

ASBESTOS-RELATED DISEASES (OCCUPATIONAL EXPOSURE) COMPENSATION BILL 2011

CLAUSE NOTES¹

PART I PRELIMINARY

Clause 1 Short Title

Cites the Act as the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011*.

Clause 2 Commencement

Provides that the Act is to commence on a day or date to be proclaimed.

Clause 3 Objects of Act

States that the objects of the Act are to establish a scheme that:

- provides fair and appropriate compensation and the payment of certain expenses in relation to the contraction by persons of ARD in the course of employment as a workers; and
- provides for a prompt and effective resolution of applications for compensation or for the payment of certain expenses; and
- provides an effective and economical mechanism for resolving disputes relating to applications for compensation or the payment of certain expenses; and
- makes provision in relation to certain judgments and agreements relating to the contraction by persons of ARD in the course of employment as workers.

¹ **Note:** In these clause notes:

ARD means asbestos-related disease.

WRCA means the *Workers Rehabilitation and Compensation Act 1988*.

ACT means the Asbestos Compensation Tribunal.

Commissioner means the Asbestos Compensation Commissioner.

Clause 4 Application of Act to Crown

This clause provides that the Act binds the Crown, not only in right of Tasmania but also so far as the legislative power of Parliament permits, in all its other capacities.

The Act applies in respect of a worker employed by or on behalf of the Crown.

A police officer is taken to be employed by the Crown. This clause mirrors section 4 of the WRCA.

PART 2 INTERPRETATIVE PROVISIONS

Division 1 General

Clause 5 Interpretation

This clause inserts the definitions detailed below in the following order:

“accredited impairment assessor” means a person who is an accredited medical practitioner under the WRCA and who is authorised by accreditation under that Act to perform impairment assessments.

“AMA Guides” has the same meaning as it has in the WRCA. This refers to the American Medical Association Guides to the Evaluation of Permanent Impairment fourth edition as modified by the WRCA, or such later edition of those Guides as may be prescribed, as modified by the WRCA. The Guide is referred to in provisions relating to the assessment of permanent impairment.

Under section 46(3) of the Act, an assessment of a degree of impairment is to be undertaken in accordance with any relevant guidelines issued by the WorkCover Tasmania Board under the WRCA, or if there are no such guidelines, the AMA Guides. The guidelines issued by the WorkCover Tasmania Board will be modified so that in effect the 5th edition of the AMA Guides with some minor modifications, rather than the 4th edition of the AMA Guides will be used to assess permanent impairment.

“application for compensation” means an application for compensation made under section 33(1) or (4) of the Act.

Section 33(1) relates to applications made by the person who has a compensable disease. Section 33(4) relates to applications made by a member of the family of a person who has a compensable disease.

“approved” means approved in writing by the Commissioner.

“asbestos-related disease” in relation to a person, means a medical condition that is attributable to the person having been exposed to asbestos.

“basic salary” means during the year beginning 1 January 2011, \$696.85, and during any subsequent year beginning 1 January the basic salary for the previous year as varied by the relevant percentage.

This definition is similar to the definition of ‘basic salary’ in section 3(1) of the WRCA. The entitlement to compensation is linked to a defined number of compensation units, which is calculated by multiplying the basic salary by the number of units. By not specifying a figure for the ‘basic salary’ in subsequent years, there is no need to amend the legislation to adjust the basic salary annually, as the basic salary will be automatically adjusted each year.

Refer to the definition for “relevant percentage” for further explanation.

“Chief Commissioner of the Tribunal” means the person who is, under section 129 of the Act, the Chief Commissioner of the ACT.

Section 129 establishes the ACT and provides that the person who is the Chief Commissioner within the meaning of the WRCA is the Chief Commissioner of the ACT.

“commencement day” means the day on which section 29 comes into force.

Section 29 specifies the circumstances when a person is entitled to compensation under the Act.

“Commissioner” means the Asbestos Compensation Commissioner appointed under section 153.

“Commissioner of the Tribunal” means a Commissioner within the meaning of the WRCA.

The definition for **“compensable disease”** refers to section 6 of the Act.

Section 6 states that a person has a compensable disease if:

- the person has an asbestos-related disease; and
- the contraction by the person of the disease is reasonably attributable to exposure to asbestos in the course of the person’s employment as a worker during a period in which the person’s employment was connected to this State.

“compensation” in relation to a person, means compensation that is paid or payable to the person under Part 7 or 8.

Part 7 specifies all of the compensation that is payable to a person who has the ARD, and includes section 72 which specifies the amount of compensation payable to a person who has an imminently fatal compensable disease and section 73 which specifies the amount of compensation payable to a person who has a non-imminently fatal compensable disease. Part 8 relates to compensation that is payable to family members rather than the compensable person.

Medical, funeral and travelling expenses as provided for in Part 11 of the Act, are not included in the definition of compensation. However, Part 10 specifies that a compensable person is entitled to these expenses. A compensable person is defined in Part 11 as a person who has a compensable disease and in relation to whom a determination has been made under section 70 that the person is entitled to compensation under the Act.

“compensation units” refers to subsection (2) for further explanation.

A compensation unit is a way of determining the amount of compensation a person who has a compensable disease is entitled. Subsection (2) details how the amount of compensation is calculated using a compensation unit.

“contractor” means a person who enters into a contract for the provision of services by the person otherwise than as a worker.

“degree of impairment” in relation to a person, means the impairment of the person because of an asbestos-related disease that is assessed at a percentage of the whole person.

The amount of compensation to which a person is entitled is linked to the percentage of impairment of the whole person.

“domestic workers compensation insurance policy” means a policy of insurance that indemnifies the policy holder for liabilities under the WRCA, or independently of that Act in respect to domestic workers.

This definition is tied to the definition of policyholder, which is defined as a person who is required under the WRCA to maintain for the purposes of that Act a policy of insurance other than a domestic workers compensation insurance policy.

This definition and the definition of policyholder reflect the corresponding definitions under section 128A of the WRCA which relate to special contributions under that Act.

“employer” means the person with whom a worker has entered into a contract of service or a training agreement and includes:

- the Crown, and
- the employer of any person who is a member of a class of persons who are to be taken to be workers under the Act.

This clause largely reflects the corresponding definition of ‘employer’ in section 3 of the WRCA. The definition is necessary as the entitlement to compensation under the Bill is linked to whether or not the ARD is reasonably attributable to exposure to asbestos in the course of employment as a worker. This in turn is linked to section 12 which states that a person is a worker if the person entered into or worked under a contract of service or training agreement with an employer.

“fund” means the Asbestos Compensation Fund established under section 162(1). The fund comprises all levies and any other money that is collected or received to fund the scheme.

“insurer” means a body corporate authorised under the *Insurance Act 1973 (Commonwealth)* to carry on insurance business. This covers insurance businesses that provide worker’s compensation insurance.

The definition is necessary as licensed insurers are responsible for collecting levies from employers who are deemed to be policy holders under the scheme. Employers who are deemed to be self insurers under the scheme are responsible for paying levies direct to the Commissioner.

“levy” means the levy from time to time determined under section 166(1). This is the levy that is determined annually by the Minister to be payable by employers who are self-insurers or policyholders to fund the scheme.

“licensed insurer” means an insurer who holds a licence that is in force under Division 2 of Part IX of the VRCA.

This definition is tied to the definition of ‘insurer’, and largely reflects the definition of licensed insurer under section 3 of the VRCA.

Licensed insurers are responsible for collecting levies from employers who are policy holders under the scheme.

“medical evidence” includes but is not limited to including x-rays, pathology results, lung function test results, spirometry test results and histopathological test results. This definition is an inclusive rather than exclusive definition. This means that any medical evidence that is relevant to the application, may be included as medical evidence, even it is medical evidence of the type not listed in the definition.

“medical panel” means the medical panel established by the selection of members of the panel under section 51(1) to determine a medical question.

Under section 50, the Commissioner establishes and maintains a register of suitably qualified medical practitioners whose role it is to determine medical questions in respect to an application for compensation.

Section 51 provides that if the Commissioner refers a medical question to the medical panel, the Commissioner is to select 3 medical practitioners from the register to form the medical panel who will determine the medical question.

“medical practitioner register” means the medical practitioner register established under section 50 of the Act.

Under section 50, the Commissioner establishes and maintains a register of suitably qualified medical practitioners whose role it is to determine medical questions in respect to an application for compensation.

“medical professional” means:

- a medical panel established under section 51 to determine a medical question;
- a member of a medical panel;
- an accredited impairment assessor to whom a medical question is referred under section 45;
- a medical practitioner to whom a medical question is referred under the Act.

“medical question” refers to section 8 of the Act for further explanation.

Medical questions are determined by the medical panel in order to ascertain not only whether there is an entitlement to compensation, but also the type and amount of compensation to which the person is entitled.

“medical specialist” in relation to an ARD, means a medical practitioner who specialises in such diseases or the field of medicine in relation to diseases of the part of the body in which the disease occurs.

This definition has been included to provide flexibility to the scheme, and recognizes that asbestos-related diseases may relate to various parts of the body and not just the respiratory system.

“members of the family” in relation to a person, means:

- a spouse of the person, or
- a person who has not attained the age of 22 years and who is:
 - (i) a natural child of the person; or

- (ii) a surrogate child within the meaning of the *Relationships Act 2003*; or
- (iii) a child who has been adopted by the person; or
- (iv) a stepchild of the person who is a member of the family where that person is nominated as a member of the family by virtue of section 99(2).

In certain circumstances, the family of a person with a compensable disease are entitled to compensation. This definition specifies which family members may be entitled to compensation in those circumstances.

A stepchild will only be considered a member of the family if, by virtue of section 99(2) the compensable person has on the application form indicated that the stepchild is to be treated as that person's natural child.

By virtue of the definition of 'spouse' under the Act, a spouse includes a person to whom the person with a compensable disease is married to or was married to at the time of death, and a person whom the person with a compensable disease is in a significant relationship or was in a significant relationship within the meaning of the *Relationships Act 2003* immediately prior to that person's death. This includes de facto and same sex couples.

“part-time Commissioner of the Tribunal” means a part-time Commissioner with the meaning of the WRCA.

“party” in relation to a proceeding before the ACT, means:

- the Commissioner; and
- any person, other than the Commissioner, who has referred the matter to the ACT; and
- any person joined as a party in relation to a proceeding by virtue of section 127(4) or section 128(3).

Section 127(4) provides that a person may be joined as a party to proceedings where that person applies under that section for a determination as to who is a member of the family or the apportionment of lump sum compensation. Section 128(3) allows the ACT to join a person with a sufficient interest in the matter as a party to a proceeding.

“person who has a compensable disease” refers to section 6 for further explanation.

“policyholder” means a person who is required under the WRCA to maintain for the purposes of that Act a policy of insurance other than a domestic workers compensation insurance policy.

This definition reflects the corresponding definition of “policyholder” under section 128A of the WRCA.

The definition is required as the levy to fund the scheme is imposed on policyholders who are required to maintain a policy of insurance under the WRCA and self insurers under that Act.

“Registrar” means the Registrar of the ACT under section 133 of the Act.

Section 133(1) provides that the person who is the Registrar of the Workers Rehabilitation and Compensation Tribunal is the Registrar of the ACT.

“relevant employment period” refers to section 7 for further explanation.

“relevant percentage” in respect of any year beginning 1 January, means the percentage difference in the average weekly ordinary full-time earnings of adults in Tasmania between the May immediately before the start of that year and the immediately preceding May, as evidenced by statistics published by the Australian Statistician under the authority of the *Census and Statistics Act 1905 (Commonwealth)*.

The definition reflects the corresponding definition of ‘relevant percentage’ under the WRCA. The effect of the definition of ‘relevant percentage’ is to adjust the ‘basic salary’ each year, thereby dispensing with the need to amend the Act. The ‘basic salary’ is used to determine the amount of compensation to which a person is entitled.

Refer to definition of ‘basic salary’ for further information.

“self-insurer” means a person who is a self-insurer for the purposes of the WRCA.

A “self-insurer” under the WRCA is defined as an employer who is the holder of a permit issued under Division 2 of Part IX of that Act. The definition is required as the levy to fund the scheme is imposed on policyholders and self insurers.

“spouse” means:

- in the case of a person who is living:
 - (i) a person to whom the person is married; and
 - (ii) if the person (whether or not he or she is married to a person) is in a significant relationship within the meaning of the *Relationships Act 2003* with another person, that other person; or
- in the case of a person who is deceased:
 - (i) the person to whom the deceased person was married at the time the deceased person died, and
 - (ii) if the deceased person (whether or not he or she was at the time of death married to a person) was immediately before his or her death in a significant relationship within the meaning of the *Relationship Act 2003*, that other person.

In certain circumstances, members of the family of a person with a compensable disease are entitled to compensation under the Act. The definition of member of the family includes a spouse.

This definition provides that a person with a compensable disease may depending on their circumstances have one or more spouse. The definition provides that a spouse includes a person to whom the person with a compensable disease is married or was married at the time of death, and a person with whom the person with a compensable disease is in a significant relationship or was in a significant relationship within the meaning of the *Relationships Act 2003* immediately prior to that person’s death. This includes de facto couples and same sex couples.

The *Relationships Act 2003* provides that if a significant relationship is registered under the *Relationships Act 2003*, it is proof of the relationship. If a significant relationship is not registered however, the Commissioner or ACT will take into account the circumstances of the relationship, as detailed in section 4(3) of that Act. This includes for example, the duration of the relationship, nature and extent of common residence and numerous other matters.

“State” means a State and a Territory of Australia.

“training agreement” has the same meaning as it has in the *Vocational Education and Training Act 1994*.

The definition is necessary as entitlement to compensation under the Act is linked to whether or not the ARD is reasonably attributable to exposure to asbestos in the course of employment as a worker. This in turn is linked to section 12 which states that a person is a worker if the person entered into or worked under a contract of service or training agreement with an employer.

“Tribunal” means the ACT established under section 129. This comprises those persons who are the Commissioners, part-time Commissioners, and Chief Commissioner under the WRCA.

“weekly payment” in relation to a person means the weekly payment determined in accordance with Division 3 of Part 7.

Under section 84(1) of the Act, a person who has a compensable disease is entitled to a ‘weekly payment’ if;

- they are entitled to compensation and have a non-imminently fatal ARD; and
- a determination has not been made that they have an imminently fatal ARD; and
- the Commissioner is satisfied that the person is partially or totally incapacitated for work as a result of the ARD; and
- the person is an eligible person in respect to the application for compensation.

Division 3 of Part 7 details the criteria for determining whether a person is entitled to weekly payments along with the process and formula for determining the amount of weekly payments to which a person is entitled.

“worker” means a worker within the meaning of section 12 of the Act and any person taken to be a worker for the purposes of the Act.

Section 12 states that a person is a worker if the person has or had entered into or works or worked under a contract of service or training agreement with an employer.

Section 12 is similar to the definition of “worker” in the WRCA. The definition is necessary as entitlement to compensation under the Act is linked to whether or not the ARD is reasonably attributable to exposure to asbestos in the course of employment as a worker.

Subsection (2) details how the amount of compensation is calculated using a compensation unit. Where the Act refers to a number of compensation units, the amount is calculated by multiplying the basic salary by the number of compensation units. Refer to the definition for ‘basic salary’ for further information.

Subsection (3) of this clause provides that the exercise and performance of the powers and duties of a local or other public authority is to be taken to be the carrying on by the authority of a trade or business.

Subsection (3) reflects section 3(3) of the WRCA and is designed to ensure that all local and public authorities are covered by the legislation.

Clause 6 When person has “compensable disease”

Subsection (1) specifies when a person has a disease which is compensable. A person has a compensable disease if:

- the person has an ARD; and
- the contraction by the person of the ARD is reasonably attributable to exposure to asbestos in the course of the person’s employment as a worker during a relevant employment period in which the employment was connected with this State.

The entitlement to compensation under this Act hinges on these elements being established. The person must first be correctly diagnosed as having an ARD.

If this is established, the applicant must then establish that the contraction of the ARD is ‘reasonably attributable’ to exposure to asbestos in the course of employment as a worker, and this must occur during a relevant employment period which is connected with Tasmania.

This means that there must be a causal connection between the contraction of the disease and exposure to asbestos at work during a relevant employment period that is connected with Tasmania.

The degree of causation that is required is that the contraction of the disease must be “reasonably attributable” to exposure to asbestos at work. It is not necessary to prove that exposure to asbestos was the major or predominant cause of the disease, as long as it can be proven that the exposure to asbestos made a ‘material contribution’ to the contraction of the disease.

The term “material contribution” was discussed in the New South Wales decision of *Workers Compensation (Dust Disease) Board of NSW v Smith, Munro and Seymour NSWCA 19*. In that case, the court stated that “one factor can contribute to an outcome even though, relative to another factor, it has a minor effect. All that is required is that the effect be “material”. Any assessment of this materiality is an evaluative judgment...”

In cases where epidemiological studies can not provide scientific certainty as to the probability of a material contribution, and further uncertainty surrounds the worker’s experience, a logical reasoned inference of material contribution based on available expert evidence may be used.

Where the exposure may have arisen in more than one situation, it is the occupational exposure to asbestos (or the nature thereof) to which the disease must be reasonably attributable, in order to satisfy the test.

The requirement to prove the causal connection between the contraction of the disease and exposure to asbestos at work also extends to proving that the relevant exposure to asbestos occurred during a relevant employment period that is connected with Tasmania. It does not matter that there may be another period during which the person was exposed to asbestos at work in another State or Territory, as long as there is a relevant employment period connected to this State during which the exposure at work occurred.

The term ‘relevant employment period’ is explained further in clause 7, and the meaning of ‘connection to this State’ is explained in clauses 26 and 27.

Subsection (2) provides that where this Act refers to a person who has a compensable disease, it includes a person who is deceased and who had, immediately before he or she died, a compensable disease.

This clause only includes deceased persons if they are not otherwise excluded from being entitled to compensation under this Act. For example, if the person died more than 12 months prior to the commencement of this Act, they or their family are not entitled to compensation under the Act.

Clause 7 Meaning of “relevant employment period”

The purpose of this clause is to define the term “relevant employment period”. This term is used in other provisions in the Bill, including in clause 6 which sets out when a person has a compensable disease, and in the state of connection provisions in Division 3 of Part 2.

The definition of relevant employment period is a key element in determining entitlement to compensation and expenses under the Bill. A person is only entitled to compensation and expenses if he or she was exposed to asbestos during a period of employment connected with Tasmania. Given that asbestos-related diseases are long latency conditions, a person claiming compensation under the Bill could have an employment history involving a number of different jobs with different employers. It will be necessary to ascertain which period of employment is the relevant one for determining whether the person has an entitlement under this Bill.

Subsection (1) provides the general, overarching definition of “relevant employment period” which is clarified in the subsequent subsections. Under subsection (1), a relevant employment period is a period that a person (the worker) is continuously employed by an employer. The scope or duration of the period is defined as beginning on the day that the worker commences employment with the employer and ending on the day on which the worker’s employment with the employer ceases. This is regardless of whether the worker is subsequently re-employed by the employer, for example, under a different contract of service. This would be a different relevant employment period.

Subsection (2) provides that the relevant employment period includes:

- a period when the person is in another State for work, and a period when the person is in this State for work for a continuous period of more than 6 months; and
- the person is exposed to asbestos at work in Tasmania when the person is in Tasmania for work for a continuous period of more than 6 months,

the relevant employment period is the period that the person is in Tasmania for a continuous period of more than 6 months.

For example:

1. Worker A is employed by Employer B for a total period of 12 years. Initially the worker is employed by Employer B to work in NSW for 10 years. Employer B then transfers Worker A to Tasmania for a period of 2 years to work in Employer B's Tasmanian operation/factory. If Worker A is exposed to asbestos during the 2 year period in Tasmania, the relevant employment period for the purposes of the Bill is the 2 year period in Tasmania.
2. Worker C is employed by Employer D for a total period of 5 years. Initially, Worker C is employed to work in Employer D's factory in Victoria for 3 years. Employer D then sends Worker C to work in Tasmania for a period of 3 months and then Worker C returns to Victoria for the rest of the 5 years. The relevant employment period is the entire 5 years that Worker C was employed by Employer D, as the period in Tasmania is less than 6 months.

This provision attempts to distinguish temporary working assignments from longer term transfers. This becomes important in applying the state of connection provisions in Division 3 of Part 2. The reference point of 6 months is consistent with cross border provisions applying in workers compensation legislation.

However, this provision is not intended to apply in the situation where a worker is employed in Tasmania for a period of less than 6 months in accordance with a discreet contract of service with an employer (i.e., not transferred or temporarily assigned to Tasmania).

For example:

3. Worker X is employed by Employer Y to work in Queensland for a period of 12 years. Worker X ceases employment with Employer Y. Worker X is then employed by Employer Z to work in Tasmania for 4 months. The 4 month period in Tasmania can be a relevant employment period for the purposes of the Bill.

Subsection (3) is intended to clarify the situation where an employer's (the original employer) business is restructured, or sold or transferred to another person (the subsequent employer) and the worker remains with the business after it is restructured, sold or transferred. In this scenario, subsection (3) provides that the worker is taken to have been employed by the original employer from the time he or she commenced employment with the original employer to the time he or she ceased employment with the subsequent employer. This will constitute the relevant employment period for the purposes of the Bill.

Subsections (4) and (5) clarify how the relevant employment period is determined in relation to casual workers. Casual employment can be irregular making it difficult to determine whether a period of employment is continuous and when it begins and ends. Subsections (4) and (5) attempt to overcome these difficulties by deeming that the period of employment commencing on the first day the worker performs work for the employer and ending on the last day on which the worker performs work for the employer (with no further work for that employer for the following 3 months) is a period of continuous employment for the purposes of determining the relevant employment period.

Clause 8 Meaning of “medical question”

This clause provides that a medical question in relation to a person is any of the following questions:

- whether the person has an ARD;
- if the contraction by the person of the ARD is reasonably attributable to exposure to asbestos in the course of the person's employment as a worker;
- if a person has an ARD, whether or not the person is reasonably likely to die within 2 years from the date on which the question is determined, and if the person is likely to die within that period, whether the disease is reasonably likely to be a significant factor contributing to the person's death;

- the degree of impairment or incapacity of the person;
- if a person has or had an ARD, whether the person may recover from the disease or has recovered; and
- any other question, related to the health of the person that is relevant to an application for compensation, a claim for expenses, or an application for variation of lump sum because of increased impairment that relates to a person.

Medical questions are verified by the medical panel established under section 51(1) of the Act. The medical questions must be verified by the medical panel as the entitlement to compensation and the type and amount of compensation and expenses to which the person is entitled are determined by the answer to these questions.

Clause 9 References to certificates as to “imminently fatal” and “non-imminently fatal” diseases

This clause explains that a reference in this Act to a medical certificate certifying that a person has a non-imminently fatal ARD means a certificate, given by a medical specialist, certifying that the medical specialist has examined the person and is of the opinion:

- that the person has an ARD; and
- the person is not reasonably likely to die within 2 years from the date on which the certificate is given or if the medical specialist is of the opinion that the person is reasonably likely to die within 2 years from the date on which the certificate is given, the ARD is not reasonably likely to be a significant factor contributing to the person’s death.

Subsection (2) explains that a reference in this Act to a medical certificate certifying that a person has an imminently fatal ARD means a certificate, given by a medical specialist, certifying that the medical specialist has examined the person and is of the opinion:

- that the person has an ARD; and
- that the person is reasonably likely to die within 2 years from the date on which the certificate is given; and
- the disease is reasonably likely to be a significant factor contributing to the person’s death.

The differentiation between an imminently fatal ARD and non-imminently fatal ARD is necessary as the entitlements depend on whether the ARD is imminently fatal or non-imminently fatal. The term

‘significant factor contributing’ to death has been used rather than ‘cause’ of death, as it acknowledges that in many cases an ARD can cause complications which can be a significant factor which contributes to the person’s death.

Clause 10 References to application for compensation relating to a person who has a compensable disease

This clause explains that a reference in this Act to an application for compensation in relation to a person who has a compensable disease, is a reference to:

- an application for compensation made by the person who has or who claims in the application to have a compensable disease; or
- an application for compensation made by a member of the family of a person who has a compensable disease; or
- a person who it is claimed in the application has a compensable disease.

Clause 11 Meaning of “evidence of a person’s occupational history”

This clause defines a “relevant exposure period” as a period during a relevant employment period, in which it was reasonably likely the person was exposed to asbestos as a worker.

Subsection (2) specifies that evidence of a person’s occupational history means evidence of any of the following:

- employment in a workplace during a relevant employment period in which a relevant exposure period occurred;
- a relevant exposure period;
- the employment of the person in a workplace during a relevant exposure period;
- the type of work performed by the person at the workplace during a relevant exposure period;
- the product name of the asbestos to which it is alleged the person may have been exposed during a relevant exposure period.

Occupational evidence is relevant in determining whether there is the causal connection between the contraction of the disease and the exposure to asbestos at work, which is required to be established in order to prove that a person has a compensable disease.

Evidence that may be provided in respect of a person's occupational history during the relevant exposure period includes, but is not limited to the following:

- pay slips, group certificates, or other documents evidencing employment;
- statement of witnesses in relation to employment as a worker of the person at a workplace during a relevant employment period or relevant exposure period, or the possible exposure of the person to asbestos at that workplace while employed;
- evidence of the person being a member of a trade union, holding a licence, qualification or other authority to engage in a trade or occupation;
- statutory declarations or affidavits, sworn by the person or another person, as to employment in an occupation by the first mentioned person.

Division 2 When persons are, or are not, workers

Clause 12 When person is worker

This clause defines a person as a worker if the person is engaged or works under a contract of service or training agreement with an employer.

It applies in relation to a contract whether the contract is or was express or implied, oral or in writing, and in relation to work that is manual, labour, clerical work in nature or any other type of work.

This clause is similar to the definition of “worker” in section 3(1) of the WRCA.

Clause 13 Certain contractors and salespeople &c., to be taken to be workers

This clause specifies that a contractor who:

- performs work under a contract made with another person; and
- does not sublet the contract or employ any worker to perform the work; and
- does not hold his or her own personal accident insurance during the period in which the work is performed,

is a worker in the employment of the person while performing the work.

The deeming that such a person is a worker does not apply in relation to a contract that is incidental to a trade or business regularly carried on by the contractor in the contractor's own name or under a business or firm name.

Subsections (1) and (2) are similar to section 4B of the WRCA.

Subsection (3) states that a salesperson, canvasser, collector, or other person who is paid wholly or partly by commission, is a worker in the employment of the person by whom the commission is payable, while they are engaged in activities to which the payment relates.

But subsection (3) does not apply to a person paid wholly or partly by commission if the commission is received for or in connection with work incidental to a trade or business regularly carried on by the salesperson, canvasser, collector or other person or by a firm of which he or she is a member.

Subsections (3) and (4) are similar to section 4C of the WRCA.

Clause 14 Taxi drivers and hire-car drivers to be taken to be workers

This clause provides that a person who drives a vehicle as a luxury hire car, with the consent or authority of a person who holds the licence or authority in this State to operate the car, is a worker employed by the holder of the licence or other authority, while the person is driving the vehicle or performing any associated activity.

This clause reflects section 4DA of the WRCA.

Subsection (2) provides that a person who drives a vehicle as a taxi is deemed to be a worker employed by the holder of a licence or other authority to operate the vehicle as a taxi, while the person is driving the taxi or performing any associated activity.

Subsection (2) reflects section 4DB of the WRCA.

Subsection (3) provides that a luxury hire car or taxi is operated as a luxury hire car or a taxi if it is a luxury hire care or taxi for the purposes of legislation in Tasmania which is in force at the time the vehicle is operated.

The deeming provision in this clause does not apply to a driver of a luxury hire car or taxi if the driver is also the holder of the licence or other authority.

Subsections (3) and (4) reflect the corresponding sections 4DA(2) and 4DB(2) of the WRCA.

Clause 15 Persons plying vehicles or vessels for hire to be taken to be workers

This clause provides that a person who is engaged in plying for hire with a vehicle or vessel, the use of which is obtained from the owner under a contract of bailment (other than a hire-purchase agreement) in consideration of the payment of a fixed sum or a share in the earnings of the vehicle or vessel, is a worker employed by that owner while so engaged.

This clause reflects section 3(2) of the WRCA.

Clause 16 Jockeys to be taken to be workers

This clause defines the following terms.

“Racing licence” means a licence or other authority authorising a person to ride horses in races or official trials;

“relevant activity” means training a horse, or engaged in associated activities, in preparation for riding a horse for fee or reward”;

“Tasracing” means Tasracing Pty Ltd formed under the *Racing (Tasracing Pty Ltd) Act 2009*.

Subsection (2) provides that a jockey or apprentice is deemed to be a worker employed by Tasracing while performing a relevant activity during a period in which he or she holds a racing licence, if he or she was at the beginning and end of that period:

- engaged to ride a horse for fee or reward at a race meeting or official trial held in Tasmania;
- engaged to ride a thoroughbred horse in a training session in Tasmania conducted by a person authorised under a law of this State to train horses for racing.

In determining any compensation payable to such a jockey or apprentice:

- he or she is taken to have been continuously employed by Tasracing for the period during which he or she has continuously held a racing licence; and
- any earnings from riding engagements in another State during the 12 months immediately before the period of his or her application for compensation, or during the period for which he or she held a racing licence, are taken to be earnings received in the employment of Tasracing.

The normal weekly earnings of a person to whom subsection (2) applies are not to be more than 2 times the basic salary.

Subsections (3) and (4) are relevant for the purposes of calculating a person's entitlement to weekly payments if they are incapacitated around the time of making the application for compensation.

This clause is similar to section 4DC of the WRCA but has been modified to reflect the latent nature of ARD and acknowledges that ARD are contracted in a manner quite different to injuries usually associated with being a jockey.

Clause 17 Ministers of religion taken to be workers

This clause provides that a Minister of religion is deemed to be a worker in relation to the carrying out of his or her activities on behalf of the church.

This clause is similar to section 3(4) of the WRCA.

Clause 18 Persons may be prescribed to be workers

This clause provides that a person, who is a member of a class of persons that is prescribed, is a worker in relation to the carrying out of an activity prescribed for the purposes of this section.

The clause provides a mechanism for a class of people who perform a particular activity to be deemed a worker.

Clause 19 Volunteers engaged in fire-fighting or fire prevention operations to be taken to be workers

This clause defines **“fire-fighting operations”** as including:

- any act that is necessary or expedient for or directed towards extinguishing a fire, preventing the spread of a fire, saving life or preventing injury to persons, preventing property from being destroyed or damaged, or providing sustenance for persons performing any of these acts, or taking action to prevent the outbreak of fire; and
- undergoing training in relation to all or any of those acts.

“Fire-fighting person or body” means the:

- the Secretary of the responsible Department in relation to the *Fire Service Act 1979*; or
- the State Fire Commission within the meaning of that Act; or
- any brigade within the meaning of that Act.

“Fire prevention operations” means any operations carried on or any work or other acts done for the purpose of preventing the outbreak of fire or abating the danger of fire, and includes the undergoing of training in relation to any of those operations, acts or work.

Subsection (2) provides that a person, who as a volunteer engages in fire-fighting operations or fire prevention operations with the consent of, or under the authority of, or in cooperation with a fire-fighting person or body, is deemed to be a worker employed by the Crown, while they are engaged in this activity.

A person engages in the operations mentioned in subsection (2) as a volunteer only if the person engages in the operations other than under

a contract for services, contract of service or a training agreement with a fire-fighting person or body.

Any meeting, competition or demonstration related to the prevention, control or extinguishment of fires is taken to be training.

This clause reflects the provisions of section 5 of the WRCA.

Clause 20 Volunteers engaged in providing ambulance services to be taken to be workers.

This clause defines an “**ambulance provider**” as the Secretary of the responsible Department in relation to the *Ambulance Service Act 1982*, or the Director or any officer of the Ambulance Service.

Subsection (2) provides that the terms “ambulance services”, “Director” and “officer of the Ambulance Service” have the same meaning as they have under section 3 of the *Ambulance Service Act 1982*.

A person who as a volunteer engages in ambulance services with the consent, authority, or in cooperation with an ambulance provider, or in pursuance of an arrangement made with the person by the Director in the exercise of the performance of the Director’s functions under the *Ambulance Service Act 1982*, is deemed to be a worker employed by the Crown while they are engaged in that activity.

A person engages in ambulance services as a volunteer only if they engage in the operations other than under a contract for services, contract of service or training agreement with the Secretary of the responsible Department in relation to the *Ambulance Service Act 1982* or the Director.

References to the term engaging in ambulance services include references to the undergoing of training and instruction in those services.

This reflects the provisions of section 6 of the WRCA.

Clause 21 Police volunteers to be taken to be workers

This clause defines “**police operations**” as:

- marine search and rescue operations within the meaning of the *Marine Search and Rescue Act 1971*; and
- operations required to search for or bring to safety persons in danger in the State, persons in need of assistance as a result of casualty occurring in the State or persons suffering from illness or injury in the State who require assistance; and
- operations required for the purpose of protecting property in this State.

A person, who as a volunteer performs police operations with the consent, authority or in cooperation with the Secretary of the responsible Department in relation to the *Police Service Act 2003*, is deemed to be a worker employed by the Crown while engaged in those activities.

A person performs police operations as a volunteer only if they perform the operations other than under a contract for services, contract of service, or training agreement with the Secretary of the responsible Department in relation to the *Police Service Act 2003*.

This clause reflects the provisions of section 6A of the WRCA.

Clause 22 Prescribed classes of volunteers to be taken to be workers

This clause provides that a person who is a member of a class of persons prescribed, who as a volunteer performs work of a prescribed class, where that work is of benefit to the State, is deemed to be a worker employed by the Crown while they are performing that work.

It also provides a mechanism for a class of people who perform particular work as volunteers, to be deemed workers employed by the Crown.

The clause reflects section 6B of the WRCA.

Clause 23 Certain persons not to be taken to be workers

This clause deems that the following persons are not workers while they are engaged in any of the following employment or programs:

- employment as an outworker;
- employment of a casual nature other than for the purposes of the employer's trade or business;
- employment as a member of a fishing boat who is remunerated wholly or mainly by share in the profits of gross earnings in respect of that boat;
- participating in an approved program of work for unemployment payment under the *Social Security Act 1991 (Commonwealth)*.

The clause reflects section 4(5) of the WRCA.

Clause 24 Persons who are Commonwealth employees when relevant exposure to asbestos occurred not to be taken to be workers

This clause deems that a person, who is a worker under a contract of service or training agreement with the Commonwealth when the relevant exposure to asbestos occurred, is not a worker, other than for the purpose of determining an entitlement to weekly payments under this Act.

Clause 25 Sportspeople not taken to be workers

This clause deems that a person is not a worker while he or she is under a contract:

- participating as a contestant in any sporting or athletic activity; or
- engaged in training or preparation with a view to participating as a contestant in that activity; or
- travelling in connection with participating as a contestant in that activity,

if under the terms of the contract he or she is not entitled to any remuneration, other than remuneration for the doing of those things.

This clause reflects section 7 of the WRCA.

Division 3 When employment is connected with this State

Clause 26 When employment is “connected with this State”

Subsection (1) provides a sequential series of tests to determine whether a worker’s employment, during the relevant employment period, is connected with Tasmania or another jurisdiction. If a worker “usually” performed their job in a particular State or Territory, then the employment is deemed to be connected with that jurisdiction. If the first test does not apply then the “State of connection” will be determined according to the second test of where the worker was usually based for the purposes of work during the relevant employment period. If that test does not identify a particular State, the “State of connection” will be where the employer’s “principal place of business” in Australia was located during the relevant employment period.

Subsection (2) provides that even if a worker happened to be outside Tasmania when (occupationally) exposed to asbestos, compensation may be payable under the Act as long as the worker’s employment, during the relevant employment period, was connected with Tasmania.

Subsection (3) provides a test to establish a “State of connection” for workers working on ships. If the tests under subsection (1) do not apply, a worker’s employment, while working on a ship in a relevant employment period, is connected to the jurisdiction in which the ship was registered. If the ship was registered in more than one State during the relevant employment period, the State of connection is the State where the ship was last registered during that period.

Subsection (4) provides for exceptional circumstances where none of the tests in subsections (1) or (3) identify a “State of connection”. This final, last resort test provides that the worker’s employment is connected with Tasmania if it is reasonably likely that the worker was exposed to asbestos in the course of the worker’s employment in Tasmania and the worker is not entitled to compensation for an asbestos-related disease in another State, Territory or place outside Australia. This is conditional upon there being no place outside Australia that the worker is entitled to compensation for the same injury.

Subsection (5) specifies that when deciding whether a worker “usually worked” in a State during the relevant employment period (as per the first test of connection under subsection (1)(a), consideration must be given to the worker’s occupational history including during the relevant

employment period. Regard must also be had to any part of the relevant employment period that a worker worked or was in a State (be it Tasmania or a different State) for the purposes of employment regardless of whether the worker is regarded under that State's laws (relating to workers compensation or compensation for asbestos-related diseases) as having been working or employed in that State. However, temporary arrangements where a worker works in a State for six months or less are not to be taken into account.

Subsection (6) states that compensation is not payable under the Act if the worker was employed on a ship and the *Commonwealth Seafarers Rehabilitation and Compensation Act 1992* applies to the worker's employment. This prevents double dipping.

Clause 26 reflects section 31A of the WRCA.

Clause 27 Determination of State of connection by Commissioner or Tribunal

Subsection (1) provides that when ascertaining whether Tasmania is the jurisdiction connected with the worker's employment during the relevant employment period, the Commissioner or ACT must determine the "State of connection" according to the tests in section 26.

Subsection (2) specifies that a determination of "State of connection" does not have to be made under subsection (1) if a previous determination is to be recognised under clause 28, e.g., if a court or Tribunal of Tasmania or another State has previously made a determination about the State of connection in respect of the relevant employment period.

Subsection (3) provides that a person who makes an application, or the Crown which includes the Commissioner, may refer to the ACT a question as to which State is the State of connection.

The referral to the ACT may not be made if a determination as to the State of connection is to be recognised under clause 28 in relation to the same relevant employment period.

This clause reflects sections 31B and 31C of the WRCA.

Clause 28 Recognition of previous determinations of State of connection

This clause applies in relation to a relevant employment period if a determination as to State of connection in relation to that period is made by the ACT, a court or Tribunal of another State with a corresponding provision of law, or a court of this State or another State in respect to a claim for damages.

The State determined as the State of connection under this section by a court or Tribunal, is to be recognised as the State of connection.

A determination by a court or Tribunal in relation to the State of connection may be appealed.

If the determination as to State of connection is changed on appeal, the change is to be recognized under this section.

This clause reflects section 31D of the WRCA.

PART 3 ENTITLEMENT TO COMPENSATION

Clause 29 Persons with compensable disease entitled to compensation

This clause provides that a person who has a compensable disease, and in relation to whom there is a determination by the Commissioner or ACT that the person has an imminently fatal ARD, is entitled to compensation under the Act.

Subsection (2) provides that a person who has a compensable disease, and in relation to whom there is a determination by the Commissioner or ACT that the person has a non-imminently fatal ARD and there is no determination that the person has an imminently fatal-ARD, is entitled to compensation under the Act, but only if the degree of permanent impairment of the whole person is 10% or more.

If the degree of impairment has not reached 10% or more at the time the application is made, the application will be placed in a holding pattern until at least 10% impairment is reached.

Subsection (3) provides that if a person has received compensation in relation to an ARD because he or she had a non-imminently fatal ARD and received compensation for that disease under this section, that person is not prevented from being entitled to further compensation under this section for that same ARD or another ARD that is an imminently fatal ARD.

In these circumstances, the person may be entitled to receive additional lump sum payments as a result of an increase in the whole person impairment of the person.

Clause 30 Entitlement to compensation when person contracts another compensable disease

This clause provides that a person, who has received compensation under the Act in relation to an imminently fatal ARD under section 29(1), is not entitled to further compensation in relation to a different ARD, whether or not the different disease is a non-imminently fatal or imminently fatal ARD.

Subsection (2) clause provides that a person, who has received compensation under the Act in relation to a non-imminently fatal ARD under section 29(2), is not entitled to further compensation in relation to a different ARD.

Subsection (3) provides that subsection (2) does not prevent a person making an application for compensation for more than one ARD.

This clause recognises that a person may receive compensation for a non-imminently fatal ARD, and they may then develop an imminently fatal ARD which is a different disease to the one for which compensation was received as a non-imminently fatal ARD. This clause allows a person to make another application for compensation in those circumstances.

Subsection (4) provides that subsection (2) also does not prevent a person from receiving further lump sum compensation under section 75 or 77 for an increase in the impairment of the person, where the increase in impairment is wholly or partly because he or she has an ARD that is different to the non-imminently fatal ARD in relation which he or she received compensation under section 29(2).

Subsection (2) also does not prevent a person from receiving further compensation by way of an increase in the amount of weekly payments by virtue of section 80, because his or her degree of incapacity has increased wholly or partly because he or she has a ARD that is different to the non-imminently fatal ARD in relation to which he or she received compensation under section 29(2).

Clause 31 Members of family of person who has compensable disease entitled to compensation

This clause provides that a person is deemed to be a relevant deceased person if she or she is a person with a compensable disease, he or she dies, and an ARD was reasonably likely to be a significant factor contributing to that person's death.

Subsection (2) provides that unless the Act determines otherwise, a person is entitled to compensation under the Act:

- if he or she is a member of the family of a compensable person who is a relevant deceased person and a person to whom all or part of compensation payable under this Act may be provided in accordance with Schedule I; and
- the relevant deceased person died within 12 months before commencement day.

Subsection (3) provides that unless the Act determines otherwise, a person is entitled to compensation under the Act:

- if he or she is a member of the family of a compensable person who is a relevant deceased person and a person to whom all or part of compensation payable under this Act may be provided in accordance with Schedule I; and
- the relevant deceased person dies after commencement day.

Schedule I details how lump sum compensation is to be distributed among members of the family.

However, a person however is not entitled to compensation in relation to a relevant deceased person if that person died more than 12 months before commencement day.

Subsection (5) provides that a person is not entitled to compensation in relation to a relevant deceased person if:

- the Commissioner has determined that the relevant deceased person is entitled to lump sum compensation equal to the maximum amount of lump sum compensation to which the relevant deceased person is entitled; or
- the Commissioner has made more than one determination that the relevant deceased person is entitled to lump sum compensation and the total of those lump sums equal the maximum amount of lump sum compensation to which the relevant deceased person is entitled.

This clause is designed to prevent compensation being paid twice to a compensable person and their family. Although it only applies where a determination has been made by the Commissioner that the relevant deceased person will receive the maximum amount of lump sum compensation to which they are entitled under the Act.

Subsection (6) provides that the maximum amount of lump sum compensation payable in relation to a relevant deceased person is 360 compensation units, which is approximately \$250,000, plus the number of compensation units whichever applies to the relevant deceased person under sections 72(2)(b) or 72(4)(b).

Section 72(2)(b) provides for an additional lump sum payment to be made based on the age of the person on commencement day, where the imminently fatal ARD was correctly diagnosed and the person was notified of the diagnosis before commencement day.

In the case of section 72(4)(b), an additional lump sum payment may be made based on the age of the person on the day on which the person is first notified by a medical specialist who has correctly diagnosed that the person has an imminently fatal ARD.

These age based lump sum payment amounts are prescribed in the regulations.

Clause 32 Assumptions as to exposure as a worker

This clause provides that where a person who has an ARD was employed as a worker for a period of at least 12 months (whether

continuous or not) during a relevant employment period that is connected with this State:

- at a workplace at which at the time of that employment products containing asbestos were manufactured; and
- in an occupation in which it may reasonably be assumed a person was likely to have been exposed to asbestos in the ordinary course of his or her duties as a worker,

it is deemed that the contraction of the ARD by the person is reasonably attributable to exposure to asbestos in the course of the person's employment.

The deeming provision applies to a person whether or not the person was, or may have been exposed to asbestos in a non work environment.

This clause recognises that any exposure that the person may be subjected to outside the work environment is likely to be negligible in comparison to their exposure in the work environment where that work environment involves the manufacture of asbestos related products.

A workplace at which products containing asbestos were manufactured includes, but is not limited to premises owned or occupied by the manufacturer where the products were manufactured, packed, stored or assembled.

Products containing asbestos are deemed to be manufactured by a principal manufacturer whether the product consists of an object containing asbestos which is manufactured by the principal manufacturer or an object that has been manufactured by another manufacturer which is made into or forms part of another object manufactured by the principal manufacturer.

PART 4 APPLICATIONS FOR COMPENSATION

Division 1 How applications to be made

Clause 33 Applications for Compensation

A person, who has a compensable disease as defined by section 6, may make an application for compensation by lodging the application with the Commissioner.

An application must be in an approved form.

Subsection (2) requires that an application for compensation is to be accompanied by:

- a relevant medical certificate;
- evidence of the occupational history;
- other evidence relevant to determining whether the person has an ARD; and
- other evidence in respect of exposure, whether or not this may have been as a result of employment as a worker.

A relevant medical certificate is a medical certificate from a medical specialist in the field to which the disease relates, which certifies that the person has a non-imminently fatal ARD or an imminently fatal ARD.

Subsection (4) provides that a member of the family of a person who has a compensable disease may also make and lodge an application for compensation in an approved form with the Commissioner.

Subsection (5) details what must accompany an application made by a member of the family. This includes:

- evidence of the occupational history;
- other evidence relevant to determining whether the person has an ARD; and
- evidence in respect of exposure, whether or not this may have been as a result of employment as a worker;
- evidence that the person has died and date of death; and
- evidence, if any is available, that an ARD was reasonably likely to have been a significant factor contributing to the person's death.

Evidence must be provided that the ARD was reasonably likely to have been a significant factor contributing to the death.

Clause 34 Applications in relation to imminently fatal disease not required in certain circumstances

This clause provides that if the Commissioner previously determined an application and found that the person had a non-imminently fatal ARD, the medical panel then determines that the person has an imminently fatal ARD and the person is alive at the time that the medical panel makes its determination, the Commissioner after receiving this information is to make a determination as if the person has made a

further application for compensation, the Commissioner has referred medical questions to the medical panel, and the determination made by the medical panel in relation to the imminently fatal ARD forms part of the determination made by the medical panel.

In these circumstances, a person who had a non-imminently fatal ARD can provide a medical certificate to the Commissioner, certifying that the person has an imminently fatal ARD.

If the Commissioner receives the medical certificate before 6 months after the certificate is given and the person is alive at the time the Commissioner receives the certificate, the application under this section is to be taken to be a fresh application and the medical certificate is to be taken to be the certificate accompanying the application.

In effect this clause means that the person does not need to go through the whole application process again if a determination has previously been made that they have a non-imminently fatal ARD and it is subsequently verified that they have an imminently fatal ARD.

Clause 35 Application by family members to be made jointly

Applications for compensation by members of the family of the person are to be made jointly with other members of the family, except if the ACT determines otherwise.

A member of the family can ask the ACT to determine whether an application for compensation may be made even if the application is not made jointly with other members of the family as required by this clause.

The ACT may determine that an application may be made by a member of the family, and it need not be made jointly, if the ACT is satisfied the other persons cannot be contacted, are unwilling to be joined or for any other reason if it would be unjust to refuse to permit the application.

Division 2 Time in which applications to be made

Clause 36 If diagnosis of imminently fatal asbestos-related disease occurs before commencement day

A person who has a compensable disease who is given a medical certificate which correctly certifies that they have an imminently fatal ARD before commencement day, may only make an application for compensation within 12 months after commencement day, or a period, if any, which is determined by the Commissioner or ACT.

Clause 37 If diagnosis of imminently fatal asbestos-related disease occurs after commencement day

A person who is given a medical certificate which correctly certifies that they have an imminently fatal ARD after commencement day, may only make an application for compensation within 12 months after the day on which the certificate is given or a period, if any, determined by the Commissioner or ACT.

Where a person receives two certificates, the day on which the first correct certificate is given is deemed to be the day on which the certificate is given.

Clause 38 No time limitation where diagnosis of non-imminently fatal asbestos-related disease

An application may be made at any time by a person who has a non-imminently fatal ARD.

Clause 39 If person who has compensable disease dies

An application relating to a person who had a compensable disease and who died within 12 months before commencement day, may only be made by the members of the family if the application is made within 12 months after commencement day, or a period, if any, determined by the Commissioner or ACT.

An application relating to a person who had a compensable disease and who dies after commencement day, may only be made by the members of the family if the application is made within 12 months of the death of

the person or a period, if any, determined by the Commissioner or ACT.

Clause 40 Extension of time to make application for compensation

A person may apply to the Commissioner seeking an extension of time to make an application for compensation.

The Commissioner must grant the extension, for a period determined by the Commissioner, if the failure to make the application was caused by a mistake or the person was absent from the State during all of the 12 month period.

The Commissioner may grant the extension, for a period determined by the Commissioner, if he or she is satisfied there was a reasonable cause for the failure to make the application in the required 12 month period. In determining a 'reasonable cause', the Commissioner is to have regard to any difficulty in obtaining evidence and whether the person within the 12 months period, has taken all reasonable steps to attempt to obtain the evidence.

A person may refer a determination of the Commissioner to the ACT. The ACT may permit the application for extension of time to be made within a period specified by the ACT.

Division 3 *Initial consideration of applications*

Clause 41 Commissioner may require further information to be provided by the applicant

If there is insufficient evidence on the application to enable the Commissioner to make a determination in relation to the application, the Commissioner may by notice to an applicant, request the person to provide further information, specify the date by which the information is to be provided, and notify the person that the Commissioner may refuse or reject the application until it is provided or if it is not provided.

The notice must specify that the person has at least 40 business days to provide the information.

The Commissioner may refuse to consider the application until the information is provided or reject the application if the information is not provided by the specified date. A person is not prevented from making a further application if the application is rejected.

Clause 42 Rejection of application

The Commissioner may reject an application if satisfied that it is frivolous or vexatious.

Clause 43 Rejection of application may be referred to Tribunal

An application that has been rejected by the Commissioner may be referred to the ACT. The ACT may determine that the Commissioner must not reject the application, or it may refuse to make a determination.

Clause 44 Commissioner to refer assessment of degree of impairment to accredited impairment assessor

Before determining an application in relation to a person who has a compensable disease, the Commissioner must refer an application that relates to a non-imminently fatal ARD to an accredited impairment assessor for a determination to be made as to the degree of impairment of the person. This is to be done before the application is referred to the medical panel.

The Commissioner is to refer the application to the impairment assessor within 5 business days after the application is made. The time frame does not apply if further information is required by the Commissioner, but once the information is received, the application is to be referred to the impairment assessor within 5 business days.

A medical question may only be referred to the medical panel if the Commissioner provides to the medical panel a determination of the impairment assessor to the effect that the degree of impairment of the person is 10% or more.

The Commissioner is not required to send the application to an impairment assessor if he or she believes the person is not entitled to compensation for some other reason.

PART 5 DETERMINATION OF MEDICAL QUESTIONS

Division 1 Accredited impairment assessors

Clause 45 Referral of accredited impairment assessor of assessment of degree of impairment

The Commissioner may refer a medical question as to the degree of impairment of a person who has a compensable disease and who has made an application for compensation, to an accredited impairment assessor.

The impairment assessor is to determine the question within 10 business days after the question is referred. The impairment assessor may provide his or her determination as to the degree of impairment to the Commissioner, or may determine that he or she is unable to make the determination. If he or she is unable to determine the degree of impairment, the Commissioner is to refer the question to another impairment assessor.

The medical panel may also refer back to the Commissioner a question as to the degree of impairment, and the Commissioner is then to refer the question to another impairment assessor.

Clause 46 Assessment of degree of impairment

The degree of impairment is to be assessed at the time the application for compensation is made, or a later time if that is approved by the Commissioner.

Assessments are to be undertaken by an impairment assessor in accordance with:

- any relevant guidelines issued by the WorkCover Tasmania Board under the WRCA; or
- if there are no guidelines, the AMA Guides; or
- if there are no guidelines and the AMA Guides are not applicable, the method prescribed, if any, under section 72 of the WRCA.

In making the assessment, the impairment assessor is not to take into account any psychiatric or psychological injury, impairment or symptoms arising as a consequence of or secondary to the disease. Also, the degree of impairment may comprise a combination of impairments arising out of the same or various ARDs, which are to be assessed together using the combination tables in the AMA Guides or as modified by the relevant guidelines by the WorkCover Tasmania Board.

These provisions are similar to section 72 of the WRCA.

Division 2 Reference of medical question to medical panel

Clause 47 Medical questions to be referred to medical panel

The Commissioner must refer to a medical panel all the medical questions specified in section 8, if the application has not yet been determined and the Commissioner has not rejected or does not intend to reject the application.

This requirement does not apply to a medical question which relates to the degree of impairment or incapacity if the application is accompanied by a medical certificate which certifies that the person has an imminently fatal ARD.

After an application has been determined, the Commissioner may refer any medical question to the medical panel. If a question is referred back to the Commissioner by a medical panel because it is unable to agree, the Commissioner must refer the medical question to a fresh medical panel.

The Commissioner is not required to refer a medical question to the medical panel, if he or she is of the opinion that there are other reasons for deciding the person is not entitled to compensation.

Clause 48 Time for referring medical questions to medical panel

A medical question is to be referred by the Commissioner to the medical panel within 5 business days after the application is made.

The time limit does not apply if the application needs to be referred to an impairment assessor first, but it does apply once the impairment assessor's determination has been received by the Commissioner.

Similarly, if the Commissioner has requested a person to provide further information that relates to a medical question, the time limit does not apply, but it does apply once the information requested is received.

If information has been requested that relates to a medical question and the matter has been referred to an impairment assessor, the time limit only applies once all of the information has been received.

If the medical panel refers a medical question back to the Commissioner, the Commissioner is to refer the medical question to a fresh medical panel within 5 business days after receiving the notice from the first medical panel.

Clause 49 Commissioner to provide opinions of assessors and other medical practitioners to medical panel

The Commissioner is to provide the medical panel to which a medical question has been referred, with all the relevant information that the Commissioner has received from an impairment assessor or medical practitioner, and any other information that is likely to assist the medical panel in determining the medical question.

Division 3 Formation of medical panel

Clause 50 Register of suitably qualified medical practitioners

The Commissioner must establish and maintain a register of practitioners who are suitably qualified and willing to be selected on the medical panel.

For the purposes of the Act, a medical practitioner is deemed to be suitably qualified if he or she is a specialist in a field of medicine in which ARDs occur.

This clause is similar to section 50 of the WRCA.

Clause 51 Selection of members of the medical panel

Where a medical question is referred to a medical panel, the Commissioner is to select 3 medical practitioners from the register to form the medical panel. Medical practitioners who are specialists in the field of medicine in which the ARD occurs, and to which the medical question relates, are if reasonably practicable, to be selected to form the medical panel.

If the medical question relates to more than one ARD, if reasonably practicable, a medical practitioner who is a specialist in the field of medicine in which each of the diseases occurs, and to which the medical question relates, should be selected to form the medical panel.

A medical practitioner must not be selected to form the medical panel if they have previously been involved in the treatment or examination, or provided services to the person in respect to the ARD, or if the medical practitioner informs the Commissioner that there may be a conflict of interest.

A member of the panel is entitled to remuneration determined by the Minister.

This clause is similar to section 50 of the WRCA.

Division 4 Referrals to medical practitioners

Clause 52 Medical panel may refer medical question to medical practitioner

A medical panel may refer a medical question, referred to it by the Commissioner, to a medical practitioner, whether or not an application has already been determined.

Clause 53 Commissioner is to refer to medical practitioner person receiving weekly payments

A person, who is receiving weekly payments because they are incapacitated for work, is to have the medical question as to the degree of incapacity, referred to a medical practitioner once in a calendar year.

**Clause 54 Opinion of medical practitioner to whom
medical question referred**

A medical practitioner who is referred a medical question, may provide their opinion to the medical panel, if they have referred to the question, or the Commissioner, if he or she has referred the question to the practitioner.

Division 5 Medical examinations by medical professionals

**Clause 55 Person may be required to attend medical
examination or take test**

A medical professional who has been referred a medical question may, by notice request a person to undergo an examination or test, at a time specified.

The examination or test can only be conducted if the medical professional considers it is necessary to determine the medical question.

A notice to the person is to specify that if the person refuses or fails without reasonable grounds to undergo the examination or test, the Commissioner must refer the matter to the ACT and refuse to deal with the application.

A medical professional includes a medical panel or member of the panel, accredited impairment assessor, or medical practitioner who has been referred a question.

**Clause 56 Medical professional may ask person
questions, &c.**

A medical professional who has been referred a medical question may require the person to answer questions, produce or consent to the production of relevant documents.

The medical profession is to advise the person that if they refuse or fail to comply with the requirement, the Commissioner must refer the matter to the ACT and refuse to deal with the application.

Clause 57 Refusal by person to assist medical professional

If a person:

- unreasonably refuses or fails to attend for an examination or test of which they have been given at least 5 business days notice; or
- refuses or fails to undergo an examination or test they are required to undergo; or
- obstructs an examination or test; or
- unreasonably refuses or fails to answer questions; or
- unreasonably refuses or fails to produce relevant documents or information or consent to their production,

the medical professional is required to advise the Commissioner and the Commissioner must refer the matter to the ACT.

If this scenario applies to a person who has made an application which has not yet been determined, whether it is the original application, or an application relating to increased impairment or incapacity, the Commissioner may refuse to deal with the application until the ACT has advised the Commissioner of the following relevant matters. It is satisfied:

- the person has attended an examination or test, has not refused, failed to undergo or obstructed an examination or test; or
- the person has answered questions, produced documents or information or consented to their production; or
- the person's refusal, failure or obstruction was reasonable.

If it is not satisfied of these matters, the ACT may make otherwise determine the matter.

Clause 58 Determination by Tribunal of matter referred to in under section 57

If a matter is referred to it, the ACT may suspend the right to compensation or suspend the right of the person or member of the family to have expenses paid under Part II, until the ACT is satisfied of the relevant matters or the ACT otherwise determines the matter.

The ACT may specify whether suspended compensation is to be paid for the period of suspension, and it may specify the period of suspension.

The relevant matters are whether the:

- person has attended an examination or test, has not refused, failed to undergo or obstructed an examination or test; or
- person has answered questions, produced documents or information or consented to their production; or
- person's refusal, failure or obstruction was reasonable.

The ACT must notify the Commissioner of a determination that the ACT is satisfied of the relevant matters or the ACT has suspended the person's right to compensation or expenses.

If the Commissioner is notified that the ACT has suspended the person's right to compensation, the Commissioner must not pay lump sum payments, must cease making weekly payments, if any, until the Commissioner is notified by the ACT that it is satisfied of the relevant matters or the ACT otherwise determines the matter.

If the Commissioner is notified that the ACT has suspended the person's right to have expenses paid, the Commissioner must not pay any expenses until the Commissioner is notified by the ACT it is satisfied of the relevant matters or it otherwise determines the matter.

If the Commissioner determines that compensation is to be paid for a period during which compensation was suspended, the Commissioner is to pay the person the compensation for that period.

Clause 59 Representation before medical professional

A person who is having an examination or test is not entitled to be represented by a person, but they may be permitted by the medical professional to be represented by a person when they attend for the examination or test.

Permission may be granted by the medical professional who is conducting the examination or test.

A person who is having an examination or test is entitled to be accompanied by a person of his or her choice when the person attends the examination or test. This clause distinguishes between a person being accompanied by another person and a person being represented by another person.

Division 6 Determination of medical questions

Clause 60 Determination of medical questions

A medical panel must make a determination on a medical question referred to it.

If 2 or more members of the medical panel agree to a decision, the decision is taken to be the decision of the medical panel.

The medical panel may decide a medical question by determining the question, or by deciding that it is unable to agree. If the medical panel is unable to agree, the question is referred back to the Commissioner.

A medical panel must notify the Commissioner in writing of its decision. The notice is to specify the evidence and reasoning used in determining the question. If the panel is unable to agree, it is to include the reasons.

A notice of the medical panel's decision is to be given to the Commissioner within 3 business days after the decision is made.

Clause 61 Determinations by medical panel if matter referred to accredited impairment assessor

A determination of an accredited impairment assessor received from the Commissioner, is taken to be a decision of the medical panel on that medical question, unless the medical panel requests the Commissioner to refer the question to another impairment assessor. In that case, the determination of the second impairment assessor is taken to be the decision of the medical panel.

The medical panel may, within 15 business days after receiving from the Commissioner a determination from an impairment assessor, request the Commissioner to refer the question to another impairment assessor.

Clause 62 Determination by medical panel of whether person has imminently or non-imminently fatal disease

A medical panel which is satisfied that a person has a compensable disease is to determine whether the person has an imminently fatal or

non-imminently fatal ARD. This occurs prior to the Commissioner having made a determination that the person is entitled to compensation.

The medical panel may make the same determination after an application for compensation has been determined by the Commissioner.

The medical panel is to determine a person has an imminently fatal ARD if it is satisfied that:

- the person has an ARD; and
- the person is reasonably likely to die within 2 years from the date on which the medical panel makes its determination; and
- an ARD is reasonably likely to be a significant factor contributing to the person's death.

The medical panel is to determine a person has a non-imminently fatal ARD if it is satisfied that:

- the person has an ARD; and
- the person is not reasonably likely to die within 2 years from the date on which the certificate is given; or
- if the person is reasonably likely to die within 2 years from the date on which the medical panel makes its determination, an ARD is not reasonably likely to be a significant factor contributing to the person's death.

Clause 63 Time in which medical panel to make determination

A medical panel is to make a decision on a medical question as soon as is practicable, and in any event within 15 business days after the question is referred to it.

The time limit does not apply if the medical panel refers the person to a medical practitioner for an examination or test, or requires the person to under an examination or test. In such a case, the time limit to make the decision applies after the medical panel receives the determination from the medical practitioner or the examination has been completed or the results of test are received.

If the medical panel requests the Commissioner to refer a question on impairment to another impairment assessor, the time limit does not

apply. In such a case the time limit applies once a copy of the decision of the impairment assessor is received from the Commissioner.

Clause 64 Medical panel to determine own procedure

Unless determined otherwise in regulations, if any, the medical panel may determine its own practice and procedures.

Clause 65 Medical panels not bound by rules of evidence

The medical panel or its members are not bound by the rules of evidence and may inform itself, or himself or herself in any manner the panel member thinks fit.

Division 7 Commissioner to pay costs of certain examinations and tests

Clause 66 Commissioner to pay for costs of tests or examinations by accredited impairment assessors

Where an application has not been referred to the medical panel because the Commissioner has not received a determination that the degree of impairment of the person is 10% or more, the Commissioner is liable for the costs of an examination or test by an impairment assessor once in a calendar year, to determine the degree of impairment of the person.

However, this only applies if the person has a compensable disease, a determination has been made that the person has a non-imminently fatal ARD, the Commissioner has not determined that the person has an imminently fatal ARD, and the Commissioner has not determined that the person has a degree of impairment of 51% or more.

The Commissioner will also be liable if a medical question as to the degree of impairment has been referred by the Commissioner to an impairment assessor.

Clause 67 Commissioner to pay for costs of certain medical examinations and tests

The Commissioner is liable for the costs of an examination or test carried by a medical practitioner to whom a medical question has been referred by the Commissioner, and an analysis required in relation to the examination or test.

Where the Commissioner has determined that a person is entitled to compensation, the Commissioner is also liable for the costs of:

- one examination or test carried out on the person by a medical specialist in each calendar year; and
- any analysis required in relation to the examination or test.

The Commissioner is also liable for the costs of an examination or test the person is required by notice to undergo, and any analysis required in relation to the examination or test.

Clause 68 Applications for payment of costs

If the Commissioner is liable for the costs, the person may apply to the Commissioner for the payment of those costs.

If an application for costs is made, the Commissioner must reimburse the person the amount of the costs if they have paid the costs, or pay the costs to the medical practitioner, impairment assessor or person who conducted the examination, test or analysis.

PART 6 DETERMINATION OF APPLICATIONS FOR COMPENSATION

Clause 69 Application for compensation to be determined after determination of medical panel

Provides that the Commissioner determines an application for compensation after receiving a determination from the medical panel. The Commissioner must make this determination within 5 business days from receiving the medical panel's determination.

The requirement above does not apply if the Commissioner in accordance with section 47(5), has not referred medical questions to a medical panel.

Clause 70 Commissioner to determine applications for compensation

Provides that the Commissioner must determine an application for compensation. Where the Commissioner determines that a person is entitled to compensation, the determination must include whether the person has an imminently fatal or non-imminently fatal ARD. The amount payable by way of lump sums, and whether the person is entitled to weekly payments and the amount of such payments, must also be determined.

Where relevant, the Commissioner must determine an application for compensation by a member of the family. Where a member of the family is entitled to compensation, the Commissioner must determine the amount payable by way of lump sum and the proportions in which the amount is to be divided between members of the family.

Where the Commissioner determines that a person is not entitled to compensation, the grounds on which that determination was made must be set out.

Clause 71 Commissioner bound by medical panel's determination of medical questions

Provides that the Commissioner is bound by the medical panel's determination of medical questions.

PART 7 COMPENSATION PAYABLE TO PERSON WHO HAS COMPENSABLE DISEASE

Division 1 Compensation payable to person who has compensable disease

Clause 72 Compensation payable to person who has imminently fatal compensable disease

A person, who has a compensable disease that was correctly diagnosed by a medical specialist before commencement day, is entitled to lump

sum compensation of 360 compensation units, which is approximately \$250,000, and the number of compensation units which are prescribed in regulations for a person of the age of the person on commencement day.

Under the regulations, if a person is 65 years or younger, at the time of commencement, they will be entitled to another 360 compensation units. The amount to which a person is entitled progressively decreases until they reach 80 years of age. From this point on, the person is no longer entitled to the additional lump sum payment based on age.

For the person to be entitled under this section, the person must also be notified by the medical specialist of the correct diagnosis before commencement day, and the Commissioner or ACT must have made a determination that the person has an imminently fatal ARD.

Where the diagnosis occurs after commencement day, the person is entitled to the same amount except that the lump sum payment based on the age of the person, is determined by the age of the person on the day on which the person is first notified by a medical specialist who has correctly diagnosed that the person has an imminently fatal ARD.

If the person is notified by two medical specialists after commencement day that they have an imminently fatal ARD, it is taken that they were notified that they had an imminently fatal ARD on the first day on which the person is notified of the correct diagnosis.

Where a person has previously been paid compensation for a non-imminently fatal ARD under the Act, the lump sum amount to which they are entitled for an imminently fatal ARD, is to be reduced by the amount that has already been paid to the person.

Clause 73 Compensation payable to the person who has a non-imminently fatal compensable disease

A person who has a compensable disease, and who has a degree of impairment of 10% or more but less than 26% because of a non-imminently fatal ARD, is entitled to 120 compensation units, which is approximately \$83,000.

If the person has a degree of impairment of 26% or more but less than 51%, the person is entitled to 240 compensation units, which is approximately \$166,000.

If the person has a degree of impairment of 51% or more, they are entitled to 360 compensation units, which is approximately \$250,000.

The total amount of lump sum compensation that the person receives under this section for a non-imminently fatal ARD cannot exceed 360 compensation units, which is approximately \$250,000. This means that for example, if a person is first assessed as having 19% whole person impairment, they will receive 120 compensation units. If they are subsequently assessed as having 36% impairment, they will receive another 120 compensation units, making the total amount that they have received at this point 240 compensation units. If they are then assessed as having 53% impairment, they will receive another 120 compensation units, making the total amount that they have received 360 compensation units.

If a person has less than 10% impairment, they are not entitled to compensation.

The person is only entitled to lump sum compensation under this section, if the Commissioner or ACT has made a determination that the person has a non-imminently fatal ARD, but has not made a determination that the person has an imminently fatal ARD. This prevents the person from receiving more than 360 compensation units for a non-imminently fatal ARD and an imminently fatal ARD.

The section also applies if the person has one or more ARDs. In effect this prevents the person from receiving more than 360 compensation units if the person has more than one ARD.

In addition to any lump sums payable, the person may also be entitled to receive weekly payments under Division 3, if the person is incapacitated for work.

Division 2 Variation of compensation payable

Clause 74 Person with increased impairment of less than 51% may apply for variation of lump sum compensation

This clause provides that a person with a non-imminently fatal ARD can apply for a further lump sum payment if the degree of impairment has increased to 26% or more but less than 51%.

This section does not apply if the person has already received more than 120 compensation units for the impairment. For example, if on their first impairment assessment they have reached 33% impairment and have already received 240 compensation units.

Any application under this section must be accompanied by a determination under section 45(3) or certificate of an accredited impairment assessor, confirming that the person has a degree of impairment, whether it is because of one or more ARDs, that is 26% or more but less than 51%.

If the increase in impairment is caused by a different ARD, an application for variation can still be made under this section, if the Commissioner or ACT has previously determined that the person is entitled to compensation under section 70.

Clause 75 Variation of lump sum compensation because of increased impairment of less than 51%

The Commissioner must grant or refuse an application for variation of lump sum compensation because of increased impairment of less than 51%.

If necessary, the Commissioner may refer a question as to the degree of impairment to an impairment assessor. If the increase in impairment is because of a different disease, the Commissioner must refer the question to a medical panel for determination as to whether the different disease is an ARD before granting or refusing the application.

The Commissioner must grant the application if:

- satisfied, having regard to a determination made under section 45(3) or a medical certificate of an impairment assessor, that the degree of impairment is 26% or more but less than 51%, or

- if the Commissioner receives a determination from the medical panel that the degree of impairment is because of one or more ARDs.

This applies even if the increase in impairment is caused by a different ARD. If the application is granted, the Commissioner must pay the additional lump sum compensation of 120 compensation units.

Clause 76 Person with increased impairment of 51% or more may apply for variation of lump sum compensation

This clause provides that a person with a non-imminently fatal ARD can apply for a further lump sum payment if the degree of impairment has increased to 51% or more.

This section does not apply if the person has already received more than 240 compensation units for the impairment. For example, if on their first impairment assessment they have reached 53% impairment and have already received 360 compensation units.

Any application under this section must be accompanied by a determination under section 45(3) or certificate of an accredited impairment assessor, confirming that the person has a degree of impairment, whether it is because of one or more ARDs, that is 51% or more.

If the increase in impairment is caused by a different ARD, an application for variation can still be made under this section, if the Commissioner or ACT has previously determined that the person is entitled to compensation under section 70.

Clause 77 Variation of lump sum compensation because of increased impairment of 51% or more

The Commissioner must grant or refuse an application for variation of lump sum compensation because of increased impairment of 51% or more.

If necessary, the Commissioner may refer a question as to the degree of impairment to an impairment assessor. If the increase in impairment is because of a different disease, the Commissioner must refer the

question to a medical panel for determination as to whether the different disease is an ARD before granting or refusing the application.

The Commissioner must grant the application if:

- satisfied, having regard to a determination made under section 45(3) or a medical certificate of an impairment assessor, that the degree of impairment is 51% or more, or
- if the Commissioner receives a determination from the medical panel that the degree of impairment is because of one or more ARDs.

This applies even if the increase in impairment is caused by a different ARD. If the application is granted, the Commissioner must pay the additional lump sum compensation of 120 compensation units if they have already received 240 compensation units, or 240 compensation units if they have already received 120 compensation units.

Clause 78 Time in which application under section 74 or section 76 is to be determined

An application for variation of lump sum payment because of increased impairment is to be determined by the Commissioner within 10 business days after receiving the application.

However, the time limit does not apply if a medical question is referred to an impairment assessor or medical panel, or if a request is made for further information from the applicant. In these circumstances, the time limit applies after the determinations of impairment assessor or medical panel are received, and or the information is received from the person by the Commissioner.

Clause 79 Person with increased incapacity may apply for variation of weekly payments

If the Commissioner has made a determination under section 70 that a person has a non-imminently fatal ARD, but has not made a determination that the person has an imminently fatal ARD, the person may apply to the Commissioner for weekly payments or an increase in the amount of weekly payments because of incapacity to work.

The application is to be accompanied by a medical certificate from a medical practitioner as to the degree of incapacity of the person.

The section applies, even if the increase in incapacity is caused by a different ARD.

Clause 80 Variation of weekly payments because of increased incapacity

The Commissioner must grant or refuse an application for variation of weekly payments because of increased incapacity.

If necessary, the Commissioner may refer a medical question as to the degree of incapacity to a medical practitioner and may refer the question to a medical panel. If the increase in incapacity is because of a different disease, the Commissioner must refer the question to a medical panel for determination as to whether the different disease is an ARD before granting or refusing the application.

The Commissioner must grant the application if:

- satisfied, having regard to a medical certificate given by a medical practitioner, or
- a determination from the medical panel,

that the degree of incapacity has increased because of an ARD.

This applies even if the increase in incapacity is caused by a different ARD. If the application is granted, the Commissioner must increase the weekly payments to reflect the degree of incapacity that the person has at the time of the application for variation of weekly payments.

Clause 81 Time in which application under section 79 is to be determined

An application for variation of weekly payments because of increased incapacity is to be determined by the Commissioner within 10 business days after receiving the application.

However, the time limit does not apply if a medical question is referred to a medical practitioner or medical panel, or if a request is made for further information from the applicant. In these circumstances, the time limit applies after the determinations of medical practitioner or medical panel are received, and or the information is received from the person, by the Commissioner.

Clause 82 Commissioner may request further information be provided

If in respect to an application for variation because of increased impairment or incapacity, the Commissioner is not satisfied there is sufficient information, the Commissioner may, by notice, request the person to provide further information by a particular date. The person must also be notified that the Commissioner may refuse to consider the application until the information is provided, and if it is not provided, the Commissioner may reject the application. The person must be given at least 40 business days to provide the information.

The Commissioner may refuse to consider the application until the information is provided, and if it is not provided, the Commissioner may reject the application.

Division 3 Calculation of weekly payments

Clause 83 Interpretation of Division 3

This clause defines ‘**normal weekly earnings**’ in relation to a person who is incapacitated for work, as the average weekly earnings of the person during the relevant period.

Normal weekly earnings under this scheme are the same as normal weekly earnings under the WRCA.

“Period of incapacity” is defined as the period of incapacity for work (whether total, partial or a combination of both) and in the case of separate periods of incapacity for work, the aggregate of those periods.

“Relevant period” means:

- if the person has been continuously employed by the same employer for 12 months or more before making the application, the 12 months immediately before the person made the application, or
- if the person has been continuously employed by the same employer for less than 12 months before making an application, the period for which he or she was employed immediately before the person made the application; or
- if the person had been employed as a worker for a total of 6 months (whether or not the 6 months consisted of consecutive

periods) in the 12 month period before the application is made, the aggregate of the period of 6 months referred to in that section.

This definition is used to calculate the amount of weekly payments to which a person is entitled.

Clause 84 Entitlement to weekly payments

If the Commissioner has determined that a person is entitled to compensation for a non-imminently fatal ARD and no determination has been made in respect to an imminently fatal ARD, the Commissioner may determine that the person is entitled to weekly payments for a period of incapacity.

However, the Commissioner must be satisfied, having regard to a medical certificate received from a medical practitioner that the person is for that period of incapacity, partially or totally incapacitated for work as a result of the ARD, and the person is an eligible person.

A person is an eligible person if on the date they make the application:

- that person was employed for at least 2 months immediately before they made the application; or
- the person had for a total of 6 months (whether or not the 6 months consisted of consecutive periods) in the 12 month period before the application was made, been employed as a worker, and would have been employed on the date on which they made the application had they not been affected by one or more ARDs.

A person is not taken to be a worker under this section, if the only reason they are a worker under this Act is because they are a volunteer.

Clause 85 Amount of weekly payments

The weekly payments to which a person is entitled under section 84 are, if the person is totally incapacitated, the weekly payments equal to whichever is the greater:

- the normal weekly earnings of the person; or
- the ordinary time rate of pay of the person for the work and hours during which the person was engaged during the relevant period.

If the person is partially incapacitated, the person is entitled to weekly payments for the period of incapacity equal to the difference between:

- the amount of weekly payment to which they would have been entitled if totally incapacitated; and
- the amount that the person is earning, or would be able to earn in suitable employment or business, during the period of incapacity.

If during the period of incapacity, the ordinary hourly rate of pay for the work and hours during which the person was engaged immediately before the commencement of that period, increases or decreases under the person's contract or industrial agreement, the weekly payment is to be increased or decreased by the same amount.

This clause reflects section 69 of the WRCA.

Clause 86 Matters to be taken into account in calculating weekly payments

In fixing the amount of weekly payment, regard is to be had to any relevant, allowance or benefit to the person. The clause specifies which payments, allowance or benefits should or should not be taken into account.

If a person has recovered from an ARD and is fit for employment, but only for employment of a more limited kind than the employment in which he or she was engaged during the relevant period; and

- the person satisfies the Commissioner that the person has taken all reasonable steps to obtain, but has failed to obtain employment; and
- the person's failure is wholly or mainly because of the ARD,

the Commissioner may treat the incapacity as total incapacity for the period, subject to the conditions the Commissioner thinks fit.

If the Commissioner determines that the person's incapacity is to be treated as total incapacity, weekly payments are payable.

In determining the amount of weekly payments, no regard is to be had to any sum paid or payable under a contract of assurance or insurance, or out of any relief, superannuation, sustentation fund or other fund similar to a contract of assurance or insurance.

This clause is similar to section 69 of the WRCA.

Clause 87 Calculation of normal weekly earnings

This clause defines “**excess hours**” as hours worked in addition to minimum guaranteed contracted hours prescribed in an award, industrial or enterprise agreement which applied during the relevant employment period, or under the person’s contract of employment during the relevant employment period.

In calculating the normal weekly earnings, regard is to be had to the principle that a person should receive no more than the person would have received if the person had continued in their usual employment.

In calculating normal weekly earnings, overtime or excess are to be disregarded unless:

- it was a requirement of the person’s contract; and
- the person worked overtime or excess hours in accordance with a roster; and
- the pattern was substantially uniform; and
- the person would have continued to work overtime or excess hours,

if they had not been incapacitated or had continued to be employed after making the application for compensation.

Bonus, gratuity or other similar payments are to be excluded.

If the person had contracts with two or more employers, the normal weekly earnings are to be calculated as the sum of the average weekly earnings in each employment, however if one of the contracts is a full time contract, the normal weekly earnings are to be calculated by reference only to the full time contract of service.

Any special expenses usually paid by the employer, are to be excluded, as are payments or allowances to cover the costs of expenses incurred for travel, meals and accommodation.

A statement in writing, verified by statutory declaration, setting out the amount of the person’s earnings during any period, is evidence of the earnings of the person during the period.

This clause reflects section 70 of the WRCA.

Division 4 Payment of weekly payments

Clause 88 When weekly payments to be made

Where it has been determined that a person is entitled to weekly payments, they are to be paid in relation to a period that begins on the day on which that determination has been made.

The Commissioner is to make weekly payments to a person on a weekly or fortnightly basis, as determined by the Commissioner after consultation with the person.

Clause 89 Entitlement to weekly payments where person ceases to reside in this State

A person who is entitled to weekly payment who no longer resides in Tasmania, is not entitled to weekly payments unless the person proves the person's address and identity, and that he or she continues to be incapacitated for work because of incapacity that is equal to or greater than the degree of incapacity to which the calculation of weekly payments relate.

The required information is to be provided in a manner and at intervals as is prescribed in the Regulations, if any.

This clause reflects section 83 of the WRCA.

Clause 90 Paid leave during period of incapacity

The clause provides definitions for “**long service leave entitlement period**” and “**recreational leave entitlement period**”.

If during a period in which weekly payments would normally be paid, there is a recreational leave entitlement period or long service leave entitlement period, the person must be given by his or her employer a similar period of leave on full pay in the case of annual recreational leave, or a similar period of leave on full or part pay, in the case of long service leave.

This must be given:

- at some time within 3 months from the date of his or return to work, or at the termination of his or her right to weekly payments, if he or she does not return to work; or
- if the person desires, the person may by arrangement with his or her employer, take annual recreational leave or long service leave during the period of incapacity.

If the person takes annual recreational leave or long service leave under this section, the person is not entitled to receive weekly payment during that leave period.

An employer must not attempt to cause or require a person to take annual recreational leave or long service leave during a period of incapacity for which weekly payments are payable.

The clause is similar to section 84 of the WRCA.

Clause 91 When weekly payments may be terminated or reduced

Unless the ACT determines otherwise, the Commissioner may only terminate or reduce weekly payments if:

- the payment relates to total incapacity and the person has returned to work; or
- the person is receiving weekly payments in respect of partial incapacity and is receiving weekly earnings in excess of the amount on which the amount of weekly payment was determined ; or
- a medical practitioner has given a medical certificate certifying that the person has wholly or substantially recovered from the ARD, or the person's incapacity is no longer due, wholly or substantially to the ARD, or another ARD.

The medical certificate is to specify the grounds on which the opinion is given.

If the Commissioner intends to terminate or reduce a weekly payment, he or she must serve on the person a notice containing certain information, along with a copy of the medical certificate that is being relied upon.

A person who is served with a notice who wishes to dispute the termination or reduction of weekly payments, may refer the matter to the ACT, but must do so within 40 business days from the date on which the person's weekly payment were terminated or reduced.

This clause is similar to section 86 of the WRCA.

Clause 92 Weekly payments cease when determination made that person has imminently fatal asbestos-related disease

An entitlement to weekly payments ceases, if the Commissioner receives from a medical panel a determination that the person has an imminently fatal ARD.

Clause 93 Weekly payments cease on pensionable age

The clause defines “**pension age**” as the date on which the person attains the pension age under the *Social Security Act 1991* of the Commonwealth.

An entitlement to weekly payments ceases:

- if the application is made before the date on which the person attains the pension age, when the person attains pension age; or
- if the application is made on or after the date on which the person attains pension age, one year after the day on which the application is made, or if another date is prescribed in regulations, that other date.

If the terms and conditions of the person's employment allow them to continue in employment beyond the pension age, the person may ask the ACT whether or not weekly payments must cease on the date required by this section. The ACT may determine that weekly payments may be continued if the ACT is satisfied that:

- the terms of the person's employment allow it; and
- the person intended to continue in that employment beyond pension age; and
- the incapacity of the person will continue beyond pension age.

In these circumstances, the ACT must determine how long the weekly payments are to continue.

This clause is similar to section 87 of the WRCA.

**Clause 94 Reference to Tribunal of refusal of
Commissioner to pay weekly payments**

A person whom the Commissioner has determined is entitled to compensation, who is aggrieved by a decision of the Commissioner not to pay weekly payments, may refer the matter to the ACT.

The ACT may determine the matter by making a decision that the Commissioner may make. This confers the same powers of the Commissioner on the ACT.

This clause reflects section 88 of the WRCA.

**Clause 95 Reference to Tribunal of matters relating to
amount of weekly payments**

If a person who receives weekly payments, or the Commissioner, are of the opinion that the amount of weekly payments is insufficient or excessive, the person or Commissioner may refer the matter to the ACT.

In this situation, the ACT is to determine the amount of weekly payments that are reasonable and appropriate in the circumstances.

In determining the matter the ACT is to consider:

- the principle that a person should not receive payments greater than the payments the person would have received in their usual employment; and
- what the current weekly earnings are of another worker who is of the same grade or classification as the person, and who is employed by the same employer in similar work; and
- the earnings the person might reasonably have earned during the period of incapacity, if they had continued for the relevant period; and
- any other relevant matter.

If the weekly payments determined by the ACT involve a reduction in the amount of weekly payments, the ACT is to determine the date from which the reduction is to take effect. However, this date cannot be prior to the date of the determination of the ACT.

Clause 96 Weekly payment may not be assigned, &c.

Weekly payments cannot be assigned, charged or taken in execution, or pass to any other person. No claim may be set off against weekly payments.

This clause reflects section 90 of the WRCA.

PART 8 COMPENSATION PAYABLE TO FAMILY MEMBERS

Clause 97 Meaning of “total family amount”

This clause defines “total family amount” in relation to a person who has a compensable disease, as the amount the person would have been entitled to under section 72 for an imminently fatal ARD, if an application had been made after commencement day and the Commissioner had determined that the person was entitled to compensation under section 70(1)(a) and determined the person had an imminently fatal ARD.

If compensation has previously been paid to a person who has a compensable disease or his or her legal personal representatives, the total family amount is to be reduced by the lump sum amount already paid.

Clause 98 Compensation payable to family members

The compensation payable to members of the family of a person who has a compensable disease, who are entitled to compensation under the Act, is an amount equal to the total family amount, which is to be distributed in accordance with Schedule I.

Clause 99 Person with compensable disease may include stepchildren in family for purposes of this Act

A person who has a compensable disease may notify the Commissioner on the relevant form that a stepchild is to be treated as if he or she were a natural child of the person. If this occurs, the stepchild is taken to be a natural child of the person.

The relevant form is an approved form that is completed and signed by the person with the compensable disease and which is witnessed by a person who is not the stepchild.

PART 9 PERSONS TO WHOM COMPENSATION TO BE PAID

Clause 100 Payment of compensation to persons entitled

All money payable to a person as a lump sum payment under the Act is to be paid to the person, or if the person is deceased, his or her legal personal representative, unless the provisions relating to the public trustee apply under section 101.

Clause 101 Payment of compensation to Public Trustee

If a person who is entitled to a lump sum payment under the Act is under legal disability, the Commissioner must determine who the money is to be paid to.

If the Commissioner has reasonable doubts about the nature of dependency between the person under legal disability and the legal guardian of the person, the Commissioner may determine that the money is to be paid to the Public Trustee.

The Public Trustee must invest or deal with the money for the benefit of the person entitled to the money, in the manner and subject to conditions that are prescribed in regulations, if any. The income from any money invested, is to be paid to or for the benefit of the person.

If any money payable to a member of the family cannot be paid to the person because they cannot be found, the Commissioner may pay the money to the Public Trustee.

The Public Trustee must invest or deal with the money for the benefit of the family member entitled to the money, in the manner and subject to conditions that are prescribed in regulations, if any. The income from any money invested, is to be paid to or for the benefit of the person.

This clause reflects section 91 of the WRCA.

PART 10 COMPENSATION AND DAMAGES UNDER COMMON LAW OR OTHER LAWS

Division 1 Interpretation

Clause 102 Interpretation of Part 10

This clause defines damages as damages which are recoverable in relation to any civil liability.

Further, in this Division, which relates to Common Law, a reference to a lump sum received or to which a person is entitled under this Act for an ARD, includes a lump sum amount that relates to another ARD. This prevents double dipping, because under the scheme a person is entitled to lump sum payments because of one or more ARDs.

Clause 103 Meaning of “relevant judgment or settlement”

This clause clarifies when a relevant judgment or settlement is given or made in respect to an ARD. It includes if:

- the person or member of the family of the person entered into an agreement to accept an amount by way of settlement in relation to the contraction of the disease; or
- a court has delivered a judgment that an amount is payable to the person or member of the family of the person in relation to the contraction of the disease.

Where a judgment or settlement is given or made, or an action for damages commenced in respect of a person in relation to one or more ARDs, and the person has made an application or has received lump sum compensation for one or more ARDs, the disease or diseases to which the application for compensation relates or lump sum payments are made, are deemed to be the same disease to which the relevant judgment, settlement or action for damages relates.

Again, this provision prevents double dipping, because under the scheme a person is entitled to lump sum payments because of one or more ARDs.

However, the deeming provision does not apply if:

- the person establishes that the relevant judgment, settlement or action for damages specify the ARD or ARDs to which the

judgment, settlement or action relates, and none of those diseases are the same ARD to which the application for compensation or compensation received relates; or

- the person establishes that the disease or diseases to which the judgment, settlement or action relates is not the same ARD to which the application for compensation or compensation received relates.

This Division applies to judgments, settlements and actions that arise in Australia or in any other country or territory.

Again this prevents double dipping by a person if they have received Common Law damages in another jurisdiction, whether within or outside of Australia.

Clause 104 When action for damages is to be taken to begin for purposes of this Part

A person is deemed to have commenced an action for damages when the person gives the person from whom the damages are being claimed, notice in writing of this intention, or the person commences proceedings in Australia, another country or territory to recover damages in relation to an ARD, whichever occurs first.

Division 2 Requirements in relation to common law actions

Clause 105 Person to notify Commissioner on commencing certain actions or receiving certain damages

A person who has received lump sum compensation under the Act must within 20 business days after commencing an action for damages in relation to an ARD, notify the Commissioner in writing of the commencement of that action, where the action is commenced after commencement day. This requirement also applies where a relevant judgement or settlement is given or made in respect of the person, or the person receives damages in relation to an ARD after commencement day.

Similarly, a person who has made an application for compensation under the Act must, within 20 business days after receiving in relation to an ARD a lump sum payment for compensation under legislation in another

place, or under the WRCA or the *Workers Compensation Act 1927*, notify the Commissioner that they have received that compensation.

Clause 106 Certain actions not to commence until application for compensation determined

An action for damages for an ARD at Common Law by a person who has a compensable disease or a member of the family of such a person, must not be commenced after the commencement day, unless the person has made an application for compensation in relation to the ARD and the Commissioner has determined the application under section 70 of the Act.

If this requirement is contravened, any relevant judgment or settlement made is void.

This clause is designed to funnel all ARD compensation claims through the statutory compensation scheme first.

If:

- a person makes an application for compensation; and
- before that application was made limitation of actions legislation did not prevent the person from taking action for damages at Common Law; and
- the action for damages is then commenced by the person or member of the family within 10 business days after the determination is made under section 70,

the legislation relating to the limitation of actions will not prevent the person or member of the family from taking the action at Common Law.

Clause 107 No entitlement to compensation if certain settlements, &c., made before commencement day

If before commencement day, a relevant judgment or settlement is given or made in relation to a person or member of the family of that person, the person and members of the family are not entitled to lump sum compensation or expenses under Part 11 of the Act.

This does not apply if it is established that the person or members of the family who are entitled to the amount of the relevant settlement or judgment, are unlikely to receive all of that amount.

This clause is not intended to preclude a person or member of the family from making a claim for compensation under the Act, if the ARD to which the claim for compensation relates is different to the ARD for which the settlement or judgment was given or made.

Division 3 Effect of common law judgments

Clause 108 References to receipt of moneys

In this Division, any reference made to the amount of money a person has received at common law, is the amount of common law damages, minus any amount awarded for legal costs, minus an individual's out of pocket legal costs.

Clause 109 Where money received under settlements, &c., after application for compensation made

If a person receives one or more lump sums of compensation under the Act, and then receives at Common Law an amount that is greater than or equal to the lump sum amounts, the person is to pay back to the Commissioner an amount equal to the lump sum amounts received under the Act.

If a person receives one or more lump sums of compensation under the Act, and then receives at Common Law an amount that is less than the total of the lump sum amounts received by the person under the Act, the person is to pay to the Commissioner the amount of money they received at Common Law.

If a person:

- receives one or more lump sum payments under the Act; and
- then receives an amount at Common Law; and
- then applies for additional lump sum compensation because of increased impairment,

the person is only entitled to receive additional lump sum compensation if the amount of Common Law damages is less than the lump sum amounts the person is entitled to, plus the lump sum amounts already received.

For example, a person has received lump sum compensation for 15% whole person impairment of approximately \$83,000. They then receive

Common Law damages of \$120,000. They have to pay the Commissioner back the \$83,000. The person is then entitled to the remaining lump sums of approximately \$166,000 less the windfall amount.

The windfall amount is \$120,000 minus \$83,000, which equals \$37,000.

Therefore the person will be entitled to \$166,000 minus \$37,000, which equals \$129,000.

The person has received \$120,000 in Common Law damages. They are now entitled to \$129,000 in lump sum compensation. Bringing the total amount they would receive to approximately \$250,000.

This clause is designed to ensure that the amount that the person will receive is topped up, if what they receive at Common Law is less than the total amount that they would receive under the scheme.

An amount that a person is required to pay to the Commissioner is a debt due and payable and the Commissioner may sue and recover the amount from the person.

**Clause 110 Where money received under settlement, &c.,
before application made by person with
imminently fatal compensable disease.**

If a person receives a Common Law judgment prior to commencement of the Act, and then makes an application for compensation, and a determination is made that they are entitled to compensation and have an imminently fatal asbestos related disease, the person would only be entitled to lump sum compensation if the amount received at Common Law is less than the amount of lump sums they would receive.

The amount of lumps sums would be approximately \$250,000 plus the age based payment as prescribed in the regulations, minus the amount received at Common Law.

This section only applies to those people who are waiting to receive payment from a Common Law judgement made prior to commencement.

**Clause III Where money received under settlement, &c.,
before application made by person with non-
imminently fatal compensable disease**

If a person receives a Common Law judgment prior to commencement of the Act, and then makes an application for compensation, and a determination is made that they are entitled to compensation and have a non- imminently fatal asbestos related disease, the person would only be entitled to lump sum compensation if the amount received at Common Law is less than all of the non-imminently fatal lump sum payments they would receive (approximately \$250,000).

The amount the person would receive is the amount of lump sums they would be entitled to, based on their whole person impairment, less what was received at Common Law.

If the person then seeks a variation due to increased impairment, the person is only entitled to receive additional lump sum compensation if the amount of Common Law damages is less than the lump sum amounts the person is entitled to, plus the lump sum amounts already received.

For example, a person has received lump sum compensation, for 15% whole person impairment, of approximately \$83,000, and has also received Common Law damages of \$120,000. They have to pay the Commissioner back the \$83,000. The person is then entitled to the remaining lump sums of approximately \$166,000 less the windfall amount.

The windfall amount is \$120,000 minus \$83,000, which equals \$37,000.

Therefore the person will be entitled to \$166,000 minus \$37,000, which equals \$129,000.

The person has received \$120,000 in Common Law damages. They are now entitled to \$129,000 in lump sum compensation, bringing the total amount they would receive to approximate maximum in lump sums.

This clause is designed to ensure that the amount that the person will receive is topped up, if what they receive at Common Law is less than the total amount that they would receive under the scheme.

This section only applies to those people who are waiting to receive payment from a Common Law judgement made prior to commencement.

112 Where money received under settlement, &c., by member of family

If a member of the family receives a Common Law judgment prior to commencement, and then makes an application for compensation, and a determination is made that they are entitled to compensation, the member of the family would only be entitled to lump sum compensation if the amount received at Common Law would be less than the lump sum compensation entitlement under the Act.

The lump sum compensation entitlement to the member of the family would be the proportion of the total family amount that member of the family is entitled to, less the amount received at Common Law.

This section only applies to those people who are waiting to receive payment from a Common Law judgement made prior to commencement.

113 Debts due and payable

An amount that a person is required to pay to the Commissioner is a debt due and payable and the Commissioner may sue and recover the amount from the person.

Division 4 Statutory Compensation under other Laws

Clause 114 Person not to receive statutory compensation under more than one Act

Compensation is not payable to a person with an ARD, if compensation has been received in relation to that ARD under legislation in another place, or under the WRCA or under the *Workers Compensation Act 1927*.

If a person receives compensation under this Act in relation to an ARD and then receives compensation under legislation in another place for the same ARD, the amount recoverable from the person is the amount of lump sum compensation paid under this Act in relation to the ARD,

or the amount of compensation received in relation to the ARD under the legislation of the other place, whichever is the lesser of the two.

That recoverable amount is a debt due and payable to the Commissioner, and the Commissioner may sue and recover the amount from the person.

Expenses under Part 11 are not payable under this Act for an ARD to the extent that those expenses have been paid under legislation of another place, or under the WRCA or under the *Workers Compensation Act 1927*.

Clause 115 Choice of law

This clause introduces the choice of laws model adopted by all Australian workers compensation jurisdictions. This same model is also reflected in Division 3 of Part 10 of the WRCA.

The aim of the choice of laws model is to ensure common law damages claims and statutory compensation claims arising out of a work related injury are both able to be dealt with under the law of the same jurisdiction.

The clause provides that “a State’s legislation about damages for a work related injury” means this State, this section and any other relevant provision of the Act, and provides for regulations to declare any provision of a law of another State, in relation to damages for a work related injury.

The clause also provides that an ‘injury’ includes anything that is within the scope of the corresponding term in the statutory workers compensation scheme of another State and that consists of an ARD.

As a State or Territory substantive law is to be used as the law that governs whether or not a claim for common law damages can be made, and what the determination of the claim can be, this section defines “substantive law” in relation to Tasmania and what is referred to in other State’s and what it includes. This ensures wide coverage and application of the term.

Subsection (2) stipulates that if a worker is entitled to compensation under a State or Territory workers compensation scheme, the

substantive law of the State or Territory governs whether or not a claim for damages can be made and what the determination of the claim is. This ensures workers can only pursue common law claims in the “State of connection”, which provides certainty and consistency.

Subsection (3) states that the section does not apply if workers compensation is payable under a statutory scheme in more than one State. This means if another jurisdiction is also able to pay compensation, then this section does not apply as it would be inappropriate for workers to be eligible for two payments.

To help ensure courts in all jurisdictions make consistent decisions with regard to the law of the jurisdiction which is to apply, subsection (4) explains that the term “employer” includes anything that is within the scope of a corresponding term in the statutory worker’s compensation scheme of other workers’ compensations jurisdictions. The concepts of employment and whether a person is a worker’s employer are similarly explained.

Subsection (4) also makes it clear that where there is reference to a “worker’s employer”, this includes a person who is vicariously liable (liable for the acts of another) for the acts of the employer and a person for whose acts the employer is vicariously liable.

Subsection (5) explains that a claim for damages also includes a claim for damages in respect of death resulting from an injury.

Subsection (6) provides that it is not relevant to the application of this section in relation to common law, if the substantive law of “another State”, being “a State other than the State with which the worker’s employment is connected”, would not give rise to a cause of action if the injury had occurred in that State or if the circumstances on which the claim is based do not give rise to a cause of action. This ensures workers can only pursue common law under the legislation of the established “State of connection”, which provides certainty as to which jurisdiction common law can be claimed and eliminates the potential for forum shopping.

Subsection (7) explains that this section relates to a worker’s claim for common law damages against the employer for an injury caused by the negligence or other tort of the worker’s employer, or a breach of contract by the worker’s employer.

Subsection (8) specifies that this section also applies to a common law claim or the recovery of contribution brought against a person other than a worker's employer, if the worker's employment is connected with Tasmania and the negligence or other tort or the breach of contract on which the claim is based occurred in Tasmania.

Subsection (9) specifies that even if damages resulting from the negligence or other tort are claimed in another action for breach of contract or another action, subsection (7)(a) relating to negligence and tort, and subsection (8) still apply.

Subsection (10) stipulates that where the substantive law of a jurisdiction applies, compensation under a statutory scheme is still payable even if the provisions of the scheme excludes a worker's right to compensation due to any conduct or failure of the worker, or when compensation would have been payable if the claim for compensation had been duly made but an election to claim that compensation by lump sum instead of common law had been duly made. This means despite any technicalities, a worker's entitlement can still be preserved.

Subsection (11) stipulates that a reference in this section to compensation payable for an injury does not include compensation that may be payable based on a provisional acceptance of liability. This is to ensure the employer and/or insurer is not unfairly bound by an interim decision which may have been made in good faith to assist the claimant and to expedite a final decision.

PART II MEDICAL, FUNERAL, TRAVEL, &C., EXPENSES

Clause 116 Interpretation of Part II

Provides for a range of medical and related expenses to be paid for a person with a compensable disease. This clause is modelled on Part IV, Division 2 of the WRCA. This clause also provides definitions of a number of terms related to medical expenses.

Clause 117 Funeral expenses payable

This clause provides that funeral expenses, as prescribed in the Regulations, are payable.

Clause 118 Medical, &c., expenses payable for imminently fatal disease

Provides that reasonable expenses necessarily incurred by a compensable person with an imminently fatal disease after the Commissioner has made a determination, are payable up to a total amount of 125 expense units, at which point the expenses will be reviewed by the Commissioner.

Beyond this amount the Commissioner has the discretion to either continue to pay or refuse to pay the expenses.

A medical expense unit is calculated by multiplying the basic salary by the number of expense units.

Clause 119 Medical, &c., expenses payable if non-imminently fatal disease

Provides that reasonable expenses necessarily incurred by a compensable person with a non-imminently fatal disease are payable by the Commissioner. This is in effect an uncapped amount.

Clause 120 Travelling expenses

Provides that the Commissioner will pay reasonable travel expenses for seeking medical treatment. Where medically necessary this will include costs for an accompanying person.

Clause 121 How claim for payment of expenses may be made

Provides that a compensable person, a member of the family, or a legal representative may lodge a claim for payment of expenses on the approved form and within 10 business days of receipt of the account.

Clause 122 Determination of claims for payment of expenses

Provides that the Commissioner must, within 10 business days, pay the amount claimed for expenses, or serve the person who lodged the claim with notice in writing disputing the claim.

Clause 123 Persons to whom expenses under this Part are to be paid

Sets out relevant persons to whom expenses are to be paid.

PART 12 DISPUTE RESOLUTION

This Part is modelled on Part V of the WRCA.

Division 1 Referral of matters to Tribunal

This Division sets out the circumstances in which a person may refer a decision of the Commissioner to the ACT and the process for making a referral to the ACT.

Division 2 Asbestos Compensation Tribunal

This Division establishes the ACT and sets out the ACT's functions and related matters.

Division 3 Hearings

This Division sets out the procedures for hearings before the ACT, and includes a provision that costs will not be awarded against a party by the ACT.

**PART 13 ASBESTOS COMPENSATION
COMMISSIONER**

Clause 153 Asbestos Compensation Commissioner

Provides for the appointment of the Asbestos Compensation Commissioner.

Clause 154 Functions of Commissioner

This clause sets out the functions of the Commissioner.

Clause 155 Powers of Commissioner

This clause establishes the powers of the Commissioner.

Clause 156 Minister may give Commissioner directions

Provides that the Minister may give directions to the Commissioner with respect to the performance of the Commissioner's functions and the exercise of the Commissioner's powers.

Clause 157 Delegation by Commissioner

Provides that the Commissioner may delegate the performance or exercise of functions and powers, other than the power of delegation.

Clause 158 Secretary to, and staff of, Commissioner

Provides that the Commissioner may appoint a Secretary and other staff from the State Service, with the approval of the Head of a State Service Agency.

Clause 159 Annual report

Provides that the Commissioner must submit an annual report to the Minister.

Clause 160 Financial statements

Provides that the Commissioner must keep records of financial affairs and provide them to the Auditor-General.

Clause 161 Commissioner to keep applicants informed

Provides that the Commissioner must take steps to ensure that an applicant is informed of the progress of their application

PART 14 COMPENSATION FUND

Clause 162 Asbestos Compensation Fund

Provides that the Commissioner must establish, maintain and administer the Asbestos Compensation Fund. It sets out the monies that are to be paid into and out of the fund.

Clause 163 Nominal Insurer to pay into Fund amounts from HIH funds

Provides that the Nominal Insurer established under the WRCA is to pay into the Asbestos Compensation Fund the amounts in credit in the Special Account less \$100,000.

Clause 164 Minister may give directions in relation to Fund

Provides that the Minister may direct the Commissioner as to how to utilise any excess amount in the Asbestos Compensation Fund.

PART 15 LEVY

Clause 165 Interpretation of Part 15

This clause defines the “levy amount” as the amount that a policyholder is required to pay under section 167(1), or in relation to a self-insurer, the amount that a self-insurer is required to pay under section 167(2).

A “notional premium” has the same meaning it has under section 144(1) of the WRCA.

Each State Service Agency or other body to which the Tasmanian Risk Management Fund applies, as well as any statutory authority within the meaning of the *Government Business Enterprises Act 1995* which is a self insurer, are deemed to be a policyholder.

Clause 166 Determination of levy

The Minister, by notice not later than 31 March in each year, may determine the levy for the following financial year. This is to be

expressed as a percentage amount. At commencement, the Minister is taken to have determined that the levy is 4%.

In determining the levy, the Minister is to take into account:

- the expected degree of payments and other expenses; and
- the amount of money expected to be received; and
- the period during which payment of the levy is likely to be required; and
- any deficit or surplus projected to occur at the end of the financial year to which the levy relates; and
- any other matters prescribed.

This clause reflects section 128(5) and 128A(4) of the WRCA.

Clause 167 Policyholders and self-insurers liable to pay levy

If the Minister determines a levy under section 166 for a financial year, each policyholder is to pay to the Commissioner the levy on the premium payable by the policyholder for policies of insurance under the WRCA for the financial year.

In respect to self-insurers, the levy payable is based on the notional premium payable by the self-insurer under the WRCA for the financial year.

This clause reflects section 128(8) of the WRCA.

Clause 168 Levy amounts to be paid by policyholder to insurer

If the Minister determines a levy in relation to a financial year, each policyholder is to pay the required amount to the licensed insurer with whom the policy is held on the day on which the Minister's determination takes effect, or during the period for which the determination has effect. The policyholder is to pay the amount not later than the day on which the premium for the policy is required to be paid.

A licensed insurer, within 20 business days after the end of each month, is to pay the Commissioner all amounts received from policyholders during that month, and is to forward a statement to the Commissioner setting out the amounts received from policyholders, the amounts due

but not paid and any other particulars required by the Commissioner. This information is to be verified by statutory declaration made by an officer of the licensed insurer.

If a policyholder is required to pay an additional premium as a result of an adjustment to a policy of insurance, the policyholder must pay to the licensed insurer the percentage specified in the levy for the financial year in which the policy commenced, of the additional premium payable no later than the day on which the additional premium is required to be paid.

Clause 169 Levy amounts to be paid by self-insurer to Commissioner

If the Minister determines a levy under section 166, each self-insurer is to pay the Commissioner the levy amount, in the case of a self-insurer who is granted a self-insurer permit under the WRCA before the day on which the determination took effect, within 20 business days of the day on which the determination took effect. In the case of a self-insurer who is granted a self-insurer permit after the day on which a determination took effect, within 20 business days of the day on which the permit is granted.

This requirement to pay within a certain timeframe however, does not apply in the first financial year in which the Act commences. Instead the levy amount is payable 90 days after the day on which the levy would otherwise be payable.

Clause 170 Convictions for offences relating to levy

If a policyholder, licensed insurer or self-insurer is convicted of an offence under this part, in addition to imposing a penalty for the offence, the court is to order the person to pay the Commissioner any unpaid amount.

An order for the payment of any unpaid amount may be enforced in the same manner as a summary conviction or order under the *Justices Act 1959*.

Clause 171 Refunds of levy amount

If a policyholder is entitled to receive from a licensed insurer a refund of an amount paid by way of a premium, the licensed insurer, in addition to any amount paid by way of refund, is to refund the policyholder an amount that represents a proportionate part of that relevant amount.

If a self-insurer would have been entitled to a refund of an amount paid by way of premium for a policy of insurance, the self-insurer is entitled to a refund of the amount that represents a proportionate part of the relevant amount paid, and the Commissioner is to pay the amount to the self-insurer.

If a licensed insurer refunds the relevant amount to a policyholder, the Commissioner on application by the licensed insurer, is to pay the insurer the amount paid by the insurer to the policyholder.

PART 16 MISCELLANEOUS

Division 1 Recovery of amounts paid under Act

Clause 172 Interpretation of this Division

The clause provides definitions for “**asbestos product**” and “**secondary asbestos product**”.

The relevant asbestos product in respect to a person with a compensable disease, is the particular asbestos product to which the person was exposed in the course of the person’s employment as a worker during a period in which the employment is connected with this State.

A person is a culpable manufacturer in relation to a person who has a compensable disease, if that first mentioned person manufactured the relevant asbestos product and knew or ought reasonably be expected to have known at the time of manufacturing, that asbestos was dangerous to human health.

A person is a culpable manufacturer in relation to a person who has a compensable disease, if that first mentioned person manufactured a secondary asbestos product that contained the relevant asbestos product, and knew or ought reasonably be expected to have known at

the time of manufacturing the secondary asbestos product that the product contained asbestos, and knew or ought reasonably be expected to have known at the time of manufacturing the secondary asbestos product, that asbestos was dangerous to human health.

A culpable supplier in relation to a person who has a compensable disease, is a person who:

- supplied a relevant asbestos product or secondary asbestos product containing the relevant asbestos product to another person; and
- who knew at the time of supply to the other person that the product contained asbestos or ought reasonably be expected to have known it contained asbestos; and
- who knew or ought reasonably be expected to have known at the time of supply that asbestos was dangerous to human health.

For the purpose of the Division, relevant amounts in relation to a person with a compensable disease are:

- amounts of compensation paid under the Act to the person or members of the family of the person; and
- amounts paid as expenses under Part II; and
- any legal and administrative costs incurred by the Commissioner in determining an application under the Act.

Clause 173 Commissioner may seek to recover certain amounts from culpable manufacturers and suppliers

This clause provides that the Commissioner may recover from a culpable manufacturer or supplier, the relevant amounts in relation to a compensable person.

Where another person is required to pay the Commissioner the relevant amount, the Commissioner may not recover this amount.

Before attempting to seek recovery the Commissioner must consider:

- whether the action is likely to be successful; and
- whether the amount that may be recovered justifies the action; and
- whether it is in the public interest to take action.

An amount is taken to be a relevant amount that has been paid, if the Commissioner lodges with the court a copy of a record of the payment of the amount paid to a person with a compensable disease. The payment of the relevant amount may not be challenged. The Commissioner is not required to discover a document, except in accordance with a court order.

A person from whom recovery is sought, may apply to have another person joined as a party, and the court may determine that a party who is joined as a culpable manufacturer or supplier are jointly and severally liable to pay the relevant amount in the proportions the court considers is representative of the liability of the respective parties.

A judgement made by a court that an amount is payable is enforceable as an order of the Supreme Court.

Division 2 Other matters

Clause 174 Enactments relating to limitation of actions do not apply

Provides that no enactment relating to the limitation of actions applies, or is to be taken to have applied, to any proceedings by a person under this Act.

Clause 175 Liability of persons performing functions under this Act

Provides that no liability attaches to the Commissioner or his or her delegate, the Secretary to the Commissioner and members of staff, the Chief Commissioner of the ACT, a Commissioner of the ACT, a part-time Commissioner of the ACT, the Registrar, a Deputy Registrar of the ACT, or a medical professional, for acts under this Act.

Clause 176 Persons not to overcharge for services the Commissioner is required to pay as expenses

Provides that anyone providing services referred to in Part 10, knowing that the Commissioner may be required to pay, must not charge a fee in excess of the amount set out in the WRCA. There is a penalty up to 100 penalty units.

Clause 177 Recovery of compensation, or expenses, that have been over-paid

Provides that the Commissioner may recover or deduct any amounts over-paid.

Clause 178 False or misleading statements

Provides that it is an offence (up to 100 penalty units) for applicants, medical practitioners or accredited impairment assessors to make false or misleading statements.

Clause 179 Commissioner may obtain information

Provides that it is an offence (up to 20 penalty units) for not providing certain information to the Commissioner where the Commissioner has requested the information in writing.

Clause 180 Medical certificates to be in approved form

Provides that medical certificates must be in the approved form.

Clause 181 Reliance on reports of medical panel or medical practitioner

Provides that reports by medical panels, medical practitioners, or medical certificates given by medical practitioners (including impairment assessors) may not be used:

- by the Commissioner in relation to an application under the Act unless a copy is provided to the applicant; or
- by a party in proceedings before the ACT or a Court unless a copy is provided to each party.

Clause 182 Receipt by minor is valid discharge

Provides that compensation and other payments under this Act may be paid to people under the age of 18.

Clause 183 Maintenance of secrecy

Provides for a penalty not exceeding 5 penalty units for the disclosure of information obtained through the exercise of powers and performance

of functions under this Act unless the disclosure is authorised or for purposes including:

- approved study or research;
- collection and analysis of statistical information;
- law enforcement.

Clause 184 Time limits for actions taken by Commissioner etc.

Provides a definition of “relevant person” being:

- the Commissioner or a member of his or her staff;
- the ACT and associated positions;
- a medical professional; or
- other prescribed person.

Provides that time limits in the Act do not apply to a relevant person for the first 12 months after commencement of the Act.

This clause recognises that from commencement, there may be a backlog of claims waiting to be dealt with.

Clause 185 Role of WorkCover Board

Defines “Board” to be the WorkCover Tasmania Board established under the WRCA.

Provides that the Board is to:

- monitor and report to the Minister on the operation and effectiveness of the Act, and performance of related systems;
- collect and publish statistics on any relevant matter;
- advise the Minister on any matter that the Minister refers to the Board.

Clause 186 Regulations

Provides that the Governor may make regulations for a range of purposes including:

- practices and procedures of the ACT, Commissioner or medical panel;
- powers that may be exercised and functions required by the Registrar.

Clause 187 Administration of Act

Administration of this Act is assigned to the Minister for Workplace Relations and the department responsible to that Minister until other provision is made under the *Administrative Arrangements Act 1990*.

Clause 188 Commissioner to be deemed a “worker”

The Commissioner is deemed to be a worker under the WRCA and this Act.

SCHEDULE I COMPENSATION PAYABLE TO FAMILY MEMBERS

PART I INTERPRETATION

Clause 1 Interpretation

Provides that:

- **“deceased person”** means a person who has a compensable disease and who has died.
- a person ceases to be a surviving child of a deceased person if the person attains the age of 22 years before the death of the deceased person.
- a person survives a deceased person only if the deceased person is still alive at the time a determination is made of the amount payable under this Act to members of the family.

PART 2 WHERE PERSON SURVIVED BY CHILD BUT THERE IS NO SURVIVING SPOUSE

Clause 1 Where person only survived by one child

Where the person is survived by only one child (and no spouse) the child is entitled to all of the lump sum.

Clause 2 Where person survived only by more than one child

Where the person is survived by more than one child (and no spouse) the lump sum is divided equally between the children.

PART 3 WHERE PERSON SURVIVED BY ONLY ONE SPOUSE

Clause 1 If person survived by only one spouse and has no children

Where the person is only survived by one spouse (and no children) the spouse is entitled to all of the lump sum.

Clause 2 If person survived by only one spouse and only by children of the person and the spouse

If the person is survived by only one spouse and only by children of the person and the spouse, the lump sum is to be paid to the surviving spouse.

Clause 3 If person survived by only one spouse and at least one of the person's children is not also a child of the spouse

If the person is survived by only one spouse and at least one of the person's children is not also a child of the spouse, the lump sum is to be paid in two equal parts – one to the surviving spouse, and the other divided equally between all surviving children of the person.

PART 4 WHERE PERSON SURVIVED BY MORE THAN ONE SPOUSE

Clause 1 If person survived by more than one spouse and no children

If the person is survived by more than one spouse and no children the lump sum is to be divided equally between the spouses.

Clause 2 If person survived by more than one spouse and children

If the person is survived by more than one spouse and children, the lump sum is to be paid in two equal parts – one divided equally between the surviving spouses, and the other divided equally between all surviving children of the person.

SCHEDULE 2 ASBESTOS COMMISSIONER

COMPENSATION

Clause 1 Terms of Office

Provides that the Commissioner may be appointed for a three year term and may be re-appointed.

Clause 2 Provisions requiring devotion to other duties

This provision allows that holding an office which requires devotion of all of his or her time does not disqualify the person from also holding the office of Commissioner.

Clause 3 Remuneration

Provides that the Minister may determine the remuneration of the Commissioner. Where the Commissioner is also employed under the *State Service Act 2000* they are not entitled to further remuneration.

Clause 4 State Service Act 2000 not to apply

Provides that the *State Service Act 2000* does not apply to the appointment of the Commissioner.

Clause 5 Deputies

Provides that the Minister may appoint a person to act in the office of the Commissioner.

Clause 6 Vacation of office

Sets out the situations in which the Commissioner is taken to have vacated his or her office.

Clause 7 Validity of proceedings, &c.

Sets out the validity of proceedings and acts of the Commissioner.

Clause 8 Presumptions

Provides that in any proceedings by or against the Commissioner, unless evidence is given to the contrary, no proof is required of the appointment of the Commissioner.