the number of medical reports in connection with a claim or any aspect of a claim and, in particular, limiting the number of medical reports that may be admitted in evidence in proceedings before the Commission, and
  - (d) limiting the number of expert witnesses that may be called by any party and otherwise restricting the calling of expert witnesses by a party.
- (2) This section only authorises Rules in connection with proceedings before the Commission.

**[15] Section 295 Disputes to which Part applies**

Insert at the end of the section:

- (2) This Part extends to a dispute that concerns failure to commence provisional weekly payments of compensation as required by Division 1 of Part 3 (even though no claim has been made for that compensation) and so extends as if:

- (a) a reference in this Part to weekly payments included a reference to provisional weekly payments, and
- (b) initial notification of injury (as defined in Part 3) constituted a claim for the compensation.

**[16] Section 296 Exercise of functions of Registrar**

Omit “this section” from section 296 (2). Insert instead “this Part”.

**[17] Section 320 Appointment of approved medical specialists**

Insert after section 320 (4):

- (5) The Registrar may from time to time issue a list of the medical practitioners who are for the time being appointed as approved medical specialists under this section. The list is evidence of the appointments concerned.

**[18] Section 325 Medical assessment certificate**

Insert at the end of section 325:

- (4) An approved medical specialist is competent to give evidence as to matters in a certificate given by the specialist under this section, but may not be compelled to give evidence.

**[19] Section 337 Maximum lawyer and agent costs**

Insert after section 337 (5):

- (6) The power under this section to make regulations fixing maximum costs for services or matters includes power to make regulations to provide that no amount is recoverable for a particular service or matter or class of services or matters, with the result that a legal practitioner or agent is not entitled to be paid or recover any amount for the service or matter concerned.

**[20] Section 347 Regulations for costs assessment**

Insert after section 347 (4):

- (5) The regulations may make such modifications to the provisions of Part 11 of the *Legal Profession Act 1987* as may be consequential on the assessment or taxation of costs payable to a legal practitioner being provided for by the regulations under this Division rather than under Division 6 of Part 11 of that Act.

**[21] Section 355 Arbitrator to attempt conciliation**

Insert at the end of section 355:

- (2) No objection may be taken to the making of an award or the determination of a dispute by an Arbitrator on the ground that the Arbitrator had previously used the Arbitrator's best endeavours to bring the parties to the dispute to a settlement.

**[22] Section 357 Power of Commission to require information**

Insert "or Rules" after "regulations" in section 357 (7).

**[23] Section 357 (7) (c)**

Insert after section 357 (7) (b):

- (c) specifying cases and circumstances in which the Commission is not to exercise the Commission's powers under this section.

**[24] Section 364 Rules of the Commission**

Insert after section 364 (1) (c):

- (c1) requiring the provision of documents and information by a party to a matter before the Commission to any other party to the matter, and

**[25] Section 364 (1) (j)**

Insert at the end of section 364 (1) (i):

, and

- (j) any other matter that this Act or the 1987 Act provides may be the subject of Rules of the Commission.

**[26] Section 365 Publication of decisions and inspection of registers of agreements**

Omit “The Commissioner” from section 365 (2).

Insert instead “The Commission”.

**[27] Section 365 (2) (a)**

Omit the paragraph.

**[28] Section 371 Functions of Registrar**

Omit “Act” from section 371 (2). Insert instead “Acts”.

**[29] Schedule 3 Provisions relating to Board of Directors**

Omit “4 directors” from clause 11 (Quorum). Insert instead “5 directors”.

**10.3 Workers Compensation Legislation Amendment Act 2000 No 87**

**Schedule 5**

Omit the Schedule.

[Minister's second reading speech made in—  
Legislative Assembly on 27 November 2001  
Legislative Council on 28 November 2001]

BY AUTHORITY