

[Act 1995 No 89]



New South Wales

WorkCover Legislation Amendment Bill 1995

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The objects of this Bill are to amend the *Workers Compensation Act 1987*, the *Occupational Health and Safety Act 1983* and associated legislation, the *Compensation Court Act 1984* and various other Acts as follows:

Workers Compensation Act 1987

The following amendments are made:

- (a) Existing provision for the automatic indexation of workers compensation lump sum payments for permanent disabilities (section 66) and pain and suffering (section 67) in line with movements in average wages is suspended so as to freeze that compensation at current levels.

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

- (b) It is made clear that lump sum workers compensation for pain and suffering is limited to pain and suffering resulting from permanent disability and does not extend to other pain and suffering resulting from work injury.
- (c) A 5% eligibility threshold is imposed for industrial deafness claims so that lump sum workers compensation is not payable unless hearing loss reaches 6%.
- (d) No compensation will be payable for psychological injury (such as stress) unless employment was a substantial cause and no compensation will be payable where stress resulted from reasonable action by the employer with respect to staffing matters (such as promotion, demotion, transfer, discipline, dismissal and retrenchment).
- (e) The payment of interest on lump sum workers compensation for non-economic loss (permanent disability and pain and suffering compensation) will be abolished, except for late payment of a Court award or agreed compensation.
- (f) The payment of interest on common law damages (for work injuries) for non-economic loss is abolished, and the payment of interest on common law damages for economic loss is restricted in line with restrictions in the *Motor Accidents Act 1988*. Interest on late payment of an award is not affected.
- (g) Additional provisions are inserted to make it clear that lump sum workers compensation is not payable for pre-existing impairment of the neck, back or pelvis by requiring the deduction of that pre-existing impairment from the compensation payable. The amendment overcomes the effect of a number of court decisions.
- (h) Lump sum compensation is introduced for workers who contract HIV/AIDS in the course of their employment.
- (i) Lump sum compensation is introduced for workers who suffer severe permanent bowel injury in the course of their employment.
- (j) Time limits for the lodgment of claims for workers are tightened to require claims to be lodged within 3 years after injury unless there are exceptional circumstances.
- (k) Penalties and other measures (such as preventing the recovery of costs) are introduced for unscrupulous activities such as touting and claims chasing, particularly in the area of hearing loss claims.
- (l) Cost penalties are introduced for unreasonable refusal of lump sum compensation settlement offers.

- (m) Provisions are introduced requiring workers to lodge their claim with the employer/insurer before litigation can be commenced. In the case of lump sum disability claims, an initial 3 month period is provided to allow an opportunity for proper claim assessment and possible reference to a medical panel if disputed.
- (n) Existing provisions requiring insurers to refer to conciliation disputes concerning liability to commence weekly compensation are extended to also require conciliation referral by insurers of disputes concerning liability to continue weekly compensation (but these provisions will not prevent the bringing of proceedings in the Compensation Court). Procedural improvements are also made to conciliation provisions
- (o) An expanded role is provided for medical panels, and (if the worker and employer agree) an independent medical practitioner of their choice, to assess disputed permanent disability compensation claims.
- (p) An expanded role is provided for commissioners of the Compensation Court with power for the regulations to prescribe those matters that are to be allocated to the commissioners, with appeals on questions of law on those matters to go to a Judge of that Court.
- (q) A regulation making power is introduced to enable the fixing of maximum legal costs in workers compensation matters and the maximum costs for the provisions of medical evidence in those matters, with no recovery of costs above any prescribed maximum.
- (r) Provision is introduced that will prevent recovery from injured workers of medical, hospital and rehabilitation costs above the maximums that are set or that can be set under existing provisions.
- (s) Provision is introduced to enable the regulations to require employers to prepare return-to-work plans for injured workers.
- (t) Penalties for failure to take out workers compensation insurance are increased, including by the introduction of imprisonment for up to 6 months as a penalty option. Other provisions are introduced and existing provisions strengthened to increase the effectiveness of the compulsory insurance provisions.
- (u) The definition of worker is extended to make it clear that, where the worker has died, the legal personal representative or dependents of the worker are included.
- (v) The method of determining the current weekly wage rate of a worker is adjusted to avoid prejudice to a worker who is employed by more than one employer.

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- (w) It is made clear that the exception under section 151B by virtue of which a worker may recover both certain common law damages and compensation under the Act is not activated simply by a failure to recover certain damages or compensation because of an agreement or compromise between parties.
- (x) It is made clear that, under section 151Z, the entitlement of a workers compensation insurer (who has paid compensation to an injured worker) to be indemnified by a negligent third party responsible for the injury extends to cases where the worker's employer was partly responsible for the negligence.
- (y) It is made clear that clause 2 of Schedule 1 (which makes a contractor a notional worker in certain circumstances) applies as long as the contractor does not employ one or more workers, but does not override the exclusion in the general definition of *worker* in section 3 of the Act of casual workers.
- (z) Provision is introduced to enable the issue of penalty notices for offences.
- (aa) Miscellaneous amendments are made to reduce litigation and other costs by clarifying various provisions, rectifying anomalies and increasing procedural efficiency.

Occupational Health and Safety Act 1983

The following amendments are made:

- (a) Penalties for offences against the Act are increased.
- (b) The requirement that occupational health and safety inspectors must give notice before entering a place of work will be removed and replaced with a requirement to give notice as soon as reasonably practicable after entry.
- (c) Provisions are included to empower authorised officers of employee organisations to enter places of work to investigate suspected breaches of occupational health and safety laws.
- (d) The Minister will be empowered to call for reports into accidents and other dangerous occurrences at places of work and will be specifically authorised to make those reports public.
- (e) Provision is made for alternative convictions in respect of certain offences against the Act.

- (f) Provisions currently in the regulations which give power to inspectors to require a contravention or likely contravention of the Act to be remedied, or to prohibit any activity which is an immediate risk to health and safety, are transferred to the Act and expanded *so* as to allow for higher penalties for breaches and for review and appeal against such requirements or prohibitions.
- (g) The jurisdiction of a Local Court to impose a penalty for an offence against the Act or the regulations is increased.
- (h) A court that convicts a person of an offence against the Act or the regulations is given power to order the person to remedy any continuing contravention of the Act or the regulations.
- (i) The time limits for instituting proceedings against the Act or the regulations are extended in certain circumstances.
- (j) The circumstances in which a director or manager of a corporation can be convicted of an offence against the Act or the regulations in respect of a contravention by the corporation are extended by removing the defence that the director had no knowledge of the contravention. Other existing defences available to directors and managers remain.
- (k) A provision which allows a court to impose an additional penalty of up to 2 years imprisonment in respect of a person who is convicted of an offence and has previously been convicted of the same offence is extended to allow additional monetary penalties to be imposed in such situations and *so* that the additional penalty applies in respect of any further offence against the Act (whether or not the further offence is the same as the earlier offence). Higher additional penalties are imposed for more serious offences while lower additional penalties are imposed for less serious offences.
- (l) The responsibilities of suppliers of plant or substances under the Act are extended to the situation where supply is by way of transfer (amendment to section 18).
- (m) The disturbance of plant, or workplaces, involved in fatalities or certain dangerous occurrences is prohibited and inspectors are empowered to give directions against the use of plant involved in certain occurrences (subject to certain safeguards and review).
- (n) Inspectors are empowered to examine, test and dismantle plant, to take tape recordings and to seize plant in certain circumstances (subject to safeguards and review).

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- (o) Inspectors and authorised officers are empowered to require a person to identify himself or herself if the inspector or officer reasonably suspects the person has committed an offence.
- (p) Provision is inserted to enable the review of the exercise of certain powers of inspectors.
- (q) The provisions on industry codes of practice are amended to allow revocations to take effect from a day that is later than the date when notice of the revocation is published.
- (r) Provision is inserted to enable a court before which a summary trial for an offence takes place to order a convicted offender to reimburse the Workcover Authority for its expenses in examining or testing plant.

Compensation Court Act 1984

The following amendments are made:

- (a) The provisions for medical panels are amended to require a panel to comprise medical practitioners nominated by both employer and employee organisations.
- (b) The existing provisions for allocation of matters as between Judges and Commissioners of the Court, which the Chief Judge is responsible for arranging by reference to criteria such as complexity and a list of scheduled matters, are varied by allowing Commissioners *to* deal with pain and suffering compensation claims, specifying that only Commissioners may hear application for revocation of a conciliation officer's payment direction, and also allowing regulations to prescribe different allocation arrangements.
- (c) Appeals from Commissioners to Judges are restricted to questions of law, admission or rejection of evidence or question as to the misuse of statutory discretion.
- (d) Appeals from Judges to the Court of Appeal are restricted to questions of law or the admission or rejection of evidence.
- (e) A new position of Senior Commissioner is provided for in the Act. That Officer is to be a member of the Court's rule committee and is to have such other functions as may be prescribed by the regulations and the rules.
- (f) Various consequential amendments are made to reflect the expanded role of commissioners under the *Workers Compensation Act 1987*.

Construction Safety Act 1912, Factories, Shops and Industries Act 1962 and Dangerous Goods Act 1975

The following amendments are made:

- (a) Penalties for offences against the Acts are increased.
- (b) The jurisdiction of a Local Court to impose a penalty for an offence against the Acts or the regulations under those Acts is increased.
- (c) Provision is inserted in the *Construction Safety Act 1912* to allow a powderman's certificate to be refused or suspended if there is an apprehended violence order against the person applying for or holding the certificate.

Workers' Compensation (Dust Diseases) Act 1942 (repeal of Workmen's compensation (Broken Hill) Act 1920)

The Workmen's *Compensation (Broken Hill) Act 1920* is repealed and consequential provisions are inserted in the *Workers' Compensation (Dust Diseases) Act 1942* (including provision for the continuation of entitlements under the repealed Act).

Amendments to other Acts

The following amendments are made:

- (a) The *Public Finance and Audit Act 1983* and the *WorkCover Administration Act 1989* are amended as a consequence of the proposed repeal of the *Workmen's Compensation (Broken Hill) Act 1920*.
- (b) The *Justices Act 1902* is amended to provide for the enforcement of penalty notices issued for offences under the *Workers Compensation Act 1987*.
- (c) The *Statutory and Other Offices Remuneration Act 1975* is amended to provide for the remuneration of the Senior Commissioner and part-time commissioners of the Compensation Court.
- (d) The *Defamation Act 1974* is amended to provide defamation protection for conciliation officers in respect of certificates they will be able to issue under the *Workers Compensation Act 1987* as to the results of conciliation and for a fair report of such a certificate.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed, except for the amendments concerning the 6% threshold for hearing loss claims which commence on the date of assent.

Clause 3 gives effect to the amendments to the *Workers Compensation Act 1987* as set out in Schedule 1.

Clause 4 gives effect to the amendments to the *Occupational Health and Safety Act 1983* as set out in Schedule 2.

Clause 5 gives effect to the amendments to the *Compensation Court Act 1984* as set out in Schedule 3.

Clause 6 gives effect to the amendments to the *Construction Safety Act 1912* as set out in Schedule 4.

Clause 7 gives effect to the amendments to the *Factories, Shops and Industries Act 1962* as set out in Schedule 5.

Clause 8 gives effect to the amendments to the *Dangerous Goods Act 1975* as set out in Schedule 6.

Clause 9 gives effect to the amendments to the *Workers' Compensation (Dust Diseases) Act 1942* as set out in Schedule 7.

Clause 10 gives effect to the amendments to the other Acts contained in Schedule 8.

Schedule 1 Amendment of Workers Compensation Act 1987

Freezing of indexation of lump sum compensation for permanent disabilities and pain and suffering

Currently the Act provides for the automatic indexation of the maximum amounts of compensation payable for permanent disability and pain and suffering, in line with movements in weekly award rates of pay. The Bill removes the provisions for automatic indexation and so freezes the amounts payable for that compensation at current levels. The maximum amount payable for permanent disability under section 66 of the Act is \$132,300 for any one disability and \$160,950 for 2 or more disabilities resulting from the one injury. The maximum amount payable for pain and suffering under section 67 of the Act is \$66,200. Provision is included to enable the regulations to reintroduce indexation of these amounts in the future. (See Schedule 1 [19], [24], [37] and [38])

Clarification that pain and suffering compensation limited to permanent disability

The Bill makes it clear that the compensation for which the Act provides for pain and suffering resulting from a permanent disability is not payable for other pain and suffering that may have resulted from the injury which caused the disability. For example, a worker who suffers pain and suffering from an injury before the onset of a disability that eventually arises from the injury is not entitled to pain and suffering resulting from the injury before the onset of the disability but is entitled to pain and suffering resulting from the disability itself. (See Schedule 1 [25])

6% threshold for deafness claims

The Bill inserts a new section 69A that provides for a 6% eligibility threshold for compensation for industrial deafness, so that no lump sum disability compensation is payable unless the worker's hearing loss reaches 6%. The new section contains an example of how the changes will work in practice. It also requires hearing loss to be assessed on the basis of a loss in both ears to ensure that a disproportionate loss in one ear does not lead to anomalous application of the new threshold.

The amendments do however provide that the worker will still be entitled to claim the cost of hearing tests, at 3 year intervals (or when the worker leaves the noisy employment) to ascertain whether the threshold level has been reached. Under the amendments, the proposed threshold will apply to compensation claims in relation to deafness lodged with the employer/insurer on or after 10 November 1995 (the date announced as the commencement of the threshold). (See Schedule 1 [30])

Compensation for psychological injury

The Bill provides that no compensation is payable for psychological injuries such as stress unless employment was a substantial (in the sense of real and important) cause of the injury and the injury was not wholly or predominantly caused by reasonable action by the employer concerning transfer, demotion, promotion, discipline, performance appraisal, retrenchment or dismissal of workers or provision of employment benefits to workers.

Psychological injury is defined to mean any psychological or psychiatric disorder and extends to include the physiological effect of such a disorder on the nervous system. The new provision does not however affect any entitlement to compensation for an injury of a physical nature even if that injury may be a symptom or effect of psychological injury.

Medical certificates supporting claims for weekly benefits for alleged psychological injury will be required to give a proper medical diagnosis of the worker's condition (without using terminology such as "stress") and to comment on whether the worker's employment is likely to have been a cause of the injury. (See Schedule 1 [6])

Abolition of interest on lump sum compensation for non-economic loss

The Bill transfers to the Act as section 113 a provision that is currently section 19 of the *Compensation Court Act 1984*. That section currently provides for the payment of interest between the date a cause of action arises and award of compensation. The section is amended by the Bill to abolish interest for that period on lump sum compensation for permanent disability and pain and suffering. Section 67 (3A) is repealed consequentially. (See Schedule 1 [58] and [26] and Schedule 3 [6])

Interest on common law damages

The Bill substitutes existing section 151M dealing with the payment of interest on common law damages. As substituted, the section will abolish entitlements to interest on damages for non-economic loss (and for domestic services, nursing and attendant or respite), claimed by a worker for an employment-related injury, and will restrict interest on damages for economic loss to three-quarters of the standard court rate. These amendments are in line with changes made in 1994 to corresponding provisions in the *Motor Accidents Act 1988*. (See Schedule 1 [71])

Pre-existing impairment of the neck, back or pelvis

The Bill inserts a new section 68A that provides for a reduction in compensation payable for permanent impairment of the back, neck or pelvis in line with the proportion of the impairment that is due to a pre-existing condition, abnormality or injury. The result will be that the employer will only be liable for the part of impairment actually caused by the work injury. The provision extends to other permanent losses of bodily function that may be suffered as a consequence of permanent impairment of the back, neck or pelvis. The intention is to minimise reluctance by an employer to employ a previously injured worker, or one with existing back weakness, because of concern about being held liable for the pre-existing condition. To avoid litigation seeking to determine the precise percentage of pre-existing impairment, the amendments provide that where it is clear that the worker

did have some pre-existing impairment but there is an absence of medical evidence to ascertain the percentage, 10% of the worker's overall back etc impairment may be taken as the proportion to be deducted for that purpose. (See Schedule 1 [29])

Compensation for HIV/AIDS

The Bill inserts provision for the payment of lump sum disability and pain and suffering compensation for work related HIV infection or AIDS. Either HIV infection or AIDS will entitle the worker to the maximum lump sum disability compensation and lump sum compensation for pain and suffering. Compensation is not payable for both HIV and AIDS. No compensation is payable if HIV or AIDS was acquired by voluntary sexual activity or illicit drug use. (See Schedule 1 [28] and [34])

Compensation for bowel injury

The Bill provides lump sum disability and pain and suffering compensation for permanent loss of bowel function. It is specified that the maximum disability payment for that category of loss is payable where the worker requires a permanent ileostomy or colostomy. (See Schedule 1 [31] and [36])

Time limits on claim lodgment

The Bill amends section 92 of the Act to impose an upper limit of 3 years on the lodgment of a workers compensation claim unless there are exceptional circumstances. Failure to lodge a claim within the required period operates as a bar to recovery of compensation. The requirement to make the claim within 3 years refers to when the worker first claims any compensation for the injury, so that if some further part of compensation is claimed later, the time limit will already have been fully met by the initial claim. (See Schedule 1 [39]–[41])

Touting and other unscrupulous activities

The Bill designates claims for industrial deafness (and other prescribed claims) as *protected claims*. An agent who engages in *prohibited conduct* in relation to those claims is guilty of an offence (maximum penalty up to \$5,000) and is not entitled to recover any fees or costs that would otherwise be payable for services relating to the claim. Examples of prohibited conduct

in this context include unsolicited direct telephone marketing of claim-related services to a person, to encourage that person to make a protected claim and to use the services of the agent (or other person from whom the agent receives any payment), and the making of deliberately misleading statements about workers compensation entitlements.

Provision is also included to require that a lawyer or agent is not entitled to payment (for services involving a protected claim) from a person such as a workers compensation insurer, unless it is certified that the claim was not paid as a result of prohibited conduct by the lawyer or agent. The Workcover Authority will be authorised to notify insurers and self-insurers that specified persons, whom the Authority is satisfied have persistently engaged in prohibited conduct, are not entitled to recover fees or costs in connection with claims. A person must be given a reasonable opportunity to make submissions before being made the subject of such a notification and an appeal lies to the Compensation Court. (See Schedule 1 [68])

Cost penalties for unreasonable refusal of settlement offer and consequences of claims delays

The Bill authorises the Compensation Court to order that legal costs not be payable where there has been an unreasonable refusal of an offer of settlement, or failure to provide particulars sufficient to enable an offer of settlement to be made, which the Court is satisfied has prolonged litigation or added to the overall costs incurred. These orders as to costs will have the effect (unless the Compensation Court otherwise orders in special cases) that the legal representative of either the worker or the employer/insurer, as relevant to the case, will not be able to recover legal fees (because of the unreasonable refusal). The Bill also allows the Court and conciliation officers to report to the Workcover Authority on delays by insurers in dealing with claims and cases of insurers being responsible for costs being unreasonably incurred in proceedings. The Authority is authorised to take appropriate action on the basis of such reports, including possible reduction in the management expenses payable to the insurer concerned. (See Schedule 1 [43] (proposed section 94B) and [58] (proposed section 119))

Restrictions on commencing court proceedings unless claim lodged with employer/insurer

The Bill restricts litigation on weekly compensation matters to situations where the worker has properly claimed against the employer/insurer in the first instance. In particular, court proceedings seeking weekly payments

cannot be commenced unless the employer/insurer has failed to pay within 21 days after the worker's claim or, secondly, the employer/insurer terminates or reduces those payments. Similarly, the amendments state that court proceedings may not be commenced in relation to a lump sum disability claim under section 66 until 12 weeks after due lodgment of the claim. However, the 12 week non-litigation period may be extended if the employer/insurer promptly processes the claim (which includes giving the worker a written acknowledgment of receipt of the claim) and (within the 12 weeks) refers a resulting dispute to a medical panel. (See Schedule 1 [56])

Expanded role for medical panels

The 12 week non-litigation period mentioned above, as well as allowing an opportunity for proper processing of lump sum disability claims and reference to conciliation, allows scope for reference of medical disputes for assessment by medical panels. A further 2 week cooling-off period provided following issue of a medical panel's certificate gives further opportunity for negotiations to settle the matter using that certificate.

Medical panels will only be able to issue conclusive certificates (with existing exceptions regarding back impairment etc) where court proceedings have been commenced, if the worker did not go through the 12 week litigation-prohibition procedure mentioned above to permit non-litigious resolution.

The Bill specifies that medical panels (even where they have issued binding certificates on disputed disability questions) may correct miscalculations and mistakes in a certificate.

Parties will be free to agree to refer a medical question to an independent medical arbitrator (of their choice) as a substitute for an official panel, with the resulting opinion to be binding only if they agree. Provision is made for special payments to workers who use that procedure (in recognition of the legal and other costs thus saved by the employer/insurer).

Special provisions are introduced enabling the Senior Conciliation Officer to refer disputed medical questions for assessment by medical panels. The Bill provides that regulations may specify that the resulting certificate of a medical panel concerning questions of the existence, nature and extent of loss or impairment for the purpose of lump sum disability claims may be binding (this procedure will not be available in a case where court proceedings have commenced). However, in any other circumstances the resulting medical panel certificate will only have prima facie evidentiary value. (See Schedule 1 [61]–[66])

Claims procedures and conciliation

Requirements are introduced for insurers to always give claimants written notice when liability for a claim is denied. The notice must include the reason for denial, information about conciliation and a statement that the worker can seek assistance from his or her union or from a lawyer. A copy of that notice will form part of the information which insurers must provide under existing provisions concerning disputes about commencing weekly payments, when referring such disputes for conciliation. That arrangement for referring weekly payment disputes for conciliation is extended by the Bill to disputes about continuation of such payments. However, these provisions will not prevent the commencement of proceedings in the Compensation Court about the dispute or make conciliation a pre-condition to such proceedings. Various procedural changes are made to conciliation provisions, including provisions about obtaining documents and arranging conferences, to make conciliation more effective.

Workers will not be required to furnish documents or attend such conferences unless they have legal representation.

Existing provisions allowing an insurer, if it has a "reasonable excuse", longer than the normal 21 days (after lodgment of claim) to assess a claim for weekly payments and refer any resulting dispute for conciliation are amended to specify that such an excuse can only operate for an additional 21 days at the most. (See Schedule 1 [43] (proposed section 94A), [45]–[48], [50]–[53])

Expanded role for commissioners

At present, commissioners of the Compensation Court have jurisdiction in a range of workers compensation matters specified in Schedule 3 to the *Compensation Court Act 1984* that are allocated to commissioners by the Chief Judge. An appeal lies to a Judge of the Compensation Court from any decision of a Commissioner. The Bill will provide for commissioners to have exclusive jurisdiction in certain workers compensation matters (to be specified by the regulations). An appeal will lie to a Judge of the Compensation Court but only on a question of law, misuse of a statutory discretion or a question on the admission or rejection of evidence. (See Schedule 2, which contains the amendments to the *Compensation Court Act 1984*)

Fixing of maximum legal and medico-legal costs

The Bill inserts new regulation making powers allowing regulations (which may apply by reference to or prevail over regulations under the *Legal Profession Act 1987*) to set maximum legal fees, including medico-legal costs, above which the employer/insurer (as well as the worker) is not liable. (See Schedule 1 [58] (proposed sections 117 and 118))

Maximum medical, hospital and rehabilitation costs

The Act currently contains provisions that allow an injured worker to recover medical, hospital and rehabilitation costs from the employer as workers compensation. The Act and the regulations fix maximum amounts that can be recovered. The Bill inserts a new provision that will prevent recovery against the injured worker above the amounts that the worker is entitled to recover as compensation for those costs. (See Schedule 1 [16] and [17])

Return-to-work plans

The Bill inserts a regulation making power (proposed section 152A) authorising regulations to require employers to prepare return-to-work plans for injured workers. A consequential amendment is made to section 43A to replace references to rehabilitation plans with references to return-to-work plans. (See Schedule 1 [14] and [75])

Enforcement of requirement for workers compensation insurance

The current penalty of up to \$20,000 for failure by the employer to insure under the Act is increased to include imprisonment of up to **6** months. Provisions are also introduced specifying that injured directors of uninsured companies may not claim against the Workcover Uninsured Fund and that, where that Fund has to pay compensation to injured employees (other than directors, who are excluded) the Workcover Authority may recover the debt owing to the Fund personally against a director of the company. The director is then entitled to recover the amount back from the company. Procedural improvements are made to make the current civil penalty for non-insurance (twice the avoided premium recoverable by the Authority as a debt) more effective against defaulting employers. As well, the Bill allows for regulations to prescribe an amnesty period for defaulting employers to obtain insurance. (See Schedule 1 [67], [76] and [77]–[81])

Clarification that expression “worker” extends to legal personal representative or dependants of deceased worker

The Bill amends section 3 to make it clear that the term “worker” includes, in relation to a deceased worker, the legal personal representative or dependants of the worker. Transitional provisions make it clear that this amendment is for clarification only and accordingly applies in respect of any worker, including a worker who died or was injured before the commencement of the amendment. (See Schedule 1 [3])

Currently weekly wage rate of person employed by more than one employer

New section 42 (7A) provides that for the purposes of calculating the current weekly wage rate of a worker who is employed under more than one contract of service with more than one employer, the current weekly wage rate must not be less than what it would have been if the worker had been employed only in the employment in which he or she received an injury. (See Schedule 1 [9])

Clarification of provisions relating to damages and compensation

Section 151B is amended to make it clear that damages can be claimed and retained under that section’s exceptions only when it is that section itself that is the reason why a party would otherwise lose certain damages or compensation.

At the same time, section 151B (4) is renumbered as subsection (3) because the amendment in the *Workers Compensation Legislation Amendment Act 1995* that would, if commenced, have inserted section 151B (3) is repealed by Schedule 8 to the Bill. (See Schedule 1 [69] and [70])

Insurance liability for common law claims for occupational diseases “straddling” commencement of the Act

The Bill amends existing section 151AB which applies where a number of insurers may each be partly liable to contribute to an employer’s liability at common law to a worker who has contracted an occupational disease. This situation may occur if the employer has been covered by various workers compensation insurers over the period during which the disease was contracted. The current version of section 151AB has the effect that liability

to indemnify the employer rests solely with the insurer who covered the employer when the worker was last employed in employment to the nature of which the disease was due (that is, in duties involving a risk of contracting the disease). The amendments made by the Bill will adjust this arrangement *so* that, in circumstances where part of the liability arose before the commencement of the Act and part arose afterwards, liability is divided equally between the insurer who covered the employer immediately before the commencement and the insurer who covered the employer after the commencement and when the worker was last employed in relevant employment. For those cases the amendments nominate the insurer after that commencement as the one normally responsible for dealing with and defending the claim, unless the 2 insurers otherwise agree or the Court otherwise orders. (See Schedule 1 [73] and [74])

Clarification of insurer's entitlement to be indemnified by a negligent third party

Section 151Z is amended to make it clear that, despite the High Court decision on a forerunner of that section in *PTC NSW v Murray-More* (1975) 49 ALJR 302, section 151Z enables a workers compensation insurer to take action against a negligent third party (who was responsible for the worker's injury) to obtain reimbursement for compensation paid by the insurer, even in circumstances where the worker's employer was also partly negligent. (See Schedule 1 [72])

Clarification of Schedule 1 Deemed employment of workers

Clause 2 of Schedule 1 is amended to make it clear that it does not matter whether a contractor employs 1 or more than 1 worker, for the exception in clause 2 (1) to operate. This means then, that despite the decision in *Monier v Szabo* (1992) 28 NSWLR 53, a contractor cannot be deemed to be a "worker" even if the contractor employs only one person. (See Schedule 1 [91])

Deemed employment

Clause 2 of Schedule 1 is further amended to exclude from the provisions under which an outworker or other contractor is taken to be a worker for the purposes of the Act a person who is a registered player of a sporting organisation. (See Schedule 1 [92])

Penalty notices

The Bill inserts a standard provision (proposed section 278A) that allows the regulations to specify offences under the Act that can be dealt with by means of a penalty notice. (See Schedule 1 [89])

Other amendments to prevent unnecessary litigation

The Bill makes the following amendments to prevent or avoid unnecessary court proceedings:

- Section 66A currently provides for the registration by the WorkCover Authority of agreements for the payment of lump sum compensation for occupational diseases. The worker is not entitled to receive any additional compensation once an agreement is registered (with safeguards for fraud and inadequate compensation). The Bill extends section 66A to all lump sum compensation agreements (not just those that relate to occupational diseases). (See Schedule 1 [20]–[22])
- The Bill inserts a new section 66B which prevents proceedings being taken in the Compensation Court merely for entry up of judgment for an award to give effect to an agreement for compensation (of the kind that can be registered under section 66A). (See Schedule 1 [23])

Miscellaneous amendments

The Bill makes the following miscellaneous amendments:

- (a) The Bill imposes additional requirements with respect to the obligation of employers to provide information to workers to enable them to calculate wage rates and related details. Currently the information is required to be provided in writing at the request of the worker (with no time specified for compliance by the employer) and there is an offence for failure to comply with such a request. The Bill will impose an upper time limit of 28 days on compliance with a request for information (with power for the regulations to change the time for compliance). The regulations will also be able to impose requirements as to the form and manner in which the information is to be given and will be able to require employers to certify as to the completeness and accuracy of the information. The offence will be changed to introduce a defence of reasonable excuse. The penalty for the offence will remain at 20 penalty units (\$2,000). (See Schedule 1 [10])

- (b) A further amendment relates to the operation of section 22 of the Act concerning apportionment of compensation liability where the worker's incapacity or bodily loss etc is partly caused by 2 or more injuries at different times. The amendment clarifies that the term "apportionment" is used in the ordinary sense of dividing shares, rather than some more limited technical sense which might confine the operation of the section to unusual cases (such as where the worker's incapacity results fully from each different injury, rather than the more common situation of resulting partly from each). (See Schedule 1 [7])
- (c) The Bill makes it clear that insurers licensed on a statutory fund basis do not have beneficial ownership of the statutory funds managed by them, but hold the assets of the fund on trust for the purposes of the Act. Those purposes include meeting claims under workers compensation insurance contracts which insurers enter into with employers whose premiums are paid into the statutory fund concerned. (See Schedule 1 [82])
- (d) The Bill provides that, where the Compensation Court reviews an award previously made by it (because of change of circumstances) and orders that the workers compensation entitlement be ended or reduced from a date prior to the order, the worker can be ordered to refund payments already received to which there was no proper entitlement. Workers can already be ordered to refund payments in that situation, except that, at present, the repayment order may have to be obtained by the employer/insurer in separate proceedings in another court after the Compensation Court has conducted its review. This is because the existing provisions of the *Workers Compensation Act 1987* have been interpreted as limiting the Compensation Court's power to order repayments. The purpose of the amendment is to avoid duplication of litigation and related costs. (See Schedule 1 [15])

Savings and transitional provisions

Schedule 6 to the Act is amended to insert various transitional provisions as a consequence of the above amendments. (See Schedule 1 [94]–[110])

Schedule 2 Amendment of Occupational Health and Safety Act 1983

Increased penalties

A number of amendments increase the penalties for offences against the Act. The maximum penalty for an offence against the Act will be \$500,000 in respect of a corporation and \$50,000 in respect of an individual. If the offence is a further offence, an additional penalty may be imposed. The maximum penalty that may be imposed for an offence against the regulations is also increased. (See Schedule 2 [2], [3], [5], [6], [8], [9], [11], [12]–[16], [19]–[24], [30], [32], [38] and [39])

Alternative convictions

New section 15 (4) gives a court power, in respect of proceedings against a person for an offence against section 15 of the Act (Employers to ensure health, safety and welfare of their employees), to convict the person of an offence under section 16 of the Act (Employers and self-employed persons to ensure health and safety of persons other than employees at places of work) as an alternative conviction. New section 16 (3) contains a reciprocal provision in respect of proceedings for an offence against section 16. (See Schedule 2 [4] and [7])

Issue of improvement and prohibition notices

New sections 3 IR–3IY give power to inspectors to require a contravention or likely contravention of the Act to be remedied, or to prohibit any activity which is not safe or which is a risk to health. An inspector will be able to do this by issuing an improvement or prohibition notice. The notice may include directions as to the measures to be taken to remedy any contravention to which the notice relates. It is an offence to fail to comply with such a notice. These provisions are based on provisions currently contained in the *Occupational Health and Safety (Inspectors' Notices and Penalty Notices) Regulation 1988*. However, the penalty for non-compliance with a notice is increased (with prohibition notices having a higher penalty than improvement notices) and provision is also made for a right to review of a notice by the Workcover Authority and for appeal against a notice to an Industrial Magistrate. (See Schedule 2 [28])

Increased jurisdiction of Local Court

An amendment to section 47 increases the maximum penalty that may be imposed by a Local Court in proceedings for an offence against the Act or the regulations from 100 penalty units (\$10,000) to 500 penalty units (\$50,000) or 2 years imprisonment (or both). (See Schedule 2 [31])

Court may order cause of offence to be remedied

New section 47A provides that a court that convicts a person of an offence of contravening the Act or the regulations may, if it appears to the court that it is within the person's power to remedy the contravention, order the person to take such steps as may be specified by the court to remedy the contravention. It will be an offence to fail to comply with such an order. (See Schedule 2 [33])

Increase in time for instituting proceedings for certain offences against the Act or regulations

New section 49 (2), (3) and (4) provides for an increased time limit for the institution of proceedings for an offence against the Act or the regulations in certain circumstances. At present proceedings must be instituted within 2 years after the act or omission constituting the offence concerned. New section 49 (2) provides that, where the act or omission is an offence against section 18 (which deals with duties of suppliers and manufacturers to ensure the health and safety of plants and substances supplied or manufactured for use at work) proceedings may be instituted within 6 months after it first becomes apparent to the Workcover Authority that the contravention concerned has occurred, or within the general 2 year limitation period, whichever period provides the longer time for proceedings to be instituted. New section 49 (3) provides for a similar extension for proceedings for an offence of failure to notify an accident or other matter relating to health and safety at a place of work. New section 49 (4) provides that, if it appears from proceedings of a coroner's inquest or a coroner's report that an offence has been committed against the Act or the regulations, proceedings for the offence may be instituted within 2 years after those proceedings or the making of that report. Transitional provisions are inserted to extend these provisions to any act or omission constituting an offence that occurred within 2 years before the commencement of the provisions. (See Schedule 2 [34])

Change in defences for directors and managers charged in respect of corporate contravention

At present every director or person concerned in the management of a corporation is deemed to contravene the Act or the regulations if the corporation contravenes the Act or the regulations. It is a defence for the director or manager to establish that the corporate contravention occurred without his or her knowledge, or that he or she was not in a position to influence the conduct of the corporation, or that he or she used all due diligence to prevent the contravention. The amendment to section 50 removes the defence that the contravention occurred without the director's or manager's knowledge. It will still be a defence to establish that the director or manager was not in a position to influence the conduct of the corporation or that he or she used all due diligence to prevent the contravention. (See Schedule 2 [35])

Penalties for further offence against the Act

At present section 51A of the Act allows a court that convicts a person of a second or subsequent offence against the Act (which is a wilful repetition of an earlier offence) to impose an additional penalty of up to 2 years imprisonment. This section is replaced. The new section provides that an additional penalty may be imposed for any subsequent offence against the Act (whether or not a repetition of an earlier offence). The additional penalties that may be imposed vary according to the seriousness of the offence. (See Schedule 2 [36])

Suppliers of plant or substances

Section 18 is amended to extend the concept of "supply" to include transfers as well as sales. (See Schedule 2 [10])

Stopping use of plant

New section 21B is inserted to prohibit the disturbance of plant, or an area of a place of work, involved in certain serious occurrences. However, the section provides exceptions and limits the duration of such a direction.

New section 21C is inserted to provide that an inspector may direct that plant must not be used, moved or interfered with if the inspector believes on reasonable grounds that it is necessary to allow an inspection or examination. However, the section provides exceptions and limits the duration of such a direction.

New section 21D provides that directions under this section may be reviewed under new section 31U. (See Schedule 2 [17])

Bowers available on entry

Section 31I is amended to empower inspectors to examine or test plant, substances and things, to dismantle them, and in certain cases to take them away. Those powers are subject to a notice requirement under new section 31T and to a review procedure under new section 31U. Section 31I is further amended to make it clear that an inspector may take video or audio records in a workplace of an employer or self-employed person. (See Schedule 2 [26] and [27])

New sections 31Z–31AE deal in greater detail with the mechanism of taking things away, the giving of receipts for things taken, the forfeiture and return of those things and the provision to the owner of access to those things. (See Schedule 2 [28])

Powers of authorised officers and inspectors

New section 51C is inserted to empower authorised officers (ie officers specified by the regulations under existing section 51B) and inspectors to require a person to identify himself or herself if the officer or inspector reasonably suspects the person has committed an offence. (See Schedule 2 [37])

Industry codes of practice

Section 44A is amended to enable revocations of industry codes of practice to take effect from a day that is later than the date when notice of the revocation is published. At present, revocations take effect at the end of the day of gazettal, but new codes and amendments can take effect on a present or future date specified in the notice of the code or amendment. (See Schedule 1 [29])

Orders for reimbursement

Section 47 is amended to enable a court that hears a summary trial for an offence to order a convicted offender to reimburse the Workcover Authority for its expenses in examining or testing plant to which the offence relates. (See Schedule 2 [31])

Inspectors' powers of entry

Section 31B (which presently requires prior notice by an inspector who enters a workplace) is replaced with a provision that inspectors must give notice as soon as reasonably practicable after entry, with exceptions for urgency and other circumstances where notice would not be appropriate or necessary. (See Schedule 2 [25])

Powers of entry of trade union officials

New sections 31AF–31AP confers on authorised officers of industrial organisations of employees powers of entry to a place of work where the organisations members work. The powers concerned closely parallel some of the powers of Workcover inspectors. See Schedule 2 [28])

Reports on accidents and dangerous occurrences

New section 31AQ enables the Minister to call for reports from the Workcover Authority on accidents and dangerous occurrences and authorises the Minister to make those reports public or table them in Parliament. Appropriate protections from liability are provided by the section. (See Schedule 2 [28])

Schedule 3 Amendment of Compensation Court Act 1984

Membership of medical panels

The Bill provides that medical referees arranged for medical panels are to be chosen on the basis of their relevant specialty or experience and that each panel must include one medical referee nominated by employer organisations and one nominated by employee organisations.

Expanded role of commissioners

The amendments provide that the Compensation Court is to be constituted either by a single Judge or a single Commissioner. Provision is made for appointment of a Senior Commissioner.

Under the amendments, appeals to a Judge of the Court will be available against a decision of a Commissioner on questions of law, the admission or rejection of evidence or misuse of a statutory discretion.

Appeals from decisions of Judges

The Bill restricts appeals from decisions of Judges of the Compensation Court to the Court of Appeal to questions of law and the admission or rejection of evidence.

Miscellaneous amendments

The Bills makes the following miscellaneous amendments:

- (a) The existing provision exempting liability to make weekly compensation payments from any order for stay of proceedings when the award under which the payments are made is appealed against is amended to limit that exemption to weekly payments in respect of the period after the award. (See Schedule 3 [22])
- (b) Provision is inserted to enable the Court to admit historical evidence and general medical and other evidence about exposure to noise in the workplace, to avoid repetition of the same evidence in a number of different proceedings. (See Schedule 3 [10])
- (c) Provision is inserted for payment of the costs of mediators and neutral evaluators of the Court out of the Workcover Authority Fund (from which the Court's operations are currently financed) rather than charging the parties for those costs. (See Schedule 3 [23])

Schedule 4 Amendment of Construction Safety Act 1912

Increased penalties

The amendments increase the penalties for offences against the Act. The maximum penalty for an offence against the Act will be \$50,000 in respect of a corporation and \$25,000 in respect of an individual. The maximum penalty that may be imposed for an offence against the regulations is also increased. (See Schedule 4 [3], [5], [6] and [8])

Increased jurisdiction of Local Court

The amendment to section 21 (3) increases the maximum penalty that may be imposed by a Local Court in proceedings for an offence against the Act or the regulations from 100 penalty units (\$10,000) to 500 penalty units (\$50,000). Transitional provisions are also inserted in the Act. (See Schedule 4 [7] and [9])

Powdermen's certificates

Section 17A is amended to make the existence of an apprehended violence order against a person a ground for refusing to issue a powderman's certificate to the person, or for suspending a certificate that the person already has. One effect of refusal or suspension is to remove a basis on which the person could seek a permit under the *Dangerous Goods Act 1975* to receive explosives. (See Schedule 4 [1] and [2])

Schedule 5 Amendment of Factories, Shops and Industries Act 1962

Increased penalties

The amendments increase the penalties for offences against the Act. The maximum penalty for an offence against the Act will be \$50,000 in respect of a corporation and \$25,000 in respect of an individual. The maximum penalty that may be imposed for an offence against the regulations is also increased.

Increased jurisdiction of Local Court

The amendment to section 145 increases the maximum penalty that may be imposed by a Local Court in proceedings for an offence against the Act or the regulations from 100 penalty units (\$10,000) to 500 penalty units (\$50,000). Transitional provisions are also inserted in the Act. (See Schedule 5 [6] and [9])

Schedule 6 Amendment of Dangerous Goods Act 1975

Increased penalties

The amendments increase the penalties for offences against the Act. The maximum penalty for an offence against the Act will be \$50,000 in respect of a corporation and \$25,000 in respect of an individual and \$10,000 per day in respect of a continuing offence. The maximum penalty that may be imposed for an offence against the regulations is also increased.

Increased jurisdiction of Local Court

The amendment to section 33 increases the maximum penalty that may be imposed by a Local Court in proceedings for an offence against the Act or the regulations from 100 penalty units (\$10,000) to 500 penalty units (\$50,000). Transitional provisions are also inserted in the Act. (See Schedule 6 [17] and [21])

Schedule 7 Amendment of Workers' Compensation (Dust Diseases) Act 1942

The *Workmen's Compensation (Broken Hill) Act 1920* ("the Broken Hill Act") is repealed. The *Workers' Compensation (Dust Diseases) Act 1942* ("the Dust Diseases Act") is amended to make savings and transitional provisions consequent on that repeal and to provide for the making of further savings and transitional provisions by regulation. Among other things, the transitional provisions provide for the transfer of the balance of the compensation fund under the Broken Hill Act to the fund under the Dust Diseases Act and for the continuation of the entitlements of claimants under the Broken Hill Act in accordance with the Dust Diseases Act. A provision that excluded Broken Hill mine owners from the scheme under the Dust Diseases Act is removed and other consequential amendments are made to the Act.

Schedule 8 Amendment of other Acts

Schedule 8 makes amendments to the *Public Finance and Audit Act 1983* and the *WorkCover Administration Act 1989* that are consequential on the repeal of the *Workmen's Compensation (Broken Hill) Act 1920*.

Schedule 3 (Amendments relating to interim payment of damages) to the *Workers Compensation Legislation Amendment Act 1995 No 30* has never commenced and is repealed.

The *Statutory and Other Offices Remuneration Act 1975* is amended to provide for the remuneration of conciliation officers.

The *Defamation Act 1974* is amended to extend the protections for defamation currently afforded to conciliation officers so as to include certificates given by conciliation officers as to the results of conciliation (to be issued under amendments proposed to be made by the Bill to the *Workers Compensation Act 1987*), and with respect to fair reports of those certificates.

The *Justices Act 1902* is amended to apply the enforcement mechanisms under that Act that apply to penalty notices under most Acts to apply to penalty notices under the *Workers Compensation Act 1987*.