



New South Wales

Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998 No 130

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New South Wales

Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998 No 130

Act No 130, 1998

An Act to amend the *Workers Compensation Act 1987*, the *Workers' Compensation (Dust Diseases) Act 1942*, the *Workplace Injury Management and Workers Compensation Act 1998*, the *Dust Diseases Tribunal Act 1989* and certain other Acts in connection with claims relating to asbestos-related and other dust diseases, and the institution of certain proceedings for, and the entitlement of persons to compensation in, workers compensation matters; and for other purposes. [Assented to 26 November 1998]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*.

2 Commencement

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

3 Schedules of amendments

Each Act that is specified in a Schedule to this Act is amended as set out in that Schedule.

Schedule 1 Amendment of Dust Diseases Tribunal Act 1989 No 63

(Section 3)

[1] Section 3 Definitions

Omit the definition of *Senior Member* from section 3 (1).
Insert in alphabetical order:

President means the President of the Tribunal.

settlement, when used in relation to a claim, includes compromise or agreement.

[2] Sections 7, 7A, 7B, 13, 32B, 32C, 32D, 32F and 32N

Omit "Senior Member" wherever occurring.
Insert instead "President".

[3] Section 12A

Insert after section 12:

12A No limitation period

- (1) The purpose of this section is to enable proceedings to be brought before the Tribunal in relation to dust-related conditions at any time.
- (2) Nothing in the *Limitation Act 1969* or any other statute of limitations operates to prevent the bringing or maintenance of proceedings before the Tribunal in relation to dust-related conditions.
- (3) Without limiting subsection (2):
 - (a) sections 14, 18A, 60C and 60G of, and Schedule 5 to, the *Limitation Act 1969* do not prevent the bringing or maintenance of any such proceedings before the Tribunal, and

- (b) any such proceedings may be brought or maintained before the Tribunal even though a limitation period has already expired under that Act, and
- (c) any such proceedings may be brought or maintained before the Tribunal as if Division 1 of Part 4 of that Act had never been in force.

[4] Section 12B

Insert as section 12B:

12B Damages for non-economic loss after death of plaintiff

- (1) The purpose of this section is to enable the estate of a person whose death has been caused by a dust-related condition to recover damages for the person's pain or suffering, or for any bodily or mental harm suffered by the person, or for curtailment of the person's expectation of life, provided proceedings commenced by the person were pending before the Tribunal at the person's death.
- (2) Section 2 (2) (d) of the *Law Reform (Miscellaneous Provisions) Act 1944* does not apply in relation to proceedings commenced by a person before his or her death and pending before the Tribunal at his or her death, where the cause of action is for damages in respect of a dust-related condition.

[5] Section 12C

Insert as section 12C:

12C Effect of settlement on proceedings by or against joint and several tortfeasors

- (1) For the avoidance of doubt, settlement with one or more joint tortfeasors in or in relation to proceedings before the Tribunal and who are liable in respect of damage as a result of a dust-related condition is not a bar to recovery against one or more other joint tortfeasors (whether or not they are defendants in the proceedings), unless the terms of the settlement otherwise provide.

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- (2) A tortfeasor who settles proceedings before the Tribunal that are brought against the tortfeasor by a plaintiff in respect of damage as a result of a dust-related condition is not precluded from recovering contribution in respect of that same damage under section 5 (1) (c) of the *Law Reform (Miscellaneous Provisions) Act 1946* from any other tortfeasor (whether a joint tortfeasor or otherwise) who is not a party to the settlement only because a judgment giving effect to that settlement has been entered in favour of the plaintiff without the Tribunal having considered the merits of the case.
 - (3) This section does not affect the operation or interpretation of section 5 (1) (a) of the *Law Reform (Miscellaneous Provisions) Act 1946*.

[6] Section 12D

Insert as section 12D:

12D Damages for non-economic loss not to be reduced by certain compensation payments

- (1) This section applies to proceedings before the Tribunal (including proceedings on an appeal from the Tribunal) for damages in relation to dust-related conditions.
- (2) In determining damages for non-economic loss in any such proceedings, no deduction is to be made for any amount of compensation already paid or payable, or payable in the future, under the *Workers' Compensation (Dust Diseases) Act 1942*.
- (3) In this section:

damages for non-economic loss means damages or compensation for the following:

- (a) pain and suffering,
- (b) loss of amenities of life,
- (c) loss of expectation of life,

- (d) disfigurement,
- (e) the need for services of a domestic nature or services relating to nursing and attendance which have been or are to be provided to a person by another person, and for which the first person has not paid and is not liable to pay any fee or charge.

[7] Section 25A

Insert after section 25:

25A Material already obtained

- (1) Material obtained for the purposes of proceedings before the Tribunal by discovery or interrogatories may:
 - (a) with the leave of the Tribunal, and
 - (b) with the consent of:
 - (i) subject to subparagraph (ii), the party who originally obtained the material or the party's solicitors, or
 - (ii) another person prescribed by the rules,be used in other proceedings before the Tribunal, whether or not the proceedings are between the same parties.
- (2) The rules may provide that subsection (1) does not apply in specified kinds of proceedings or in specified circumstances.

[8] Section 25B

Insert as section 25B:

25B General issues already determined

- (1) Issues of a general nature determined in proceedings before the Tribunal (including proceedings on an appeal from the Tribunal) may not be relitigated or reargued in other proceedings before the Tribunal without the leave of the Tribunal, whether or not the proceedings are between the same parties.

- (2) In deciding whether to grant leave for the purposes of subsection (1), the Tribunal is to have regard to:
 - (a) the availability of new evidence (whether or not previously available), and
 - (b) the manner in which the other proceedings referred to in that subsection were conducted, and
 - (c) such other matters as the Tribunal considers to be relevant.
- (3) The rules may provide that subsection (1) does not apply in specified kinds of proceedings or in specified circumstances or (without limitation) in relation to specified kinds of issues.
- (4) This section does not affect any other law relating to matters of which judicial notice can be taken or about which proof is not required.

[9] Section 32E Meetings of the Rule Committee

Omit section 32E (7). Insert instead:

- (7) The President may, subject to any decision of the Rule Committee under subsection (1), call meetings of the Rule Committee as and when the President thinks necessary.

[10] Section 33 Rules

Insert at the end of section 33 (4) (k):

, and

- (l) requiring a plaintiff to file and serve on other parties a notice of particulars or further particulars of a specified class or description (verified as prescribed by the rules):
 - (i) at the time the plaintiff applies for an expedited hearing or within a specified period before or after making such an application, and
 - (ii) at any other specified stage of the proceedings, and

- (m) where there is more than one alleged tortfeasor:
 - (i) requiring a plaintiff who settles a claim with one or more but not all the alleged tortfeasors (before or after the proceedings were commenced) to file the terms of settlement and particulars of amounts paid under the settlement, and
 - (ii) authorising the disclosure, by the Tribunal or by a member, registrar or officer of the Tribunal, of any terms and particulars filed by a plaintiff to another party to the proceedings, whether or not the terms contain non-disclosure requirements, and
 - (iii) specifying the circumstances in which, and the matters that are to be taken into consideration before which, any such disclosure may be made, and
- (n) empowering the Tribunal to order that all or any of the provisions of section 151AC of the *Workers Compensation Act 1987* do not apply in or in relation to a particular case:
 - (i) on its own motion, or
 - (ii) on application by a party or by an insurer who is not a party and on its being satisfied as to specified matters.

[11] Part 5

Insert after Part 4:

Part 5 Arbitration

38 Arbitration for insurance purposes

- (1) The rules may make provision for or with respect to the arbitration of disputes as to the liability of insurers as referred to in section 151AC of the *Workers Compensation Act 1987*.

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- (2) In particular, the rules may make provision for or with respect to:
- (a) the appointment of a member, registrar or other officer of the Tribunal, or another person approved by the President, as an arbitrator or referee, and
 - (b) the reference of disputes to arbitration, and
 - (c) the determination of the kinds of premises where arbitrations can be conducted and, if relevant, the provision of the services of officers of the Tribunal and the provision of court rooms and other facilities for the purposes of an arbitration, and
 - (d) requiring the plaintiff and other persons to give evidence at an arbitration, and
 - (e) the joinder of insurers and other persons as parties to the arbitration, including insurers and persons who were not parties to the original proceedings before the Tribunal, and
 - (f) the determination and payment of arbitration fees and expenses (including for example the cost of hiring premises) and the persons by whom the whole or any part of any such fees and expenses are to be paid, and
 - (g) the determination and payment of costs incurred in an arbitration, and
 - (h) the manner in which a determination of an arbitrator may be called in question, and whether or not, or to what extent, a determination may be called in question on a matter of fact or law, and
 - (i) any other matters associated with an arbitration.
- (3) An arbitrator or referee has power to determine issues for the purpose of resolving any such dispute.
- (4) Subject to any rules made under subsection (2) (h), the Tribunal, on application made to it by any party within the period prescribed by the rules, may set aside a determination made by an arbitrator or referee and may:

- (a) refer the determination back to the arbitrator or referee who made it, or
- (b) revoke the reference to the arbitrator or referee who made the determination and make such order as it thinks fit for the continuance of the matter.

39 Other statutory provisions not affected

Nothing in this Part affects any other Act that enables the reference of actions or other matters to arbitration.

[12] Part 6

Insert as Part 6:

Part 6 Interim payments

Division 1 Preliminary

40 Definitions

In this Part:

designated insurer means a designated insurer referred to in section 151AC of the *Workers Compensation Act 1987*.

inter-insurer dispute means a dispute referred to in section 151AC of the *Workers Compensation Act 1987*, whether or not persons who are not insurers are involved.

Division 2 Interim payments, where no inter-insurer dispute

41 Interim payments before assessment of damages, where no inter-insurer dispute

- (1) Without affecting the generality of section 10 (4) of this Act, Division 2 of Part 5 of the *Supreme Court Act 1970* applies in relation to proceedings before the Tribunal, as if references in that Division to the Supreme Court were references to the Tribunal.

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- (2) That Division extends to proceedings before the Tribunal in relation to any liability of an employer to or in respect of whom section 151AB of the *Workers Compensation Act 1987* applies.
 - (3) However, that Division does not apply to any claim in respect of which an inter-insurer dispute remains unresolved.

Division 3 Interim payments, where inter-insurer dispute

42 Definition

In this Division:

interim payment means payment of a part or the whole of damages by a designated insurer:

- (a) in accordance with an order of the Tribunal under section 43, or
- (b) voluntarily.

43 Interim payments before or after assessment of damages where inter-insurer dispute

- (1) While an inter-insurer dispute remains unresolved, the Tribunal may, in accordance with this section, order a designated insurer who is a party to the dispute to make one or more payments to the plaintiff of part or the whole of the damages sought to be recovered in the proceedings concerned.
- (2) The Tribunal may make such an order against a designated insurer on the application of the plaintiff at any stage of the proceedings or at any time during the currency of the dispute (whether before or after judgment has been obtained, and whether before or after damages have been assessed).
- (3) The Tribunal may make such an order if:
 - (a) the defendant or the designated insurer has admitted liability, or

Schedule 1 Amendment of Dust Diseases Tribunal Act 1989 No 63

- (b) the plaintiff has obtained judgment against the defendant (whether or not damages have been assessed), or
 - (c) the Tribunal is satisfied that, if the proceedings proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant.
- (4) The Tribunal may order a designated insurer to make one or more payments of such amounts as it thinks just but not exceeding:
- (a) if damages have not been assessed—a reasonable proportion of the damages that in the opinion of the Tribunal are likely to be recovered by the plaintiff, or
 - (b) if damages have been assessed—the amount of damages as assessed.
- (5) In estimating damages that have not been assessed, the Tribunal is to take into account any relevant contributory negligence or any cross-claims on which the defendant may be entitled to rely.

44 Interim payment not admission of liability, where inter-insurer dispute

- (1) The fact that a designated insurer makes one or more interim payments is not of itself an admission of liability by the defendant or the designated insurer.
- (2) The making of, or refusal to make, an order under section 43 is not a finding as to liability in respect of the proceedings.

45 Adjustments, where inter-insurer dispute, before assessment of damages

- (1) This section applies to proceedings in which a designated insurer makes one or more interim payments before damages are assessed.

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- (2) The Tribunal or an arbitrator or referee may make such orders with respect to the interim payments as may be just, and in particular may order one or more of the following:
- (a) the repayment by the plaintiff of all or part of any interim payment, with or without interest,
 - (b) the variation or discontinuance of any such payments,
 - (c) the payment by another party to the proceedings of all or part of any interim payment that the defendant is entitled to recover from that party.
- (3) The Tribunal may make an order under this section:
- (a) in making a final judgment or order, or
 - (b) in granting the plaintiff leave to discontinue the proceedings or to withdraw the claim, or
 - (c) on the application of any party, at any other stage in the proceedings.
- (4) Subject to any direction of the Tribunal, an arbitrator or referee may make an order under this section in the course of an arbitration under section 38, on the application of any party.

46 Adjustments, where inter-insurer dispute, after assessment of damages

- (1) This section applies where a designated insurer makes one or more interim payments after damages are assessed.
- (2) The Tribunal or an arbitrator or referee may make such orders with respect to the interim payments as may be just, and in particular may order reimbursement of the designated insurer by another insurer to the dispute concerned for all or part of any interim payment, with or without interest.

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- (3) In making any such orders, the Tribunal or the arbitrator or referee is to have regard to the provisions of section 151AC of the *Workers Compensation Act 1987* and to such other matters as the Tribunal considers to be relevant.
- (4) The Tribunal may make such an order on the application of any party.
- (5) Subject to any direction of the Tribunal, an arbitrator or referee may make such an order in the course of an arbitration under section 38, on the application of any party.

[13] Schedule 3 Savings, transitional and other provisions

Insert "**Part 1 Preliminary**" before clause 1.

Insert "**Part 2 Courts Legislation Amendment Act 1995**" before clause 2.

Insert "**Part 3 Courts Legislation Further Amendment Act 1995**" before clause 3.

Insert "**Part 4 Courts Legislation Amendment Act 1998**" after clause 3.

[14] Schedule 3, clause 1 Regulations

Insert at the end of clause 1 (1):

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

[15] Schedule 3, Part 5

Insert at the end of Schedule 3:

**Part 5 Workers Compensation Legislation
Amendment (Dust Diseases and Other
Matters) Act 1998**

5 Definition

In this Part:

amending Act means the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*.

6 President

- (1) The person holding office as Senior Member of the Tribunal immediately before the commencement of the amendment of section 7 by the amending Act is taken to have been appointed as President.
- (2) Anything done or omitted to be done by, to or in relation to the Senior Member of the Tribunal is taken to have been done or omitted to be done by, to or in relation to the President.
- (3) A reference in any other Act, statutory instrument or other document of any kind to the Senior Member of the Tribunal is taken to be or to include a reference to the President.

7 No limitation period

- (1) Section 12A, which was inserted by the amending Act, applies in relation to causes of action arising before or after the commencement of that section, and extends to proceedings pending at that commencement.
- (2) However, section 12A does not apply in relation to a cause of action to the extent that proceedings on the cause of action have been determined before the commencement of that section.

8 Damages for non-economic loss after death of plaintiff

- (1) Section 12B, which was inserted by the amending Act, extends so that it applies in relation to the following proceedings:
 - (a) proceedings commenced before the commencement of that section and pending at that commencement,
 - (b) proceedings commenced before the commencement of that section, where the person died before 7 May 1998 and the proceedings:
 - (i) were pending at the date of death, and

- (ii) were still pending on 7 May 1998,
 - (c) proceedings commenced before the commencement of that section, where the person died on or after 7 May 1998 and the proceedings were pending at the date of death.
- (2) Section 12B applies in relation to proceedings commenced after the commencement of that section, whether the cause of action arose before or arises after that commencement.
 - (3) However, section 12B does not apply in relation to a cause of action to the extent that proceedings on the cause of action have been determined before the commencement of that section.

9 Application of section 12C on previous settlements

- (1) Section 12C, which was inserted by the amending Act, applies in relation to causes of action arising before or after the commencement of that section.
- (2) Section 12C (2) extends to proceedings pending at that commencement, but does not apply to proceedings that have been settled before that commencement.

10 Damages for non-economic loss not to be reduced by certain compensation payments

- (1) Section 12D, which was inserted by the amending Act, applies in relation to causes of action arising before or after the commencement of that section, and extends to proceedings pending at that commencement.
- (2) However, section 12D does not apply in relation to a cause of action to the extent that proceedings on the cause of action have been determined before the commencement of that section.

11 Material already obtained

- (1) Section 25A, which was inserted by the amending Act, applies in relation to causes of action arising before or after the commencement of that section, but does not apply in relation to proceedings pending at that commencement.
- (2) Section 25A does not apply to material obtained by discovery or interrogatories before the commencement of that section.

12 Issues already determined

- (1) Section 25B, which was inserted by the amending Act, applies in relation to causes of action arising before or after the commencement of that section, but does not apply in relation to proceedings pending at that commencement. However, section 25B does apply to issues that have been or are determined in proceedings pending at the commencement of that section to prevent those issues from being relitigated or reargued, without the leave of the Tribunal, in other subsequent proceedings.
- (2) Subject to any rules to the contrary made under section 25B (3), section 25B applies to issues determined before the commencement of that section.

**Schedule 2 Amendment of Law Reform
(Miscellaneous Provisions) Act 1944
No 28**

(Section 3)

Section 2 Effect of death on certain causes of action

Insert after section 2 (6):

- (7) This section has effect subject to section 12B of the *Dust Diseases Tribunal Act 1989*.

Schedule 3 Amendment of Law Reform (Miscellaneous Provisions) Act 1946 No 33

(Section 3)

Section 6 Amount of liability to be charge on insurance moneys payable against that liability

Insert after section 6 (8):

- (9) Despite subsection (8), this section applies in relation to a policy of workers compensation insurance entered into by an employer (whether entered into before or after the commencement of this subsection), where the employer:
- (a) being a natural person, has died, or is permanently resident outside the Commonwealth and its Territories, or cannot after due inquiry and search be found, or
 - (b) being a corporation (other than a company that has commenced to be wound up), has ceased to exist, or
 - (c) being a company, corporation, society, association or other body (other than a company that has commenced to be wound up), was at the time when it commenced to employ workers to which the policy relates incorporated outside the Commonwealth and its Territories and registered as a foreign company under the laws of any State or Territory and is not so registered under any such law, or
 - (d) being a company, is in the course of being wound up.

**Schedule 4 Amendment of Limitation Act 1969
No 31**

(Section 3)

Section 8 Saving of specified enactments

Insert at the end of the section:

- (2) This Act has effect subject to section 12A of the *Dust Diseases Tribunal Act 1989* and clause 7 of Schedule 3 to that Act.

Schedule 5 Amendment of Workers Compensation Act 1987 No 70

(Section 3)

[1] Section 31 Payment in respect of dependent children

Omit section 31 (1) (a) and (b). Insert instead:

- (a) be paid to the surviving parent of the child concerned, if there is one, or
- (b) be paid to the Public Trustee for the benefit of the child or to any person (approved by the Public Trustee) having the care or custody of the dependent child, if no such parent survives.

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

Omit paragraph (a) of the definition of *de facto spouse or other family member* in section 37 (7).

Insert instead:

- (a) in relation to:
 - (i) an injury received before the commencement of Schedule 5 [2] to the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*—although not legally married to the worker, lives with the worker as the worker's husband or wife on a permanent and genuine domestic basis, or
 - (ii) an injury received after that commencement—is the other party to a de facto relationship with the worker, or

[3] Section 85 Payments to Public Trustee for benefit of beneficiary

Omit section 85 (4). Insert instead:

- (4) A reference in subsection (3) to the widow or widower of a deceased worker includes a reference to a dependant of the worker who is the other party to a de facto relationship with the worker.

[4] Section 151AB Special insurance provisions relating to occupational diseases

Omit "this section" from section 151AB (6).
Insert instead "sections 151AB and 151AC".

[5] Section 151AC

Insert after section 151AB:

151AC Further special insurance provisions relating to dust diseases

(1) Application of this section

This section applies in relation to an employer who is liable independently of this Act for damages for a dust disease as defined by the *Workers' Compensation (Dust Diseases) Act 1942* contracted by a worker, where there is a dispute as to which of 2 or more insurers in a category of insurers is liable to indemnify the employer under any of the provisions of section 151AB.

(2) Designated insurer to be responsible pending resolution of dispute

For the purposes of section 151AB, and pending resolution of the dispute, the insurer who is the designated insurer in the relevant category under this section is to be treated as being the insurer who is so liable to indemnify the employer. Section 151AB has effect, and is to be construed, accordingly.

(3) Identification of designated insurer

The following provisions have effect for the purpose of determining which insurer among the following categories of insurers is the designated insurer for the purposes of this section:

- (a)** If, in the case of a liability that arose before the relevant commencement, there is a dispute as to which of 2 or more insurers is liable to indemnify the employer under section 151AB, the insurer

who was the last of those insurers to be the employer's insurer while the worker was employed before that commencement by that employer is the designated insurer.

- (b) If, in the case of a liability that arose after the relevant commencement, there is a dispute as to which of 2 or more insurers is liable to indemnify the employer under section 151AB, the insurer who was the last of those insurers to be the employer's insurer while the worker was employed after that commencement by that employer is the designated insurer.
 - (c) If, in the case of a liability that arose partly before and partly after the relevant commencement, there is a dispute as to which of 2 or more insurers is liable to indemnify the employer under section 151AB in respect of any liability that arose before that commencement, the insurer who was the last of those insurers to be the employer's insurer while the worker was employed before that commencement by that employer is the designated insurer.
 - (d) If, in the case of a liability that arose partly before and partly after the relevant commencement, there is a dispute as to which of 2 or more insurers is liable to indemnify the employer under section 151AB in respect of any liability that arose after that commencement, the insurer who was the last of those insurers to be the employer's insurer while the worker was employed after that commencement by that employer is the designated insurer.
- (4) However, the insurers in a category may agree as to which of them is to be the designated insurer or the Dust Diseases Tribunal can order that any one of them is to be the designated insurer, and any such agreement or order overrides subsection (3).

(5) **Designated insurer to act for other insurers**

In addition to the provisions of section 151AB:

- (a) where subsection (3) (a) or (b) applies—the designated insurer who is the insurer liable under section 151AB (1) is to act for all the insurers in the relevant category in the carriage of the insurance aspects of the claim, and
- (b) where subsection (3) (c) or (d) applies—the designated insurer who is the insurer who is primarily responsible under section 151AB (2) is to act for all the insurers in the 2 relevant categories in the carriage of the insurance aspects of the claim.

(6) **Other insurers can make submissions as to damages**

Despite subsection (5), if the damages payable to or in respect of the worker have not been assessed, any of the other insurers in dispute may, with the leave of the Dust Diseases Tribunal, make submissions to the Tribunal relating to the amount of damages payable.

(7) **Methods of resolving dispute**

The dispute may be resolved by such processes as the parties to the dispute agree or as are otherwise available.

(8) **Arbitration under special provisions**

However, if the dispute has not been resolved by the relevant time, it is to be resolved by arbitration under section 38 of the *Dust Diseases Tribunal Act 1989*, unless the Dust Diseases Tribunal otherwise orders (whether before or after the arbitration commences). The *relevant time* is:

- (a) subject to paragraph (b), the time when the total amount of damages is assessed and payable, or
- (b) if the designated insurer pays the total amount of damages assessed, together with all costs payable, to or in respect of the worker, such later time as one of the parties to the dispute notifies to the other party or parties to the dispute.

(9) **Nature of resolution of dispute**

For the purposes of this section, the dispute is not resolved until it has been determined which of the insurers in dispute was the insurer when the worker was last employed at the relevant time by the employer in an employment to the nature of which the disease was due. That insurer is referred to in the following provisions of this section as an *insurer who is liable*.

(10) **Adjustment after resolution of dispute**

If, on resolution of the dispute, it is determined that a designated insurer is not an insurer who is liable, then (in addition to any other liabilities) the insurer who is liable:

- (a) is liable to reimburse or indemnify the designated insurer for any amounts already paid by the designated insurer in that capacity (including any amounts paid on an interim basis), and
- (b) is liable to reimburse or indemnify the employer for any costs of the worker already ordered by the Dust Diseases Tribunal, and
- (c) is (subject to any order of the Dust Diseases Tribunal) liable to pay the reasonable costs of any of the insurers in dispute incurred in earlier proceedings before the Tribunal because the insurer who is liable disputed liability (thereby giving rise wholly or in part to the dispute), and
- (d) without affecting the generality of paragraph (c), is (subject to any order of the Dust Diseases Tribunal) liable to pay the reasonable costs of any of the insurers in dispute (other than the designated insurer) incurred in any such earlier proceedings in making submissions to the Tribunal relating to the amount of damages payable to or in respect of the worker.

- (11) If, on resolution of the dispute, it is determined that a designated insurer is an insurer who is liable, then (in addition to any other liabilities) the insurer who is liable:
- (a) is liable to reimburse or indemnify the employer for any costs of the worker already ordered by the Dust Diseases Tribunal, and
 - (b) is (subject to any order of the Dust Diseases Tribunal) liable to pay the reasonable costs of any of the insurers in dispute incurred in earlier proceedings before the Tribunal because the insurer who is liable disputed liability (thereby giving rise wholly or in part to the dispute), and
 - (c) without affecting the generality of paragraph (b), is (subject to any order of the Dust Diseases Tribunal) liable to pay the reasonable costs of any of the insurers in dispute incurred in any such earlier proceedings in making submissions to the Tribunal relating to the amount of damages payable to or in respect of the worker.
- (12) **Parties to dispute**
An insurer may be or become a party to the dispute even though the insurer was not a party to or represented in the original proceedings before the Dust Diseases Tribunal. Without limiting the foregoing, an insurer becomes a party to the dispute on being joined as a party to an arbitration under section 38 of the *Dust Diseases Tribunal Act 1989*.
- (13) **Rules**
This section has effect subject to orders of the Dust Diseases Tribunal under rules referred to in section 33 (4) (n) of the *Dust Diseases Tribunal Act 1989*.
- (14) **Transitional**
This section applies to causes of action arising before or after the commencement of this section, and extends to proceedings instituted before that commencement but only if no hearing in the proceedings has started before that commencement.

(15) **Definition**

In this section:

category of insurers means the category consisting of the insurers in dispute as referred to in a paragraph of subsection (3).

[6] Schedule 6, Part 20

Insert at the end of clause 1 (1):

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

Schedule 6 Amendment of Workers' Compensation (Dust Diseases) Act 1942 No 14

(Section 3)

[1] Section 3 Definitions

Omit the definitions of *Widow* and *Widower* from section 3 (1).

[2] Section 3 (1)

Insert in alphabetical order:

De facto relationship means the relationship between two unrelated adult persons:

- (a) who have a mutual commitment to a shared life, and
- (b) whose relationship is genuine and continuing, and
- (c) who live together,

and who are not married to one another.

Spouse of a person means:

- (a) where the claim for compensation concerned was made by or in relation to the person before the commencement of Schedule 6 [2] to the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*—a husband or wife of the person, or
- (b) where the claim for compensation concerned was made by or in relation to the person after that commencement:
 - (i) a husband or wife of the person, or
 - (ii) the other party to a de facto relationship with the person.

[3] Section 3 (2) and (3)

Insert at the end of section 3:

- (2) For the purposes of determining whether two persons are in a de facto relationship for the purposes of this Act, all the circumstances of the relationship are to be taken into account, including (but not limited to) matters prescribed by the regulations for the purposes of this subsection.
- (3) The following provisions have effect for the purposes of this section:
 - (a) Persons are *related* if:
 - (i) one is the parent, or another ancestor, of the other, or
 - (ii) one is the child, or another descendant, of the other, or
 - (iii) they have a parent in common.
 - (b) For the purposes of paragraph (a):
 - (i) a person is taken to be an ancestor or descendant of another person even if the relationship between them is traced through, or to, a person who is or was an adopted child, and
 - (ii) the relationship of parent and child between an adoptive parent and an adopted child is taken to continue even though the order by which the adoption was effected has been annulled, cancelled or discharged or the adoption has otherwise ceased to be effective, and
 - (iii) the relationship between an adopted child and the adoptive parent, or each of the adoptive parents, is taken to be or to have been the natural relationship of child and parent, and

(iv) a person who has been adopted more than once is taken to be the child of each person by whom he or she has been adopted.

(c) In paragraph (b), *adopted* means adopted under the law of any place, whether in Australia or not, relating to the adoption of children.

[4] Section 5 Workers' Compensation (Dust Diseases) Board

Omit "2" where twice occurring in section 5 (1) (a).
Insert instead "3".

[5] Section 5 (2A)

Omit "chairperson" and "chairperson's" in each case where secondly occurring.
Insert instead "person" and "person's" respectively.

[6] Section 6 Constitution of Fund

Omit section 6 (2A). Insert instead:

(2A) The board is authorised to make from the fund:

- (a) grants for the purpose of clinical or research work relating to the prevention and treatment of dust diseases or for any other purpose relating to the prevention and treatment of dust diseases, and
- (b) grants for the purpose of providing assistance to groups or organisations that provide support for victims of dust diseases or their families.

[7] Section 8 Certificate of medical authority and rates of compensation

Insert "of the person" after "children" in section 8 (2AA).

[8] Section 8 (2B) (a) (i) and (ii)

Omit the subparagraphs. Insert instead:

- (i) a prescribed relative of the worker, or
- (ii) a surviving spouse and a child or children of the worker.

[9] Section 8 (2B) (b) (ii)

Omit "a weekly payment".

Insert instead "in the case of a surviving spouse—a weekly payment".

[10] Section 8 (2B) (b) (iii)

Omit "subject".

Insert instead "in the case of a surviving spouse and subject".

[11] Section 8 (2D) (b) and (2E) (b)

Omit "widow or widower" wherever occurring.

Insert instead "surviving spouse".

[12] Section 8 (9)

Insert after section 8 (8):

- (9) In this section:

prescribed relative of a person means:

- (a) where the person died before the commencement of Schedule 6 [12] to the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*—a surviving spouse of the person, or
- (b) where the person dies after that commencement:
 - (i) a surviving spouse of the person, or

- (ii) if there is no surviving spouse of the person—a father, mother, grandfather, grandmother, step-father, step-mother, grandson, granddaughter, brother, sister, half-brother or half-sister of the person.

[13] Section 8E

Insert after section 8D:

8E Reimbursement of compensation from negligent third parties

(1) **Purpose of section**

The purpose of this section is to provide the board with rights to be reimbursed for compensation paid or payable by it where damages are recovered or recoverable, being rights that correspond in certain respects to those available to an employer (or an employer's insurer) under section 151Z of the *Workers Compensation Act 1987*.

(2) **Application of section**

This section applies where a worker suffers disablement or death from a dust disease.

(3) **Reimbursement where damages recovered**

If:

- (a) a person (the *first person*) recovers damages from some other person (the *second person*) in respect of the disablement or death pursuant to the final determination of the relevant proceedings, and
- (b) there is deducted from the damages the amount of any compensation already paid to the first person under this Act, or the present value of future benefits payable to the first person under this Act, or both,

the following provisions have effect:

- (c) the second person is liable to pay to the board an amount equal to the amount or amounts so deducted,
- (d) the amount that the second person is liable to pay under this subsection is payable within 42 days after recovery of the damages or within such other period as is prescribed by the regulations or as is (subject to the regulations) allowed by the board,
- (e) the amount that the second person is liable to pay under this subsection, or any unpaid portion of it, together with interest as prescribed by the regulations, is recoverable by the board in a court of competent jurisdiction as a debt owing to the board.

(4) **Reimbursement where damages not sought to be recovered**

If:

- (a) the dust disease for which compensation is payable under this Act to a person (the *first person*) was caused under circumstances creating a liability in some other person (the *second person*) to pay damages for economic loss in respect of the disablement or death, and
- (b) the first person has not recovered any such damages, and proceedings are not pending for their recovery, and
- (c) the first person has received compensation under this Act,

the following provisions have effect:

- (d) the board may but is not required to take action to be indemnified, by the second person, for the amount of any compensation already paid to the first person under this Act, being an indemnity limited to the amount of those damages.

- (e) a certificate executed by the board and certifying that a specified amount is the amount of compensation paid as referred to in paragraph (d) is (without proof of its execution) admissible in any proceedings and is evidence of the matters certified in the certificate,
 - (f) if two or more persons are so liable to pay those damages, they are jointly and severally liable under the indemnity,
 - (g) all questions relating to matters arising under this subsection are, in default of agreement, to be settled by proceedings in the Dust Diseases Tribunal or by arbitration if the Tribunal so orders.
- (5) **Persons affected by section**
For the purposes of this section:
- (a) a "first person" can be the worker or another person, and
 - (b) a "second person" cannot be the worker's employer.
- (6) **Joint liability—employer**
If:
- (a) the first person takes or is entitled to take proceedings to recover damages from the worker's employer as joint tortfeasor or otherwise, in addition to taking or being entitled to take proceedings to recover damages from the second person, and
 - (b) the second person is entitled to recover from the worker's employer any contribution towards the damages recovered or would be entitled to do so if proceedings to recover those damages were taken,

the following provisions have effect:

- (c) the amount that the second person is liable to pay to the board under subsection (3) or the amount for which the second person can be required to indemnify the board under subsection (4) is to be reduced by the same proportion as that contribution bears to the amount of those damages,
 - (d) the second person is not entitled to recover from the worker's employer any contribution towards the amount paid or payable to the board by the second person.
- (7) **Joint liability—non-employer**
If:
- (a) the first person takes or is entitled to take proceedings to recover damages from another person as joint tortfeasor or otherwise (not being the worker's employer), in addition to taking proceedings to recover damages from the second person, and
 - (b) the second person is entitled to recover from that other person any contribution towards the damages recovered,

the following provisions have effect:

- (c) the second person is entitled to recover from that other person a contribution towards the amount that the second person is liable to pay under subsection (3), being a contribution that bears the same proportion to that amount as the contribution towards the damages recovered bears to the amount of those damages,
- (d) the second person is entitled to recover from that other person that contribution towards the amount paid or payable to the board by the second person,

(e) the second person is entitled to recover that contribution whether or not that other person is or was a party to the proceedings taken by the first person to recover the damages from the second person.

(8) **Determination of amount of compensation**

In cases where damages were paid otherwise than under an award or judgment, the amount of compensation referred to in subsection (3) is, if the regulations so provide, to be determined in accordance with or subject to such principles as are specified or referred to in the regulations.

(9) **Regulations**

The regulations may make provision for or with respect to the following:

- (a) determining the amount of compensation in cases referred to in subsection (8),
- (b) requiring parties to notify the board of prescribed particulars concerning prescribed classes of awards, judgments, settlements or agreements in cases to which this section relates,
- (c) exempting any case or class of cases from the operation of the whole or any specified provisions of this section.

(10) **Definitions**

In this section:

damages means damages whether or not payable under an award or judgment, and includes damages payable under a settlement, but does not include damages of a class excluded by the regulations from this definition.

damages for economic loss means damages other than damages for non-economic loss as defined in section 12D of the *Dust Diseases Tribunal Act 1989*.

employer, in relation to a worker, means a person who was the worker's employer at any relevant time, and includes:

- (a) a person who is vicariously liable for the acts of the employer, and
- (b) a person for whose acts the employer is vicariously liable.

[14] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

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

[15] Schedule 2, Part 3

Insert after Part 2:

Part 3 Provisions consequent on enactment of Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998

8 Definition

In this Part:

amending Act means the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*.

9 Reimbursement of compensation—insurance policies

- (1) If a person liable to pay an amount to the board under subsection (3) of section 8E (which was inserted by the amending Act) or required to indemnify the board for an amount under subsection (4) of that section is or was covered by a policy of insurance or indemnity (issued or effective before the commencement of that section) in respect of the damages recovered or recoverable by another person, the following provisions have effect:

- (a) The policy is taken also to cover that liability to pay the amount to the board or that requirement to indemnify the board.
 - (b) However, the policy remains subject to any monetary limits in respect of the maximum amount payable by the insurer in respect of any relevant cause of action.
- (2) Subclause (1) applies in relation to causes of action arising before but not after the commencement of section 8E.
 - (3) However, subclause (1) does not apply in relation to a cause of action where proceedings were determined before the commencement of section 8E.

10 Reimbursement of compensation—causes of action

- (1) Section 8E (which was inserted by the amending Act) applies in relation to causes of action arising before or after the commencement of that section, including where proceedings were pending at that commencement.
- (2) However, section 8E does not apply in relation to a cause of action where proceedings were determined before the commencement of that section.

Schedule 7 Amendment of Workplace Injury Management and Workers Compensation Act 1998 No 86

(Section 3)

[1] Section 4 Definitions

Insert in alphabetical order in section 4 (1):

de facto relationship means the relationship between two unrelated adult persons:

- (a) who have a mutual commitment to a shared life, and
- (b) whose relationship is genuine and continuing, and
- (c) who live together,

and who are not married to one another.

spouse of a person means:

- (a) in relation to an injury received before the commencement of Schedule 7 to the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*—a husband or wife of the person, or
- (b) in relation to an injury received after that commencement:
 - (i) a husband or wife of the person, or
 - (ii) the other party to a *de facto* relationship with the person.

[2] Section 4 (1) definition of “dependants”

Omit paragraph (c). Insert instead:

- (c) a person so dependent who:
 - (i) in relation to an injury received before the commencement of Schedule 7 to the *Workers Compensation Legislation Amendment (Dust Diseases and Other*

Schedule 7 Amendment of Workplace Injury Management and Workers
Compensation Act 1998 No 86

Matters) Act 1998—although not legally married to the worker, lived with the worker as the worker’s husband or wife on a permanent and genuine domestic basis, or

- (ii) in relation to an injury received after that commencement—is the other party to a de facto relationship with the worker.

[3] Section 4 (4) and (5)

Insert after section 4 (3):

(4) **De facto relationship**

For the purposes of determining whether two persons are in a de facto relationship for the purposes of this Act, all the circumstances of the relationship are to be taken into account, including (but without being limited to) matters prescribed by the regulations for the purposes of this subsection.

(5) **Meaning of “related”**

The following provisions have effect for the purposes of this section:

(a) Persons are *related* if:

- (i) one is the parent, or another ancestor, of the other, or
- (ii) one is the child, or another descendant, of the other, or
- (iii) they have a parent in common.

(b) For the purposes of paragraph (a):

- (i) a person is taken to be an ancestor or descendant of another person even if the relationship between them is traced through, or to, a person who is or was an adopted child, and

- (ii) the relationship of parent and child between an adoptive parent and an adopted child is taken to continue even though the order by which the adoption was effected has been annulled, cancelled or discharged or the adoption has otherwise ceased to be effective, and
 - (iii) the relationship between an adopted child and the adoptive parent, or each of the adoptive parents, is taken to be or to have been the natural relationship of child and parent, and
 - (iv) a person who has been adopted more than once is taken to be the child of each person by whom he or she has been adopted.
- (c) In paragraph (b), ***adopted*** means adopted under the law of any place, whether in Australia or not, relating to the adoption of children.

[Minister's second reading speech made in—
Legislative Assembly on 29 October 1998
Legislative Council on 17 November 1998]

