29.2.2008 (3)

Workers Rehabilitation and Compensation (Scheme Review) Amendment Bill 2008

REPORT

Today I am introducing a Bill to amend the *Workers Rehabilitation and Compensation Act 1986*.

The Bill contains a large number of amendments directed at various aspects of the design of South Australia's Workers Compensation system.

However, the overall objectives of the Bill are very simple. There are three:

- First, the Bill aims to align South Australia's Scheme nationally while ensuring the State scheme is fair for injured workers particularly in terms of the critical elements of, income maintenance, medical payments and non economic loss.
- Second, the Bill amends the Scheme in a way that is anticipated to restore its financial health and allow it to go on providing benefits at this level.
- Third, it is expected that the improved financial outlook for the Scheme will also be able to be used to the benefit of the cost competitiveness of the State's economy.

The Bill is the outcome of the Government's decision last March to commission an independent review of the South Australian Workers Rehabilitation and Compensation Scheme.

The decision to conduct the Review was made against a background of a deterioration in the state of WorkCover's compensation funds.

During 2006-07, the WorkCover Scheme compensation funds experienced a loss of $149 million, following a $42 million loss in 2005-06. As at 30 June, WorkCover's liabilities exceeded its assets by $843.5 million.

The Board of WorkCover has sought to address the deterioration in its financial circumstances in several ways. The most important to date is the decision to engage Employers Mutual as sole claim agents from 1 July 2006, replacing the four previous claim managers.

The Board has also examined the design of the current Scheme. In November 2006, the Board submitted a package of proposals for changing the design of the Scheme to the Government. This precipitated the Government's subsequent decision to hold the Review.

The consultation processes supporting the Review have been extensive with 76 written submissions received.

There are a number of factors which have been identified by WorkCover and by the Review as contributors to the financial deterioration of the Scheme. However, underlying these factors is one common element—a shift in culture away from injury management and return to work towards a culture of compensation.

Reversing this culture is the key to restoring the financial health of the Scheme while ensuring that injured workers have the best possible chance of resuming productive working lives.

Regrettably, there are, and will be, cases where the degree of impairment is so severe as to prevent early return to work or return to work at all. In these cases, the South Australian Scheme has traditionally been more generous than the Scheme of any other State in Australia.

South Australia will go on providing the most generous income maintenance benefits in Australia. Workers who do not have a work capacity will continue to receive weekly payments until retirement.

These payments will be made at 100% of the workers pre-injury average weekly earnings for 13 weeks and at 80% thereafter. This 80% is higher than the rates paid in New South Wales and Victoria, the two jurisdictions with Schemes most comparable with our own.

Injured workers will also be eligible to claim compensation for non-economic loss under an entitlement that is now the highest maximum payment for such loss of any State Scheme.

Workers will also continue to be able to receive compensation for medical benefits beyond 12 months cessation of income maintenance as the proposal to cap these benefits after that period has been rejected by the Review and by the Government.

Another benefit for injured workers is that the Bill adopts the successful New South Wales model of provisional liability. Under this provision, injured workers will be able to avoid delays in payments by accepting up to 13 weeks of income replacement and a maximum of $5,000 of medical expenses. The experience in New South Wales is that this form of intervention assists both return to work and the efficiency of the dispute resolution process.

These reforms have as their twin objectives encouraging return to work and providing equitable and generous support for those whose impairment prevents them from resuming work at an early date.

The Review has also identified other measures for achieving the shift in culture that is required to secure early return to work. There are two that are particularly important.

The first is changes to work capacity reviews.

This review is a statutory process which requires the assessment of an injured worker's capacity for some form of work. It can lead to a cessation of benefits or reduction of benefits if the worker has not returned to work to their maximum capacity.

The Review argues that the current procedure for this assessment in South Australia has "become opaque and tortuous" and "interpreted in a very restricted and technical manner in a number of decisions of the tribunal."

Difficulties also appear to arise in relation to the "job matching" requirements whereby WorkCover must establish that a particular injured worker is able to enter into particular types of employment.

The Review has supported WorkCover's proposal to apply the Victorian legislative model which limits the obligations of the compensating authority to establishing whether or not the worker has a current work capacity, irrespective of the availability of work for which the worker has been determined as capable of performing.

WorkCover proposed that this model be applied after 104 weeks. The Review is recommending 130 weeks, consistent with current Victorian practice.

The second major measure for achieving early return to work is the amendment to significantly restrict access to redemptions.

The historical, financial, and comparative analyses contained in the Review report all point to the central significance that the payment of lump sum redemptions has assumed—as a method for closing claims.

Individual redemptions can appear to benefit the financial position of the scheme in circumstances where they redeem a claim for less than the claim's estimated liability. However, the net impact of the significant use of redemptions has been the creation of a 'lump-sum culture' in which the negotiation and settlement of pay-outs for claims often replaces a primary focus on achieving return to work outcomes.

This Bill amends the Act to implement these and a number of other proposals that are consistent with the Government's policy objectives.

In closing, there are three points that need to be understood clearly:

- First, the Government has accepted without qualification the full set of recommendations provided by Australia's pre-eminent expert in this area.
- Second, an independent actuarial assessment has indicated that the Review's recommendation:

  "satisfy the Review Terms of Reference provided initiatives are undertaken and applied as recommended, that is allowing a reduction in the average levy rate to the range of 2.25% to 2.75% from 1 July 2009, and an extinguishing of the unfunded liability over five to six years."

- Third and finally, I draw the attention of the House to Mr Clayton's conclusion that:

  "If the full range of recommendations set out in this Report were to be implemented, South Australia will retain its position as the fairest workers' compensation scheme in the country. For workers who do not have a work capacity, weekly payment benefits continue to the age of retirement. The benefit arrangements for non-economic loss will be modernised and, particularly for the most seriously injured workers, will be the most generous in Australia. The wider structural arrangements are aimed to position South Australia as a leading jurisdiction in terms of a 'work health' model of workers' compensation. The strong accountability arrangements, including the Code of Workers' Rights and the South Australia WorkCover Ombudsman will provide a level of protection that places South Australia among the international best." Reference page 194-195

I commend the Bill to Members.

EXPLANATION OF CLAUSES

Part 1—Preliminary

1—Short title

This clause is formal.

2—Commencement

Operation of the measure will commence on a day to be fixed by proclamation. Section 7(5) of the *Acts Interpretation Act 1915* will not apply to the amending Act (in case it is necessary to delay the commencement of certain amendments beyond the second anniversary of assent).

3—Amendment provisions

This clause is formal.

Part 2—Amendment of *Workers Rehabilitation and Compensation Act 1986*

4—Amendment of section 3—Interpretation

This clause inserts new definitions required for the purposes of the measure. Some existing definitions are amended. The following are examples of new defined terms:

A worker's ***current work capacity*** is a present inability arising from a compensable disability such that he or she is not able to return to the employment in which he or she was engaged when the disability occurred but is able to return to work in suitable employment. ***No current work capacity***, in relation to a worker, means a present inability arising from a compensable disability such that a worker is unable to return to work.

New subsection (10) explains that ***total incapacity*** for work is an incapacity where the worker has no current work capacity, while ***partial incapacity for work*** is an incapacity where the worker has a current work capacity.

Suitable employment means employment for which a worker is suited, whether or not the work is available, having regard to the following:

- the nature of the worker's incapacity and previous employment;
- the worker's age, education, skills and work experience;
- the worker's place of residence;
- medical information relating to the worker that is reasonably available, including in any medical certificate or report;
- if any rehabilitation programs are being provided to or for the worker.
- the worker's rehabilitation and return to work plan, if any;

Proposed subsection (12) explains the meaning of a reference in the Act to suitable employment provided by a worker's employer.

The definition of ***exempt employer*** is deleted as that term is to be replaced with ***self-insured employer***. The opportunity has also been taken to correct a number of obsolete references and to provide clarification in relation to existing terms. For example, proposed subsection (11) explains the meaning of ***legal personal representative*** in relation to a deceased worker for the purposes of the Act. A person is the legal personal representative of a deceased worker if the person is entitled to administer the deceased's estate or authorised by the Tribunal to act as the deceased's representative.

New subsection (13) provides that a reference in a provision of the Act to a designated form is a reference to a form designated for the purposes of the provision by the Minister.

5—Substitution of section 4

Section 4 of the Act provides for the determination of a worker's average weekly earnings. The section currently provides in subsection (1) that the average weekly earnings of a disabled worker are the average amount that the worker could reasonably be expected to have earned for a week's work if the worker had not been disabled.

This clause substitutes a new section 4 under which the average weekly earnings of a disabled worker is the average weekly amount that the worker earned during the period of 12 months preceding the date on which the disability occurred in relevant employment.

Relevant employment is constituted by employment with the employer from whose employment the disability arose. If the worker was, at the time of the occurrence of the disability, employed by 2 or more employers, relevant employment is constituted by employment with each such employer. An amount paid while a worker was on annual, sick or other leave is to be taken to be earnings.

The proposed section includes a number of additional provisions relevant to determining a disabled worker's average weekly earnings. These provisions deal with, for example, the average weekly earnings of a worker who is a director and employee of a body corporate, the extent to which overtime is to be taken into account and matters to be disregarded in determining average weekly earnings (such as superannuation contributions payable by an employer and prescribed allowances).

6—Amendment of section 7—Advisory Committee

This amendment is consequential on the change in terminology from 'exempt employer' to 'self-insured employer'.

7—Amendment of section 28A—Rehabilitation and return to work plans

Under section 28A, a rehabilitation and return to work plan is to be prepared for a worker who is receiving income maintenance and is likely to be incapacitated for work by a compensable disability for more than 3 months but has some prospect of returning to work. The first amendment made by this clause reduces then length of the relevant period of incapacity to 13 weeks.

The second amendment is consequential on the insertion of section 28D by clause 8. The Corporation will be required to consult a relevant rehabilitation and return to work co-ordinator when preparing a plan.

8—Insertion of section 28D

This clause inserts new section 28D, which will require employers to appoint rehabilitation and return to work co-ordinators. The co-ordinator is to be an employee of the employer and based in South Australia. The functions of the co-ordinator are as follows:

- to assist workers suffering from compensable disabilities, where prudent and practicable, to remain at or return to work as soon as possible after the occurrence of the disability;

- to assist with liaising with the Corporation in the preparation and implementation of a rehabilitation and return to work plan for a disabled worker;
- to liaise with any persons involved in the rehabilitation of, or the provision of medical services to, workers;
- to monitor the progress of a disabled worker's capacity to return to work;
- to take steps to as far as practicable prevent the occurrence of a secondary disability when a worker returns to work;
- to perform other functions prescribed by the regulations.

9—Amendment of section 30—Compensability of disabilities

As a consequence of this amendment, a worker's employment will include attendance at a place for the purposes of a rehabilitation and return to work plan.

10—Amendment of section 32—Compensation for medical expenses

Under section 32, a worker is entitled to be compensated for certain medical and related costs in accordance with scales of charges prescribed by regulation. As a consequence of these amendments, the scales will be published by the Minister rather than prescribed by regulation.

11—Insertion of section 32A

This clause inserts a new section. Section 32A provides that a worker may apply to the Corporation for the payment of costs within the ambit of section 32 (ie, medical and related expenses) before his or her claim for compensation is determined. The Corporation may determine that it is reasonable to accept provisional liability for the payment of compensation under section 32 and make payments under section 32A.

The maximum amount payable with respect to a particular disability is $5 000 (indexed). The acceptance of provisional liability under section 32A does not constitute an admission of liability, and a payment under the section with respect to a particular cost discharges any liability that the Corporation may have with respect to the cost under section 32. Section 32A also provides that the Corporation may determine not to make a payment with respect to a particular disability despite having previously done so.

The following decisions under section 32A are not reviewable:

- a decision to accept or not to accept liability;
- a decision to make or not to make a payment;
- a decision to exercise or not to exercise a right of recovery.

12—Amendment of section 33—Transportation for initial treatment

This amendment provides for the indexing of an amount prescribed by regulation under section 33(4), which relates to recovery by an employer of the costs of transportation provided for an injured worker.

13—Amendment of section 34—Compensation for property damage

This amendment provides for the indexing of an amount prescribed by regulation under section 34(1), which relates to compensation for a disabled worker for damage to therapeutic appliances, clothes, personal effects or tools of trade.

14—Substitution of section 35

This clause replaces section 35 with a number of new provisions relating to compensation by way of income maintenance.

35—Preliminary

New section 35 provides that a worker who suffers a compensable disability that results in incapacity for work is entitled to weekly payments in respect of the disability in accordance with Part 4 Division 4.

Weekly payments are not payable under Division 4 in respect of a period of incapacity for work falling after the date on which the worker reaches retirement age. If, however, a worker who is within 2 years of retirement age, or above retirement age, becomes incapacitated for work while still in employment, weekly payments are payable for a period of incapacity falling within 2 years after the commencement of the incapacity.

A worker is not entitled to receive, in respect of 2 or more disabilities, weekly payments in excess of the worker's notional weekly earnings. Where a liability to make weekly payments is redeemed, the worker will be taken to be receiving the weekly payments that would have been payable is there had been no redemption.

The section provides that a reference in Division 4 to a worker making every reasonable effort to return to work in suitable employment includes any reasonable period during which—

- the worker is waiting for a response to a request for suitable employment made by the worker and received by the employer; and
- if the employer's response is that suitable employment may or will be provided at some time, the worker is waiting for suitable employment to commence; and
- if the employer's response is that suitable employment cannot be provided at some time, the worker is waiting for a response to requests for suitable employment from other employers; and
- the worker is waiting for the commencement of a rehabilitation and return to work plan, after approval has been given.

A worker is not to be treated as making every reasonable effort to return to work in suitable employment if the worker—

- has refused to have an assessment made of the his or her employment prospects; or
- has refused or failed to take all reasonably necessary steps to obtain suitable employment; or
- has refused or failed to accept an offer of suitable employment from a person; or
- has refused or failed to participate in a rehabilitation program or a rehabilitation and return to work plan.

For the purposes of Division 4, the ***first entitlement period*** is an aggregate period not exceeding 13 weeks in respect of which a worker has an incapacity for work and is entitled to compensation because of the incapacity.

The ***second entitlement period*** is an aggregate period not exceeding 117 weeks in respect of which a worker has an incapacity for work and is entitled to compensation because of the incapacity.

35A—Weekly payments over designated periods

Section 35A sets out the weekly payment entitlements of a worker in respect of a compensable disability while incapacitated for work.

During the first entitlement period, the worker is entitled, for any period during which he or she has no current work capacity, to weekly payments equal to his or her notional weekly earnings. For any period during which the worker has a current work capacity, he or she is entitled to weekly payments equal to the difference between his or her notional weekly earnings and designated weekly earnings (see below).

During the second entitlement period, the worker is entitled, for any period during which he or she has no current work capacity, to weekly payments equal to 80% of his or her notional weekly earnings. For any period during which the worker has a current work capacity, he or she is entitled to weekly payments equal to 80% of the difference between his or her notional weekly earnings and designated weekly earnings.

For the purposes of section 35A, the ***designated weekly earnings*** of a worker will be taken to be the current weekly earnings of the worker in employment or the weekly earnings the Corporation determines that the worker could earn from time to time in employment, whichever is the greater. The 'weekly earnings that the worker could earn from time to time' may be in the worker's employment previous to the disability or in suitable employment, that the Corporation determines that the worker is capable of performing despite the disability. In determining a worker's 'designated weekly earnings', certain prescribed benefits are not to be taken into account.

Designated weekly earnings will not be taken to be the weekly earnings that a worker could earn from time to time if—

- the employer has failed to provide the worker with suitable employment and the worker is making every reasonable effort to return to work in suitable employment; or
- the worker is participating in a rehabilitation and return to work plan which reasonably prevents the worker from returning to employment.

35B—Weekly payments after expiry of designated periods—no work capacity

Under section 35B(1), which is to operate subject to section 35C and other relevant provisions, a worker's entitlement to weekly payments will cease at the end of the second entitlement period (unless brought to an end at an earlier time) unless the worker is assessed by the Corporation as having no current work capacity and likely to continue indefinitely to have no current work capacity.

If the worker is so assessed by the Corporation, he or she is entitled to weekly payments while incapacitated for work in respect of a particular disability equal to 80% of his or her notional weekly earnings as though the second entitlement period were continuing.

The Corporation is entitled to conduct a review of the assessment of a worker at any time. A review must be conducted as often as may be reasonably necessary, being at least once in every 2 years.

A worker who, immediately before the end of a second entitlement period, is in receipt of payments under paragraph (a) of section 35A(2) (that is, he or she has no current work capacity), is entitled to continue to receive weekly payments at the rate prescribed by that paragraph (80% of notional weekly earnings) unless or until the Corporation has assessed whether he or she falls within the category of a worker who may be considered as having no current work capacity and likely to continue indefinitely to have no current work capacity. The Corporation must not discontinue weekly payments to such a worker until he or she has been given at least 13 weeks notice in writing of the proposed discontinuance. The notice must not be given unless or until the assessment has been undertaken.

The provisions mentioned in the above paragraph do not apply if the Corporation discontinues the worker's weekly payments under section 36 or suspends payments under some other provision.

If the Corporation is satisfied, following a review of an assessment of a worker, that the worker has a current work capacity, it may discontinue weekly payments.

35C—Weekly payments after expiry of designated periods—current work capacity

Under section 35C, but subject to the Act, a worker who is, or has been, entitled to weekly payments under section 35A(2)(b) or 35B, may apply to the Corporation for a determination that his or her entitlement to weekly payments does not cease at the end of the second entitlement period under section 35A or at the expiry of an entitlement under section 35B.

If the Corporation is satisfied that a worker who has made such an application is in employment and that because of the compensable disability, he or she is, and is likely to continue indefinitely to be, incapable of undertaking further or additional employment or work that would increase his or her current weekly earnings, the Corporation may determine that the worker's entitlement to weekly payments does not cease.

The worker's entitlement where such a determination has been made will be (subject to other relevant provisions) 80% of the difference between the worker's notional weekly earnings and his or her current weekly earnings.

15—Amendment of section 36—Discontinuance of weekly payments

Section 36 deals with circumstances in which a worker's weekly payments can be discontinued. The first amendment made by this clause adds the following to the list of such circumstances in subsection (1):

- that the worker's entitlement to weekly payments has ceased because of the passage of time;
- that the worker's entitlement to weekly payments has ceased because of the occurrence of some other event or the making of some other decision or determination that, under another provision of the Act, brings the entitlement to weekly payments to an end, or the discontinuance of weekly payments is otherwise authorised or required under another provision of the Act.

Section 36(1a) lists circumstances in which a worker breaches the obligation of mutuality. As a consequence of the second amendment made by this clause, a worker breaches the obligation of mutuality if he or she refuses or fails to participate in an assessment of his or her capacity, rehabilitation progress or future employment prospects.

Section 36(2) lists circumstances in which weekly payments to a worker who has suffered a compensable disability may be reduced. This clause adds the following to the list:

- the worker has recommenced work as an employee or as a self-employed contractor, or the worker has had an increase in remuneration as an employee or a self-employed contractor;
- the worker's entitlements to weekly payments reduces because of the passage of time;

- the worker's entitlement to weekly payments reduces because of the occurrence of some other event or the making of some other decision or determination that, under another provision of the Act, is expressed to result in a reduction to an entitlement to weekly payments or the reduction of weekly payments is otherwise authorised or required under another provision of the Act.

Section 36(3a) currently provides that notice of a decision to discontinue or reduce weekly payments under the section must (depending on the ground for the decision) be given at least 21 days before the decision is to take effect. The provision as amended by this clause will provide that the notice is to be given at least the prescribed number of days, rather than 21 days, before the decision is to take effect. The prescribed number of days is as follows:

- if the worker has been receiving weekly payments under the Division (or Division 7A) for a period that is less than 13 weeks, or for 2 or more periods that aggregate less than 13 weeks—7 days;
- if the worker has been receiving weekly payments for a period or periods above the period or periods mentioned above but for less than 52 weeks, or for 2 or more periods that aggregate less than 52 weeks—14 days;
- in any other case—28 days.

The amendments also add the following to the list of decisions to reduce weekly payments where the required notice must be given:

- a decision to reduce weekly payments on account of the end of the first entitlement period under section 35A;
- a decision to discontinue weekly payments on account of the end of the second entitlement period under section 35A;
- a decision to discontinue weekly payments on account of—
    - a review by the Corporation under section 35B(3); or
    - a decision of the Corporation under section 35C(5)(a).

Section 36(4) currently provides that if a worker lodges a notice of dispute in relation to a decision of the Corporation to discontinue or reduce weekly payments within 1 month of receiving notice of the decision, the operation of the decision will be suspended and may be further suspended by the Workers Compensation Tribunal from time to time to allow a reasonable opportunity for resolution of the dispute. That subsection is to be deleted. New subsection (4) will provide that, so long as there has been compliance with subsection (3a) (ie, notice has been given as required), a discontinuance or reduction of weekly payments under section 36 is to take effect in accordance with the Corporation's notice of the determination. The effect of a decision to discontinue or reduce weekly payments will not be affected by the worker lodging a notice of dispute.

New subsection (5a) sets out the amount a worker is entitled to be paid where a dispute is resolved in favour of the worker at the reconsideration, conciliation or arbitration state, or on appeal:

- in the case of resolution on a reconsideration—the worker is entitled to the total amount that, under the terms of the reconsideration, should have been

paid to the worker between the date that the disputed decision took effect and the date that the decision, as varied under the reconsideration, takes effect;

- in the case of a resolution at the conciliation stage—the worker is entitled to be paid any amount payable under the terms of the relevant settlement;
- in the case of a determination at arbitration or on appeal—the worker is entitled to be paid the amount that, under the terms of the arbitration or according to the outcome of the appeal, would have constituted the worker's entitlements under the Act had the weekly payments not been discontinued or reduced.

New section 36(14) provides that a worker is required to take reasonable steps to attend any appointment reasonably required for the purposes of the Division. A worker is also required to take reasonable steps to comply with any requirement reasonably required under a rehabilitation program or a rehabilitation and return to work plan. A failure to comply with these requirements constitutes a ground for the discontinuance of payments under section 36. This provision is expressed to be for the avoidance of doubt.

16—Insertion of section 37

This clause inserts a new section. Under the proposed section, the Corporation may review the calculation of the average weekly earnings of a worker for the purpose of making an adjustment due to a change in a component of the worker's remuneration used to determine average weekly earnings or a change in the equipment or facilities provided or made available to the worker. This review may be undertaken on the Corporation's own initiative or at the request of a worker.

The Corporation is required to give a worker notice of a proposed review under the section and also to invite the worker to make submissions. If the Corporation finds on a review that there has been a change that warrants an adjustment, the Corporation may make the adjustment. The worker may be required by the Corporation to provide relevant information and must be given notice of the Corporation's decision on the review.

17—Amendment of section 38—Review of weekly payments

Section 38 provides for review on the initiative of the Corporation or at the request of a worker of the amount of weekly payments made to the worker. As a consequence of the amendments to section 38 made by this clause, a worker's request for a review must be in a designated manner and a designated form, and notices to the worker under the section must be in a designated form (rather than a prescribed form).

18—Repeal of section 38A

Section 38A, which authorises the discontinuance or reduction of weekly payments because of passage of time, is repealed by this clause.

19—Amendment of section 39—Economic adjustments to weekly payments

Section 39 applies if a worker to whom weekly payments are payable is incapacitated for work, or appears likely to be incapacitated for work, for more than 1 year. The Corporation is required, during the period of incapacity, to review the weekly payments for the purpose of making an adjustment under the section.

Under new subsection (1a), the Corporation will be required to give a worker notice in the designated form before commencing a review. The notice must inform the worker of the proposed review and invite him or her to make written representations.

20—Amendment of section 40—Weekly payments and leave entitlements

Section 40(3) deals with an employer's liability to grant annual leave where a worker has received weekly payments in respect of total incapacity for work over a period of 52 weeks or more. The subsection, as recast and substituted by this clause, provides that if a worker has received weekly payments in respect of total incapacity for work over a period of 52 weeks, whether consecutive or not, the employer's liability to grant annual leave in respect of the period of employment that coincides with that period will be taken to have been satisfied. On the completion of such a period of 52 weeks, another period may be taken to commence for the purposes of the subsection.

21—Amendment of section 41—Absence of worker from Australia

This amendment has the effect of requiring a notice to be in a designated form rather than the form prescribed by regulation.

22—Amendment of section 42—Redemption of liabilities

As a consequence of this amendment to section 42, where a redemption of a liability to make weekly payments is proposed, an agreement for that redemption cannot be made unless 1 or more of the following requirements are satisfied:

- the rate of weekly payments to be redeemed does not exceed $30 (indexed);
- the worker has attained the age of 55 years and the Corporation has determined that he or she has no current work capacity;
- the Tribunal (constituted of a presidential member) has determined, on the basis of a joint application made to the Tribunal by the worker and the Corporation, that the continuation of weekly payments is contrary to the best interests of the worker from a psychological and social perspective.

23—Repeal of Part 4 Division 4B

Division 4B of Part 4, which authorises the Corporation assess the loss of future earning capacity of a worker who has been incapacitated by a compensable disability for more than 2 years, is repealed by this clause.

24—Substitution of section 43

This clause repeals section 43, which provides for lump sum compensation for a worker's non-economic loss, and substitutes a number of new provisions.

43—Lump sum compensation

New section 43 provides that a compensable disability resulting in permanent impairment as assessed in accordance with section 43A gives rise to an entitlement to compensation for non-economic loss by way of a lump sum. The lump sum will be an amount that represents a portion of the prescribed sum calculated in accordance with the regulations.

The ***prescribed sum*** is $400 000 (indexed). However, if a regulation is made prescribing a greater amount, the prescribed sum is that amount.

Regulations made for this purpose must provide for compensation that at least satisfies the requirements of Schedule 3 (inserted by clause 73) taking into account assessment of whole person impairment.

There is no entitlement under section 43 if the worker's impairment is less than 5% or, in the case of a permanent psychiatric impairment, less than 10%.

Any degree of impairment is to be assessed for the purposes of section 43 in accordance with section 43A.

Compensation will not be payable under section 43 in respect of a worker following his or her death.

43A—Assessment of impairment

Section 43A sets out a scheme for assessing the degree of permanent impairment. An assessment is to be made in accordance with the WorkCover guidelines (to be published by the Minister for the purposes of section 43) and must be made by a legally qualified medical practitioner. The practitioner must also hold a current accreditation issued by the Corporation.

The guidelines are to be published in the Gazette. They may adopt or incorporate the provisions of other publications, whether with or without modification or addition and whether in force at a particular time or from time to time. Other requirements and options in relation to the guidelines are listed in section 43A(4). The Minister may amend or substitute the guidelines from time to time but must, before publishing or amending the guidelines, consult with the Australian Medical Association (South Australia) Incorporated and any other prescribed body.

The Corporation is to establish an accreditation team for the purposes of the requirement that assessments be made by medical practitioners holding current accreditations.

An assessment of the degree of impairment resulting from a disability must be made after the disability has stabilised and be based on the worker's current impairment as at the date of the assessment. Under section 43A(9), an assessment must take into account the following principles:

- if a worker presents for assessment in relation to disabilities which occurred on different dates, the impairments are to be assessed chronologically by date of disability;
- impairments from unrelated disabilities or causes are to be disregarded in making an assessment;

- assessments are to comply with any other requirements specified by the WorkCover Guidelines or prescribed by the regulations.

43B—No disadvantage—compensation table

This section applies specified circumstances where a worker is entitled to compensation equal to the amount applying under the table in Schedule 3A (inserted by clause 73) instead of the compensation payable under sections 43 and 43A. Those circumstances are as follows:

- the worker suffers a compensable disability that gives rise to compensation under section 43 or 43A;
- the compensable disability is a loss mentioned in the table;
- the amount of compensation payable under section 43 and section 43A in respect of the disability is less than the amount applying under the table in respect of that disability.

However, if a worker suffers 2 or more disabilities mentioned in the table in Schedule 3A arising from the same trauma, the worker is not entitled in any case to receive compensation under section 43B in excess of $254 100 (indexed).

25—Amendment of section 44—Compensation payable on death—weekly payments

Section 44 deals with compensation payable if a worker dies as a result of a work related injury. The section currently sets out the entitlement of certain dependants to a funeral benefit, weekly payments and a lump sum. The section as amended deals only with the entitlement of a spouse, domestic partner or dependent child to weekly payments. Other benefits are detailed in new sections 45A, 45B and 45C (inserted by clause 26).

26—Insertion of sections 45A, 45B and 45C

This clause inserts 3 new sections that detail the lump sum, funeral benefits and counselling services to which a dependent spouse, domestic partner or child is entitled on the death of a worker as a result of a work related injury.

45A—Compensation payable on death—lump sums

For the purposes of this section, a ***dependent child*** is a child mainly or partially dependent on the worker's earnings. A ***dependent partner*** is a spouse or domestic partner totally dependent on the worker's earnings, while a ***partially dependent partner*** is a spouse or domestic partner who is to any extent dependent on the worker's earnings. The ***prescribed sum*** is the prescribed sum under section 43.

Under section 45A(4), if a worker dies as a result of a compensable disability, compensation in the form of a lump sum is payable as follows:

- if the worker leaves a dependent partner, or dependent partners, and no dependent child, the amount of

compensation is an amount equal to the prescribed sum payable to the dependent partner or, if there is more than 1, in equal shares to the dependent partners;

- if the worker leaves no dependent partner and no dependent children other than an orphan child or orphan children, the amount of compensation is an amount equal to the prescribed sum payable to that orphan child or, if there are 2 or more, in equal shares for those children;
- if the worker leaves a dependent partner, or dependent partners, and 1, and only 1, dependent child, the amount of compensation is—
    - an amount equal to 90% of the prescribed sum payable to the dependent partner or, if more than 1, in equal shares to the dependent partners; and
    - an amount equal to 10% of the prescribed sum payable to the dependent child;
- if the worker leaves a dependent partner, or dependent partners, and more than 1 and not more than 5 dependent children, the amount of compensation is an amount equal to the prescribed sum payable in the following shares:
    - an amount equal to 5% of the prescribed sum payable to each dependent child;
    - the balance to the dependent partner or, if more than 1, in equal shares to the dependent partners;
- if the worker leaves a dependent partner, or dependent partners, and more than 5 dependent children, the amount of compensation is an amount equal to the prescribed sum payable in the following shares:
    - an amount equal to 75% of the prescribed sum payable to the dependent partner or, if more than 1, in equal shares to the dependent partners;
    - an amount equal to 25% of the prescribed sum payable to the dependent children in equal shares;
- if the worker does not leave a dependent partner but leaves a dependent child or dependent children (not taking into account an orphan child or orphan children), the dependent child is, or if more than 1, each of those dependent children are, entitled to the amount of compensation being such share of a sum not exceeding the prescribed sum that the Corporation considers is reasonable and appropriate to the loss to the dependent child or, if more than 1 dependent child, to those dependent children;
- if the worker leaves—

- a partially dependent partner or partially dependent partners; and
- a dependent partner or dependent partners or a dependent child or dependent children or any combination of such,

each of those dependents is entitled to the amount of compensation being such share of a sum not exceeding the prescribed sum that the Corporation considers is reasonable and appropriate to the loss to that dependent;

- if the worker does not leave a dependent partner, dependent child or partially dependent partner but leaves another person who is to an extent dependent on the worker's earnings, the Corporation may, if it considers it to be justified in the circumstances, pay compensation of a sum not exceeding the prescribed sum that the Corporation considers is reasonable and appropriate to the loss to that person (and if the Corporation decides to make a payment of compensation to more than 1 person, the sums paid must not in total exceed the prescribed sum);
- if the worker is under the age of 21 years at the time of the compensable disability and leaves no dependent partner, dependent child or partially dependent partner but, immediately before the disability, was contributing to the maintenance of the home of the members of his or her family, the members of his or her family are taken to be dependents of the worker partly dependent on the worker's earnings.

If a person who is entitled to a payment under section 45A is under the age of 18 years, the payment may, at the determination of the Corporation, be made wholly or partly to a guardian or trustee for the benefit of the person.

The section also provides that compensation is payable, if the Corporation so decides, to a spouse or domestic partner or child of a deceased worker who, although not dependent on the worker at the time of the worker's death, suffers a change of circumstances that may, if the worker had survived, have resulted in the spouse or domestic partner or child becoming dependent on the worker.

45B—Funeral benefit

Where a worker dies because of a compensable disability, a funeral benefit is payable equal to the actual cost of the funeral or the prescribed amount, whichever is the lesser. The funeral benefit is to be paid to the person who conducted the funeral or to a person who has paid, or is liable to pay, the deceased's funeral expenses.

45C—Counselling services

Under this new section, a family member of a worker who has died as a result of a compensable disability is entitled to be compensated for the cost of approved counselling services to assist the family member to deal with issues associated with the death. ***Family member*** means a spouse, domestic partner, parent, sibling or child of the worker or of the worker's spouse or domestic partner.

27—Amendment of section 46—Incidence of liability

Section 46 as amended will provide that the Corporation is liable for the compensation that is payable under the Act on account of the occurrence of a compensable disability. Under the section, if a worker is wholly or partially incapacitated for work and is in employment when the incapacity arises, the worker's employer is liable to pay income maintenance for the first 2 weeks of incapacity. Under new subsection (8b), the Corporation will undertake that liability of an employer in respect of a particular disability if the Corporation is satisfied that the employer has complied with its responsibilities under section 52(5) within 2 business days after receipt of the worker's claim.

28—Amendment of section 50—Corporation as insurer of last resort

These amendments are necessary as a consequence of the change in terminology from 'exempt employer' to 'self-insured employer'.

29—Insertion of Part 4 Division 7A

The new Division inserted by this clause provides for the commencement of weekly payments on a provisional basis following the initial notification of a disability.

Division 7A—Special provisions for commencement of weekly payments after initial notification of disability

50A—Interpretation

This section provides definitions of terms used in Division 7A. An ***initial notification*** is the notification of a disability that is given to an employer (if the worker is in employment) and the Corporation, in the manner and form required by the Provisional Payment Guidelines, by the worker or by a person acting on behalf of the worker. The ***Provisional Payment Guidelines*** are guidelines published by the Minister from time to time in the Gazette for the purposes of the Division.

50B—Commencement of weekly payments following initial notification of disability

This section provides that provisional weekly payments of compensation by the employer or the Corporation are to commence within 7 days after initial notification of a disability by the worker. This requirement does not apply if the Corporation determines that there is a reasonable excuse (under the Provisional Payment Guidelines) for not commencing weekly payments.

50C—Status of payments

The payment of provisional weekly payments of compensation is on the basis of the provisional acceptance of liability for a period of up to 13 weeks determined by the Corporation having regard to the nature of the disability and the period of incapacity. The acceptance of liability on a provisional basis is not an admission of liability by the employer or the Corporation. A provisional payment will be taken to constitute the payment of weekly payments under Division 4.

The employer or the Corporation may decide to discontinue weekly payments under section 50C on a ground set out in the Provisional Payment Guidelines.

50D—Worker to be notified if weekly payments are not commenced

A worker is to be notified if weekly payments are not commenced because of a reasonable excuse under the Provisional Payment Guidelines. The notice is to include details of the excuse.

50E—Notice of commencement of weekly payments

Following the commencement of weekly payments under Division 7A, the employer or the Corporation must notify the worker that weekly payments have commenced on the basis of provisional acceptance of liability.

50F—Obligations of worker

The Corporation may require the worker to provide a medical certificate in addition to other information of a prescribed kind.

50G—Liability to make weekly payments not affected by making of claim

The making of a claim for compensation does not affect a liability to make weekly payments in connection with the acceptance of liability on a provisional basis.

50H—Set-offs and rights of recovery

An amount paid under Division 7A may be set off against a liability to make weekly payments of compensation under Division 4. Further, if an employer or the Corporation makes 1 or more payments under Division 7A and it is subsequently determined that the worker was not entitled to compensation, the employer or the Corporation may, subject to and in accordance with the regulations, recover the amount or amounts paid as a debt from the worker.

50I—Status of decisions

Certain decisions under Division 7A are not subject to review:

- a decision to make a provisional weekly payment of compensation;
- a decision not to make a provisional weekly payment of compensation after it is established that there is a reasonable excuse under the Provisional Payment Guidelines;
- a decision to discontinue weekly payments of compensation under section 50C or 50F;
- a decision to continue or not to continue weekly payments of compensation under section 50G;
- a decision to exercise or not to exercise a right of recovery under section 50H.

30—Amendment of section 51—Duty to give notice of disability

This amendment is necessary as a consequence of the change in terminology from 'exempt employer' to 'self-insured employer'.

31—Amendment of section 52—Claim for compensation

Some of the amendments made by this clause are necessary as a consequence of the change in terminology from 'exempt employer' to 'self-insured employer'. It is also proposed to refer in some provisions to designated forms instead of prescribed forms.

32—Amendment of section 53—Determination of claim

Section 53(7a) details circumstances that constitute an appropriate case for the Corporation to redetermine a claim. As a consequence of the amendment made to that subsection by this clause, the Corporation will be authorised to redetermine a claim where the redetermination is for the purposes of section 4(11) (inserted by clause 5) and is appropriate by reason of the stabilising of a compensable disability.

33—Amendment of section 54—Limitation of employer's liability

These amendments are necessary because of the change in terminology from 'exempt employer' to 'self-insured employer'.

34—Amendment of section 58A—Reports of return to work etc

This amendment is necessary because of the change in terminology from 'exempt employer' to 'self-insured employer'.

35—Amendment of section 58B—Employer's duty to provide work or pay wages

Section 58B deals with the duty of the employer of a worker who has been incapacitated for work in consequence of a compensable disability to provide suitable employment for the worker. Proposed new subsection (3) provides that if a worker who has been incapacitated for work in consequence of a compensable disability undertakes alternative or modified duties under employment or an arrangement that falls outside the worker's contract of service for the employment from which the

disability arose, the employer must pay an appropriate wage or salary in respect of those duties unless otherwise determined by the Corporation.

36—Amendment of section 60—Self-insured employers

Most of the amendments made by this clause are necessary because of the change in terminology from 'exempt employer' to 'self-insured employer'.

This clause also amends section 60, which provides for the registration of an employer or group of employers as a self-insured employer or as a group of self-insured employers, by inserting a definition of 'related bodies corporate'. Some consequential amendments are also made. ***Related bodies corporate*** means—

- in the case of corporations—bodies corporate that are related bodies corporate under section 50 of the *Corporations Act 2001* of the Commonwealth;
- in the case of any other kind of bodies corporate—bodies corporate that are associated entities under section 50AAA of the *Corporations Act 2001* of the Commonwealth.

New subsection (4a) provides that the Corporation may, at any time, on the application of 2 or more self-insured employers, amend the registration of each self-insured employer so as to form a group on the ground that they are now related bodies corporate.

Under subsection (4b) the Corporation may, at any time, on application by a group of self-insured employers, amend the registration of the group in order to—

- add another body corporate to the group (on the ground that the body corporate is now a related body corporate); or
- remove a body corporate from the group (on the ground that the body corporate is no longer a related body corporate); or
- amalgamate the registration of 2 or more groups (on the ground that all the bodies corporate are now related bodies corporate); or
- divide the registration of a group into 2 or more new groups (on the ground that the bodies corporate have separated into 2 or more groups of related bodies corporate).

37—Amendment of section 61—The Crown and certain agencies to be self-insured employers

38—Amendment of section 62—Applications

The amendments made by these clauses are necessary because of the change in terminology from 'exempt employer' to 'self-insured employer'.

39—Amendment of section 62A—Ministerial appeal on decisions relating to self-insured employers

Section 62A provides a right of appeal to the Minister in respect of certain decisions of the Corporation relating to registration as a self-insured employer or group of self-insured employers. As a consequence of these amendments, an employer or group of employers will be able to appeal to the Minister if the Corporation reduces the period of registration of the employer or group as a self-insured employer or group of self-insured employers.

Under new subsection (2a), if an employer or a group of employers appeals to the Minister against a decision of the Corporation to refuse to renew, or to cancel, the registration of the employer or employers as a self-insured employer or group of self-insured employers, the Corporation may extend or renew the registration of the employer or employers for a period of up to 3 months (pending resolution of the appeal).

40—Substitution of heading to Part 5 Division 2

This amendment is necessary because of the change in terminology from 'exempt employer' to 'self-insured employer'.

41—Amendment of section 63—Delegation to self-insured employer

Section 63(1) lists the powers and discretions of the Corporation that are delegated to self-insured employers. This clause amends the subsection adding references to powers and discretions under a number of additional sections of the Act.

New subsection (5a) clarifies that if the Corporation would, but for a delegation under the section, be required to take any action or do any thing in relation to a worker of a self-insured employer. responsibility for taking the action or doing the thing rests with the employer. Further, any cost incurred in connection with taking the action or doing the thing is to be borne by the employer.

Other amendments to section 63 made by this clause are necessary because of the change in terminology from 'exempt employer' to 'self-insured employer'.

42—Amendment of section 64—The Compensation Fund

This clause amends section 64 by adding the following to the list of matters towards which the Compensation Fund may be applied:

- any costs incurred by the Minister or the Crown if a decision or process of the Minister under section 62A becomes the subject of judicial proceedings;
- the costs associated with the establishment and operation of Medical Panels (see note on clause 60);
- the costs recoverable from the Compensation Fund under Part 6C (Medical Panels);
- the costs recoverable from the Compensation Fund under Part 6D (WorkCover Ombudsman).

43—Amendment of section 66—Imposition of levies

Under section 66, an employer, other than a self-insured employer, is liable to pay a levy to the Corporation. The levy is a percentage of the aggregate remuneration paid to the employer's workers in each class of industry in which the employer employs workers. The percentage applicable to classes of industry is fixed by the Corporation by notice in the Gazette. It is currently provided that a percentage fixed in relation to a class of industry must not exceed 7.5% (thought this operates subject to other provisions, particularly subsection (9)). This clause amends the section by increasing the maximum to 15%.

Proposed new subsection (2a) provides that the levy will be payable at first instance on the basis of an estimate of aggregate remuneration for a particular financial year in accordance with Division 6. (A new Division 6 is inserted by clause 47.)

44—Amendment of section 67—Adjustment of levy in relation to individual employers

Section 67 provides for adjustment of the levy in relation to individual employers, having regard to various listed matters. This clause amends the section by adding the following to that list: the employer's practices and procedures in connection with the appointment and work of a rehabilitation and return to work co-ordinator under Part 3 (including with respect to compliance with any relevant guidelines published by the Corporation for the purposes of section 28D).

45—Substitution of heading to Part 5 Division 5

46—Amendment of section 68—Special levy for self-insured employers

The amendments made by these clauses are necessary because of the change in terminology from 'exempt employer' to 'self-insured employer'.

47—Substitution of Part 5 Division 6

Part 5 Division 6, which relates to the payment of levies by employers, is deleted by this clause and a new Division, dealing with the same subject, is substituted.

Division 6—Payment of levies

69—Initial payment

This clause provides that an employer must provide to the Corporation an estimate of the aggregate remuneration the employer expects to pay to the employer's workers during a financial year. The estimate provided by an employer that is not a self-insured employer is to relate to workers in each class of industry. The return is to be accompanied by the levy payable on aggregate remuneration in the relevant class or classes of industry based on the estimate or estimates set out in the return.

The Corporation may, by notice to a particular employer or in the Gazette—

- specify another date that will apply instead of the prescribed date; or
- specify an estimate or estimates of aggregate remuneration that will apply instead of any other estimate; or
- specify that the levy must be paid according to some other requirement determined by the Corporation.

69A—Revised estimates of remuneration by employers

This section details circumstances in which an employer must provide the Corporation with a revised estimate or estimates. For example, an employer is obliged to advise the Corporation if it

becomes aware that the actual remuneration paid or payable by the employer exceeds or is likely to exceed by more than the prescribed percentage the estimate, or latest estimate, of aggregate remuneration applying in relation to the employer under Division 6.

69B—Certificate of remuneration

The Corporation may require an employer to provide a certified statement of remuneration paid or payable by the employer in a designated form during a period specified by the Corporation to workers employed by the employer. The requirement is to be made by notice in writing to the employer.

69C—Revised estimates of remuneration by Corporation

This section authorises the Corporation to, in its absolute discretion, review an estimate of remuneration previously made under Division 6.

69D—Statement for reconciliation purposes

Section 69D requires an employer to provide the Corporation with a statement setting out the remuneration paid by the employer to workers employed by the employer during a period for which a levy was payable.

69E—Adjustment of levy

The Corporation may issue a notice of adjustment of a levy to an employer if it considers the levy should be adjusted for any 1 of a number of reasons specified in the section.

69F—Deferred payment of levy

Under this section, the Corporation may defer the payment of a levy by an employer in financial difficulties if satisfied that the employer has a reasonable prospect of overcoming those difficulties and the deferment would assist materially in overcoming the difficulties. A deferment may be conditional, and the Corporation may cancel a deferment by written notice to the employer.

69G—Exercise of adjustment powers

Under this section, the Corporation may exercise its powers under Division 6 regardless of whether or not—

- a levy has been fixed, demanded or paid; or
- a period to which a determination or adjustment may apply has been completed; or
- the Corporation has already reviewed or adjusted an estimate, liability or payment under the Division; or
- circumstances have arisen that would, but for this section, stop the Corporation from conducting a review, or making a determination or adjustment.

48—Amendment of section 70—Recovery on default

Section 70 provides the Corporation with a power of recovery in certain circumstances. Under the section as amended by this clause, if an employer fails or neglects to provide information when required by or under Part 5 of the Act, or the employer provides information that the Corporation has reasonable grounds to believe is defective, the Corporation may make its own estimates, determinations or assessments. The Corporation may also impose a fine on the employer. A fine so imposed may be remitted by the Corporation in part or in full.

49—Amendment of section 72—Review

Under section 72, an employer may require the board of management of the WorkCover Corporation to review certain decisions. As a consequence of this amendment, if an employer considers that a decision of the Corporation as to the estimate of remuneration that is to be used for the calculation of a levy is unreasonable, the board must review the decision. On a review, the board may alter the estimate.

50—Amendment of section 78—Constitution of Tribunal

Section 78 provides that the Workers Compensation Tribunal may be comprised of a Full Bench, a single presidential member or a single conciliation and arbitration officer. This amendment to section 78 removes the reference to the Full Bench.

51—Repeal of section 78A

This clause repeals section 78A, which is no longer required as it relates to the constitution, and decisions of, the Full Bench.

52—Substitution of Part 6 Division 10

Division 10 of Part 6 of the Act deals with appeals and references of questions of law. The Division currently provides that an appeal lies on a question of law against a decision of the Tribunal constituted of a single presidential member to a Full Bench of the Tribunal. The Full Bench may refer a question of law for the opinion of the Full Court of the Supreme Court. This clause deletes Division 10 and substitutes a new Division under which different arrangements apply in respect of appeals and questions of law.

Division 10—Appeals and references of questions of law

86—Appeals from decisions of arbitration officers

Under new section 86, an appeal lies on a question of fact or law against a decision of an arbitration officer to a single presidential member of the Tribunal.

86A—Appeals on question of law to Supreme Court

An appeal lies on a question of law against a decision of a presidential member to a single Judge of the Supreme Court in the case of a question decided as a part of interlocutory proceedings and to the Full Court of the Supreme Court in any other case. An appeal

cannot be commenced without the permission of a Supreme Court Judge .

86B—Reference of question of law to presidential member

An arbitration officer may refer a question of law for the opinion of a presidential member of the Tribunal. On such a reference, the presidential member may—

- decide the question of law referred to the presidential member; or
- refer the matter back to the arbitration officer with directions the presidential member considers appropriate; or
- refer the question of law to the Full Court of the Supreme Court under section 86C; or
- make consequential or related orders (including orders for costs).

86C—Reference of question of law to Supreme Court

A presidential member may, under this section, refer a question of law for the opinion of the Full Court of the Supreme Court. The Full Court may—

- decide the question of law; or
- refer the matter back to the presidential member with directions considered appropriate; or
- make consequential or related orders (including orders for costs).

53—Amendment of section 89—Interpretation

This amendment is necessary because of the change in terminology from 'exempt employer' to 'self-insured employer'.

54—Insertion of section 91B

Section 91B, which is a new section inserted by this clause, applies to a dispute relating to a decision to vary, discontinue or suspend weekly payments of compensation. The section authorises the Tribunal to direct the Corporation or self-insured employer who is a party to such a dispute to pay, or to continue to pay, weekly payments of a specified amount for a specified period or periods (each of which may not exceed 13 weeks). The Tribunal may also direct payment of weekly payments with respect to a period that is before the direction is given, but that period must not exceed 13 weeks.

The Tribunal should not make such a direction if it is satisfied that there is (and continues to be) a genuine and substantive dispute about the worker's entitlement to weekly payments of compensation.

A decision of a conciliator or arbitrator under the section is subject to review by a presidential member of the Tribunal. If a dispute is subsequently resolved in favour of the Corporation or a self-insured employer, the Corporation or employer may recover

amounts paid under the section as a debt or set off the amounts against liabilities of the Corporation or employer in respect of the person to whom the amounts were paid.

55—Substitution of section 92D

Section 92D currently provides for the reference of a dispute that is not settled in conciliation proceedings into the Tribunal for either arbitration or judicial determination. This clause substitutes a new section. Under new section 92D, if conciliation proceedings do not result in an agreed settlement of a dispute, the dispute is to be referred by the conciliator into the Tribunal for arbitration.

56—Amendment of section 93A—Conduct of proceedings

Under section 93A as amended by this clause, an arbitration is to be conducted as a full determination of the matters in dispute.

57—Repeal of Part 6A Division 6

Division 6 of Part 6A, relating to judicial determination of disputes, is repealed by this clause because disputes are no longer to be referred for judicial determination.

58—Amendment of section 95—Costs

Under section 95 as amended by this clause, a party to a dispute (other than a compensating authority) is entitled to an award against the compensating authority for the party's reasonable costs of the initial reconsideration of the disputed decision and any subsequent proceedings for resolution of the dispute under Part 6A. This principle operates subject to Part 6 and limits prescribed by regulation.

59—Insertion of section 95A

This clause inserts a new section authorising the Tribunal to make certain orders if a party's professional representative has caused costs to be incurred improperly or without reasonable cause or has caused costs to be wasted by undue delay or negligence or by any other misconduct or default.

The orders that the Tribunal may make are as follows:

- that all or any of the costs between the professional representative and his or her client be disallowed or that the professional representative repay to his or her client the whole or part of any money paid on account of costs;
- that the professional representative pay to his or her client all or any of the costs which his or her client has been ordered to pay to a party;
- that the professional representative pay all or any of the costs of a party other than his or her client.

A professional representative is in default if any proceedings cannot conveniently be heard or proceed, or fail or are adjourned without any useful progress being made, because the professional representative failed to—

- attend in person or by a proper representative; or
- file a document which ought to have been filed; or
- lodge or deliver a document for the use of the Tribunal which ought to have been lodged or delivered; or

- be prepared with any proper evidence or account; or
- otherwise proceed.

A professional representative must be given an opportunity to make representations and call evidence before an order is made against him or her under the section.

60—Insertion of Parts 6C and 6D

The clause inserts 2 new Parts. The first deals with the establishment of Medical Panels while the second establishes the office of WorkCover Ombudsman.

Part 6C—Medical Panels

Division 1—Establishment and constitution

98—Establishment

This section provides that there will be such Medical Panels as are necessary for the purposes of the Act and sets out procedures for the appointment of persons to, and removal of persons from, Medical Panels.

98A—Constitution

This section provides that a Medical Panel is to consist of the number of members as is determined by the Convenor of Medical Panels in each particular case. The number of members is not to exceed 5.

98B—Procedures

Medical Panels are not bound by the rules of evidence and may act informally and without regard to technicalities or legal forms.

98C—Validity of acts

An act or proceeding of a Medical Panel is not invalid by reason only of a vacancy in its membership or a defect in the appointment of a member.

98D—Immunity of members

No personal liability will attach to a member of a Medical Panel for an act or omission by the member or the Medical Panel in good faith and in the exercise or purported exercise of powers or functions under the Act.

Division 2—Functions and powers

98E—Interpretation

This clause provides that the following are ***medical questions***:

- a question whether a worker has a disability and, if so, the nature or extent of that disability;
- a question whether a worker's disability—

- in the case of a disability that is not a secondary disability or a disease—arose out of or in the course of employment; or
- in the case of a disability that is a secondary disability or a disease—arose out of employment or arose in the course of employment and the employment contributed to the disability;

- a question whether a worker's employment was a substantial cause of a worker's disability consisting of an illness or disorder of the mind;
- a question whether a worker has suffered a disability of a kind referred to in the first column of Schedule 2 (which relates to disabilities presumed to have arisen from employment);
- a question whether a medical expense has been reasonably incurred by a worker in consequence of having suffered a compensable disability;
- a question whether a charge for a medical service should be disallowed under section 32(5);
- a question whether a disability results in incapacity for work;
- a question as to the extent or permanency of a worker's incapacity for work and the question whether a worker has no current work capacity or a current work capacity;
- a question as to what employment would or would not constitute suitable employment for a worker;
- a question as to whether a worker who has no current work capacity is likely to continue indefinitely to have no current work capacity;
- a question whether a worker who has a current work capacity is, and is likely to continue indefinitely to be, incapable of undertaking further or additional employment or work and, if not so incapable, what further or additional employment or work the worker is capable of undertaking;
- a question as to when a disability, other than noise induced hearing loss, that developed gradually first caused an incapacity for work;
- a question as to when and in what employment a worker with noise induced hearing loss was last exposed to noise capable of causing noise induced hearing loss;
- a question as to when a worker has ceased to be incapacitated for work by a compensable disability;
- a question as to what constitutes proper medical treatment for the purposes of section 36(1a)(c);

- a question as to whether a disability is permanent and, if so, the level of impairment of a worker for the purposes of sections 43 and 43A;
- a question as to whether a provision of a rehabilitation and return to work plan imposes an unreasonable obligation on a worker;
- a question as to any other prescribed matter.

98F—Functions

A Medical Panel's function is to give an opinion on a referred medical question.

98G—Powers and procedures on a referral

This section sets out the powers and procedures of a Medical Panel. A Medical Panel may ask a worker—

- to meet with the Medical Panel and answer questions;
- to supply to the Medical Panel copies of all documents in the possession of the worker relating to the medical question;
- to submit to a medical examination by the Medical Panel or by a member of the Medical Panel.

A person or body referring a medical question to a Medical Panel is required to submit a document to the Medical Panel specifying—

- the disability or alleged disability to, or in respect of, which the medical question relates;
- the facts or questions of fact relevant to the medical question which the person or body is satisfied have been agreed and those facts or questions that are in dispute.

The person or body must also submit copies of all documents relating to the medical question in the possession of the person or body.

Under subsection (7), information given to a Medical Panel cannot be used in subsequent proceedings unless the proceedings are before the Tribunal or a court under the Act, or the worker consents to the use, or the proceedings are for an offence against the Act.

98H—Opinions

Medical Panels are required under this section to form an opinion on referred medical questions within 60 days following the referral or a longer period agreed by the Corporation or the Tribunal. The Medical Panel must give a certificate as to its opinion.

Division 3—Related matters

98I—Admissibility

A Medical Panel's certificate is admissible in any proceedings under the Act, and a member of a Medical Panel may give evidence as to matters in a certificate given by a panel of which he or she was a member. The member cannot be compelled to give such evidence.

98J—Support staff

The Minister is required under this section to ensure that there are such administrative and ancillary staff as are necessary for the proper functioning of Medical Panels.

Part 6D—WorkCover Ombudsman

Division 1—Appointment and conditions of office

99—Appointment

Section 99 provides that there is to be a WorkCover Ombudsman who is to be appointed by the Governor. The person appointed to the role may hold another office or position if the Governor is satisfied that there is no conflict between the functions and duties of the WorkCover Ombudsman and the functions and duties of the other office or position.

99A—Term of office and conditions of appointment

Section 99A sets out the term of office, which is not to exceed 7 years, and the conditions of the appointment of the WorkCover Ombudsman. A person cannot hold office as WorkCover Ombudsman for more than 2 consecutive terms.

99B—Remuneration

The WorkCover Ombudsman's remuneration, allowances and expenses are to be determined by the Governor.

99C—Temporary appointments

This section authorises the Minister to appoint a person to act as WorkCover Ombudsman—

- during a vacancy in the office of WorkCover Ombudsman; or
- when the WorkCover Ombudsman is absent from, or unable to discharge, official duties; or
- if the WorkCover Ombudsman is suspended from office.

Division 2—Functions and powers

99D—Functions

The functions of the WorkCover Ombudsman are as follows:

- to identify and review issues arising out of the operation or administration of the Act, and to make recommendations for improving the operation or administration of the Act, especially so as to improve processes that affect workers who have suffered a compensable disability or employers;
- to receive and investigate complaints about administrative acts under the Act, and to seek to resolve those complaints expeditiously, including by making recommendations to relevant parties;
- to encourage and assist the Corporation and employers to establish their own complaint-handling processes and procedures with a view to improving the effectiveness of the Act;
- to initiate or support other activities or projects relating to the workers rehabilitation and compensation scheme established by the Act;
- to provide other assistance or advice to support the fair and effective operation or administration of the Act.

He or she may act on his or her own initiative, at the request of the Minister or on the receipt of a complaint from an interested person. However, under subsection (3), the WorkCover Ombudsman may not investigate certain acts.

The WorkCover Ombudsman may attempt to deal with a complaint by conciliation.

99E—Powers—general

The WorkCover Ombudsman has the powers necessary or expedient for, or incidental to, the performance of his or her functions.

99F—Obtaining information

Under this section, if the WorkCover Ombudsman has reason to believe that a person is capable of providing information or producing a document relevant to a matter under his or her consideration, he or she may, by notice in writing, require the person to do 1 or more of the following:

- to provide the information to the WorkCover Ombudsman in writing signed by the person or, in the case of a body corporate, by an officer of the body corporate;
- to produce the document to the WorkCover Ombudsman;
- to attend before a person specified in the notice and answer questions or produce documents relevant to the matter.

The maximum penalty for failing to comply with such a requirement is a fine of $5 000.

99G—Power to examine witnesses etc

The WorkCover Ombudsman, or a person who is to receive information under section 99F, may administer an oath or affirmation to a person required to attend before him or her and may examine the person on oath or affirmation. The WorkCover Ombudsman may require a person to verify by statutory declaration—

- any information or document produced; or
- a statement that the person has no relevant information or documents or no further relevant information or documents.

The maximum penalty for failing to comply with such a requirement is a fine of $5 000.

Division 3—Other matters

99H—Independence

The WorkCover Ombudsman is to act independently, impartially and in the public interest. The Minister cannot control how the WorkCover Ombudsman is to exercise his or her statutory functions and powers.

99I—Staff

The WorkCover Ombudsman's staff is to consist of—

- Public Service employees assigned to work in the office of the WorkCover Ombudsman; and
- persons appointed by the WorkCover Ombudsman, with the consent of the Minister, for the purposes of the Act.

99J—Funding

The cost associated with the office of the WorkCover Ombudsman (including in the performance by the WorkCover Ombudsman of functions) and the WorkCover Ombudsman's staff are to be recoverable from the Compensation Fund under a scheme established or approved by the Treasurer after consultation with the Corporation.

99K—Delegation

This section sets out the WorkCover Ombudsman's power to delegate a function or power to a particular person or body or to the person for the time being occupying or holding a particular office or position.

99L—Annual report

The WorkCover Ombudsman must, on or before 30 September in each year, forward a report to the Minister on the work of the WorkCover Ombudsman during the financial year ending on the

preceding 30 June. The Minister must have copies of the report laid before both Houses of Parliament.

99M—Other reports

The WorkCover Ombudsman may, at any time, prepare a report to the Minister on any matter arising out of the exercise of the WorkCover Ombudsman's functions. The Minister must have copies of the report laid before both Houses of Parliament.

99N—Immunity

The WorkCover Ombudsman is to incur no civil liability for an honest act or omission in the performance or exercise, or purported performance or exercise, of a function or power under the Act. This immunity does not extend to culpable negligence.

61—Amendment of section 103A—Special provision for prescribed classes of volunteers

This amendment is necessary because of the change in terminology from 'exempt employer' to 'self-insured employer'.

62—Amendment of section 105—Insurance of registered employers against other liabilities

This clause amends section 105(2) by adding a reference to a rehabilitation and return to work plan. The subsection currently refers only to a rehabilitation programme.

63—Amendment of section 106—Payment of interim benefits

Under section 106, the Corporation may make interim payments of compensation pending the final determination of a claim. New subsection (3), inserted by this clause, makes it clear that the section does not derogate from Division 7A of Part 4 (Special provisions for commencement of weekly payments after initial notification of disability), which is inserted by clause 29.

64—Amendment of section 107B—Worker's right of access to claims file

Section 107B provides that the Corporation or a delegate of the Corporation must, at the request of a worker, provide the worker with certain material or make certain material available for inspection. The maximum penalty for an offence against the provision is currently a fine of $2 000. This clause increases the maximum fine to $5 000.

65—Amendment of section 111—Inspection of place of employment by rehabilitation adviser

The maximum penalty for hindering an inspection by a rehabilitation adviser of a disabled worker's place of employment is currently a fine of $3 000. This clause amends the provision by increasing the maximum to $5 000.

66—Amendment to section 112—Confidentiality to be maintained

The maximum penalty for disclosing confidential information contrary to section 112(1) is currently a fine of $3 000. This clause amends subsection (1) by increasing the maximum fine to $5 000.

A new subsection authorises the Corporation to enter into arrangements with corresponding workers compensation authorities about sharing information obtained in the course of carrying out functions related to the administration, operation or enforcement of the Act or a corresponding law. A disclosure made in accordance with such an arrangement will be permitted, as will a disclosure authorised or required under any other Act or law.

A ***corresponding workers compensation authority*** is any person or authority in a State or a Territory other than South Australia with power to determine or manage claims for compensation for disabilities arising from employment.

67—Insertion of section 112AA

The new section inserted by this clause prohibits an employer who is registered under the Act, and an employee of such an employer, from disclosing the physical or mental condition of a worker unless the disclosure is—

- reasonably required for, or in connection with, the carrying out of the proper conduct of the business of the employer; or
- required in connection with the operation of the Act; or
- made with the consent of the person to whom the information relates, or who furnished the information; or
- required by a court or tribunal constituted by law, or before a review authority; or
- authorised or required under another Act or law; or
- made—
  - (i) to the Corporation; or
  - (ii) to the worker's employer; or
- made under the authorisation of the Minister; or
- authorised by regulation.

68—Amendment of section 113—Disabilities that develop gradually

These amendment are necessary because of the change in terminology from 'exempt employer' to 'self-insured employer'.

69—Amendment of section 119—Contract to avoid Act

Section 119(2) provides that a purported waiver of a right conferred by or under the Act is void and of no effect. Under subsection (3), a person who enters into an agreement or arrangement with intent either directly or indirectly to defeat, evade or prevent the operation of the Act, or who attempts to induce a person to waive a right or benefit conferred by or under the Act, is guilty of an offence.

Under proposed new subsection (4), subsections (2) and (3) will not apply to action taken by an employer with the consent of the Corporation or to an agreement or arrangement entered into by an employer with, or with the consent of, the Corporation.

70—Amendment of section 120—Dishonesty

This amendment is necessary because of the change in terminology from 'exempt employer' to 'self-insured employer'.

71—Insertion of section 123B

Under new subsection 123B, the Governor may prescribe a code to be known as the *Code of Claimants' Rights*. The purpose of the Code is to meet the reasonable expectations of claimants for compensation under the Act about how they should be dealt with by the Corporation or a self-insured employer. The Code is to do the following:

- set out principles that should be observed by the Corporation and self-insured employers;
- provide for the procedure for lodging and dealing with complaints about breaches of the Code;
- provide—
    - for the consequences of, and remedies for, a breach of the Code by the Corporation or a self-insured employer; and
    - how and to what extent the Corporation or a self-insured employer must address situations where its conduct is not consistent with or does not uphold the rights of claimants under the Code.

72—Amendment of Schedule 1

This clause amends Schedule 1 by the insertion of a new clause that provides for the making by regulation of provisions of a saving or transitional nature consequent on the amendment of the Act by another Act. Although a provision of a regulation made under this clause may take effect from the commencement of the amendment or from a later day, a provision that takes effect from a day earlier than the day of the regulation's publication in the Gazette does not operate to the disadvantage of a worker by decreasing his or her rights.

73—Substitution of Schedule 3

This clause inserts 2 new Schedules. Schedule 3 is inserted for the purposes of section 43(3). Schedule 3A is inserted for the purposes of section 43B.

Schedule 1—Transitional provisions

The Schedule includes a number of necessary transitional provisions.