

[Act 1998 No 130]



New South Wales

# Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Bill 1998

## Explanatory note

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

### Overview of Bill

The object of this Bill is to amend various Acts:

- (a) as regards asbestos-related and other dust diseases:
  - (i) to facilitate the institution, conduct and determination of proceedings before the Dust Diseases Tribunal (the *Tribunal*) for disability or death caused by dust diseases. and
  - (ii) to extend the class of dependants who are entitled to compensation awarded by the Workers' Compensation (Dust Diseases) Board (the *Board*). and
  - (iii) to provide the Board with rights to be reimbursed for compensation paid or payable by it where damages are recovered or recoverable. and
  - (iv) to enable funding of dust disease victim support groups. and

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

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- (b) as regards workers compensation generally:
  - (i) to enable proceedings to be brought against an insurer under a policy of workers compensation insurance where the employer has died or is defunct, and
  - (ii) to extend the class of dependants who are entitled to compensation, and
- (c) for other purposes, including:
  - (i) to change the title of the office of Senior Member of the Tribunal to "President". and
  - (ii) to increase the membership of the Board.

The Acts proposed to be amended are as follows:

- (a) *Bust Diseases Tribunal Act 1989*,
- (b) *Law Reform (Miscellaneous Provisions) Act 1944*,
- (c) *Law Reform (Miscellaneous Provisions) Act 1946*,
- (d) *Limitation Act 1969*,
- (e) *Workers Compensation Act 1987*,
- (f) *Workers' Compensation (Dust Diseases) Act 1942*,
- (g) *Workplace Injury Management and Workers Compensation Act 1998*,

## 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 appointed by proclamation.

**Clause 3** is a formal provision giving effect to the amendments to Acts as set out in the Schedules to the proposed Act.

### **Schedule 1      Amendment of Dust Diseases Tribunal Act 1989**

**Schedule 1 [1]** inserts definitions of expressions used in the Act as proposed to be amended.

**Schedule 1 [2]** changes the title of the office of Senior Member of the Tribunal to "President". and makes consequential amendments. Clause 6 as proposed to be inserted by Schedule 1 [15] into Schedule 3 to the Act provides for the present Senior Member to continue as President. **Schedule 1 [9]** makes a further consequential amendment.

**Schedule 1 [3]** inserts a new section 12A to abolish **all** limitation periods for the bringing of proceedings in relation to dust-related conditions before the Tribunal. This involves overriding provisions of the *Limitation Act 1969*.

**Schedule 1 [4]** inserts a new section 12B to enable damages for non-economic loss to survive the death of the plaintiff in proceedings before the Tribunal. This involves overriding a provision of the *Law Reform (Miscellaneous Provisions) Act 1944*.

**Schedule 1 [5]** inserts a new section 12C to abolish the settlement bar rule in proceedings before the Tribunal. The settlement bar rule provides that settlement of a claim with one joint tortfeasor has the effect of releasing all other joint tortfeasors. This will enable settlements involving multiple defendants to occur progressively. There is a view that the rule has already been impliedly abolished by the enactment of a provision of the *Law Reform (Miscellaneous Provisions) Act 1946*, and the Bill provides that the operation or interpretation of that provision is not affected by the proposed section 12C. The issue is dealt with in Discussion Paper 38 of the New South Wales Law Reform Commission, *Contributions between persons liable for the same damage* (September 1997). Reference is also made to Schedule 1 [10], which proposes the insertion of a rule-making power to provide for the disclosure of particulars, thereby also further facilitating progressive settlement of matters involving multiple defendants.

**Schedule 1 [6]** inserts a new section 12D to provide that damages for non-economic loss awarded in proceedings before the Tribunal are not to be reduced by any amounts payable under the *Workers' Compensation (Dust Diseases) Act 1942*. This deals with the decision in *James Hardie & Co Pty Ltd v Newton* (1997) 42 NSWLR 729.

**Schedule 1 [7]** inserts a new section 25A to allow material obtained by discovery or interrogatories in connection with proceedings before the Tribunal to be used in other proceedings before the Tribunal.

**Schedule 1 [8]** inserts a new section 25B to provide that issues of a general nature determined in proceedings before the Tribunal (or on appeal from the Tribunal) should not be relitigated or reargued in other proceedings before the Tribunal, without the leave of the Tribunal. This would prevent the re-opening of issues already established, for example the carcinogenic nature of certain asbestos fibres, but would not apply to specific issues, for example whether a particular worker was exposed to such fibres.

**Schedule 1 [10]** amends section 33 to enable additional rules to be made under the Act. Proposed section 33 (4) (l) enables rules to be made for the purpose of requiring the plaintiff in proceedings before the Tribunal to disclose certain matters (thereby facilitating the progressive settlement of claims, including claims in cases involving joint, concurrent or consecutive tortfeasors). Proposed section 33 (4) (m) enables rules to be made for the purpose of requiring the filing of, and permitting (in appropriate cases) the disclosure of, particulars of settlements. Proposed section 33 (4) (n) enables rules to be made enabling the Tribunal to disapply proposed section 151AC of the *Workers Compensation Act 1987* in particular cases (thereby in appropriate circumstances facilitating litigation of matters referred to in section 151AB of that Act).

**Schedule 1 [11]** inserts a new Part 5 to provide the machinery for arbitration of inter-insurer disputes, as contemplated by amendments proposed to be made to the *Workers Compensation Act 1987*,

**Schedule 1 [12]** inserts a new Part 6 to deal with the making of interim payments in ordinary proceedings and in proceedings where there is such an inter-insurer dispute.

**Schedule 1 [13]–[15]** make amendments of a savings or transitional nature consequent on the proposed amendments.

## **Schedule 2      Amendment of Law Reform (Miscellaneous Provisions) Act 1944**

**Schedule 2** amends section 2, as a consequence of the amendment proposed by Schedule 1 [4].

## **Schedule 3      Amendment of Law Reform (Miscellaneous Provisions) Act 1946**

**Schedule 3** amends section 6 to enable proceedings to be brought directly against an insurer under a policy of workers compensation insurance (whether relating to dust diseases or otherwise) where the employer has died or is defunct. This overcomes the decision in *GIO General Limited v P Malathounis* (Court of Appeal, 30 September 1997).

## **Schedule 4      Amendment of Limitation Act 1969**

**Schedule 4** amends section 8, as a consequence of the amendment proposed by Schedule 1 [3].

## **Schedule 5      Amendment of Workers Compensation Act 1987**

**Schedule 5 [1]–[3]** make amendments consequential on amendments proposed to be made to the *Workplace Injury Management and Workers Compensation Act 1998* by Schedule 7. The amendments will extend the class of dependants who are entitled to Compensation under the Act. This is achieved by inserting definitions of *de facto relationship* and spouse by Schedule 7, which will extend the ambit of the Act to persons in a de facto relationship. Words and expressions used in the *Workers Compensation Act 1987* have the same meaning as in the *Workplace Injury Management and Workers Compensation Act 1998*.

The insertion of that definition of *spouse* affects the operation of:

- (a) section 45 of the Act, in so far as it allows the Compensation Court to reduce or abolish an entitlement to weekly payments of compensation if that would result in a spouse's entitlement to social security benefits, and
- (b) section 61 of the Act, which defines the entitlement to medical care partly by reference to the care that an injured worker might reasonably expect from a spouse, and
- (c) section 151P of the Act, which limits the class of persons in whose favour damages for psychological or psychiatric injury may be awarded (family members and spouses).

Other amendments affect:

- (a) section 31 of the Act, which currently provides for payment of benefits in respect of dependent children of a deceased worker to a widow or widower (payment will in future be to a surviving parent) (see **Schedule 5 [1]**), and
- (b) section 37 of the Act, which currently includes de facto spouses among the persons in respect of whom a weekly payment may in certain cases be made by way of compensation for total incapacity (eligibility will in future be by references to persons in a de facto relationship) (see **Schedule 5 [2]**), and

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(c) section 85 of the Act, which currently provides for the manner of payment of a death benefit to a widow or widower (the provision will in future extend to a person in a de facto relationship) (see **Schedule 5 [3]**).

**Schedule 5 [5]** inserts a new section 151AC, which is intended to complement section 151AB. Section 151AB provides a scheme for identifying one insurer (or in some cases two insurers) who are to be liable to pay the damages in cases of disease contracted by a gradual process, including a dust disease. Proposed section 151AC provides a mechanism, in the case of a dust disease, to designate one of two or more insurers for this purpose on an interim basis, pending resolution of a dispute as to which of them is liable. The proposed section 151AC will be capable of being disapplied by the Dust Diseases Tribunal in accordance with rules made under the *Dust Diseases Tribunal Act 1989* (see Schedule 1 [10]). **Schedule 5 [4]** makes a consequential amendment.

**Schedule 5 [6]** will enable regulations of a savings or transitional nature to be made.

## **Schedule 6      Amendment of Workers' Compensation (Dust Diseases) Act 1942**

**Schedule 6 [1]–[3]** and **[7]–[12]** make amendments to extend the class of persons who are entitled to benefits under the Act. This is achieved by inserting definitions of *de facto relationship* and *spouse*, which will extend the ambit of the Act to persons in a de facto relationship. In the case of the death of a worker from a dust disease, eligibility for a lump sum (which is presently limited to the worker's spouse or de facto spouse and their children) is extended to other relatives (including parents, brothers and sisters) if there is no surviving spouse.

**Schedule 6 [4]** amends section 5 to increase (by two) the membership of the Board, so that there will be an additional employer representative and an additional employee representative.

**Schedule 6 [5]** amends section 5 by way of statute law revision.

**Schedule 6 [6]** amends section 6 to enable the Board to make grants from the Workers' Compensation (Dust Diseases) Fund to provide assistance to groups or organisations that provide support for victims of dust diseases or their families.

**Schedule 6 [13]** inserts a new section 8E, which provides the Board with rights to be reimbursed for compensation paid or payable by it where damages are recovered or recoverable by or in respect of a disabled or deceased worker from a negligent person (other than the worker's employer). These rights correspond in certain respects to those available to an employer

(or an employer's insurer) under section 151Z of the *Workers Compensation Act 1987*. The following matters are noted about the new section 8E:

- (a) The effect of subsection (3) of the new section will be that, when a negligent person receives a reduction in damages payable to the worker because of workers compensation paid or payable by the Board, the negligent party will be liable to pay the amount of the reduction to the Board, rather than retaining the benefit of the reduction as a windfall.
- (b) The new section will not operate to require workers' employers to reimburse the Board in this way. because employers already indirectly make payments to the Board. The fund administered by the Board is partly financed by contributions made directly by insurers and therefore indirectly by employers, and compensation payments are made from this fund.
- (c) The new section requires reimbursement of the Board by negligent persons other than employers, for example the manufacturers or suppliers of products that contain dust and cause dust disease.
- (d) The new section applies to amounts deducted or deductible from damages for economic loss because proposed section 12D of the *Dust Diseases Tribunal Act 1989* will prevent deductions of compensation paid or payable under the *Workers' Compensation (Dust Diseases) Act 1942* from damages for non-economic loss (see Schedule 1 [6]).
- (e) Reimbursement in terms of subsection (3) of the new section is to be made automatically after the conclusion of the proceedings in which damages are awarded to the worker. without the Board having to be involved in the proceedings or having to take separate action. In the event that the amount remains unpaid, it is recoverable as a debt.

**Schedule 6 [14] and [15]** insert into Schedule 2 provisions of savings or transitional nature. including the power to make regulations for that purpose.

### **Schedule 7      Amendment of Workplace Injury Management and Workers Compensation Act 1998**

**Schedule 7** makes amendments that result in extending the class of persons who are entitled to benefits under the workers compensation legislation. This is achieved by inserting definitions of *de facto relationship* and *spouse*. which will extend the ambit of the legislation to persons in a de facto relationship.