

Act No. 70

## **WORKERS COMPENSATION BILL 1987\***

NEW SOUTH WALES



### **EXPLANATORY NOTE**

**(This Explanatory Note relates to this Bill as introduced into Parliament)**

The following Bills are cognate with this Bill:

Coal Mines Regulation (Workers Compensation) Amendment Bill 1987;  
Compensation Court (Amendment) Bill 1987;  
Construction Safety (Workers Compensation) Amendment Bill 1987;  
Dangerous Goods (Workers Compensation) Amendment Bill 1987;  
Defamation (Workers Compensation) Amendment Bill 1987;  
Factories, Shops and Industries (Workers Compensation) Amendment Bill 1987;  
Industrial Arbitration (Workers Compensation) Amendment Bill 1987;  
Mines Inspection (Workers Compensation) Amendment Bill 1987;  
Miscellaneous Acts (Workers Compensation) Amendment Bill 1987;  
Occupational Health and Safety (Workers Compensation) Amendment Bill 1987;  
Police Regulation (Superannuation) (Workers Compensation) Amendment Bill 1987;  
Public Health (Workers Compensation) Amendment Bill 1987;  
Workers Compensation (Bush Fire, Emergency and Rescue Services) Bill 1987;  
Workers' Compensation (Dust Diseases) Amendment Bill 1987.

The object of this Bill is to reform workers' compensation in New South Wales. For that purpose the Workers' Compensation Act 1926 is to be repealed and replaced with a new Act.

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\* Amended in committee—see table at end of volume.

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The principal reforms effected by the new Act are as follows:

(a) *Weekly benefits for incapacitated workers—*

- (i) Weekly benefits for total incapacity are to be retained at the current award rate during the first 26 weeks of incapacity but a maximum limit of \$500 per week (indexed) is to be imposed.
- (ii) The maximum rates of weekly benefits for total incapacity fixed by the Act after the first 26 weeks of incapacity are to be increased for incapacitated workers with dependants (the existing rate of \$36.40 per week for a dependent spouse is to be increased to \$42 per week (indexed) and the existing rate of \$18.20 per week for each dependent child is to be increased to an amount between \$30–\$45 per week (indexed) depending on the number of children).
- (iii) Weekly benefits for partially incapacitated workers are to be fixed at the pre-injury earnings of the worker (subject to the \$500 per week upper limit) less post-injury actual or possible earnings.
- (iv) Weekly benefits for partially incapacitated workers who have not been provided with suitable employment by their employers are to be payable as if the workers were totally incapacitated but only for a maximum period of 34 weeks (unlike the situation under section 11 (2) of the existing Act which is not limited). During the 34 weeks period the worker will be required to be seeking suitable employment and either undergoing approved rehabilitation training or establishing that suitable employment is not available because of the injury.

(b) *Death benefits—*

- (i) The lump sum payable to the dependants of a worker who dies as a result of a work-related injury is to be increased from \$62,200 to \$80,000 (indexed).
- (ii) The weekly payment in respect of each dependent child of any such worker is to be increased from \$31.10 per week to \$45 per week (indexed).

(c) *Lump sums for permanent injuries—*

- (i) The existing "Table of Maims" is to be revised to provide a greater range of permanent injuries for which a lump sum benefit is payable—the amount for each injury is to be expressed as a specified percentage of \$80,000 (indexed). Additional permanent injuries for which compensation will be payable include impairment of the back, neck and pelvis and incurable loss of mental powers involving inability to work.
- (ii) A further benefit is to be payable for actual pain and suffering resulting from a permanent injury which is mentioned in the "Table of Maims" and for which compensation of at least 10 per cent of \$80,000 is payable. The maximum amount payable for pain and suffering is set at \$40,000 (indexed).

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- (d) *Redemptions of weekly benefits*—The right to redeem the whole or any part of future weekly benefits by a lump sum is to be replaced by a right to commute. The right to commute is restricted to workers aged 55 years or over, and in specially approved circumstances by the Board or in accordance with the regulations.
  - (e) *Journey claims*—Compensation for journey claims is retained but clarified to ensure that any interruption or deviation is not covered unless it is established that it did not materially add to the risk of injury.
  - (f) *Medical, rehabilitation and related expenses*—Compensation will be payable for certain modifications required to an injured worker's house or vehicle or for other special expenses prescribed by the regulations.
  - (g) *Abolition of certain common law remedies*—The recovery of damages at common law from an employer (including fellow workers) is to be abolished if the employer is liable to pay workers compensation benefits.
  - (h) *Date of commencement*—Generally the proposed reforms do not affect compensation or damages for injuries received before the commencement of the reforms.
  - (i) *Dispute resolution*—
    - (i) The workers compensation commissioners are to be given unlimited jurisdiction. Complex or other matters may be transferred to the Compensation Court in addition to matters on appeal.
    - (ii) Review officers are to be employed under the Public Service Act 1979 to conciliate on disputes and in certain cases to give directions for payment of weekly compensation if there is no genuine dispute.
    - (iii) Provision is to be made to require prompt payment of claims for weekly payments of compensation and for reference to a review officer of any dispute as to the liability to pay or continue to pay any such compensation.
  - (j) *Rehabilitation*—Special provision is to be made to promote the rehabilitation of injured workers and, in particular, to require employers to prepare rehabilitation programmes for injuries at workplaces.
  - (k) *Insurance arrangements*—Existing insurers are to be replaced by specially licensed corporations operating a system of statutory funds similar to life insurance companies. Provision for premiums adjustment is to be made to ensure the adequacy of the statutory funds to meet future claims.
  - (l) *Occupational health and safety*—Measures to promote occupational health and safety (including increased penalties for offences) are contained in the cognate Bills.
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**PART 1—PRELIMINARY**

This Part contains general provisions relating to the proposed Act, being those providing for—

- (a) the short title of the proposed Act (clause 1);
- (b) the commencement of the proposed Act on a day or days to be appointed by the Governor-in-Council (clause 2);
- (c) the definition of certain expressions for the purposes of the proposed Act (clause 3); and
- (d) a definition of “injury” (clause 4).

The Part also contains provisions—

- (a) giving effect to Schedule 1 (circumstances in which certain persons are deemed to be workers) (clause 5);
- (b) binding the Crown (clause 6);
- (c) stating that the proposed Act does not affect certain other Acts relating to workers compensation (clause 7); and
- (d) for the establishment of a Workers Compensation Review Committee (clause 8).

**PART 2—COMPENSATION—LIABILITY**

This Part deals with the liability to pay compensation under the proposed Act. The Part generally continues the substantive requirements of the existing Act. It contains provisions—

- (a) stating generally a worker's entitlement (or, in the case of the death of a worker, the worker's dependants' entitlement) to receive compensation from the worker's employer in the event of injury (clause 9);
- (b) specifying the circumstances in which a worker is entitled to compensation for an injury received while journeying to or from work or during recesses (clauses 10 and 11);
- (c) relating to injuries to union representatives while on union business (clause 12);
- (d) for the payment of compensation in respect of injuries received outside New South Wales (clause 13);
- (e) relating to the effect of the worker's conduct on the entitlement to compensation (clause 14);
- (f) with respect to determining, where the injury is a disease, the time of injury and the employers or insurers who are liable to pay compensation (clauses 15–18);
- (g) deeming certain diseases (such as brucellosis) to be work related diseases in certain circumstances (clause 19);
- (h) relating to the respective liabilities of principals and contractors where work is carried out under contract (clause 20);

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- (i) for the payment of compensation to sailors on certain ships (clause 21);
- (j) for the apportionment of compensation where there is more than one injury (clause 22); and
- (k) enabling the payment of compensation even though the claimant is under 18 or resides outside New South Wales or the employment contract was illegal (clauses 23 and 24).

### PART 3—COMPENSATION—BENEFITS

#### DIVISION 1—*Compensation payable on death*

This Division deals with the compensation payable where death results from an injury. Generally, the amounts payable are—

- (a) if the worker leaves dependants who were wholly dependent on the worker—\$80,000, plus \$45 per week in respect of each dependant child (clause 25);
- (b) if the dependants were partially dependent—the whole, or a proportionate part, of the amount referred to in paragraph (a) (a commissioner to determine the amount in the case of a dispute) (clause 26);
- (c) if there are no dependants—reasonable funeral expenses not exceeding a prescribed amount (clause 27); and
- (d) the reasonable cost of transporting the body where necessary (clause 28).

The Division also contains provisions—

- (a) for apportionment of payments between dependants (clause 29);
- (b) for review of such apportionments where there is a change in circumstances (clause 30);
- (c) as to the method of payment of compensation in respect of dependent children (clause 31); and
- (d) as to payment to legal personal representatives where there are no dependants (clause 32).

#### DIVISION 2—*Weekly compensation by way of income support*

This Division deals with the weekly compensation payable where an injured worker is totally or partially incapacitated for work.

Clause 33 provides that the compensation payable in respect of a totally or partially incapacitated worker shall include a weekly payment.

The Division contains provisions—

- (a) defining the “first 26 weeks of incapacity” for the purposes of the Division (clause 34);
- (b) prescribing the maximum weekly payment as \$500 (clause 35);

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- (c) stating that the weekly payment for the first 26 weeks shall be the amount of the worker's current weekly wage rate (clause 36);
- (d) stating that the weekly payment after the first 26 weeks in respect of a totally incapacitated worker shall be 90 per cent of the worker's average weekly earnings, subject to an upper limit of \$159 per week, a lower limit of \$126.40 per week, and special limits in the case of low wage earners. Additional amounts of \$42 per week are payable in respect of dependent wives or husbands and amounts ranging from \$30 per week to \$45 per week for dependent children (clause 37);
- (e) for treating partially incapacitated workers as totally incapacitated (for a maximum period of 34 weeks) if the employer fails to provide suitable employment and the worker, in certain specified circumstances, is seeking suitable employment or has either undertaken approved rehabilitation training or establishes that suitable employment is not available because of the injury (clause 38);
- (f) for treating certain incapacitated workers who are fit for employment of a kind not commonly available for persons in the workers' circumstances as totally incapacitated (the "odd-lot" rule) (clause 39);
- (g) stating that the weekly payment after the first 26 weeks in respect of a partially incapacitated worker shall be an amount not exceeding the difference between—
  - (i) the worker's pre-injury earnings or \$500, whichever is the lesser; and
  - (ii) the average weekly amount which the worker is earning or is able to earn, subject to certain limitations (clause 40);
- (h) for the calculation of compensation for periods of less than a week (clause 41);
- (i) defining "current weekly wage rate" for the purposes of the Division (clause 42);
- (j) for the computation of "earnings" and "average weekly earnings" for the purposes of the Act (clause 43);
- (k) for the increase of weekly payments of workers who reach 21 (clause 44);
- (l) for the reduction or discontinuance of weekly payments to enable certain pensions, allowances or other benefits under the Commonwealth Social Security Act 1947 or other laws to be payable (clause 45);
- (m) for the reduction of weekly payments so as to prevent dual benefits of the same kind being payable by an employer (clause 46);
- (n) deeming workers who cannot engage in particular employment without substantial risk of further injury to be incapacitated for that employment (clause 47);
- (o) in respect of the payment of compensation where the worker had an existing incapacity at the time of the injury (clause 48);
- (p) for the payment of compensation despite entitlement to holiday or long service leave pay (clause 49);
- (q) for the adjustment of compensation where there is an entitlement to sick leave pay (clause 50);

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- (r) enabling the commutation of weekly payments to a lump sum where a worker has reached the age of 55 years or in certain other prescribed circumstances, subject to certain limitations (clause 51);
- (s) in respect of the termination of weekly payments on a worker reaching normal retiring age (clause 52);
- (t) for the termination, unless the injury is permanent, of weekly payments on a worker ceasing to reside in Australia (clause 53);
- (u) with respect to requiring an employer to give notice to a worker before terminating weekly payments in certain circumstances (clause 54);
- (v) for the review (and the termination, reduction or increase, as necessary) of weekly payments by a commissioner (at the request of an employer, a worker or the Board) (clause 55);
- (w) enabling a commissioner to require a worker to supply medical certificates as to incapacity for work (clause 56);
- (x) requiring a worker to notify any person paying compensation of the worker's return to work or of any change in employment that affects the worker's earnings (clause 57); and
- (y) enabling a commissioner to order a refund of compensation overpaid as a result of a return to work by a worker or a change in the worker's earnings (clause 58).

#### *DIVISION 3—Compensation for medical, hospital and rehabilitation expenses etc.*

This Division (clauses 59–64) continues (subject to the additional benefits mentioned earlier) the substance of the provisions of section 10 of the former Act relating to the amounts of compensation payable in respect of medical or related treatment, hospital treatment, ambulance services, rehabilitation treatment etc. for injured workers.

#### *DIVISION 4—Compensation for non-economic loss*

This Division sets out the lump sums payable to an injured worker in respect of the loss of, or permanent loss of the use of, a thing such as a limb or other part of the body. The Division also prescribes an additional amount in respect of pain and suffering arising from the loss.

The Division contains provisions—

- (a) defining terms used in the Division (clause 65);
- (b) stating that a worker who has suffered a loss mentioned in the Table to the Division ("the Table of Maims") is entitled to compensation equal to such percentage of \$80,000 as is set out opposite the loss in that Table. If there is more than one injury, the total compensation cannot exceed \$80,000 (clause 66);

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- (c) stating that an amount not exceeding \$40,000 is payable by way of compensation for pain and suffering resulting from a loss, except where the loss is a loss in respect of which less than 10 per cent of the maximum amount under proposed section 66 is payable. The compensation payable is to be reasonably proportionate to the degree and duration of the pain and suffering (clause 67);
- (d) for the determination of compensation payable where the loss is of a proportion of a thing mentioned in the Table of Maims (clause 68);
- (e) enabling the amendment, by regulation, of the Table of Maims (clause 69); and
- (f) relating to ascertaining the percentage of diminution of hearing in boilermaker's deafness and like cases; calculating the compensation payable in respect of further losses resulting from an earlier injury; the reference of certain losses to medical panels for determination of specified matters; and reimbursement of costs of medical certificates etc. (clauses 70–73).

*DIVISION 5—Compensation for property damage*

This Division (clauses 74–78) continues the substance of the provisions of sections 10A and 10B of the former Act relating to compensation payable in respect of damage to artificial limbs, clothing etc., resulting from a work-related accident.

*DIVISION 6—Indexation of amounts of benefits*

This Division (clauses 79–82) provides for the indexation of the maximum amounts of compensation payable under the proposed Act. Provision is made for the adjustment of the amounts on 1 April and 1 October in each year in accordance with movements in the award rates of pay index.

*DIVISION 7—Payment of benefits*

This Division (clauses 83–87) deals with the manner of payment, and investment by the Board, of compensation under the proposed Act. Provision is also made for the payment of weekly compensation at fortnightly or shorter intervals (clause 84).

**PART 4—COMPENSATION—CLAIMS AND PROCEEDINGS***DIVISION 1—Notice of injury and claims for compensation*

This Division (clauses 88–94) deals with the giving of notice of injuries etc. and making claims for compensation. Provision has been made for prescribing the form of claim and the documents to accompany the claim (clause 92).



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### DIVISION 2—*Review officers*

This Division provides for the employment of review officers under the Public Service Act 1979 (clause 95) and contains provisions—

- (a) stating that they shall exercise their functions in respect of disputes assigned to them under the proposed Act subject to the general control of the Senior Commissioner (clause 96);
- (b) with respect to the assignment to review officers of disputes concerning payment of compensation and the conciliation of disputes (clauses 97 and 98);
- (c) precluding legal representation in a dispute before a review officer unless the parties and the review officer agree to such representation (clause 99); and
- (d) stating that a statement made during proceedings before a review officer is not admissible in proceedings before the Compensation Court or a commissioner unless the person who made the statement agrees (clause 100).

### DIVISION 3—*Special provisions with respect to weekly payments of compensation*

This Division deals with the time of commencement of weekly payments, and with disputes as to the payment, or continuation of the payment, of weekly payments.

The Division contains provisions—

- (a) defining terms used in the Division (clause 101);
- (b) requiring weekly payments to commence as soon as practicable (but not later than 31 days) after a claim is made (if liability is disputed, the dispute may be referred to a review officer) (clause 102);
- (c) making it an offence not to commence weekly payments as required (clause 103);
- (d) enabling a review officer to direct payment of weekly payments if, after failing to reach agreement by conciliation, the review officer is satisfied that there is no genuine dispute (clause 104);
- (e) with respect to the effect etc., of directions given by a review officer (clause 105); and
- (f) making it an offence to fail to comply with a direction by a review officer (clause 106).

### DIVISION 4—*Proceedings before commissioners and the Compensation Court*

This Division (clauses 107–126) deals with proceedings before the commissioners and the Compensation Court. Commissioners are given jurisdiction in all matters but provision is made for the referral of matters to the Court. Existing rights of appeal to the Court are retained. The provisions relating to the procedure and decisions of the commissioners are similar to those contained in the Compensation Court Act 1984 in relation to the Court.

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*DIVISION 5—Medical examinations and disputes*

This Division (clauses 127–137) deals with the appointment of medical referees and medical panels, the examination of injured workers by medical practitioners, the referral of matters to medical referees or medical panels and the admission of medical certificates and reports in proceedings for compensation. Except for the power of the Board to refer injured workers for examination, this Division does not make any significant changes to the provisions of the former Act.

The Compensation Court, a commissioner, a review officer or the State Compensation Board may at any time or from time to time require a worker claiming compensation or in receipt of weekly payments to submit himself or herself for examination by a medical referee or medical panel (clause 130).

*DIVISION 6—Uninsured Liability and Indemnity Scheme*

This Division (clauses 138–148) continues the Uninsured Liability and Indemnity Scheme. Under the Scheme, workers may be paid compensation if their employers are not insured or cannot be identified.

**PART 5—COMMON LAW REMEDIES**

This Part (in clause 149) abolishes common law actions against employers, fellow workers etc., in respect of injuries for which compensation is payable under the proposed Act by employers.

The Part (in clauses 150 and 151) continues the substance (with necessary adjustments because of the operation of proposed section 149) of the provisions of sections 64, 64A and 65 of the former Act relating to remedies against an employer and a third person, where both are liable, and the abolition of the doctrine of common employment.

**PART 6—REHABILITATION OF INJURED WORKERS**

This Part deals with the rehabilitation of injured workers and contains provisions—

- (a) for the establishment by employers of rehabilitation programmes (clause 152);
- (b) for the institution and administration by the State Compensation Board of vocational re-education and rehabilitation schemes (clause 153); and
- (c) for the appointment and duties of rehabilitation counsellors (clause 154).

**PART 7—INSURANCE***DIVISION 1—Insurance policies*

This Division requires employers (other than self-insurers) to take out policies of insurance for their liability under the proposed Act (clause 155) and makes certain provisions in relation to that insurance.

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The Division includes provisions—

- (a) for the recovery of double premiums from employers not obtaining insurance (clause 156);
- (b) making it an offence for a licensed insurer to refuse insurance (clause 157);
- (c) continuing the substance of provisions of section 18 of the former Act relating to the insurance of trainees under the Australian Traineeship System, and the provisions which are to be contained in policies of insurance generally (clauses 158 and 159);
- (d) requiring employers (with certain exceptions) to pay to insurers the first \$500 of any claim under a policy (clause 160); and
- (e) continuing the substance of provisions of sections 18A and 49A of the former Act (and of certain regulations under that Act) relating to the inspection of policies, the awarding of compensation where an employer has died (or, being a company, has ceased to exist), the keeping by insurers of records of policies, and offences in respect of policies (clauses 161–164).

*DIVISION 2—Insurance premiums*

This Division (clauses 165–175) continues the substance of provisions of the former Act relating to the calculation and payment of insurance premiums. The Insurance Premiums Committee is retained with authority to make insurance premiums orders setting rates of premiums for policies of insurance.

*DIVISION 3—Licensing of insurers*

This Division (clause 176) provides for the cancellation of all licences of existing insurers (except specialised insurers, as defined, and the G.I.O.) as from the date the Division commences.

The Division also contains provisions relating to applications for new licences and licensing generally (clauses 177–192).

This Division provides—

- (a) for the cancellation of policies following their assignment to other insurers (clause 185);
- (b) limiting arrangements by Commonwealth insurers under which they incur liabilities of licensed insurers (clause 187);
- (c) with respect to re-insurance arrangements (clause 188); and
- (d) enabling the Supreme Court to deal with insurers or former insurers unable to meet their liabilities (clause 191).

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*DIVISION 4—Statutory funds of licensed insurers*

This Division (clauses 193–209) provides that new licensed insurers will operate a system of statutory funds similar to life insurance companies. Provision for premium adjustment is made to ensure the adequacy of the statutory funds to meet future claims.

*DIVISION 5—Self-insurers*

This Division (clauses 210–216) continues the substance of provisions of the former Act relating to employers undertaking their own insurance (and becoming self-insurers for the purposes of the Act). Provision is made for the making of applications to, and the determination of applications by, the Board.

*DIVISION 6—Insurers' Contribution Fund*

This Division (clauses 217–224) continues the Insurers' Contribution Fund.

*DIVISION 7—Insurers' Guarantee Fund*

This Division (clauses 225–239) continues the Insurers' Guarantee Fund to meet the liabilities of any insurer that may become insolvent.

**PART 8—WORKERS COMPENSATION COMMISSIONERS**

This Part deals with the appointment of workers compensation commissioners and contains provisions—

- (a) specifying the qualifications of commissioners and providing that, except as expressly provided, they are not subject to the control of the Compensation Court (clause 240);
- (b) for the appointment of a Senior Commissioner (clause 241);
- (c) with respect to the sittings and arrangement of business of commissioners (clauses 242 and 243);
- (d) for the delegation of the Senior Commissioner's functions (clause 244);
- (e) for the employment of staff (clause 245);
- (f) enabling commissioners to have access to Compensation Court documents and Judges of the Court to have a similar power in respect of commissioners' documents (clause 246); and
- (g) with respect to protection from personal liability in the exercise of the commissioners' functions (clause 247).

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PART 9—STATE COMPENSATION BOARD

DIVISION 1—*Constitution of Board*

This Division (clauses 248–253) continues the substance of provisions of sections 31 and 33–35 of the former Act relating to the constitution etc. of the State Compensation Board.

DIVISION 2—*Functions of Board*

This Division (clauses 254–257) continues the substance of provisions of the former Act relating to the functions of the Board.

The Division also includes provisions—

- (a) requiring the Board, from information supplied to it and from its own inquiries, to monitor entitlements to, and payments of, compensation (clause 256); and
- (b) giving the Board a right to be heard in any proceedings before the Compensation Court or a commissioner under the proposed Act (clause 257).

DIVISION 3—*State Compensation Board Fund*

This Division (clauses 258–261) establishes a State Compensation Board Fund on the same lines as the fund established under section 41 of the former Act for the purposes of that Act. The Division continues the requirement for insurers to make contributions to the Fund from receipts of premiums.

DIVISION 4—*Miscellaneous*

This Division (clauses 262–268) continues in relation to the Board the substance of certain miscellaneous provisions applicable to the Board as established under the former Act.

PART 10—MISCELLANEOUS

This Part (clauses 269–280) contains the miscellaneous provisions.

The Part also contains provisions—

- (a) giving effect to a Schedule of Acts to be repealed (clause 281); and
- (b) giving effect to a Schedule of savings, transitional and other provisions (clause 282).

SCHEDULES

Schedule 1 sets out the circumstances in which certain persons are deemed to be workers for the purposes of the proposed Act (continuing, in substance, certain provisions of section 6 of the former Act).

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Schedule 2 contains the provisions relating to the remuneration, term of office etc., of commissioners.

Schedule 3 contains the provisions relating to the members of the State Compensation Board.

Schedule 4 contains the provisions relating to the procedure of the State Compensation Board.

Schedule 5 specifies the Acts or parts of Acts to be repealed by the proposed Act.

Schedule 6 contains savings, transitional and other provisions. Generally the effect of the provisions is that the proposed reforms will not affect compensation or damages for injuries received before the commencement of the reforms. The Schedule also includes provisions to maintain at existing rates the weekly compensation payments for injured coal miners. The Schedule authorises the making of savings and transitional regulations.

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