

**WORKERS COMPENSATION (AMENDMENT) ACT 1991
No. 2**

NEW SOUTH WALES



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WORKERS COMPENSATION (AMENDMENT) ACT 1991
No. 2

NEW SOUTH WALES



Act No. 2, 1991

An Act to amend the Workers Compensation Act 1987 in relation to the rehabilitation of injured workers, retrospective common law claims and workers compensation insurers, and for other purposes. [Assented to 26 March 1991]

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Workers Compensation (Amendment) Act 1991.

Commencement

2. (1) This Act commences on a day or days to be appointed by proclamation, except as provided by this section.

(2) Schedule 2, and section 3 in its application to that Schedule, are taken to have commenced on 1 February 1990.

Amendment of Workers Compensation Act 1987 No. 70

3. The Workers Compensation Act 1987 is amended as set out in Schedules 1-4.

Explanatory notes

4. Matter appearing under the heading "Explanatory note" in Schedules 1-4 does not form part of this Act.

**SCHEDULE 1 - AMENDMENTS RELATING TO
REHABILITATION OF INJURED WORKERS**

(Sec. 3)

(1) Section 153 (**Vocational re-education etc. provided by Authority**):

At the end of section 153 (3) (b), insert:

; or

- (c) to provide financial assistance to employers or others who offer injured workers work-trial experience or other voluntary work as part of the workers' rehabilitation training (being assistance in connection with the cost of any necessary insurance arrangements relating to the workers or for other incidental expenses).

Explanatory note

The amendment authorises the WorkCover Authority to provide from its fund financial assistance to employers and others for costs (including insurance costs) associated with providing injured workers with work-trial experience and other voluntary work as part of their rehabilitation training.

SCHEDULE 1 - AMENDMENTS RELATING TO
REHABILITATION OF INJURED WORKERS - *continued*

(2) Section 153A:

After section 153, insert:

Second-injury scheme

153A. (1) The Authority is to institute and administer under section 153 a scheme (to be called "the second-injury scheme") to encourage the employment of injured workers by providing financial incentives to their employers in connection with insurance liabilities arising from further injuries to the workers.

(2) The second-injury scheme applies to such injured workers as are approved by the Authority as being suitable for inclusion in the scheme.

(3) Any such approval:

- (a) applies to such employment of the injured worker as is specified in the approval (including employment that is limited to, or excludes, employment with particular employers); and
- (b) applies for a period of 6 months of any such employment or such other period as is specified in the approval; and
- (c) applies to all injuries or only to particular injuries, or injuries of a class, specified in the approval; and
- (d) is subject to any other conditions imposed by the Authority.

(4) If the second-injury scheme applies to an injured worker:

- (a) the employer of the worker is not required under section 160 to repay the first \$500 (or other agreed amount) of any claim paid under a policy of insurance for compensation for an injury to the worker to which the scheme applies; and
- (b) any such claim (or any liability of the employer independently of this Act for that injury) is to be excluded from the claims experience of the employer for the purposes of calculating the

**SCHEDULE 1 - AMENDMENTS RELATING TO
REHABILITATION OF INJURED WORKERS - *continued***

premium payable by the employer for a policy of insurance.

- (5) Subsection (4) is subject to:
 - (a) the regulations; and
 - (b) the terms and conditions of the Authority's approval for the inclusion of the injured worker in the second-injury scheme; and
 - (c) any other limitation imposed by the Authority when giving that approval.
- (6) The regulations may make provision for or with respect to the operation of the second-injury scheme.

Explanatory note

The amendment provides for the establishment by the WorkCover Authority of a "second-injury scheme" to encourage the employment of injured workers by providing financial incentives to their employers. Under the scheme the employer may be exempted from payment of the first \$500 of a claim for compensation arising from the employment of the injured worker (such as a claim for the aggravation of the existing injury) and is not liable for any increased premium for future policies of insurance arising from any such claim (or any related common law claim).

**SCHEDULE 2 - AMENDMENTS RELATING TO
RETROSPECTIVE COMMON LAW CLAIMS**

(Sec. 3)

- (1) Section 151G (**Damages for non-economic loss**):
 - Omit section 151G (6).

Explanatory note

Section 151G was inserted into the Principal Act in 1989 as part of the legislation that restored, retrospectively to 30 June 1987, common law rights to damages for serious work-related injuries. The section deals with the assessment of damages for non-economic loss ("pain and suffering" etc.) as follows:

- (a) maximum damages are limited to \$180,000;
- (b) no damages unless they exceed \$45,000;
- (c) damages of between \$45,000 and \$60,000 are reduced on a sliding scale.

**SCHEDULE 2 - AMENDMENTS RELATING TO
RETROSPECTIVE COMMON LAW CLAIMS - *continued***

Section 151G (6) limited further the recovery of such damages in the case of retrospective claims in the period 1987-1989 by increasing the figure of "\$45,000" to "\$75,000" and increasing the figure of "\$60,000" to "\$100,000". The amendment removes that further limitation and therefore enables the damages recoverable for non-economic loss in retrospective claims to be assessed in the same way as other claims. The amendment applies retrospectively from the date of commencement of section 151G.

- (2) **Section 151H (No damages for economic loss unless injury serious):**

Omit section 151H (3).

Explanatory note

Section 151H was inserted into the Principal Act in 1989 as part of the legislation that restored, retrospectively to 30 June 1987, common law rights to damages for serious work-related injuries. The section prevents the award of damages for economic loss (loss of earnings, medical expenses etc.) unless:

- (a) the worker has suffered a permanent injury (referred to in the "Table of Disabilities" in Division 4 of Part 3) for which the compensation payable is at least 33% of the maximum compensation under that Table; or
- (b) the worker has been awarded damages for non-economic loss of at least \$60,000; or
- (c) the worker dies as a result of the injury.

Section 151H (3) limited further the recovery of such damages in the case of retrospective claims in the period 1987-1989 by increasing the percentage of "33%" to "60%" and increasing the figure of "\$60,000" to "\$100,000". The amendment removes that further limitation and therefore enables the damages recoverable for economic loss in retrospective claims to be assessed in the same way as other claims. The amendment applies retrospectively from the date of commencement of section 151H.

- (3) **Section 151W:**

Omit the section, insert instead:

**Time limit for commencement of court proceedings
extended**

151W. In the application of section 151D to an injury received before the date of assent to the Workers Compensation (Amendment) Act 1991, the injury is to be taken to have been received on that date.

SCHEDULE 2 - AMENDMENTS RELATING TO
RETROSPECTIVE COMMON LAW CLAIMS - *continued*

Explanatory note

The amendment extends the time limits set out in section 151D of the Principal Act for the commencement of court proceedings on retrospective common law claims. As a result of the amendments made by this Schedule, the time limits are to run from the date of assent to the proposed Act instead of the commencement of the amendments for the restoration of common law rights.

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS

(Sec. 3)

(1) Section 177 (**Applications for licences**):

After section 177 (4), insert:

(5) An application is to be accompanied by such fee (if any) as is prescribed by the regulations or (subject to the regulations) as is determined by the Authority. Any such fee is to be paid into the WorkCover Authority Fund.

Explanatory note

The amendment authorises the imposition of a fee to be paid by an applicant for a licence to issue workers compensation insurance policies.

(2) Section 185:

Omit the section, insert instead:

Assignment of policies of former insurers etc.

185. (1) In this section:

"**former insurer**" means a former licensed insurer whose licence has ceased to be in force by cancellation, suspension or the expiry of the term of the licence.

(2) The Authority may assign all or any class of policies of insurance of a former insurer to a licensed insurer nominated by the Authority.

(3) Policies of insurance may be assigned under this section by notice served by the Authority on the former insurer concerned.

(4) All money standing to the credit of the statutory funds of the former insurer to which the policies of

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

insurance relate is to be paid to the licensed insurer to which the policies are assigned, and may be recovered by the Authority or that licensed insurer as a debt in a court of competent jurisdiction.

(5) If the policies of insurance to which a statutory fund relates are not all assigned to a particular licensed insurer, the Authority may, by notice in writing to the former insurer, determine the respective amounts to be paid from the fund to the licensed insurers to which the policies are assigned.

(6) If the amount to be paid from a statutory fund of a former insurer includes any investment, the Authority may require the former insurer to execute the necessary documents to enable the investment to be transferred under this section.

(7) An assignment of an insurance policy under this section:

- (a) transfers the rights, obligations and liabilities under the policy of the former insurer to the licensed insurer to which the policy is assigned; and
- (b) does not otherwise affect the rights, obligations or liabilities acquired, accrued or incurred under the policy.

(8) For the purposes of this Act, any such assigned policy is to be taken to have been issued or renewed by the licensed insurer to which it is assigned.

Explanatory note

The amendment is designed to ensure the effective administration of claims under policies issued by licensed insurers which cease to be licensed. Under the amendment, the WorkCover Authority is authorised to assign the policies concerned to other current licensed insurers. At present section 185 permits assignment, but only in respect of the balance of the current period of a policy.

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

(3) Section 197 (**Application of statutory funds**):

(a) After section 197 (h), insert:

(h1) the payment by the insurer of contributions under this Act to the Premiums Adjustment Fund, the Contribution Fund, the Guarantee Fund or the WorkCover Authority Fund, being:

(i) contributions which the Authority has directed the insurer to pay from the statutory fund; or

(ii) in the absence of any such direction, contributions relating to premium income payable into the statutory fund;

(h2) meeting any costs incurred by the Authority for the benefit of insurers or in exercising its functions under this Act in connection with insurers, being such amount of those costs as the Authority has directed the insurer to pay from the statutory fund;

(b) At the end of section 197, insert:

(2) The Authority may, by notice in writing to an insurer, direct the insurer to pay any contribution (or part of any contribution) under this Act to the Premiums Adjustment Fund, the Contribution Fund, the Guarantee Fund or the WorkCover Authority Fund from such statutory fund of the insurer as is specified in the direction.

(3) The Authority may, by notice in writing to an insurer, direct the insurer to pay a specified amount of the costs incurred by the Authority for the benefit of insurers or in exercising its functions under this Act in connection with insurers.

Explanatory note

The amendments relate to the payments authorised to be paid out of the statutory funds of a licensed insurer (being separate funds for each year into which the premium income for policies issued in a year is required to be paid).

At present, contributions are payable in respect of premium income received by the insurer and accordingly they are added to the premiums payable by current employers. Under the amendments (proposed section

**SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued***

197 (1) (h1) and (2)), the WorkCover Authority may direct that the contributions be paid from money standing to the credit of statutory funds for previous years. As a result, payments may be directed to be made from funds that contain premiums collected in previous years and that have available reserves. The regulations have authorised a similar arrangement for the payment of contributions to fund the liabilities of defaulting insurers and have been used during the recent failure of NEM Insurance.

At present the costs incurred by the WorkCover Authority are funded by the contributions of insurers to the WorkCover Authority Fund. Under the amendments (proposed section 197 (1) (h2) and (3)), insurers may be directed to fund those costs directly if they involve costs incurred for the benefit of insurers or in exercising statutory functions.

- (4) **Section 203 (Establishment of Premiums Adjustment Fund):**
- (a) In section 203 (2) (a), after "section 208", insert "or 224E".
 - (b) From section 203 (2) (c) and (3), omit "Division" wherever occurring, insert instead "Act".

Explanatory note

The amendment is consequential on the amendment made by item (7) of this Schedule.

- (5) **Section 208B:**

After section 208A, insert:

Obligations of insurer to make statutory contributions if insurer has insufficient funds in statutory fund

208B. (1) An insurer which is liable to make any contribution to the Premiums Adjustment Fund, the Contribution Fund, the Guarantee Fund or the WorkCover Authority Fund may postpone that payment while there is insufficient money to make that payment in the statutory fund from which the contribution is payable.

(2) The insurer is required to make the contribution as soon as the relevant statutory fund of the insurer contains sufficient money to allow the insurer to do so.

(3) If the Authority is satisfied that any deficiency in the statutory fund of an insurer was caused (wholly or partly) by a failure of the insurer to comply with this Act or the regulations or by a breach of a director's duty under section

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

200, the Authority may require the insurer to pay the contribution from any of its funds (other than its statutory funds).

(4) If an amount that an insurer is required to pay under subsection (3) is not paid by the date directed by the Authority:

- (a) the amount may be recovered by the Authority in the manner authorised by this Act for the recovery of the contribution concerned; and
- (b) the insurer is not entitled, while the amount remains unpaid, to withdraw management expenses referred to in section 197 (c) from any statutory fund of the insurer.

Explanatory note

The amendment inserts proposed section 208B which complements section 208A relating to the obligations of licensed insurers (other than former licensed insurers). Under section 208A the obligation of a licensed insurer to pay claims is postponed if there is insufficient money in the relevant statutory fund of the insurer to meet the claim. Under proposed section 208B a similar postponement will apply if there is insufficient money to make a contribution under the Principal Act to the Funds administered by the Authority (including the Premiums Adjustment Fund). In both cases an insurer is required to meet its obligations from its own funds if the deficiency was caused by fraud or other default.

(6) Section 210 (**Applications for licences**):

After section 210 (3), insert:

(4) An application is to be accompanied by such fee (if any) as is prescribed by the regulations or (subject to the regulations) as is determined by the Authority. Any such fee is to be paid into the WorkCover Authority Fund.

Explanatory note

The amendment authorises the imposition of a fee to be paid by an applicant for a self-insurers licence. Any such licensed employer is not obliged to obtain workers compensation insurance.

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

(7) Part 7, Division 6A:

After Division 6, insert:

Division 6A - Defaulting insurers etc.

Definitions

224A. In this Division:

"defaulting insurer" means an insurer to which an order of the Minister in force under section 224B relates, but does not include an insolvent insurer;

"insolvent insurer" means an insolvent insurer within the meaning of Division 7.

Declaration of defaulting insurers

224B. (1) If the Minister is satisfied that a licensed insurer or former licensed insurer is unable to meet claims and other liabilities under policies of insurance issued or renewed by it, the Minister may, by order in writing, declare that the insurer is a defaulting insurer for the purposes of this Division.

(2) An insolvent insurer may not be declared to be a defaulting insurer and the declaration of a defaulting insurer ceases to have effect if the insurer is or becomes an insolvent insurer.

Premiums Adjustment Fund may be applied to meet claims etc. of defaulting insurer

224C. (1) Amounts standing to the credit of the Premiums Adjustment Fund may be applied by the Authority for the purposes of:

- (a) satisfying, on behalf of the defaulting insurer, claims, judgments or awards arising from or relating to policies of insurance issued or renewed by the defaulting insurer (whether before or after the commencement of this section); and

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

(b) meeting the management expenses incurred in respect of satisfying those claims, judgments or awards.

(2) Amounts applied by the Authority under this section are to be applied in accordance with such priorities among claims, judgments or awards as the Authority determines.

(3) The Authority may recover from the defaulting insurer as a debt in any court of competent jurisdiction the payments made on its behalf by the Authority under this section and not repaid to the Authority by the defaulting insurer.

(4) Any amounts repaid by or recovered from a defaulting insurer are to be credited to the Premiums Adjustment Fund.

(5) The obligation of a defaulting insurer to repay any amounts paid on its behalf under this section does not cease because the insurer becomes an insolvent insurer.

Premiums Adjustment Fund may be applied to meet deficiency in Insurers' Guarantee Fund

224D. (1) Amounts standing to the credit of the Premiums Adjustment Fund may be applied by the Authority for the purpose of meeting any deficiency in the Guarantee Fund, having regard to the payments required to be made from the Guarantee Fund under this Act in connection with insolvent insurers.

(2) Any amount applied under this section is to be advanced by the Authority and paid into the Guarantee Fund.

(3) Repayments of any such advance are to be credited to the Premiums Adjustment Fund.

(4) The Authority may dispense with the repayment of any such advance.

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

(5) Any advance made under the regulations before the commencement of this section from the Premiums Adjustment Fund to the Guarantee Fund is to be taken to have been made under this section.

Contributions to Premiums Adjustment Fund for purposes of this Division

224E. (1) The Authority may determine, from time to time, the amount required to be contributed to the Premiums Adjustment Fund if there is insufficient money in that Fund for the purposes of this Division.

(2) The Authority may direct insurers (within the meaning of Division 4) to pay to the Authority for payment into the Premiums Adjustment Fund such contributions as the Authority determines in order that the requisite amount is contributed to the Premiums Adjustment Fund.

(3) The Authority is required to make any such determination in such equitable manner as the Authority determines having regard to the amounts standing to the credit of the statutory funds of each such insurer.

(4) The provisions of section 208 relating to the recovery of contributions to the Premiums Adjustment Fund under that section apply to the recovery of contributions under this section.

(5) The Authority may refund any contributions by insurers under this section. An amount refunded is to be paid into the statutory fund from which the contribution was paid.

Repeal of Part 13 of the Workers Compensation (General) Regulation 1987

224F. Part 13 of the Workers Compensation (General) Regulation 1987 (Defaulting insurers) is repealed.

Explanatory note

The amendment transfers to the Principal Act provisions included in the regulations on 1 May 1990. The provisions enable the WorkCover Authority

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

to provide funds to meet workers compensation claims which are not paid because of the default of an insurer. The funds are to be provided on an interim basis pending the appointment of a liquidator in respect of the defaulting insurer and the full implementation of the Insurers' Guarantee Fund provisions of the Principal Act. The transferred provisions will enable the payment of claims from the Premiums Adjustment Fund and recovery from the defaulting insurer even though the insurer has not agreed to the payments being made on its behalf (under the regulations such an agreement was necessary before the Authority could pay claims). During the recent failure of NEM Insurance to pay claims, agreement could not be reached, but on the appointment of a liquidator an advance was made to the Insurers' Guarantee Fund pending the formal requirements required to secure the necessary contributions to that Fund.

(8) Part 7, Division 7 (**Insurers' Guarantee Fund**):

Omit "Government Insurance Office" wherever occurring, insert instead "Authority".

Explanatory note

Division 7 of Part 7 of the Act (which deals with the Insurers' Guarantee Fund and insolvent insurers) is amended to replace references to the Government Insurance Office with references to the WorkCover Authority. The Authority is to take over the management of that Fund.

(9) Section 227 (**Insurers' Guarantee Fund**):

From section 227 (5), omit "that Office" wherever occurring, insert instead "the Authority".

Explanatory note

The amendment is consequential on the amendment made by item (8) of this Schedule.

(10) Section 228 (**Contributions to Guarantee Fund**):

(a) In section 228 (4) (b), after "the contribution", insert ", together with interest calculated at the rate of 15 per cent per annum compounded quarterly (or, where another rate is prescribed, that other rate)".

(b) From section 228 (5), omit ", as specified by the Government Insurance Office".

Explanatory note

Item (10) (a) provides that interest is payable on overdue contributions by insurers to the Insurers' Guarantee Fund. At present interest is payable

**SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued***

on overdue contributions to the Premiums Adjustment Fund (s. 208 (4)) or to the Insurers' Contribution Fund (s. 220 (4)).

Item (10) (b) is consequential on the amendment made by item (8) of this Schedule.

(11) **Section 234 (Application of Guarantee Fund):**

In section 234 (1) (b) (i), after "Fund", insert "(including any legal or other costs connected with the declaration of an insurer as an insolvent insurer)".

Explanatory note

The amendment makes it clear that the money standing to the credit of the Insurers' Guarantee Fund, which may be used to pay the costs of administration of the Fund, may be used in particular to meet legal or other costs connected with the declaration of an insurer as an insolvent insurer (that declaration being necessary to enable the Fund to be used to meet the claims of insolvent insurers).

(12) **Schedule 6, Part 15 (Provisions relating to insurance):**

At the end of the Part, insert:

**Savings provision - transfer of administration of
Guarantee Fund from GIO to WorkCover Authority**

17. Any thing done by the Government Insurance Office under Division 7 of Part 7 of this Act before the commencement of Schedule 3 (8) to the Workers Compensation (Amendment) Act 1991 that could have been done by the WorkCover Authority if Schedule 3 (8) had been in force is to be taken to have been done by the WorkCover Authority.

Explanatory note

The amendment saves actions of the GIO in relation to the administration of the Insurers' Guarantee Fund following the proposed transfer of that administration to the WorkCover Authority.

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS

(Sec. 3)

(1) Section 22:

Omit the section, insert instead:

Compensation to be apportioned where more than one injury etc.

22. (1) If:

- (a) the death or incapacity of a worker; or
- (b) a loss suffered by a worker as referred to in Division 4 of Part 3; or
- (c) a liability under Division 3 of Part 3 to a worker, results from more than one injury to the worker, liability to pay compensation under this Act is to be apportioned in such manner as the Compensation Court determines.

(2) Liability to pay compensation under this Act includes:

- (a) the liability of an employer (including an employer who is a self-insurer); and
- (b) the liability of an insurer under a policy of insurance in respect of the payment of that compensation (including a direct liability to the worker); and
- (c) a liability under the Uninsured Liability and Indemnity Scheme; and
- (d) in the case of a worker who is partially incapacitated for work, a liability for any additional amount that is payable because the worker is compensated under this Act as if totally incapacitated.

(3) Liability to pay compensation under this Act is not to be apportioned by the Compensation Court if the parties to whom the liability relates have agreed on the apportionment.

(4) Liability to pay compensation under this Act may be apportioned by the Compensation Court even though it is the liability of a single insurer in respect of different periods of insurance, but only if the employer or the Authority applies for such an apportionment.

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

(5) The Compensation Court may, on the application of any insurer or employer concerned or of the Authority, determine a dispute as to whether:

- (a) liability to pay compensation under this Act should be apportioned under this section; or
- (b) any such liability should be apportioned under this section in respect of different injuries.

The determination of the Compensation Court has effect despite any agreement on apportionment.

(6) The disputes that may be so determined by the Compensation Court include any case in which liability is not to be apportioned, but a dispute arises as to which injury (from among 2 or more alleged injuries) gave rise to the liability.

(7) A person who is liable to pay compensation under this Act is not entitled in any proceedings under this Act to a reduction in that liability by apportionment on account of the existence of any other person who is also liable to pay any part of that compensation unless that other person is a party to the proceedings.

(8) This section applies to any liability arising before or after the commencement of this Act.

Explanatory note

The amendment will enable the Compensation Court to apportion the respective liabilities of the insurers of a single employer where compensation is payable in respect of 2 or more injuries. The section at present is limited to cases in which different employers are involved.

The amendment overcomes the difficulty raised in the case of *National Employers' Mutual General Insurance Association Ltd. v Calver* [1983] 3 NSWLR 107 and in subsequent cases that apportionment relating to a single employer is required to be dealt with by the Supreme Court instead of the Compensation Court where related matters are dealt with. The amendment gives the employer or the WorkCover Authority standing to challenge an apportionment, particularly if it affects the employer's claims experience or related insurers.

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

(2) Section 151E (**Application - modified common law damages**):

After section 151E (2), insert:

(3) This Division applies to an award of damages in respect of an injury caused by the negligence or other tort of the worker's employer even though the damages are recovered in an action for breach of contract or in any other action.

(4) Subsection (3) is enacted for the avoidance of doubt and has effect in respect of actions brought before as well as after the commencement of that subsection.

Explanatory note

The Principal Act modifies the common law damages recoverable for work-related injuries caused by the negligence or other tort of the worker's employer. Because of the general definition of "damages" in Part 5 of the Principal Act, the modifications apply to a wide range of proceedings for the recovery of damages. The proposed amendment is intended to remove any doubt that the general definition of "damages" applies to the provisions of the Principal Act relating to the modification of damages and, in particular, that the modification of common law damages applies to actions for breach of any implied term of a contract of employment that the worker is to be provided with a safe place of work.

(3) Section 151G (**Damages for non-economic loss**):

In section 151G (7), after "amounts" where lastly occurring, insert "and were referred to in section 81 (1)".

Explanatory note

The amendment enables the rounding off to the nearest \$50 (instead of the nearest 10 cents) of the amounts of \$180,000, \$45,000 and \$60,000 mentioned in the section after the application of the automatic indexation provisions of Division 6 of Part 3 of the Principal Act.

(4) Section 151H (**No damages for economic loss unless injury serious**):

In section 151H (4), after "amount" where lastly occurring, insert "and were referred to in section 81 (1)".

Explanatory note

The amendment enables the rounding off to the nearest \$50 (instead of the nearest 10 cents) of the amount of \$60,000 mentioned in the section after the application of the automatic indexation provisions of Division 6 of Part 3 of the Principal Act.

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

(5) Section 151AB:

After section 151AA, insert:

Special insurance provision relating to occupational diseases etc.

151AB. (1) If an employer is liable independently of this Act for damages for an occupational disease contracted by a worker, the liability is to be taken (for the purpose of this section only) to have arisen when the worker was last employed by that employer in an employment to the nature of which the disease was due.

(2) The purpose of this section is to identify (from among a number of insurers under policies of insurance obtained by a single employer for different periods) one insurer which is to indemnify the employer for the full amount of the damages or which is to pay the full amount of damages to the worker, without any right to a contribution from those other insurers.

(3) If 2 or more employers are jointly or severally liable for damages referred to in this section, the provisions of this section apply separately to each employer.

(4) This section does not affect the amount of damages recoverable by a worker.

(5) This section applies to any liability arising before or after the commencement of this Act and to any policy of insurance issued before or after that commencement.

(6) In this section:

"occupational disease" means a disease of such a nature as to be contracted by a gradual process, and includes:

- (a) a dust disease as defined by the Workers' Compensation (Dust Diseases) Act 1942; and
- (b) total or partial loss of sight which is of gradual onset; and
- (c) the condition known as "boilermaker's deafness" or any deafness of similar origin.

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

Explanatory note

The proposed section applies where a number of insurers may each be partly liable to contribute to the liability of an employer for common law damages to a worker who suffers from an occupational disease. This situation would arise if an employer has, over the period when the worker contracted the disease, obtained policies of insurance from different insurers. The proposed section provides that the insurer which last insured the employer in respect of the worker is liable to indemnify the employer for all the damages and is not entitled to claim contributions from previous insurers. The proposed section does not affect the right of the worker to recover all the damages to which the worker is entitled. A similar provision applies to claims for workers compensation and previously applied to common law claims under section 18 (6B) of the Workers' Compensation Act 1926.

- (6) Schedule 6, Part 6 (**Provisions relating to compensation for non-economic loss (table of disabilities)**):

After clause 5, insert:

Compensation for further loss of hearing - special provision

5A. (1) For the purposes of clause 5 (b), partial loss of hearing of both ears is to be treated as a loss or impairment for which compensation was payable under section 16 of the former Act (even though that section provided compensation only for partial loss of hearing of one ear).

(2) A loss of hearing (resulting from an injury received before the commencement of Division 4 of Part 3 of this Act) is, if it involved a partial loss of hearing of both ears, to be treated as a proportionate loss of hearing of both ears for the purposes of:

- (a) calculating the compensation payable for the loss of hearing (if the worker has not been awarded, and has not received or agreed to receive, compensation for the loss); or
- (b) calculating the compensation payable for a further loss of hearing (if the worker has been awarded, or has received or agreed to receive, compensation for the previous loss of hearing).

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

(3) If a worker, before the commencement of this clause, has suffered a further loss of hearing (being a partial loss of hearing of both ears) and has been awarded or has received or agreed to receive compensation for that further loss that was (for the purposes of calculating the compensation payable) treated as a loss of hearing of one ear under the Table to Division 4 of Part 3 of this Act, nothing in this clause entitles the worker to additional compensation for that further loss.

Explanatory note

The amendment makes a transitional provision for compensation for partial loss of hearing in both ears. The amendment will ensure that compensation is payable under section 71 of the Principal Act even though under section 16 of the Workers' Compensation Act 1926 a different method of assessing loss of hearing in both ears applied.

(7) Schedule 6, Part 20 (**Savings and transitional regulations**):

At the end of clause 1 (1), insert:

the Workers Compensation (Amendment) Act 1991.

Explanatory note

The amendment authorises the making of regulations of a savings or transitional nature consequent on the enactment of the proposed Act. Similar regulations are authorised in the case of previous amendments.

[*Minister's second reading speech made in -
Legislative Assembly on 17 October 1990
Legislative Council on 26 November 1990*]



FIRST PRINT

WORKERS COMPENSATION (AMENDMENT) BILL 1990

NEW SOUTH WALES



EXPLANATORY NOTE

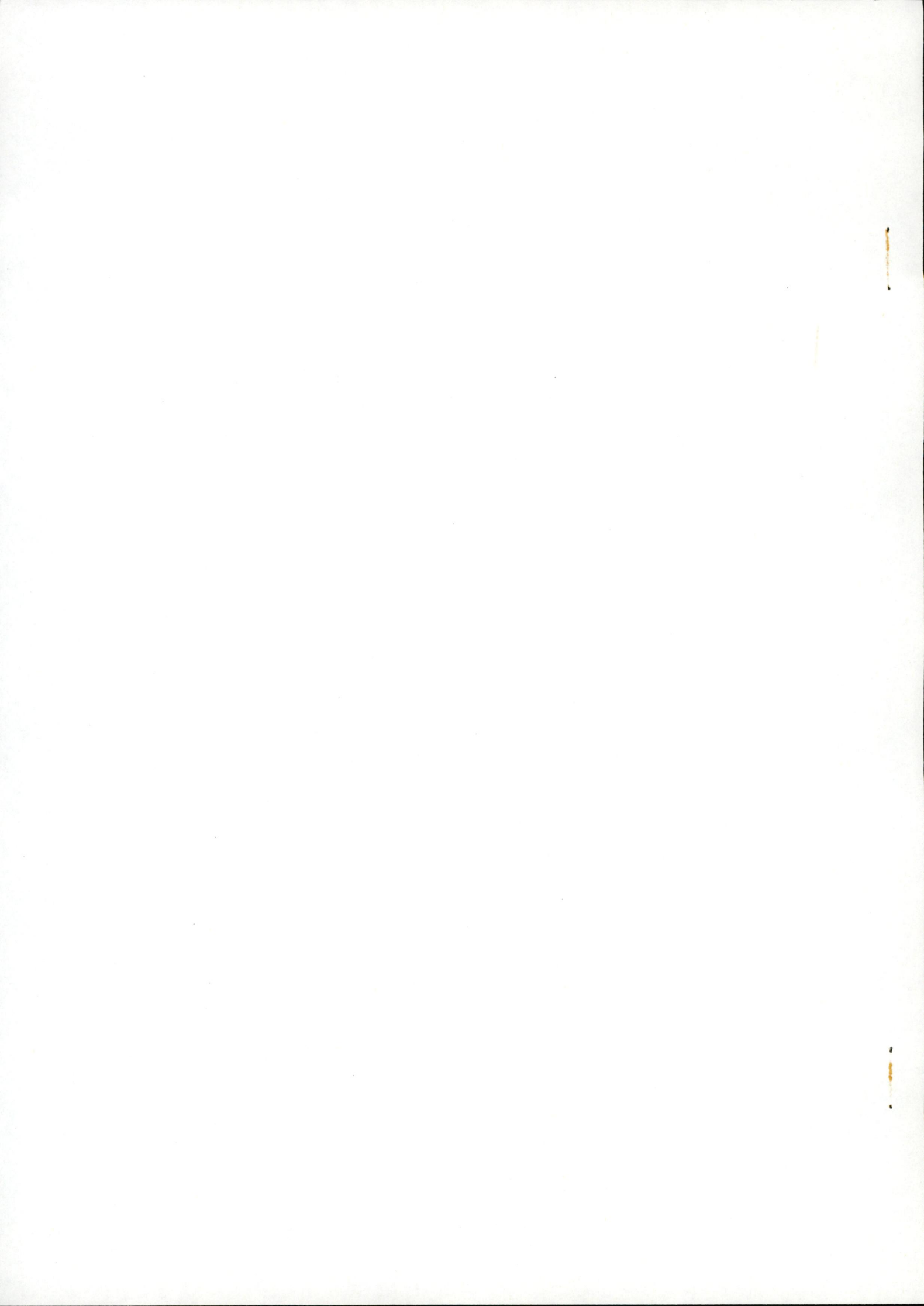
(This Explanatory Note relates to this Bill as introduced into Parliament)

This Bill is cognate with the Occupational Health and Safety Legislation (Amendment) Bill 1990.

The objects of this Bill are:

- (a) to assist in the rehabilitation of injured workers by providing financial assistance and incentives to employers in order to encourage the employment of the injured workers; and
- (b) to improve the common law entitlements of workers injured during the 1987-1989 financial years by removing special limitations on the recovery of damages that do not apply to injuries occurring after that time (the special limitations reduce the damages payable for less serious injuries); and
- (c) to make further provision relating to the regulation of workers compensation insurers and, in particular, to provide for the payment of the compensation claims payable by defaulting or insolvent insurers; and
- (d) to make minor miscellaneous amendments to the Workers Compensation Act 1987.

A detailed explanation of each amendment is set out in the Bill after the amendment concerned.



FIRST PRINT

WORKERS COMPENSATION (AMENDMENT) BILL 1990

NEW SOUTH WALES



TABLE OF PROVISIONS

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WORKERS COMPENSATION (AMENDMENT) BILL 1990

NEW SOUTH WALES



No. , 1990

A BILL FOR

An Act to amend the Workers Compensation Act 1987 in relation to the rehabilitation of injured workers, retrospective common law claims and workers compensation insurers, and for other purposes.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Workers Compensation (Amendment) Act 1990.

Commencement

2. (1) This Act commences on a day or days to be appointed by proclamation, except as provided by this section.

(2) Schedule 2, and section 3 in its application to that Schedule, are taken to have commenced on 1 February 1990.

Amendment of Workers Compensation Act 1987 No. 70

3. The Workers Compensation Act 1987 is amended as set out in Schedules 1-4.

Explanatory notes

4. Matter appearing under the heading "Explanatory note" in Schedules 1-4 does not form part of this Act.

**SCHEDULE 1 - AMENDMENTS RELATING TO
REHABILITATION OF INJURED WORKERS**

(Sec. 3)

(1) Section 153 (**Vocational re-education etc. provided by Authority**):

At the end of section 153 (3) (b), insert:

; or

- (c) to provide financial assistance to employers or others who offer injured workers work-trial experience or other voluntary work as part of the workers' rehabilitation training (being assistance in connection with the cost of any necessary insurance arrangements relating to the workers or for other incidental expenses).

Explanatory note

The amendment authorises the WorkCover Authority to provide from its fund financial assistance to employers and others for costs (including insurance costs) associated with providing injured workers with work-trial experience and other voluntary work as part of their rehabilitation training.

SCHEDULE 1 - AMENDMENTS RELATING TO
REHABILITATION OF INJURED WORKERS - *continued*

(2) Section 153A:

After section 153, insert:

Second-injury scheme

153A. (1) The Authority is to institute and administer under section 153 a scheme (to be called "the second-injury scheme") to encourage the employment of injured workers by providing financial incentives to their employers in connection with insurance liabilities arising from further injuries to the workers.

(2) The second-injury scheme applies to such injured workers as are approved by the Authority as being suitable for inclusion in the scheme.

(3) Any such approval:

- (a) applies to such employment of the injured worker as is specified in the approval (including employment that is limited to, or excludes, employment with particular employers); and
- (b) applies for a period of 6 months of any such employment or such other period as is specified in the approval; and
- (c) applies to all injuries or only to particular injuries, or injuries of a class, specified in the approval; and
- (d) is subject to any other conditions imposed by the Authority.

(4) If the second-injury scheme applies to an injured worker:

- (a) the employer of the worker is not required under section 160 to repay the first \$500 (or other agreed amount) of any claim paid under a policy of insurance for compensation for an injury to the worker to which the scheme applies; and
- (b) any such claim (or any liability of the employer independently of this Act for that injury) is to be excluded from the claims experience of the employer for the purposes of calculating the

**SCHEDULE 1 - AMENDMENTS RELATING TO
REHABILITATION OF INJURED WORKERS - *continued***

premium payable by the employer for a policy of insurance.

- (5) Subsection (4) is subject to:
- (a) the regulations; and
 - (b) the terms and conditions of the Authority's approval for the inclusion of the injured worker in the second-injury scheme; and
 - (c) any other limitation imposed by the Authority when giving that approval.
- (6) The regulations may make provision for or with respect to the operation of the second-injury scheme.

Explanatory note

The amendment provides for the establishment by the WorkCover Authority of a "second-injury scheme" to encourage the employment of injured workers by providing financial incentives to their employers. Under the scheme the employer may be exempted from payment of the first \$500 of a claim for compensation arising from the employment of the injured worker (such as a claim for the aggravation of the existing injury) and is not liable for any increased premium for future policies of insurance arising from any such claim (or any related common law claim).

**SCHEDULE 2 - AMENDMENTS RELATING TO
RETROSPECTIVE COMMON LAW CLAIMS**

(Sec. 3)

- (1) Section 151G (**Damages for non-economic loss**):
Omit section 151G (6).

Explanatory note

Section 151G was inserted into the Principal Act in 1989 as part of the legislation that restored, retrospectively to 30 June 1987, common law rights to damages for serious work-related injuries. The section deals with the assessment of damages for non-economic loss ("pain and suffering" etc.) as follows:

- (a) maximum damages are limited to \$180,000;
- (b) no damages unless they exceed \$45,000;
- (c) damages of between \$45,000 and \$60,000 are reduced on a sliding scale.

**SCHEDULE 2 - AMENDMENTS RELATING TO
RETROSPECTIVE COMMON LAW CLAIMS - *continued***

Section 151G (6) limited further the recovery of such damages in the case of retrospective claims in the period 1987-1989 by increasing the figure of "\$45,000" to "\$75,000" and increasing the figure of "\$60,000" to "\$100,000". The amendment removes that further limitation and therefore enables the damages recoverable for non-economic loss in retrospective claims to be assessed in the same way as other claims. The amendment applies retrospectively from the date of commencement of section 151G.

(2) Section 151H (No damages for economic loss unless injury serious):

Omit section 151H (3).

Explanatory note

Section 151H was inserted into the Principal Act in 1989 as part of the legislation that restored, retrospectively to 30 June 1987, common law rights to damages for serious work-related injuries. The section prevents the award of damages for economic loss (loss of earnings, medical expenses etc.) unless:

- (a) the worker has suffered a permanent injury (referred to in the "Table of Disabilities" in Division 4 of Part 3) for which the compensation payable is at least 33% of the maximum compensation under that Table; or
- (b) the worker has been awarded damages for non-economic loss of at least \$60,000; or
- (c) the worker dies as a result of the injury.

Section 151H (3) limited further the recovery of such damages in the case of retrospective claims in the period 1987-1989 by increasing the percentage of "33%" to "60%" and increasing the figure of "\$60,000" to "\$100,000". The amendment removes that further limitation and therefore enables the damages recoverable for economic loss in retrospective claims to be assessed in the same way as other claims. The amendment applies retrospectively from the date of commencement of section 151H.

(3) Section 151W:

Omit the section, insert instead:

**Time limit for commencement of court proceedings
extended**

151W. In the application of section 151D to an injury received before the date of assent to the Workers Compensation (Amendment) Act 1990, the injury is to be taken to have been received on that date.

**SCHEDULE 2 - AMENDMENTS RELATING TO
RETROSPECTIVE COMMON LAW CLAIMS - *continued***

Explanatory note

The amendment extends the time limits set out in section 151D of the Principal Act for the commencement of court proceedings on retrospective common law claims. As a result of the amendments made by this Schedule, the time limits are to run from the date of assent to the proposed Act instead of the commencement of the amendments for the restoration of common law rights.

**SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS**

(Sec. 3)

(1) Section 177 (**Applications for licences**):

After section 177 (4), insert:

(5) An application is to be accompanied by such fee (if any) as is prescribed by the regulations or (subject to the regulations) as is determined by the Authority. Any such fee is to be paid into the WorkCover Authority Fund.

Explanatory note

The amendment authorises the imposition of a fee to be paid by an applicant for a licence to issue workers compensation insurance policies.

(2) Section 185:

Omit the section, insert instead:

Assignment of policies of former insurers etc.

185. (1) In this section:

"former insurer" means a former licensed insurer whose licence has ceased to be in force by cancellation, suspension or the expiry of the term of the licence.

(2) The Authority may assign all or any class of policies of insurance of a former insurer to a licensed insurer nominated by the Authority.

(3) Policies of insurance may be assigned under this section by notice served by the Authority on the former insurer concerned.

(4) All money standing to the credit of the statutory funds of the former insurer to which the policies of

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

insurance relate is to be paid to the licensed insurer to which the policies are assigned, and may be recovered by the Authority or that licensed insurer as a debt in a court of competent jurisdiction.

(5) If the policies of insurance to which a statutory fund relates are not all assigned to a particular licensed insurer, the Authority may, by notice in writing to the former insurer, determine the respective amounts to be paid from the fund to the licensed insurers to which the policies are assigned.

(6) If the amount to be paid from a statutory fund of a former insurer includes any investment, the Authority may require the former insurer to execute the necessary documents to enable the investment to be transferred under this section.

(7) An assignment of an insurance policy under this section:

- (a) transfers the rights, obligations and liabilities under the policy of the former insurer to the licensed insurer to which the policy is assigned; and
- (b) does not otherwise affect the rights, obligations or liabilities acquired, accrued or incurred under the policy.

(8) For the purposes of this Act, any such assigned policy is to be taken to have been issued or renewed by the licensed insurer to which it is assigned.

Explanatory note

The amendment is designed to ensure the effective administration of claims under policies issued by licensed insurers which cease to be licensed. Under the amendment, the WorkCover Authority is authorised to assign the policies concerned to other current licensed insurers. At present section 185 permits assignment, but only in respect of the balance of the current period of a policy.

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

(3) Section 197 (**Application of statutory funds**):

(a) After section 197 (h), insert:

(h1) the payment by the insurer of contributions under this Act to the Premiums Adjustment Fund, the Contribution Fund, the Guarantee Fund or the WorkCover Authority Fund, being:

(i) contributions which the Authority has directed the insurer to pay from the statutory fund; or

(ii) in the absence of any such direction, contributions relating to premium income payable into the statutory fund;

(h2) meeting any costs incurred by the Authority for the benefit of insurers or in exercising its functions under this Act in connection with insurers, being such amount of those costs as the Authority has directed the insurer to pay from the statutory fund;

(b) At the end of section 197, insert:

(2) The Authority may, by notice in writing to an insurer, direct the insurer to pay any contribution (or part of any contribution) under this Act to the Premiums Adjustment Fund, the Contribution Fund, the Guarantee Fund or the WorkCover Authority Fund from such statutory fund of the insurer as is specified in the direction.

(3) The Authority may, by notice in writing to an insurer, direct the insurer to pay a specified amount of the costs incurred by the Authority for the benefit of insurers or in exercising its functions under this Act in connection with insurers.

Explanatory note

The amendments relate to the payments authorised to be paid out of the statutory funds of a licensed insurer (being separate funds for each year into which the premium income for policies issued in a year is required to be paid).

At present, contributions are payable in respect of premium income received by the insurer and accordingly they are added to the premiums payable by current employers. Under the amendments (proposed section

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

197 (1) (h1) and (2)), the WorkCover Authority may direct that the contributions be paid from money standing to the credit of statutory funds for previous years. As a result, payments may be directed to be made from funds that contain premiums collected in previous years and that have available reserves. The regulations have authorised a similar arrangement for the payment of contributions to fund the liabilities of defaulting insurers and have been used during the recent failure of NEM Insurance.

At present the costs incurred by the WorkCover Authority are funded by the contributions of insurers to the WorkCover Authority Fund. Under the amendments (proposed section 197 (1) (h2) and (3)), insurers may be directed to fund those costs directly if they involve costs incurred for the benefit of insurers or in exercising statutory functions.

- (4) Section 203 (**Establishment of Premiums Adjustment Fund**):
- (a) In section 203 (2) (a), after "section 208", insert "or 224E".
 - (b) From section 203 (2) (c) and (3), omit "Division" wherever occurring, insert instead "Act".

Explanatory note

The amendment is consequential on the amendment made by item (7) of this Schedule.

- (5) Section 208B:
After section 208A, insert:

Obligations of insurer to make statutory contributions if insurer has insufficient funds in statutory fund

208B. (1) An insurer which is liable to make any contribution to the Premiums Adjustment Fund, the Contribution Fund, the Guarantee Fund or the WorkCover Authority Fund may postpone that payment while there is insufficient money to make that payment in the statutory fund from which the contribution is payable.

(2) The insurer is required to make the contribution as soon as the relevant statutory fund of the insurer contains sufficient money to allow the insurer to do so.

(3) If the Authority is satisfied that any deficiency in the statutory fund of an insurer was caused (wholly or partly) by a failure of the insurer to comply with this Act or the regulations or by a breach of a director's duty under section

**SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued***

200, the Authority may require the insurer to pay the contribution from any of its funds (other than its statutory funds).

(4) If an amount that an insurer is required to pay under subsection (3) is not paid by the date directed by the Authority:

- (a) the amount may be recovered by the Authority in the manner authorised by this Act for the recovery of the contribution concerned; and
- (b) the insurer is not entitled, while the amount remains unpaid, to withdraw management expenses referred to in section 197 (c) from any statutory fund of the insurer.

Explanatory note

The amendment inserts proposed section 208B which complements section 208A relating to the obligations of licensed insurers (other than former licensed insurers). Under section 208A the obligation of a licensed insurer to pay claims is postponed if there is insufficient money in the relevant statutory fund of the insurer to meet the claim. Under proposed section 208B a similar postponement will apply if there is insufficient money to make a contribution under the Principal Act to the Funds administered by the Authority (including the Premiums Adjustment Fund). In both cases an insurer is required to meet its obligations from its own funds if the deficiency was caused by fraud or other default.

(6) Section 210 (Applications for licences):

After section 210 (3), insert:

(4) An application is to be accompanied by such fee (if any) as is prescribed by the regulations or (subject to the regulations) as is determined by the Authority. Any such fee is to be paid into the WorkCover Authority Fund.

Explanatory note

The amendment authorises the imposition of a fee to be paid by an applicant for a self-insurers licence. Any such licensed employer is not obliged to obtain workers compensation insurance.

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

- (7) Part 7, Division 6A:
After Division 6, insert:

Division 6A - Defaulting insurers etc.

Definitions

224A. In this Division:

"**defaulting insurer**" means an insurer to which an order of the Minister in force under section 224B relates, but does not include an insolvent insurer;

"**insolvent insurer**" means an insolvent insurer within the meaning of Division 7.

Declaration of defaulting insurers

224B. (1) If the Minister is satisfied that a licensed insurer or former licensed insurer is unable to meet claims and other liabilities under policies of insurance issued or renewed by it, the Minister may, by order in writing, declare that the insurer is a defaulting insurer for the purposes of this Division.

(2) An insolvent insurer may not be declared to be a defaulting insurer and the declaration of a defaulting insurer ceases to have effect if the insurer is or becomes an insolvent insurer.

Premiums Adjustment Fund may be applied to meet claims etc. of defaulting insurer

224C. (1) Amounts standing to the credit of the Premiums Adjustment Fund may be applied by the Authority for the purposes of:

- (a) satisfying, on behalf of the defaulting insurer, claims, judgments or awards arising from or relating to policies of insurance issued or renewed by the defaulting insurer (whether before or after the commencement of this section); and

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

(b) meeting the management expenses incurred in respect of satisfying those claims, judgments or awards.

(2) Amounts applied by the Authority under this section are to be applied in accordance with such priorities among claims, judgments or awards as the Authority determines.

(3) The Authority may recover from the defaulting insurer as a debt in any court of competent jurisdiction the payments made on its behalf by the Authority under this section and not repaid to the Authority by the defaulting insurer.

(4) Any amounts repaid by or recovered from a defaulting insurer are to be credited to the Premiums Adjustment Fund.

(5) The obligation of a defaulting insurer to repay any amounts paid on its behalf under this section does not cease because the insurer becomes an insolvent insurer.

Premiums Adjustment Fund may be applied to meet deficiency in Insurers' Guarantee Fund

224D. (1) Amounts standing to the credit of the Premiums Adjustment Fund may be applied by the Authority for the purpose of meeting any deficiency in the Guarantee Fund, having regard to the payments required to be made from the Guarantee Fund under this Act in connection with insolvent insurers.

(2) Any amount applied under this section is to be advanced by the Authority and paid into the Guarantee Fund.

(3) Repayments of any such advance are to be credited to the Premiums Adjustment Fund.

(4) The Authority may dispense with the repayment of any such advance.

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

(5) Any advance made under the regulations before the commencement of this section from the Premiums Adjustment Fund to the Guarantee Fund is to be taken to have been made under this section.

Contributions to Premiums Adjustment Fund for purposes of this Division

224E. (1) The Authority may determine, from time to time, the amount required to be contributed to the Premiums Adjustment Fund if there is insufficient money in that Fund for the purposes of this Division.

(2) The Authority may direct insurers (within the meaning of Division 4) to pay to the Authority for payment into the Premiums Adjustment Fund such contributions as the Authority determines in order that the requisite amount is contributed to the Premiums Adjustment Fund.

(3) The Authority is required to make any such determination in such equitable manner as the Authority determines having regard to the amounts standing to the credit of the statutory funds of each such insurer.

(4) The provisions of section 208 relating to the recovery of contributions to the Premiums Adjustment Fund under that section apply to the recovery of contributions under this section.

(5) The Authority may refund any contributions by insurers under this section. An amount refunded is to be paid into the statutory fund from which the contribution was paid.

Repeal of Part 13 of the Workers Compensation (General) Regulation 1987

224F. Part 13 of the Workers Compensation (General) Regulation 1987 (Defaulting insurers) is repealed.

Explanatory note

The amendment transfers to the Principal Act provisions included in the regulations on 1 May 1990. The provisions enable the WorkCover Authority

SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued*

to provide funds to meet workers compensation claims which are not paid because of the default of an insurer. The funds are to be provided on an interim basis pending the appointment of a liquidator in respect of the defaulting insurer and the full implementation of the Insurers' Guarantee Fund provisions of the Principal Act. The transferred provisions will enable the payment of claims from the Premiums Adjustment Fund and recovery from the defaulting insurer even though the insurer has not agreed to the payments being made on its behalf (under the regulations such an agreement was necessary before the Authority could pay claims). During the recent failure of NEM Insurance to pay claims, agreement could not be reached, but on the appointment of a liquidator an advance was made to the Insurers' Guarantee Fund pending the formal requirements required to secure the necessary contributions to that Fund.

(8) Part 7, Division 7 (**Insurers' Guarantee Fund**):

Omit "Government Insurance Office" wherever occurring, insert instead "Authority".

Explanatory note

Division 7 of Part 7 of the Act (which deals with the Insurers' Guarantee Fund and insolvent insurers) is amended to replace references to the Government Insurance Office with references to the WorkCover Authority. The Authority is to take over the management of that Fund.

(9) Section 227 (**Insurers' Guarantee Fund**):

From section 227 (5), omit "that Office" wherever occurring, insert instead "the Authority".

Explanatory note

The amendment is consequential on the amendment made by item (8) of this Schedule.

(10) Section 228 (**Contributions to Guarantee Fund**):

(a) In section 228 (4) (b), after "the contribution", insert ", together with interest calculated at the rate of 15 per cent per annum compounded quarterly (or, where another rate is prescribed, that other rate),".

(b) From section 228 (5), omit ", as specified by the Government Insurance Office".

Explanatory note

Item (10) (a) provides that interest is payable on overdue contributions by insurers to the Insurers' Guarantee Fund. At present interest is payable

**SCHEDULE 3 - AMENDMENTS RELATING TO WORKERS
COMPENSATION INSURERS - *continued***

on overdue contributions to the Premiums Adjustment Fund (s. 208 (4)) or to the Insurers' Contribution Fund (s. 220 (4)).

Item (10) (b) is consequential on the amendment made by item (8) of this Schedule.

(11) Section 234 (Application of Guarantee Fund):

In section 234 (1) (b) (i), after "Fund", insert "(including any legal or other costs connected with the declaration of an insurer as an insolvent insurer)".

Explanatory note

The amendment makes it clear that the money standing to the credit of the Insurers' Guarantee Fund, which may be used to pay the costs of administration of the Fund, may be used in particular to meet legal or other costs connected with the declaration of an insurer as an insolvent insurer (that declaration being necessary to enable the Fund to be used to meet the claims of insolvent insurers).

(12) Schedule 6, Part 15 (Provisions relating to insurance):

At the end of the Part, insert:

**Savings provision - transfer of administration of
Guarantee Fund from GIO to WorkCover Authority**

17. Any thing done by the Government Insurance Office under Division 7 of Part 7 of this Act before the commencement of Schedule 3 (8) to the Workers Compensation (Amendment) Act 1990 that could have been done by the WorkCover Authority if Schedule 3 (8) had been in force is to be taken to have been done by the WorkCover Authority.

Explanatory note

The amendment saves actions of the GIO in relation to the administration of the Insurers' Guarantee Fund following the proposed transfer of that administration to the WorkCover Authority.

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS

(Sec. 3)

(1) Section 22:

Omit the section, insert instead:

Compensation to be apportioned where more than one injury etc.

22. (1) If:

- (a) the death or incapacity of a worker; or
- (b) a loss suffered by a worker as referred to in Division 4 of Part 3; or

(c) a liability under Division 3 of Part 3 to a worker, results from more than one injury to the worker, liability to pay compensation under this Act is to be apportioned in such manner as the Compensation Court determines.

(2) Liability to pay compensation under this Act includes:

- (a) the liability of an employer (including an employer who is a self-insurer); and
- (b) the liability of an insurer under a policy of insurance in respect of the payment of that compensation (including a direct liability to the worker); and
- (c) a liability under the Uninsured Liability and Indemnity Scheme; and
- (d) in the case of a worker who is partially incapacitated for work, a liability for any additional amount that is payable because the worker is compensated under this Act as if totally incapacitated.

(3) Liability to pay compensation under this Act is not to be apportioned by the Compensation Court if the parties to whom the liability relates have agreed on the apportionment.

(4) Liability to pay compensation under this Act may be apportioned by the Compensation Court even though it is the liability of a single insurer in respect of different periods of insurance, but only if the employer or the Authority applies for such an apportionment.

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

(5) The Compensation Court may, on the application of any insurer or employer concerned or of the Authority, determine a dispute as to whether:

- (a) liability to pay compensation under this Act should be apportioned under this section; or
- (b) any such liability should be apportioned under this section in respect of different injuries.

The determination of the Compensation Court has effect despite any agreement on apportionment.

(6) The disputes that may be so determined by the Compensation Court include any case in which liability is not to be apportioned, but a dispute arises as to which injury (from among 2 or more alleged injuries) gave rise to the liability.

(7) A person who is liable to pay compensation under this Act is not entitled in any proceedings under this Act to a reduction in that liability by apportionment on account of the existence of any other person who is also liable to pay any part of that compensation unless that other person is a party to the proceedings.

(8) This section applies to any liability arising before or after the commencement of this Act.

Explanatory note

The amendment will enable the Compensation Court to apportion the respective liabilities of the insurers of a single employer where compensation is payable in respect of 2 or more injuries. The section at present is limited to cases in which different employers are involved.

The amendment overcomes the difficulty raised in the case of *National Employers' Mutual General Insurance Association Ltd. v Calver* [1983] 3 NSWLR 107 and in subsequent cases that apportionment relating to a single employer is required to be dealt with by the Supreme Court instead of the Compensation Court where related matters are dealt with. The amendment gives the employer or the WorkCover Authority standing to challenge an apportionment, particularly if it affects the employer's claims experience or related insurers.

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

(2) Section 151E (**Application - modified common law damages**):

After section 151E (2), insert:

(3) This Division applies to an award of damages in respect of an injury caused by the negligence or other tort of the worker's employer even though the damages are recovered in an action for breach of contract or in any other action.

(4) Subsection (3) is enacted for the avoidance of doubt and has effect in respect of actions brought before as well as after the commencement of that subsection.

Explanatory note

The Principal Act modifies the common law damages recoverable for work-related injuries caused by the negligence or other tort of the worker's employer. Because of the general definition of "damages" in Part 5 of the Principal Act, the modifications apply to a wide range of proceedings for the recovery of damages. The proposed amendment is intended to remove any doubt that the general definition of "damages" applies to the provisions of the Principal Act relating to the modification of damages and, in particular, that the modification of common law damages applies to actions for breach of any implied term of a contract of employment that the worker is to be provided with a safe place of work.

(3) Section 151G (**Damages for non-economic loss**):

In section 151G (7), after "amounts" where lastly occurring, insert "and were referred to in section 81 (1)".

Explanatory note

The amendment enables the rounding off to the nearest \$50 (instead of the nearest 10 cents) of the amounts of \$180,000, \$45,000 and \$60,000 mentioned in the section after the application of the automatic indexation provisions of Division 6 of Part 3 of the Principal Act.

(4) Section 151H (**No damages for economic loss unless injury serious**):

In section 151H (4), after "amount" where lastly occurring, insert "and were referred to in section 81 (1)".

Explanatory note

The amendment enables the rounding off to the nearest \$50 (instead of the nearest 10 cents) of the amount of \$60,000 mentioned in the section after the application of the automatic indexation provisions of Division 6 of Part 3 of the Principal Act.

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

(5) Section 151AB:

After section 151AA, insert:

Special insurance provision relating to occupational diseases etc.

151AB. (1) If an employer is liable independently of this Act for damages for an occupational disease contracted by a worker, the liability is to be taken (for the purpose of this section only) to have arisen when the worker was last employed by that employer in an employment to the nature of which the disease was due.

(2) The purpose of this section is to identify (from among a number of insurers under policies of insurance obtained by a single employer for different periods) one insurer which is to indemnify the employer for the full amount of the damages or which is to pay the full amount of damages to the worker, without any right to a contribution from those other insurers.

(3) If 2 or more employers are jointly or severally liable for damages referred to in this section, the provisions of this section apply separately to each employer.

(4) This section does not affect the amount of damages recoverable by a worker.

(5) This section applies to any liability arising before or after the commencement of this Act and to any policy of insurance issued before or after that commencement.

(6) In this section:

"occupational disease" means a disease of such a nature as to be contracted by a gradual process, and includes:

- (a) a dust disease as defined by the Workers' Compensation (Dust Diseases) Act 1942; and
- (b) total or partial loss of sight which is of gradual onset; and
- (c) the condition known as "boilermaker's deafness" or any deafness of similar origin.

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

Explanatory note

The proposed section applies where a number of insurers may each be partly liable to contribute to the liability of an employer for common law damages to a worker who suffers from an occupational disease. This situation would arise if an employer has, over the period when the worker contracted the disease, obtained policies of insurance from different insurers. The proposed section provides that the insurer which last insured the employer in respect of the worker is liable to indemnify the employer for all the damages and is not entitled to claim contributions from previous insurers. The proposed section does not affect the right of the worker to recover all the damages to which the worker is entitled. A similar provision applies to claims for workers compensation and previously applied to common law claims under section 18 (6B) of the Workers' Compensation Act 1926.

- (6) Schedule 6, Part 4 (**Provisions relating to weekly payments of compensation**):

After clause 6, insert:

Agreements for redemptions under section 15 of the former Act

7. (1) For the purposes of section 15 of the former Act (as applied under clause 6), a lump sum payment to which a worker has agreed as a redemption of any liability referred to in that section is to be taken to have been determined by the Compensation Court under that section if the lump sum is paid to the worker.

(2) This Act, the Compensation Court Act 1984 and any other Act apply as if a Judge of that Court had made a determination in the terms of the agreement. Rules of the Compensation Court may be made for the recording of the agreement as a determination of that Court.

(3) This clause does not apply if the worker is under the age of 18 years when the agreement is made.

(4) This clause ceases to apply if the agreement is declared by any court to be void on any ground on which agreements generally may be declared void in accordance with law. The Compensation Court may, on a re-opening of the Court's determination under the Compensation

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

Court Act 1984, declare the agreement void on any such ground (but not on any other ground).

(5) The Authority may, as a condition of any payment to an insurer from the Contribution Fund in respect of any such lump sum payment, require the insurer to provide such information (verified in such manner) as the Authority may require to ensure that the claim relates to the payment of compensation under this Act.

(6) This clause has effect despite section 272 (No contracting out).

(7) Nothing in this clause prevents an application being made to the Compensation Court for the determination of a lump sum payment under section 15 of the former Act in any case where an agreement has not been made for the payment of the lump sum (such as a case in which the Compensation Court is authorised by that section to dispense with the consent of the worker or the case of a worker under the age of 18 years).

(8) Part 18 of this Schedule does not have the effect of extending the application of this clause in respect of injuries received (after the commencement of Division 2 of Part 3 of this Act) by workers employed in or about a mine to which the Coal Mines Regulation Act 1982 applies.

(9) This clause does not apply to agreements made before the commencement of this clause.

Explanatory note

The Principal Act preserved the operation of section 15 of the Workers' Compensation Act 1926 (under which the liability for weekly payments of compensation and medical and related expenses could be redeemed by the payment of a lump sum agreed to by the injured worker) for incapacity arising from injuries received before the commencement of the new Act. Under that section, the Compensation Court is required to sanction each such agreement. The proposed amendment will enable any such agreement to be treated as a determination of the Court and so avoid the necessity of instituting court proceedings to sanction the agreement. Under the proposed amendment, the agreement may only be set aside if the worker is less than 18 years' old or if it may be set aside under the general law relating to agreements.

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

- (7) Schedule 6, Part 6 (**Provisions relating to compensation for non-economic loss (table of disabilities)**):

After clause 5, insert:

Compensation for further loss of hearing - special provision

5A. (1) For the purposes of clause 5 (b), partial loss of hearing of both ears is to be treated as a loss or impairment for which compensation was payable under section 16 of the former Act (even though that section provided compensation only for partial loss of hearing of one ear).

(2) A loss of hearing (resulting from an injury received before the commencement of Division 4 of Part 3 of this Act) is, if it involved a partial loss of hearing of both ears, to be treated as a proportionate loss of hearing of both ears for the purposes of:

- (a) calculating the compensation payable for the loss of hearing (if the worker has not been awarded, and has not received or agreed to receive, compensation for the loss); or
- (b) calculating the compensation payable for a further loss of hearing (if the worker has been awarded, or has received or agreed to receive, compensation for the previous loss of hearing).

(3) If a worker, before the commencement of this clause, has suffered a further loss of hearing (being a partial loss of hearing of both ears) and has been awarded or has received or agreed to receive compensation for that further loss that was (for the purposes of calculating the compensation payable) treated as a loss of hearing of one ear under the Table to Division 4 of Part 3 of this Act, nothing in this clause entitles the worker to additional compensation for that further loss.

Explanatory note

The amendment makes a transitional provision for compensation for partial loss of hearing in both ears. The amendment will ensure that compensation is payable under section 71 of the Principal Act even though

SCHEDULE 4 - MISCELLANEOUS AMENDMENTS - *continued*

under section 16 of the Workers' Compensation Act 1926 a different method of assessing loss of hearing in both ears applied.

- (8) **Schedule 6, Part 20 (Savings and transitional regulations):**
At the end of clause 1 (1), insert:
the Workers Compensation (Amendment) Act 1990.

Explanatory note

The amendment authorises the making of regulations of a savings or transitional nature consequent on the enactment of the proposed Act. Similar regulations are authorised in the case of previous amendments.
