

# **Comparison of Workers' Compensation Arrangements for Asbestos Related Disease in Australia and New Zealand**

**March 2011**





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## CONTENTS

<i>Creative Commons</i>	2
<b>Important Notes</b>	<b>4</b>
<b>1. Definition of ‘worker’</b>	<b>4</b>
1.1 Definition of worker	4
1.2 Definitions of deemed workers	6
1.3 Coverage for independent contractors and labour hire workers	9
<b>2. Diagnosis</b>	<b>10</b>
2.1 How is diagnosis undertaken and by whom?	11
2.2 Guidelines for certification and issues of fact/medical questions to be determined by medical panels	20
<b>3. Proving work related exposure</b>	<b>27</b>
<b>4. Benefits to recipients and their dependants</b>	<b>29</b>
4.1 Incapacity benefits, step downs and redemptions.	29
4.2 Medical treatment benefits	33
<b>5. Time limitations to claims</b>	<b>38</b>
5.1 Statutory Limitation	38
5.2 Common law limitation	38
<b>6. Exclusionary provisions</b>	<b>43</b>

# Important Notes

The commentary and tables contained in this document have been compiled to provide an overview of the way in which the various workers' compensation schemes in Australia and New Zealand apply to workers with asbestos related diseases. In the interests of readability, not every scenario or application has been extracted.

Where applicable, sections of the *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (Safe Work Australia 2011) have been used with changes specifically relating to asbestos related disease being made as necessary.

## 1. Definition of 'worker'

### 1.1 DEFINITION OF WORKER

To be eligible for compensation a person injured in the workplace must fall within the definition of *worker* in their jurisdiction.

Much of this information has been extracted from the *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (Safe Work Australia 2011). It is also important to note that not every definition of 'worker' has been listed, with only the definitions that are most likely to have application to asbestos related disease being extracted.<sup>1</sup>

**TABLE 1.1 – DEFINITION OF WORKER AS AT 30 SEPTEMBER 2010**

Jurisdiction	Definition of 'worker'
<b>New South Wales</b>  <b><i>Workplace Injury Management and Workers Compensation Act 1998 s4(1)</i></b>  <b><i>Workers' Compensation (Dust Diseases) Act 1942</i></b>	<p>A person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing) – 1998 Act, s4(1) but excluding:</p> <ul style="list-style-type: none"><li>a) certain members of the Police Force covered by the Police Superannuation Fund</li><li>b) a person whose employment is casual, that is, for 1 period only of not more than 5 working days, and who is employed otherwise than for the purposes of the employer's trade or business</li><li>c) certain officers of religious or voluntary associations where remuneration is less than \$700 per year</li><li>d) certain registered participants in a sporting organisation covered under the <i>Sporting Injuries Insurance Act 1978</i>,</li></ul> <p>but also including certain classes of persons who are deemed by s5 and Schedule 1 to be workers.</p> <p>Note: 'worker' does not include a worker in or about a mine – <i>Workers' Compensation (Dust Disease) Act 1942</i>, s3(1).</p> <p>'Worker' also does not include an employee of the Commonwealth or persons under a contract of service or apprenticeship outside of New South Wales – <i>Workers' Compensation (Dust Diseases) Act 1942</i>, s8AA.</p>

<sup>1</sup> For information on the applicability of workers' compensation arrangements for judges, members of parliament and sportspersons see *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (Safe Work Australia 2011).

**TABLE 1.1 – DEFINITION OF WORKER AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction</b>	<b>Definition of ‘worker’</b>
<b>Victoria</b>  <b><i>Accident Compensation Act 1985 s5(1)</i></b>	<ul style="list-style-type: none"> <li>a) A person (including a domestic servant or an outworker) who has entered into or works under a contract of service or apprenticeship or otherwise with an employer whether by way of manual labour, clerical work or otherwise and whether the contract is express or implied, is oral or is in writing.</li> <li>b) A person who is deemed to be working under a contract of service.</li> <li>c) A person deemed to be a worker.</li> <li>d) A school student undertaking work experience or workplace training.</li> <li>e) A TAFE student undertaking practical placement – s5(1).</li> </ul>
<b>Queensland</b>  <b><i>Workers’ Compensation and Rehabilitation Act 2003 s11 and Schedule 2</i></b>	<p>A worker is an individual who works under a contract of service. Schedule 2 of the Act mentions persons who are or are not workers. A person who works under a contract, or at piecework rates, for labour only or substantially for labour only is a worker.</p> <p>In particular, any person who works for another person under a contract (regardless of whether the contract is a contract of service) is a ‘worker’ unless the person can satisfy all three elements of a results test, or it can be shown that a personal services business determination is in effect for the person under the <i>Income Tax Assessment Act 1997</i> (Cth).</p> <p>The three elements of the results test to be satisfied are that:</p> <ul style="list-style-type: none"> <li>• the person performing the work is paid to achieve a specified result or outcome</li> <li>• the person performing the work has to supply the plant and equipment or tools of trade needed to perform the work, and</li> <li>• the person is, or would be, liable for the cost of rectifying any defect in the work performed.</li> </ul>
<b>Western Australia</b>  <b><i>Workers’ Compensation and Injury Management Act s5(1)</i></b>	<p>Any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied, is oral or in writing. The meaning of worker also includes:</p> <ul style="list-style-type: none"> <li>a) any person to whose service any industrial award or industrial agreement applies, and</li> <li>b) any person engaged by another person to work for the purpose of the other person’s trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services – s5(1).</li> </ul>
<b>South Australia</b>  <b><i>Workers’ Rehabilitation and Compensation Act 1986 s3(1) and s103A</i></b>	<ul style="list-style-type: none"> <li>a) A person by whom work is done under a contract of service (whether or not as an employee).</li> <li>b) A person who is a worker by virtue of section 103A.</li> <li>c) A self-employed worker, and includes a former worker and the legal personal representative of a deceased worker.</li> </ul> <p>Note: If a worker suffers from a disability that is attributable to a trauma that occurred before the 30/9/1987, they will be compensated under the <i>Workers Compensation Act 1971</i> and the definition of worker contained in that Act will apply.</p>
<b>Tasmania</b>  <b><i>Workers’ Rehabilitation and Compensation Act 1988 s3(1)</i></b>	<ul style="list-style-type: none"> <li>• Any person who has entered into, or works under, a contract of service or training agreement with an employer, whether by way of manual labour, clerical work or otherwise, and whether the contract is express or implied, or is oral or in writing.</li> <li>• Any person or class taken to be a worker for the purposes of the Act – s3(1).</li> </ul>
<b>Northern Territory</b>  <b><i>Workers Rehabilitation and Compensation Act 2009 s3(1) – s3(10)</i></b>	<p>Contract or agreement of any kind to perform work or a service.</p> <p>Exclusions apply for people who supply an ABN – s3.</p>
<b>Australian Capital Territory*</b>  <b><i>Workers Compensation Act 1951 Ch3</i></b>	<p>An individual who has entered into or works under a contract of service with an employer, whether the contract is expressed or implied, oral or written – s8(1).</p> <p>The Act devotes an entire chapter (Chapter 3) to defining and identifying a worker in general and certain categories of workers. The Minister may additionally make a declaration to deem persons in certain occupations to be workers.</p> <p>Note: From 30 June 2010 amendments clarifying the broad definition of worker will commence.</p>

**TABLE 1.1 – DEFINITION OF WORKER AS AT 30 SEPTEMBER 2010**

Jurisdiction	Definition of 'worker'
<p><b>Commonwealth</b></p> <p><i>Safety, Rehabilitation and Compensation Act 1988</i></p> <p><i>Seafarers Rehabilitation and Compensation Act 1992</i></p> <p><i>Military Rehabilitation and Compensation Act 2004</i></p>	<p><b>Comcare:</b> "employee" - a person employed by the Commonwealth or by a Commonwealth Authority whether the person is so employed under a law of the Commonwealth or of a Territory or under a contract of service or apprenticeship.</p> <p>Also a person who is employed by a licensed corporation if a person performs work for that corporation under a law or a contract and the person would, if the corporation were not licensed, be entitled to workers' compensation in connection of that work – s4 &amp; s5.</p> <p><b>Seacare:</b> Seafarer (person employed in any capacity on a prescribed ship or the business of the ship, other than: a pilot, a person temporarily employed on the ship in port, or a person defined as a special personnel in s283 of the Navigation Act), trainee, person attending approved industry training or registering availability for employment or engagement on a prescribed ship – s4.</p> <p><b>DVA:</b> member or former member of the Permanent Forces, Reserves, or cadets of the Australian Defence Force who has rendered service on or after 1 July 2004.</p>
<p><b>New Zealand</b></p> <p><i>Accident Compensation Act 2001</i></p>	<p>An earner is a natural person who engages in employment for the purposes of pecuniary gain, whether or not as an employee s(6) (also includes employees on unpaid parental leave, self-employed persons and employees who have purchased weekly compensation and employees who ceased work in the 28 days prior to incapacity, and who had an agreement to start work within three months of the date of incapacity or within 12 months for seasonal workers).</p>

\* as at 30 June 2010

## 1.2 DEFINITIONS OF DEEMED WORKERS

A *deemed worker* for workers' compensation purposes is a person who performs work for another in circumstances that fall outside of the general statutory definition of worker in a jurisdiction, but who is deemed by legislation to be a worker in order to receive a workers' compensation benefit.

**TABLE 1.2 – DEFINITION OF DEEMED WORKER AS AT 30 SEPTEMBER 2010**

Jurisdiction	Definition of deemed worker
<b>New South Wales</b>  <b>Workplace Injury Management and Workers Compensation Act 1998</b>	<p>Schedule 1 of the 1998 Act lists the twenty-one specific circumstances in which persons are deemed to be workers. Note: The <i>Workers' Compensation (Dust Disease) Act 1942</i>, s3(1), states that, for the purposes of that Act, 'worker' does not include a worker in or about a mine, excluding 7-8 below:</p> <ol style="list-style-type: none"> <li>1 Workers lent or on hire.</li> <li>1A Outworkers.</li> <li>2 Other contractors.</li> <li>2A Contractors with labour hire services arrangements.</li> <li>3 Rural work.</li> <li>4 Timbergetters.</li> <li>5 Salespersons, canvassers, collectors and others.</li> <li>6 Tributaries.</li> <li>7 Mine employees.</li> <li>8 Mines rescue personnel.</li> <li>9 Jockeys and harness racing drivers.</li> <li>10 Drivers of hire-vehicles or hire-vessels – contract of bailment.</li> <li>11 Caddies and others employed through club.</li> <li>12 Shearers' cooks and others.</li> <li>13 Fire fighters in fire district.</li> <li>14 Workers at place of pick-up.</li> <li>15 Boxers, wrestlers, referees and entertainers.</li> <li>16 Voluntary ambulance workers.</li> <li>17 Ministers of religion.</li> <li>18 Ministers of religion covered by policies.</li> <li>19 Participants in training programs.</li> </ol>
<b>Victoria</b>  <b>Accident Compensation Act 1985</b>	<p>Circumstances under the Act where a person may be deemed to be a worker:</p> <ol style="list-style-type: none"> <li>(i) Timber contractors – s6(1).</li> <li>(ii) Drivers of passenger vehicles – s7.</li> <li>(iii) Contractors – s8.</li> <li>(iv) Independent contractors – s9 and s10.</li> <li>(v) Subcontractors and their workers – s10A.</li> <li>(vi) Sharefarmers – s11.</li> <li>(vii) Declared workers of religious bodies and organizations - s12.</li> <li>(viii) Secretaries of co-operative societies - s13.</li> <li>(ix) Crown employees, Ministers, government members, judicial officers, bail justices, public corporation members, retired police reserve members - s14.</li> <li>(x) Municipal councillors - s14AA.</li> <li>(xi) Persons engaged at places of pick-up for the purposes of being selected for work (e.g. fruit pickers) – s15.</li> <li>(xii) Jockeys and track riders, riders and drivers in mixed sports gatherings – ss16(4) &amp; 16A.</li> <li>(xiii) Outworkers - s17.</li> <li>(xiv) Sailors – s81(2).</li> <li>(xv) Workers participating in deemed training programs – s5(4A) – s5(4E).</li> <li>(xvi) Other types of deemed workers – s5.</li> </ol>

**TABLE 1.2 – DEFINITION OF DEEMED WORKER AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction</b>	<b>Definition of deemed worker</b>
<b>Queensland</b>  <b><i>Workers' Compensation and Rehabilitation Act 2003</i></b>	<p>Circumstances under the Act where a person may be deemed to be a worker:</p> <ul style="list-style-type: none"> <li>(i) Workers lent or on hire (including labour hire firms and holding companies – Schedule 2 (1.6).</li> <li>(ii) Sharefarmers – Schedule 2 (1.3).</li> <li>(iii) Salespersons – Schedule 2 (1.4).</li> <li>(iv) Labour workers – Schedule 2 (1.1).</li> <li>(v) Contractors and workers of contractors – Schedule 2 (1.5).</li> </ul>
<b>Western Australia</b>  <b><i>Workers' Compensation and Injury Management Act</i></b>	<p>Circumstances under the Act where a person may be deemed to be a worker:</p> <ul style="list-style-type: none"> <li>(i) Workers lent or let on hire – s5(1).</li> <li>(ii) Contract in substance for personal manual labour or service – s5(1).</li> <li>(iii) Workers under an industrial award or agreement – s5(1).</li> <li>(iv) Deceased worker – s5(1).</li> <li>(v) Police officer – s5(1) (Who suffers an injury and dies as a result of that injury).</li> <li>(vi) Clergy – s8, s9 and s10.</li> <li>(vii) Tributaries – s7.</li> <li>(viii) Jockey – s11A.</li> <li>(ix) Crown workers – s14(2).</li> <li>(x) Certain persons deemed workers – s175AA.</li> <li>(xi) Working directors – s10A.</li> </ul>
<b>South Australia</b>  <b><i>Workers' Rehabilitation and Compensation Act 1986</i></b>	<p>The definition of "contract of service" in s3(1) of the WRCA includes: "a contract, arrangement or understanding under which one person (the worker) works for another in prescribed work or work of a prescribed class".</p> <p>Current classes of work prescribed for the purposes of the WRCA, include:</p> <ul style="list-style-type: none"> <li>(i) building work (other than wall or floor tilers)</li> <li>(ii) cleaning work</li> <li>(iii) council driving</li> <li>(iv) taxi and hire car driving</li> <li>(v) transport driving</li> <li>(vi) work as an entertainer</li> <li>(vii) work as an outworker</li> <li>(viii) work as a licensed jockey</li> <li>(ix) work as a minister, priest or member of another religious order (except Anglican, Catholic, Lutheran and Uniting churches or the Salvation Army)</li> <li>(x) work as a Review Officer appointed under the WRCA.</li> </ul> <p>Under section 103 of the WRCA, the Corporation may also extend the application of the WRCA to self-employed persons.</p> <p>Under section 103A of the WRCA, the Crown is the presumptive employer of volunteers of a prescribed class, (to date only Country Fire Service volunteers are prescribed by regulation).</p>
<b>Tasmania</b>  <b><i>Workers' Rehabilitation and Compensation Act 1988</i></b>	<p>Circumstances under the Act where a person may be deemed to be a worker:</p> <ul style="list-style-type: none"> <li>(i) Contractors where the work exceeds \$100 and is not incidental to a trade or business regularly carried on by the contractor – s4B.</li> <li>(ii) Services of workers lent or on hire – s4A.</li> <li>(iii) Police volunteers – s6A.</li> <li>(iv) Volunteers performing fire-fighting operations and fire prevention operations – s5.</li> <li>(v) Volunteers providing ambulance services – s6.</li> <li>(vi) Port and harbour persons engaged at places of pickup – s25(4).</li> <li>(vii) Salespersons, canvassers and collectors – s4C.</li> <li>(viii) Luxury hire car drivers and taxi drivers – s4DA &amp; s4DB.</li> <li>(ix) Jockeys – s4DC.</li> <li>(x) Specified clergymen – s3(4).</li> <li>(xi) Participants in training programs – s4D.</li> <li>(xii) Persons in prescribed relationship between employer and worker – s4E.</li> <li>(xiii) Prescribed classes of volunteers (none are prescribed for the purpose of 6B) – s6B.</li> </ul>



**TABLE 1.2 – DEFINITION OF DEEMED WORKER AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction</b>	<b>Definition of deemed worker</b>
<b>Northern Territory</b>  <b><i>Workers Rehabilitation and Compensation Act 2009</i></b>	<p>Circumstances under the Act and Regulations where a person may be deemed to be a worker:</p> <ul style="list-style-type: none"> <li>(i) Subcontracting – s127.</li> <li>(ii) Workers of householders – s3(5).</li> <li>(iii) Working directors – s3(3).</li> <li>(iv) Jockeys – Reg 3A(1)(b).</li> <li>(v) Taxi drivers – Reg 3A(1)(c).</li> <li>(vi) Community work orders – s3(4).</li> <li>(vii) Persons specifically prescribed by the Regulations.</li> <li>(viii) Family members – s3(2).</li> <li>(ix) Emergency service volunteers – s3(7).</li> <li>(x) Volunteer fire fighters – s3(8) and s3(8A).</li> </ul>
<b>Australian Capital Territory*</b>  <b><i>Workers Compensation Act 1951</i></b>	<p>Circumstances under the Act where a person may be deemed to be a worker:</p> <ul style="list-style-type: none"> <li>(i) Casuals (in certain instances) – s10.</li> <li>(ii) Regular contractors – s11(1).</li> <li>(iii) Subcontracting – s13.</li> <li>(iv) Trainees – s14.</li> <li>(v) Outworkers – s15.</li> <li>(vi) Timber contractors – s16.</li> <li>(vii) Family day care carers – s16A.</li> <li>(viii) Religious workers – s17.</li> <li>(ix) Volunteers – s17A.</li> <li>(x) Commercial voluntary workers – s18.</li> <li>(xi) Public interest voluntary workers – s19.</li> </ul>
<b>Commonwealth</b>  <b><i>Safety, Rehabilitation and Compensation Act 1988</i></b>  <b><i>Seafarers Rehabilitation and Compensation Act 1992</i></b>  <b><i>Military Rehabilitation and Compensation Act 2004</i></b>	<p><b>Comcare:</b> The following persons are deemed to be employees of the Commonwealth, provided they perform certain duties:</p> <ul style="list-style-type: none"> <li>(i) the Commissioner of the Australian Federal Police (AFP), Deputy Commissioner of the AFP or an AFP worker</li> <li>(ii) a member of the Defence Force in certain circumstances, or</li> <li>(iii) a person who is the holder of or is acting in: <ul style="list-style-type: none"> <li>a) an office established by a law of the Commonwealth, or</li> <li>b) an office that is established by a law of a Territory (other than an ACT enactment or a law of the Northern Territory) and is declared by the Minister to be an office to which the SRC Act applies – s5(2).</li> </ul> </li> </ul> <p>The SRC Act deems certain categories of persons to be employees of the Commonwealth and the Minister may declare persons who engage in activities or perform acts at the request of the Commonwealth or a licensee as employees: – s5(6)</p> <p>At the request of the Chief Minister of the Australian Capital Territory (ACT), The Minister may make a written declaration that persons may be taken to be employees of the ACT government when engaging in certain activities – s5(15).</p> <p><b>Seacare:</b> The Act does not include any category of ‘deemed’ worker.</p> <p><b>DVA:</b> The Defence Minister may make a written determination for the purposes of the MRC Act that a person, or a class of persons, is a member of the Australian Defence Force (“declared member”) if that person engages, or has engaged, in activities, or who performs, or has performed, acts at the request or direction of the Defence Force; or for the benefit of the Defence Force; or in relation to the Defence Force, under a requirement made by or under a Commonwealth law (s8).</p>
<b>New Zealand</b>  <b><i>Accident Compensation Act 2001</i></b>	<p>An earner is a natural person who engages in employment for the purposes of pecuniary gain, whether or not as an employee – s6.</p>

\* as at 30 June 2010

## 1.3 COVERAGE FOR INDEPENDENT CONTRACTORS AND LABOUR HIRE WORKERS

TABLE 1.3 – COVERAGE FOR INDEPENDENT CONTRACTORS AND LABOUR HIRE WORKERS AS AT 30 SEPTEMBER 2010

Jurisdiction	Are individual contractors covered under legislation?	Are labour hire workers covered under legislation?
New South Wales	Not unless contractor is a deemed worker pursuant to Schedule 1, 1998 Act.	Yes.
Victoria	No, if employed under contract <i>for service</i> ; they are covered if enter into any form of contract <i>of services</i> .	Yes, labour hire firm held to be employer.
Queensland	No, if employed under contract <i>for services</i> .	Yes, labour hire firm held to be employer.
Western Australia	No, if employed under contract <i>for service</i> .	Yes, labour hire firm held to be employer.
South Australia	Yes, if undertake prescribed work or work of a prescribed class.	Yes, labour hire firm held to be employer.
Tasmania	No, if employed under contract <i>for services</i> . Exception where contract is for work not related to a trade or business (s4B).	Yes, labour hire firm held to be employer.
Northern Territory	No if ABN supplied, otherwise yes.	
Aust Capital Territory *	No, if employed under contract <i>for services</i> . However, there are provisions for the coverage of regular contractors.	Yes, where the individual is not an executive officer of the corporation and: <ul style="list-style-type: none"> <li>the individual has been engaged by the labour hirer under a contract for services to work for someone other than the labour hirer</li> <li>there is no contract to perform work between the individual and person for who work is to be performed,</li> </ul> the individual does all or part of the work.
Commonwealth	<b>Comcare:</b> No, if employed under contract <i>for service</i> . <b>Seacare:</b> No, compensation only through employment of employees. <b>DVA:</b> only if a “declared member” (s8).	<b>Comcare:</b> Possibly, according to definition of nature of contract. <b>Seacare:</b> Possibly, according to definition of nature of contract. <b>DVA:</b> only if a “declared member” (s8).
New Zealand	Yes.	Yes, labour hire firm held to be employer.

\* as at 30 June 2010

# 2. Diagnosis

## 2.1 HOW IS DIAGNOSIS UNDERTAKEN AND BY WHOM?

### *Overview*

Most jurisdictions in Australia deal with diagnosis in the same way, using a three stage process. The exceptions are the Northern Territory and the Commonwealth, which leave out the final stage, and New South Wales, which has a unique system.

### *Who undertakes diagnosis*

In Victoria, Queensland, Western Australia, South Australia and Tasmania initial diagnosis is undertaken by a medical practitioner, generally the doctor treating the worker. Secondary diagnosis is then undertaken by an independent medical practitioner who is provided and paid for by the employer, insurer or relevant authority. If required, final diagnosis is then undertaken by a medical panel, generally populated from a list of medical experts. The ACT has a substantially similar process, the only difference being that final diagnosis, if required, is undertaken by a single medical referee instead of a medical panel.

In Western Australia it is rare for secondary diagnosis to be undertaken by an independent medical practitioner on behalf of the employer. In practice a two stage process applies for dealing with diagnosis:

1. initial diagnosis undertaken by a medical practitioner
2. assessment by the medical panel.

The Northern Territory, New Zealand and the Commonwealth require:

1. initial diagnosis by a medically qualified practitioner nominated by the worker, and
2. a secondary diagnosis by a practitioner provided and paid for by the employer or authority.

However, neither requires diagnosis by a medical panel.

In New South Wales diagnosis for the purposes of statutory compensation is done by a panel of three respiratory physicians called the 'Medical Authority' appointed by the Minister under the *Workers' Compensation Dust Diseases Act 1942*. Workers who have already been diagnosed with a dust disease by their treating doctor/s will have their medical results presented to the Medical Authority. The Dust Diseases Board (DDB) offers free screening for workers with a known occupational exposure to harmful dust. Compensation cannot be awarded without the appropriate certificate from the Medical Authority.

### *How diagnosis is undertaken*

In the majority of jurisdictions the only guidance provided on how diagnosis is to be undertaken is given to medical panels. The exceptions are the Northern Territory, which only gives basic guidance as to how secondary diagnosis is undertaken, the ACT, which provides only general guidance to all doctors conducting medical assessments, and New Zealand and the Commonwealth, which are silent regarding diagnosis.

In New South Wales the respiratory physicians on the Medical Authority determine what medical information they require to make a diagnosis in each case. The diagnostic information required will vary depending on the dust

disease. Some dust diseases can be diagnosed with only a medical history, a clinical examination, X-rays, spirometry and diffusing capacity. Many cases now require a high resolution CT scan. Some diseases require histopathology, cytology, medical reports. All cases require a detailed dust exposure history. The DDB arranges and pays for all medical tests required by the Medical Authority under section 6(2B) of the *Workers' Compensation (Dust Diseases) Act 1942*. In addition, section 9A allows applicants to claim reimbursement of travelling expenses incurred as a result of attending the medical examination and/or the value of wages/salaries lost.

In Victoria, South Australia and Western Australia a medical panel may meet with a worker privately, ask the worker questions, require the worker to produce copies of relevant documents, and submit to a medical examination. A medical panel may also require any medical practitioner who has examined the worker to meet with the panel to answer questions and supply any relevant documents. Tasmania has a similar system, with the only difference being that no mention is made to any power of the medical panel to require someone else to come before it to answer questions.

The Queensland Act simply states that a medical panel may make a personal examination of a worker at any time. The Western Australian Act is substantially similar, stating that a medical panel may undertake such examinations and tests as it sees fit.

The Northern Territory legislation provides that secondary diagnosis is to be undertaken by way of medical examination. No mention is made to the existence of medical panels or the process to be followed should there be conflicting medical opinions given by the practitioners who have examined the worker. The Act does set up a Worker Health Court, which has the power to hear and determine claims for compensation under the Act and all matters and questions incidental to or arising out of such claims. The Court has considerable freedom in its examination of witness, with the Act allowing it to give any necessary directions touching the time, place and manner of examination or taking of evidence.

The ACT Act gives general guidance to all medical practitioners conducting diagnosis, stating they must do so using evidence based methodology as defined under the Regulations.

New Zealand's AC Act and the Commonwealth Act makes no mention of how diagnosis is to be undertaken at any level.

### *Level of proof*

Of the nine jurisdictions only three make any reference to the level of proof to be adopted in diagnosis. The Victorian, South Australian and Tasmanian Acts state that their medical panels are not bound by the rules or practices as to evidence, and furthermore, that they may act informally, without regard to technicalities or legal forms.

**TABLE 2.1 – DIAGNOSIS ARRANGEMENTS AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction &amp; Legislation</b>	<b>Who undertakes diagnosis?</b>	<b>How is diagnosis undertaken?</b>
<b>New South Wales</b>  <b>Workers' Compensation (Dust Diseases) Act 1942</b>	<p>Diagnosis is undertaken by the Medical Authority (a medical board consisting of 3 legally qualified medical practitioners appointed by the minister: one appointed as chairperson, another nominated by employees of dust disease affected industries, and another by employers in such industries) – s7.</p> <p>No less than two members of the Medical Authority may make a determination – s8.</p> <p>Diagnosis for the purpose of compensation by the DDB is performed exclusively by the Medical Authority.</p> <p><u>The DDB offers free respiratory screening to any worker with a history of occupational exposure to harmful dust. Screening is performed by:</u></p> <ul style="list-style-type: none"> <li>• the DDB's Sydney Respiratory Examination Centre</li> <li>• or, the DDB mobile respiratory screening unit</li> <li>• or by Local Medical Officers (LMOs) on behalf of the DDB.</li> </ul>	<p>The legislation is largely silent on how diagnosis is to be undertaken, stating only that the medical authority is to "undertake such duties and <i>make such examinations</i> (emphasis added) as the board may require" (s7(3)).</p> <p>Note:</p> <p>The processes for diagnosis are defined by the Medical Authority in accordance with accepted medical practice.</p> <p><u>Respiratory screening includes:</u></p> <ul style="list-style-type: none"> <li>• X-rays of lungs</li> <li>• Lung function test</li> <li>• Medical consultation.</li> </ul> <p>The information from those tests, along with the industrial work history of the worker, is then forwarded to the Medical Authority for their consideration. The Medical Authority may require additional tests including CT scan and pathological examinations in relevant cases.</p> <p>If a claimant is not able to attend the Dust Diseases Board in Sydney or lives in rural NSW or interstate, they are examined on the mobile respiratory screening unit or by a local doctor on behalf of the DDB.</p>

**TABLE 2.1 – DIAGNOSIS ARRANGEMENTS AS AT 30 SEPTEMBER 2010**

Jurisdiction & Legislation	Who undertakes diagnosis?	How is diagnosis undertaken?
<b>Victoria</b>  <b><i>Accident Compensation Act 1985</i></b>	<p><u>Initial</u> Initial diagnosis undertaken by a medical practitioner – s103.</p> <p><u>Secondary</u> Further examination may also be undertaken by an independent medical examiner provided and paid for by the Authority or self-insurer – s112.</p> <p><u>Final</u> Final diagnosis may be undertaken by a Medical Panel in certain circumstances [if the County Court, Magistrates' Court or Conciliation Officer, Authority or self-insurer has a medical question; or if a party to the proceeding so requests] – s45 and s67(2). A Medical Panel consists of a number of members (not exceeding 5) appointed by the Convenor of the Medical Panels, drawn from a list of medical practitioners appointed by the Governor in Council – s63(2),(4).</p>	<p><u>Initial</u> Medical practitioner must issue worker with a medical certificate – s105. Medical certificate must be in the form approved by the Authority and specify the expected duration of the worker's incapacity – s105.</p> <p><u>Final</u> 65(5) A Panel may ask a worker: a) to meet with the Panel and answer questions b) to supply copies of all documents in the possession of the worker which relate to the medical question to the Panel c) to submit to a medical examination by the Panel or by a member of the Panel. Any attendance of a worker before the Medical Panel must be in private, unless the Medical panel considers that it is necessary for another person to be present – s65(4). If a Conciliation Officer refers a medical question to a Medical Panel and it becomes apparent to the Convenor or the Medical Panel that the formation of an opinion by the Medical Panel on the medical question will depend substantially on the resolution of factual issues which are more appropriately determined by a court than by a Medical Panel: a) the Convenor may decline to convene a Medical Panel, or b) the Medical Panel may decline to give an opinion on the medical question – s65(5A). If a Medical Panel has been referred a medical question and the Medical Panel considers that further information is required to enable the Medical Panel to form a medical opinion on the question— a) the Medical Panel may request the person or body referring the medical question to provide the information within the period specified in the requirement; and b) the time limit specified in section 68(1) is suspended from the date a request under paragraph (a) is made until the end of the period specified in the requirement – s65(5C).</p> <p>65(6) If a Panel so requests and the worker consents, a person who is— a) a provider of a medical service b) who has examined the worker must – c) meet with the Panel and answer questions; and d) supply relevant documents to the Panel.</p> <p>65(6A), (6B) A person referring a medical question to a Medical Panel must submit a document to the Medical Panel specifying— a) the injury to which the medical question relates b) the facts or questions of fact relevant to the medical question which the person or body is satisfied have been agreed and those facts or questions that are in dispute. A person referring a medical question to a Medical Panel must submit copies of all documents relating to the medical question in their possession. s68(1) A Medical Panel must form its opinion on a medical question referred to it within 60 days after the reference is made or such longer period as is agreed by the Conciliation Officer, the County Court, the Authority or self-insurer, and issue a certificate as to that opinion. (3) A statement of reasons for the opinion must be provided within 7 days after forming its opinion.</p>

TABLE 2.1 – DIAGNOSIS ARRANGEMENTS AS AT 30 SEPTEMBER 2010

Jurisdiction & Legislation	Who undertakes diagnosis?	How is diagnosis undertaken?
<b>Queensland <i>Workers' Compensation and Rehabilitation Act 2003</i></b>	<p><u>Initial</u> Initial diagnosis is undertaken by the doctor treating the worker – s132.</p> <p><u>Secondary</u> An insurer may at any time require the worker to submit to a personal examination by a registered person (a doctor) – s135.</p> <p><u>Final</u> Final diagnosis may be undertaken by a medical assessment tribunal (or a doctor nominated by a tribunal) – ss179, 500, 505, 510.</p> <p>Tribunals are made up of 3 doctors who are specialists in the tribunal's area, drawn from the panel of doctors appointed by the Governor in Council – s493.</p>	<p><u>Initial</u> Silent on how diagnosis is to be undertaken but does stipulate form diagnosis must take. An application for compensation must be accompanied by a certificate given by a doctor who attended the worker – s132.</p> <p><u>Secondary</u> Silent on how diagnosis is to be undertaken but it can be inferred from s500A(1) (and s499) that it must be presented as a medical report.</p> <p><u>Final</u> The tribunal may make a personal examination of the worker at any time – s510(1). It is entirely within the tribunal's discretion who may be present at an examination, but the only representative who may be present is a person nominated by the worker as their representative – s510(1A).</p>
<b>Western Australia <i>Workers' Compensation and Injury Management Act 1981</i></b>	<p><u>Initial</u> Initial diagnosis is to be undertaken by a medical practitioner.</p> <p><u>Secondary</u> If so required by the employer, the worker must submit himself for examination by a medical practitioner provided and paid by the employer – s64. This is very rarely applied. The process is generally characterised as a two stage process from initial to final.</p> <p><u>Final</u> Final diagnosis undertaken by a medical panel comprising 2 or 3 physicians (all nominated by the chief executive officer of WorkCover WA from among physicians who specialise in diseases of the chest or occupational disease; and at least one of whom specialises in diseases of the chest) – s36.</p>	<p><u>Initial</u> Silent.</p> <p><u>Secondary</u> Silent.</p> <p><u>Final</u> The medical panel may make such examinations and tests as it sees fit. Additionally, any medical practitioner who has examined or treated the worker may attend and make oral submissions to the panel.</p>

**TABLE 2.1 – DIAGNOSIS ARRANGEMENTS AS AT 30 SEPTEMBER 2010**

Jurisdiction & Legislation	Who undertakes diagnosis?	How is diagnosis undertaken?
<p><b>South Australia</b></p> <p><i><b>Workers' Rehabilitation and Compensation Act 1986</b></i></p>	<p><u>Initial</u> Initial diagnosis is undertaken by a recognised medical expert (a legally qualified medical practitioner).</p> <p><u>Secondary</u> The employer of the claimant may request the worker submit to an examination by a recognised medical expert nominated by the WorkCover Corporation of South Australia – s108.</p> <p><u>Final</u> Final diagnosis may, if required by the Corporation of the Tribunal, be carried out by a Medical Panel or a member of a Medical panel – ss98F &amp; 98G. A Medical Panel consists of no more than 5 legally qualified medical practitioners selected by the convenor of Medical Panels, drawn from a list compiled by the Governor on the recommendation of the Minister – ss98 &amp; 98A.</p>	<p><u>Initial</u> Act silent on process for diagnosis. But specifies that this diagnosis is to be presented in the form of a certificate stating: the nature of the disability; its probable cause; the extent and probable duration of the worker's incapacity – s52(1).</p> <p><u>Secondary</u> <u>Silent.</u></p> <p><u>Final</u> s98G(1) A Medical panel may ask a worker –</p> <ul style="list-style-type: none"> <li>a) to meet with the Medical Panel and answer questions;</li> <li>b) to supply copies of all documents in the possession of the worker which relate to the medical question of the Medical Panel</li> <li>c) to submit to a medical examination by the Medical Panel or by a member of the Medical Panel.</li> </ul> <p>(2)-(3) A person/body referring a medical question to a Medical Panel must submit a document to the Medical Panel specifying –</p> <ul style="list-style-type: none"> <li>a) the disability or alleged disability to, or in respect of, which the medical question relates;</li> <li>b) the facts or question of fact relevant to the medical question which the person or body is satisfied have been agreed and those facts or questions that are in dispute.</li> </ul> <p>And copies of all relevant documents.</p> <p>(4) If a Medical Panel requests and the worker consents, a medical expert who has provided a medical service to a worker in relation to the relevant compensable disability must –</p> <ul style="list-style-type: none"> <li>a) meet with the Medical Panel and answer questions; and</li> <li>b) supply relevant documents to the Medical Panel.</li> </ul> <p>(6) Any attendance of a worker before a Medical Panel must be in private, unless the Medical panel considers that it is necessary for another person to be present.</p> <p>s98(3) A Medical Panel may engage consultants and seek expert advice as it considers necessary in any particular case.</p>



**TABLE 2.1 – DIAGNOSIS ARRANGEMENTS AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction &amp; Legislation</b>	<b>Who undertakes diagnosis?</b>	<b>How is diagnosis undertaken?</b>
<b>Tasmania</b> <b>Workers' Rehabilitation and Compensation Act 1988</b>	<p><u>Initial and Secondary</u></p> <p>Initial diagnosis is to be undertaken by a medical practitioner engaged by the worker. If required a worker is to submit to a further examination by a medical practitioner nominated by the worker's employer or insurer – 90A.</p> <p><u>Final</u></p> <p>If there is a conflict in medical opinion between the two, the Tribunal may determine the medical question or may refer it to a medical panel – s49.</p> <p>A medical panel consists of 2-3 practitioners, all drawn from a register of qualified medical practitioners (kept by the Tribunal), one of whom is a general practitioner, and one of whom has expertise in the medical field to which the question relates.</p> <p>Note:</p> <ol style="list-style-type: none"> <li>Under 49(3) the Tribunal has the power to determine medical questions on medical evidence but that power is deferred to a medical panel by s39(3)(b).</li> <li>Medical practitioners with a conflict of interest or who have treated the worker/provided medical services in relation to the injury in question must not serve as members of a medical panel – s50(5).</li> </ol>	<p><u>Initial</u></p> <p>The procedure for diagnosis by the medical practitioner provided by the worker and by the employer/insurer is not stipulated in the Act.</p> <p><u>Final</u></p> <p>The procedure for diagnosis by a medical panel is stipulated in s54.</p> <ol style="list-style-type: none"> <li>A medical panel/member of a medical panel may conduct such medical examination of the worker as the medical panel or member considers necessary to determine a medical question.</li> <li>In conducting a medical examination, a medical panel may require the worker to answer questions, produce relevant documents or consent to the production of relevant documents by another person.</li> </ol> <p>Note:</p> <ol style="list-style-type: none"> <li>ss51-52 stipulate time limits for: a medical panel to make its determination and to submit a written determination; the Tribunal to pass the determination on.</li> <li>s51 stipulates procedure if there is a disagreement within the medical panel regarding the question.</li> </ol>
<b>Northern Territory</b> <b>Workers Rehabilitation and Compensation Act 2008</b>	<p><u>Initial</u></p> <p>Initial diagnosis undertaken by a medical practitioner who is treating the worker for the associated injury – s90B.</p> <p><u>Secondary</u></p> <p>The worker may then be required by an employer to submit to an examination by a medical practitioner provided and paid for by the employer – s91.</p> <p>A claim for compensation must be accompanied by certificate from a medical practitioner or other proscribed person –s82.</p> <p>If, because of the worker's isolation, a medical practitioner is unavailable to provide the certificate, a registered or enrolled nurse within the meaning of the <i>Health Practitioners Act</i> or a person registered under the <i>Health Practitioners Act</i> in the category of registration of Aboriginal health worker, may provide a worker with a certificate to accompany their claim – <i>Workers Rehabilitation and Compensation Regulations 2009</i>, s12.</p>	<p>The legislation does not specify how diagnosis is to be undertaken.</p> <p>The legislation is also silent as to what process is to be followed should there be conflicting medical opinions given by the practitioners who have examined the worker.</p> <p>But, ss94(1) states the Work Health Court (set up by the Act) has the power to hear and determine claims for compensation under the Act and all matters and questions incidental to or arising out of such claims.</p> <p>The Act also gives the Work Health Court considerable freedom in its examination of witnesses. S96 states that the Court may: give any necessary directions touching the time, place and manner of examination or taking of evidence.</p>

**TABLE 2.1 – DIAGNOSIS ARRANGEMENTS AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction &amp; Legislation</b>	<b>Who undertakes diagnosis?</b>	<b>How is diagnosis undertaken?</b>
<b>Australian Capital Territory*</b>  <b>Workers Compensation Act 1951</b>  <b>Workers Compensation Regulations 2002</b>	<p><u>Initial</u> Initial diagnosis is undertaken by the nominated doctor treating the worker (the <i>treating doctor</i>) – s116 (Act) and s9 (<i>Workers Compensation Regulation 2002</i>).</p> <p><u>Secondary</u> Either party may then request the diagnosis by a medical specialist. – s10 (<i>Regs</i>).</p> <p><u>Final</u> Final diagnosis may be undertaken by a medical referee (appointed by the Minister on the advice of a medical advisory committee) to resolve any dispute between previous medical opinions – s13 and s14 (<i>Regs</i>) and s206 (<i>Act</i>).</p>	<p><u>General</u> Any doctor who does a medical assessment of an injured worker must do the assessment using evidence based methodology – s9 (<i>Regs</i>). Note: “evidence based methodology” is defined in s8 (<i>Regs</i>).</p> <p>9(2) (<i>Regs</i>): The doctor must record the results of the assessment, including the following matters:</p> <ol style="list-style-type: none"> <li>The aetiology of the worker’s injury;</li> <li>The diagnosis of the injury;</li> <li>The prognosis of the injury;</li> <li>The recommended medical treatment for the injury.</li> </ol> <p><u>Initial</u> Initial diagnosis is to be presented in a medical certificate to accompany any claim for compensation – s116 (<i>Act</i>).</p> <p>The certificate must include a statement of the doctor’s assessment of whether the worker’s condition is consistent with the worker’s employment being a substantial contributing factor to the injury – s118(2) (<i>Act</i>).</p> <p>If diagnosis is required by a medical specialist, written notice must be given 2 weeks before the date of the assessment to the other party – s10 (<i>Regs</i>).</p> <p>Note: s10(5) (<i>Regs</i>) gives specific guidelines for the content of the written notice.</p> <p><u>Secondary</u> The medical specialist must prepare a report about the assessment. If that assessment is different from previous reports, it must specify why – s11 (<i>Regs</i>).</p> <p>A copy of the report must be provided to the other party within 5 days after it is provided to the requesting party – s11(4) (<i>Regs</i>).</p> <p><u>Final</u> s15 If diagnosis is required by a medical referee, the assessment must be presented in a report stating:</p> <ol style="list-style-type: none"> <li>the results of the assessment of the aetiology of diagnosis or, or the prognosis or recommended treatment for, the worker’s injury; and</li> <li>if the assessment differs from prior assessments,               <ol style="list-style-type: none"> <li>how and why the assessment differs; and</li> <li>why the referee’s assessment is preferable.</li> </ol> </li> </ol>

**TABLE 2.1 – DIAGNOSIS ARRANGEMENTS AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction &amp; Legislation</b>	<b>Who undertakes diagnosis?</b>	<b>How is diagnosis undertaken?</b>
<b>Commonwealth</b> <b>Safety, Rehabilitation and Compensation Act 1988</b> <b>Military Rehabilitation and Compensation Act 2004</b>	<p><u>Initial</u> Legally qualified medical practitioner – s54(2).</p> <p><u>Secondary</u> Relevant authority may require the employee to undergo an examination by one legally qualified medical practitioner nominated by that authority – s57(1)(b). DVA – For most DVA claims the diagnosis can be confirmed on the advice of a medical practitioner or from medical reports. However, there are a number of conditions where, in order to be satisfied that the claimed condition meets the definition in the applicable Statement of Principles (SoP), or to have enough information to apply the SoP factors, it is necessary to obtain particular additional diagnostic evidence, particularly for mental disorder claims. The MRCC may, at any time after the claim is made, require the person to undergo an examination by one medical practitioner nominated by the MRCC – s328(2).</p>	<p><u>Initial</u> Silent.</p> <p><u>Secondary</u> Silent. DVA – silent.</p>
<b>New Zealand</b> <b>Accident Compensation Act 2001</b>	<p><u>Initial</u> Initial diagnosis is to be undertaken by a medical practitioner.</p> <p><u>Secondary</u> The insurer may request the worker submit to an examination by a respiratory physician or occupational physician funded by the insurer.</p> <p><u>Final</u> If there is a conflict in medical opinion between the two, the insurer may determine the medical question.</p>	<p><u>Initial</u> Act silent on the process for diagnosis. An application for compensation must be accompanied by certification given by a doctor who attended the claimant.</p> <p><u>Secondary</u> Opinion by a respiratory physician or occupational physician must be presented as a medical report.</p> <p><u>Final</u> The insurer's medical authority may ask the worker – a) to answer questions put by the insurer b) to submit to a medical examination by the insurer's medical authority or delegate</p>

\* as at 30 June 2010

## 2.2 GUIDELINES FOR CERTIFICATION AND ISSUES OF FACT/MEDICAL QUESTIONS TO BE DETERMINED BY MEDICAL PANELS

The majority of jurisdictions provide guidelines for certifying the nature of the disease and the degree of the worker’s impairment. New South Wales is the exception, providing none. The detail of these guidelines varies across the jurisdictions. New South Wales, Queensland and Western Australia require medical panels to determine a number of specific questions relating to the nature, cause and extent of the claimant’s impairment. Victoria, South Australia and Tasmania provide non-conclusive lists of medical questions that may be referred to a medical panel for determination. Medical questions can often involve some issue of fact. For example, with causation matters a medical panel may, in effect, be asked to accept certain facts upon which diagnosis is based. The desirability of medical panels determining issues of fact has been questioned with some arguing that such issues should be determined by courts.

Table 2.2 provides an overview of the major guidelines for certification and issues of fact/medical questions to be determined by medical panels as at 30 September 2010.

TABLE 2.2 – GUIDELINES FOR CERTIFICATION AND ISSUES OF FACT/MEDICAL QUESTIONS TO BE DETERMINED BY MEDICAL PANELS AS AT 30 SEPTEMBER 2010		
Jurisdiction & Legislation	Guidelines for certification	Issues of fact/medical questions to be determined by medical panels
<b>New South Wales</b> <i>Workers' Compensation (Dust Diseases) Act 1942</i>	A certificate affecting the compensation of a worker can only be issued after consideration of the case has been given by the Medical Authority at a meeting at which two members are present – s7(2).	s8 The medical authority is required to determine two issues: <ol style="list-style-type: none"> <li>1. Whether the person has been totally or partially disabled (or deceased) from a dust disease; and</li> <li>2. Whether the person's disablement was reasonably attributable to exposure to the afflicting dust during the course of their employment as a "worker" under the Act.</li> </ol>

**TABLE 2.2 – GUIDELINES FOR CERTIFICATION AND ISSUES OF FACT/MEDICAL QUESTIONS TO BE DETERMINED BY MEDICAL PANELS AS AT 30 SEPTEMBER 2010**

Jurisdiction & Legislation	Guidelines for certification	Issues of fact/medical questions to be determined by medical panels
<p><b>Victoria</b></p> <p><b><i>Accident Compensation Act 1985</i></b></p>	<p><u>Initial</u></p> <p>Medical practitioner must issue worker with a medical certificate – s105.</p> <p>Medical certificate must be in the form approved by the Authority and specify the expected duration of the worker's incapacity – s105.</p> <p><u>Secondary</u></p> <p>After the initial medical certificate, the worker must provide ongoing medical certificates by a registered medical practitioner, physiotherapist, chiropractor or osteopath certifying the worker's incapacity for work during a period not exceeding 28 days and specifying the expected duration of the worker's incapacity in respect of the period of which the worker is entitled to weekly payments – s111.</p> <p><u>Final</u></p> <p>65(6A), (6B)</p> <p>A person referring a medical question to a Medical Panel must submit a document to the Medical Panel specifying—</p> <ol style="list-style-type: none"> <li>the injury to which the medical question relates;</li> <li>the facts or questions of fact relevant to the medical question which the person or body is satisfied have been agreed and those facts or questions that are in dispute;</li> </ol> <p>And copies of all documents relating to the medical question in their possession.</p> <p>s68(1)</p> <p>A Medical Panel must form its opinion on a medical question referred to it within 60 days after the reference is made or such longer period as is agreed by the Conciliation Officer, the County Court, the Authority or self-insurer, and issue a certificate as to that opinion.</p> <p>S68(3) That opinion must be given in writing within 7 days.</p>	<p>Medical Panel is required to determine 'medical questions' (s45 and s62) referred to it by the court's own motion or by the court on the request of a party to the proceeding.</p> <p><b>'Medical question' is defined to include the following (s5):</b></p> <ol style="list-style-type: none"> <li>a question as to the nature of a worker's medical condition relevant to an injury or alleged injury; or</li> <li>a question as to the existence, extent or permanency of any incapacity of a worker for work or suitable employment and the question whether a worker is partially or totally incapacitated; or</li> <li>a question as to whether a worker has a current work capacity or has no current work capacity and what employment would or would not constitute suitable employment; or</li> <li>a question as to whether a worker has no current work capacity and is likely to continue indefinitely to have no current work capacity; or</li> <li>a question as to whether a worker has a current work capacity and, because of the injury, is, and is likely to continue indefinitely to be incapable of undertaking—             <ol style="list-style-type: none"> <li>further or additional employment or work;</li> <li>further or additional employment or work that would increase the worker's current weekly earnings—</li> </ol> </li> </ol> <p>and, if not so incapable, what further or additional employment or work the worker is capable of undertaking; or</p> <ol style="list-style-type: none"> <li>a question as to the medical, personal and household or occupational rehabilitation service provided, or to be provided, to a worker for an injury, including a question as to the adequacy, appropriateness or frequency of that service; or</li> <li>a question whether a worker's employment was in fact, or could possibly have been, a significant contributing factor to an injury or alleged injury, or to a similar injury; or</li> <li>if paragraph (b) does not apply, a question whether a worker's employment was in fact, or could possibly have been, a contributing factor to an injury or alleged injury, or to a similar injury; or</li> <li>a question as to the extent to which any physical condition, including any impairment, resulted from or was materially contributed to by the injury; or</li> <li>a question as to the extent to which any physical condition, including any impairment, results from or is materially contributed to by the injury; or</li> <li>a question as to the level of impairment of a worker including a question of the degree of impairment of a worker assessed in accordance with section 91 and a question as to whether or not that impairment is permanent; or</li> <li>a question as to the amount of the total percentage referred to in section 89(3)(b); or</li> <li>a question as to whether a worker has an injury which is a total loss mentioned in the Table to section 98E(1); or</li> <li>a question whether a worker's incapacity for work resulted from or was materially contributed to by an injury or alleged injury; or</li> <li>a question whether a worker's incapacity for work results from or is materially contributed to by an injury or alleged injury; or</li> <li>a question prescribed to be a medical question in respect of an application for leave under section 134AB(16)(b); or</li> <li>a question determined to be a medical question by a court hearing an application for leave under section 134AB(16)(b).</li> </ol>

**TABLE 2.2 – GUIDELINES FOR CERTIFICATION AND ISSUES OF FACT/MEDICAL QUESTIONS TO BE DETERMINED BY MEDICAL PANELS AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction &amp; Legislation</b>	<b>Guidelines for certification</b>	<b>Issues of fact/medical questions to be determined by medical panels</b>
<b>Queensland</b> <i><b>Workers' Compensation and Rehabilitation Act 2003</b></i>	<p><u>Initial</u> An application for compensation must be accompanied by a certificate given by a doctor who attended the worker – s132.</p> <p><u>Secondary</u> Diagnosis must be presented as a medical report – s500A(1) (and s449).</p> <p><u>Final</u> A tribunal must give a written decision for any matter referred to it with reasons for the decision. A copy of that decision must be given to the insurer and the worker – s516.</p>	<p>s501 If the insurer has not admitted that an injury was sustained by a worker, and the nature of the injury, the tribunal must decide—</p> <ol style="list-style-type: none"> <li>whether the matters alleged in the application for compensation constitute an injury to the worker and, if so, the nature of the injury; and</li> <li>whether an incapacity for work resulting from the injury—               <ol style="list-style-type: none"> <li>is total or partial; and</li> <li>is permanent or temporary.</li> </ol> </li> </ol> <p>Even if the insurer has admitted that an injury was sustained by a worker, and the nature of the injury, the tribunal must decide—</p> <ol style="list-style-type: none"> <li>whether an incapacity for work resulting from the injury—               <ol style="list-style-type: none"> <li>is total or partial; and</li> <li>is permanent or temporary.</li> </ol> </li> </ol>
<b>Western Australia</b> <i><b>Workers' Compensation and Injury Management Act 1981</b></i>	<p><u>Initial</u> Diagnosis must be in the form of a certificate signed by a medical practitioner stating that the worker is unfit for work because of a recurrence of an injury – s57A and s57B.</p> <p><u>Secondary</u> Silent.</p> <p><u>Final</u> The determination of the medical panel must, as far as is practicable in each case, be in the form and contain answers to the questions prescribed – s38.</p>	<p>ss37-38 Once submissions have been considered and certificates from other medical practitioners have been perused, the panel is obliged to determine key questions:</p> <ol style="list-style-type: none"> <li>is, or was, the worker suffering from pneumoconiosis, mesothelioma or lung cancer?</li> <li>If so, is, or was, the worker thereby less able to earn full wages?</li> <li>To what extent if any does, or did pneumoconiosis, mesothelioma or lung cancer adversely affect the worker's ability to undertake physical effort?</li> <li>What other, if any, disease or physical condition is, or was, contributing to the worker's being less able to earn full wages, or death and to what extent?</li> <li>Is, or was, the worker fit for work? If so, at what level – light, moderate, or heavy?</li> </ol>

**TABLE 2.2 – GUIDELINES FOR CERTIFICATION AND ISSUES OF FACT/MEDICAL QUESTIONS TO BE DETERMINED BY MEDICAL PANELS AS AT 30 SEPTEMBER 2010**

Jurisdiction & Legislation	Guidelines for certification	Issues of fact/medical questions to be determined by medical panels
<p><b>South Australia</b></p> <p><i><b>Workers' Rehabilitation and Compensation Act 1986</b></i></p>	<p><u>Initial</u> Diagnosis is to be presented in the form of a certificate stating: the nature of the disability; its probable cause; the extent and probable duration of the worker's incapacity – s52(1).</p> <p><u>Secondary</u> Silent.</p> <p><u>Final</u> s98G(2)-(3) A person/body referring a medical question to a Medical Panel must submit a document to the Medical Panel specifying –</p> <ul style="list-style-type: none"> <li>a) the disability or alleged disability to, or in respect of, which the medical question relates;</li> <li>b) the facts or question of fact relevant to the medical question which the person or body is satisfied have been agreed and those facts or questions that are in dispute.</li> </ul> <p>A Medical Panel must form its opinion on a medical question referred to it within 60 days, giving a certificate as to its opinion. That opinion must include a statement of reasons – s98H.</p>	<p>A Medical Panel is required to give an opinion on any medical question referred to it under the Act – s98F(1)</p> <p>The definition of “medical question” in section 98E contains numerous questions requiring a determination of fact, including:</p> <ul style="list-style-type: none"> <li>a) a question whether a worker has a disability and, if so, the nature or extent of that disability; or</li> <li>b) a question whether a worker's disability— <ul style="list-style-type: none"> <li>(i) in the case of a disability that is not a secondary disability or a disease—arose out of or in the course of employment; or</li> <li>(ii) in the case of a disability that is a secondary disability or a disease—arose out of employment or arose in the course of employment and the employment contributed to the disability; or</li> </ul> </li> <li>c) a question whether a worker's employment was a substantial cause of a worker's disability consisting of an illness or disorder of the mind; or</li> <li>d) a question whether a worker has suffered a disability of a kind referred to in the first column of Schedule 2; or</li> <li>e) a question whether a medical expense has been reasonably incurred by a worker in consequence of having suffered a compensable disability; or</li> <li>f) a question whether a charge for a medical service should be disallowed under section 32(5); or</li> <li>g) a question whether a disability results in incapacity for work; or</li> <li>h) a question as to the extent or permanency of a worker's incapacity for work and the question whether a worker has no current work capacity or a current work capacity; or</li> <li>i) a question as to what employment would or would not constitute suitable employment for a worker; or</li> <li>j) a question as to whether a worker who has no current work capacity is likely to continue indefinitely to have no current work capacity; or</li> <li>k) a question whether a worker who has a current work capacity is, and is likely to continue indefinitely to be, incapable of undertaking further or additional employment or work and, if not so incapable, what further or additional employment or work the worker is capable of undertaking; or</li> <li>n) a question as to when a worker has ceased to be incapacitated for work by a compensable disability; or</li> <li>o) a question as to what constitutes proper medical treatment for the purposes of section 36(1a)(c); or</li> <li>p) a question as to whether a disability is permanent and, if so, the level of impairment of a worker for the purposes of sections 43 and 43A; or</li> <li>q) a question as to whether a provision of a rehabilitation and return to work plan imposes an unreasonable obligation on a worker; or</li> <li>r) a question as to any other prescribed matter.</li> </ul>



TABLE 2.2 – GUIDELINES FOR CERTIFICATION AND ISSUES OF FACT/MEDICAL QUESTIONS TO BE DETERMINED BY MEDICAL PANELS AS AT 30 SEPTEMBER 2010		
Jurisdiction & Legislation	Guidelines for certification	Issues of fact/medical questions to be determined by medical panels
<b>Tasmania</b> <i>Workers' Rehabilitation and Compensation Act 1988</i>	<p><u>Final</u> s51</p> <ol style="list-style-type: none"> <li>1. If 2 or members of a medical panel are in agreement as to the determination of a medical question, the determination of those members is taken to be the determination of the panel.</li> <li>2. Determination to be made as soon as practicable but within 28 days.</li> <li>3. If the members of a medical panel do not agree, the question is returned to the Tribunal for its determination.</li> </ol> <p>A written determination from the Medical Panel, that includes reasoning, is to be submitted to the Tribunal within 7 days after the determination is made. The Tribunal must then provide a copy of that determination to the worker within 3 days – s52.</p>	<p>Under s3(1) a "medical question" that the Tribunal or a medical panel may be required to answer means a question relating to –</p> <ol style="list-style-type: none"> <li>a) the existence, nature or extent of an injury; or</li> <li>b) whether an injury is, or is likely to be, permanent or temporary; or</li> <li>c) a worker's capacity for work or specific work duties; or</li> <li>d) the loss, or the degree of loss, of any of the parts or faculties of the body; or</li> <li>e) the permanent loss of the effective use of a part of the body; or</li> <li>f) the assessment of the degree of permanent impairment; including whether the impairment is permanent;</li> </ol> <p>a medical service provided or to be provided to a worker for an injury, including the adequacy, appropriateness or frequency of that service.</p>
<b>Northern Territory</b> <i>Workers Rehabilitation and Compensation Act 2008</i>	<p>None.</p>	<p>None.</p>

**TABLE 2.2 – GUIDELINES FOR CERTIFICATION AND ISSUES OF FACT/MEDICAL QUESTIONS TO BE DETERMINED BY MEDICAL PANELS AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction &amp; Legislation</b>	<b>Guidelines for certification</b>	<b>Issues of fact/medical questions to be determined by medical panels</b>
<b>Australian Capital Territory*</b>  <b>Workers Compensation Act 1951</b>  <b>Workers Compensation Regulations 2002</b>	<p><u>Initial</u> Initial diagnosis is to be presented in a medical certificate to accompany any claim for compensation – s116. The certificate must include a statement of the doctor's assessment of whether the worker's condition is consistent with the worker's employment being a substantial contributing factor to the injury – s118(2). If diagnosis is required by a medical specialist, written notice must be given 2 weeks before the date of the assessment to the other party – s10 (Regs). Note: s10(5) (Regs) gives specific guidelines for the content of the written notice. <u>Secondary</u> The medical specialist must prepare a report about the assessment. If that assessment is different from previous reports, it must specify why – s11 (Regs). A copy of the report must be provided to the other party within 5 days after it is provided to the requesting party – s11(4) (Regs). <u>Final</u> s15 If diagnosis is required by a medical referee, the assessment must be presented in a report stating:</p> <ul style="list-style-type: none"> <li>a) the results of the assessment of the aetiology of diagnosis or, or the prognosis or recommended treatment for, the worker's injury; and</li> <li>b) if the assessment differs from prior assessments,               <ul style="list-style-type: none"> <li>(iii) how and why the assessment differs; and</li> <li>(iv) why the referee's assessment is preferable.</li> </ul> </li> </ul>	None.
<b>Commonwealth Safety, Rehabilitation and Compensation Act 1988</b> <b>Military Rehabilitation and Compensation Act 2004</b>	<p><u>Initial</u> Diagnosis must be presented in a medical certificate that must be lodged with original claim for compensation – s54(2)(b). DVA – none.</p>	None. DVA – none.
<b>New Zealand Accident Compensation Act 2001</b>	None.	None.

\* as at 30 June 2010

# 3. Proving work related exposure

## Overview

The majority of schemes contain a general presumption that where a worker suffers from an asbestos related disease and his or her employment has involved exposure to and inhalation of asbestos fibres, his or her employment contributed to a substantial degree to the disease. The onus is therefore on the employer to provide evidence to the contrary in order to rebuff the presumption.

This general presumption is established through the inclusion of occupational disease schedules listing a series of occupational diseases together with particular occupational categories or work description. Where a worker of the scheduled occupational class or engaged in the scheduled work description develops a scheduled occupational disease the onus of proof is reversed so that the disease is regarded as being of occupational origin unless it can be proven otherwise.<sup>2</sup> This is generally the case with asbestos related diseases.

The New South Wales, DVA and Queensland schemes, however, do not contain such schedules and, as such, do not contain the same general presumption. They simply state that the worker's employment must be shown to be "reasonably attributable" or a "significant contributing factor" to the worker's contraction of the disease. Similarly, if an asbestos related disease is not listed in a schedule, normal causation applies, requiring the worker to prove their employment was a significant contribution factor to their contraction of the disease.

**TABLE 3 – PROVING WORK-RELATED EXPOSURE AS AT 30 SEPTEMBER 2010**

Jurisdiction & Statute	Proving work related exposure
<b>New South Wales Workers Compensation (Dust Diseases) Act 1942</b>	Contraction of the disease must be found to be "reasonably attributable" to the person's exposure to the inhalation of dust in an occupation to the nature of which the disease was due – s8(1)(a).
<b>Victoria Accident Compensation Act 1985;</b>	If a worker was employed in any mining, manufacturing or other process involving contact with asbestos and they contract asbestosis (with or without mesothelioma), the disease shall be deemed due to the nature of the employment, unless the Authority or a self-insurer proves to the contrary – s87.
<b>Queensland Workers' Compensation and Rehabilitation Act 2003</b>	Employment must be shown to be a "significant contributing factor" to the contraction of the disease – s32.
<b>Western Australia Workers' Compensation and Injury Management Act 1981</b>	If a worker was employed in any process entailing substantial exposure to asbestos dust and they contract pneumoconiosis, mesothelioma or lung cancer, it shall be deemed to have been due to the nature of the employment, unless the employer proves the contrary – s44 (and Sch 3).

<sup>2</sup> Alan Clayton, Richard Johnstone and Sonya Sceats, *The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers' Compensation Systems* (2002) National Research Centre of OHS Regulation, 21.

**TABLE 3 – PROVING WORK-RELATED EXPOSURE AS AT 30 SEPTEMBER 2010**

Jurisdiction & Statute	Proving work related exposure
<b>South Australia</b>  <b><i>Workers' Rehabilitation and Compensation Act 1986</i></b>  <b><i>Workers' Rehabilitation and Compensation Regulations 1999</i></b>  <b><i>Dust Diseases Act 2005</i></b>	<p>If a worker suffers from asbestosis (or mesothelioma) and has been employed in work involving exposure to inhalation of asbestos fibres, the worker's disability is presumed, in the absence of proof to the contrary, to have arisen from that employment – s31(2) (and Sch 2); and s6 <i>Regulations</i>.</p> <p>If it is established that an injured person suffers or suffered from a dust disease and was exposed to asbestos dust in circumstances in which exposure might have caused or contributed to the disease, it will be presumed, in absence of proof to the contrary, that the exposure caused or contributed to the disease – s8 <i>Dust Diseases Act</i>.</p>
<b>Tasmania</b>  <b><i>Workers' Rehabilitation and Compensation Act 1988</i></b>	<p>Where worker suffers from asbestosis or mesothelioma and has been employed in work involving exposure to inhalation of asbestos fibres, presumption, in the absence of contrary evidence, his employment contributed to a substantial degree to the disease – s26 (and Sch 4).</p>
<b>Northern Territory</b>  <b><i>Workers Rehabilitation and Compensation Act 2008</i></b>	<p>Unless the contrary is established, where a worker contracts an asbestos related disease and has been employed in work involving exposure to asbestos dust, the disease shall be taken to have been contracted by the worker in the course of his employment – s4(6) (and Sch 1).</p>
<b>Australian Capital Territory*</b>  <b><i>Workers Compensation Act 1951</i></b>  <b><i>Workers Compensation Regulations 2002</i></b>	<p>Where a worker is suffering from asbestosis, or the death of a worker results from asbestosis, and the worker was engaged in employment involving exposure to, or contact with, asbestos, unless the contrary is established, that employment is taken to have been a contributing factor to the disease – s28 (and Sch 1, <i>Workers Compensation Regulations 2002</i>).</p> <p>Any employment in which a worker who has contracted a disease was engaged at any time before symptoms of the disease first became apparent is, unless the contrary is established, taken for this Act to have been a substantial contributing factor to the worker's contracting the disease if the incidence of the disease among people who have engaged in that kind of employment is significantly greater than the incidence of the disease among people who have engaged in employment generally in the place where the worker was ordinarily employed – s29(1).</p>
<b>Commonwealth</b>  <b><i>Safety, Rehabilitation and Compensation Act 1988</i></b>  <b><i>Safety, Rehabilitation and Compensation (Specified Disease) Notice 2007 (1)</i></b>	<p>Where an employee is suffering from asbestosis, or the death of an employee results from asbestosis, and the employee was engaged by the Commonwealth in employment involving exposure to asbestos dust, the employment is taken to have contributed, to a significant degree, to the contraction of the disease, unless the contrary is established – s7(1) (and <i>Safety, Rehabilitation and Compensation (Specified Disease) Notice 2007 (1)</i>).</p> <p>Where an employee contracts a disease, any employment in which he or she was engaged by the Commonwealth or a licensed corporation at any time before symptoms of the disease first became apparent shall, unless the contrary is established, be taken, to have contributed, to a significant degree, to the contraction of the disease if the incidence of that disease among persons who have engaged in such employment is significantly greater than the incidence of the disease among persons who have engaged in other employment in the place where the employee is ordinarily employed – s7(2).</p>
<b>New Zealand</b>  <b><i>Accident Compensation Act 2001</i></b>	<p>If a worker is suffering from asbestosis, mesothelioma or lung cancer and is (or has been) employed in work involving exposure to inhalation of asbestos fibres, the worker's condition is presumed, in the absence of proof to the contrary, to have arisen from that employment – s30(3) (and Sch 2); and s60.</p> <p>Other asbestos-related conditions are accepted as being occupational provided, on the balance of probabilities, that –</p> <ol style="list-style-type: none"> <li>the worker was exposed to asbestos in the course of work</li> <li>the worker had no material non-work exposure</li> <li>the risk of developing that condition is significantly greater in that occupation or environment – s30(2).</li> </ol> <p>The exposure to asbestos must have occurred in New Zealand or the person concerned must have been ordinarily resident in New Zealand when the exposure took place – s30(4A).</p>

\* as at 30 June 2010

# 4. Benefits to recipients and their dependants

## 4.1 INCAPACITY BENEFITS, STEP DOWNS AND REDEMPTIONS.

Almost all jurisdictions provide for a period of near-full income replacement of pre-injury earnings for workers who cannot earn due to a work related injury. These weekly income replacements are 'stepped down' by a percentage or a set amount after a determined period. Provisions are also made to further reduce the amounts of income replacement based on an injured person's capacity to earn. In the majority of jurisdictions the benefits provided for workers with asbestos related injuries are the same as those available for general workers' compensation injuries. Queensland is the only jurisdiction that does not offer weekly benefits to workers with latent onset injuries that are terminal conditions. Instead it compels workers to take lump sum compensation.<sup>3</sup>

Most jurisdictions also place an age limit on the receipt of such payments. Due to the fact that asbestos related diseases typically have long latency periods. Workers will often be beyond the age of retirement before they begin to show symptoms of an asbestos related disease, these age limitations are especially significant. The majority of jurisdictions allow weekly payments to be made to workers who are injured after they reach the retirement age, but only for between one and two years. After that workers are expected to rely on the standard welfare payments.<sup>4</sup> Western Australia, however, exempts those workers who are suffering from mesothelioma, pneumoconiosis or lung cancer from the age limit. The New South Wales scheme also differs, setting no age limit and allowing workers suffering from asbestos related disease to receive weekly benefits until their death.

All jurisdictions, except New South Wales, allow injured workers to redeem weekly payments as a lump sum in certain circumstances. Two jurisdictions, Western Australia and Queensland, make special arrangements to facilitate lump sum redemption for workers with asbestos related disease or mesothelioma. While lump sum redemption for asbestos related disease is theoretically possible in the other jurisdictions, strict eligibility requirements that are in-place in the majority of schemes make it unlikely in practice.

In theory it would also be possible for asbestos related disease sufferers to claim lump sum compensation under the various schemes' permanent impairment entitlements. The degenerative nature of most asbestos related diseases, however, means that in the majority of situations these provisions are unlikely to apply to such workers as most jurisdictions require a worker's condition to be stabilised. Therefore, permanent impairment entitlements have not been extracted in this report.<sup>5</sup>

Table 4.1 lists the relevant benefits, step downs, variations, age and time limits for all jurisdictions. All amounts are correct as at 30 September 2010.

3 If a worker in Queensland were to be diagnosed with an asbestos related disease that was not deemed to be a terminal condition, the regular compensation arrangements would apply. See section 128B of the *Workers' Compensation and Rehabilitation Act (2003)* (Qld) for more detail.

4 It is important to note that there are no such age limits on the receipt of medical benefits, which are generally unlimited. For more detail on medical benefits see 4.2 below.

5 For a summary of permanent impairment entitlements see *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (Safe Work Australia 2011).

TABLE 4.1 – SUMMARY OF BENEFITS AS AT 30 SEPTEMBER 2010

Parameter	NSW <sup>1</sup>	Vic <sup>2</sup>	Qld	WA	SA <sup>3</sup>	Tas	NT	ACT <sup>*</sup>	Cth	NZ
<b>100% wage replacement (no. of weeks)</b>	26 – s8(2).	13 (95% of workers pre injury pay) – s93A(3).	26	13 – Sch 1, cl 11.	13 – s35A.	26 – s69B.	26 – s64.	26 – s39.	45	Week 2-5: 80% of short-term calculation.
<b>Final step-down (After week ...)</b>	26 – s8(2).	13 – 93B(3).	104	13 – Sch 1, cl 11.	26 – s35B.	78 – s69B.	26 – s64.	26 – s39.	45	Week 5: 80% of long-term calculation.
<b>Minimum amount</b>	>26 weeks the lesser of \$409.10 or 90% AWE, for workers over 21 years \$325.40. for workers with AWE not exceeding \$291.80 per week the lesser of 100% AWE, or \$266.10.  – s8(2).  The Board can set weekly benefits at a lower rate for workers who have been exposed to inhalation of dust in other jurisdictions or who are not totally disabled – s8(6A).	80% of worker's pre injury pay – s93B(3).	Greater of 75% worker's NWE or 70% of QOTE.	85% of average weekly earnings – Sch 1, cl 11.	80% of notional weekly earnings – s35A.	80% (safety net – payments can't fall below 70% of basic salary or 100% weekly payment, which ever is lower).	75% (or 150% of AWE <sup>4</sup> in the NT, whichever is lesser) – s65.	65% of pre- injury earnings or statutory floor (\$543.78) whichever is more.  Seacare: Lesser of 75% or statutory amount (\$402.06).	Lesser of 75% or statutory amount (\$402.06).	NZ\$408

TABLE 4.1 – SUMMARY OF BENEFITS AS AT 30 SEPTEMBER 2010

Parameter	NSW <sup>1</sup>	Vic <sup>2</sup>	Qld	WA	SA <sup>3</sup>	Tas	NT	ACT *	Cth	NZ
<b>Variation</b>	\$107.80 for dependent spouse. \$77.10 for one dependent child <sup>5</sup> – s8(2).	Less current weekly earnings. – Pt IV, Div 3A.	-	Subject to award rates.	Less capacity or deemed capacity to earn.	Less capacity to earn.	More for dependants, less capacity to earn.	More for dependants, less capacity to earn.	More for dependants, less capacity to earn.	Less capacity to earn.
<b>Financial Limit</b>	\$1716.40 per week.	\$1810 per week.	Until weekly compensation totals \$265 485.	2 x ABS AWE <sup>6</sup> (\$2060.80) per week. \$183 394 total.	\$2408.20 per week.	-	-	-	150% of AWOTEFA <sup>7</sup> (currently \$1,884.45).	NZ\$1717.98 per week.
<b>Lump sum redemption/ settlement/ commutation<sup>8</sup></b>	There is no entitlement to commute weekly benefits for workers under the <i>Workers' Compensation (Dust Diseases) Act 1942</i> , however dependent death entitlements may be redeemed.	Only allowable in limited circumstances – Pt IV, Div 3A. Only for weekly payments. Does not include reasonable medical and like expenses which continue to be paid.	\$265,485 less any weekly compensation already paid. Additional 10% for care. \$265,485 additional payable according to an age scale – s128B Additional 15% for dependants – s128D After redemption no further entitlements to compensation for the injury (inc. medical expenses) – s128B.	Under 65: \$183 394 – sch 1, c7(3); s5; s67. Potential additional 75% – s217(3),(4). Worker not entitled to further compensation after receiving redemption (inc. common law damages) – s67. Over 65: \$56,271 <sup>9</sup> if over 65 – sch 5, cl 1. This redemption does not affect common law rights.	Redemptions are negotiated between the worker and Workcover.	Settlements within 2 years must be approved by Tribunal. Tribunal must be satisfied that all reasonable efforts have been made to be rehabilitate, retrain or return to worker to work.	Commute weekly benefits into lump sum payment. Max. 156 times NWE <sup>10</sup> of 156 times AWE, whichever is greater – s74 Only for workers who are not totally incapacitated and rehabilitation is complete. Medical and like expenses are continued to be paid.	Negotiated between worker and insurer/ employer.	Only available in some circumstances. Calculated per s30(1) (or s137(1) for “former workers”) under the SRC Act and s44 of the Seafarers Act. Medical or permanent impairment payments are not affected. Can only be paid if Comcare is satisfied that the degree of incapacity is unlikely to change. <b>DVA:</b> Only available in some circumstances and are calculated per s138.	Injury prior to 1 April 2002, an independence allowance may be payable if impairment > 10%. From 1 April 2002, spouse of person killed can apply to have weekly compensation commuted. The independence allowance can be capitalised for periods of 5 years, weekly compensation and medical costs can not be commuted.

TABLE 4.1 – SUMMARY OF BENEFITS AS AT 30 SEPTEMBER 2010

Parameter	NSW <sup>1</sup>	Vic <sup>2</sup>	Qld	WA	SA <sup>3</sup>	Tas	NT	ACT *	Cth	NZ
<b>Indexation mechanism</b>	Quarterly Wage Price Index for NSW ordinary time hourly rates of pay excluding bonuses.	CPI (Melbourne) Adjusted 1 July.	QOTE: Queensland full time adult's ordinary time earnings. Adjusted 1 July.	Labour Price Index ordinary time hourly rates of pay for Western Australia. Adjusted 1 July.	Adjusted on 1 January in each year, beginning on 1 January 2010, by multiplying the stated amount by a proportion obtained by dividing the Consumer Price Index for the September quarter of the immediately preceding year by the CPI for the September quarter, 2008.	'Basic salary' adjusted on 1 January x percentage change in full-time average.	208 x full-time adult persons weekly ordinary time earnings for Northern Territory. Adjusted on 1 January.	CPI (Canberra). Adjusted quarterly in line with CPI indexed variations.	<b>Comcare:</b> CPI. Adjusted 1 July. <b>Seacare:</b> Identical to Comcare. <b>DVA:</b> CPI. Adjusted 1 July.	CPI. Adjusted 1 July.
<b>Time limit</b>	-	130 weeks unless no current work capacity likely to continue indefinitely.	5 years.	-	130 weeks unless no current and continuing work capacity.	Depends on the worker's degree of whole person impairment (WPI) – 9 years if < 15% WPI 12 years if ≥ 15% WPI but < 20% WPI 20 years if ≥ 20% WPI but < 30% WPI To age of retirement if ≥ 30% WPI.	-	-	-	-



TABLE 4.1 – SUMMARY OF BENEFITS AS AT 30 SEPTEMBER 2010

Parameter	NSW <sup>1</sup>	Vic <sup>2</sup>	Qld	WA	SA <sup>3</sup>	Tas	NT	ACT *	Cth	NZ
<b>Age limit</b>	None – s8(3).	65 unless lower industry retirement age. If injured within 130 weeks of retirement max. 130 weeks.	-	65 unless worker is over 64 at time of injury, in which case max 1 year – s56  No age limit for workers with pneumoconiosis, mesothelioma or lung cancer – sch5, cl3.	65 unless worker is within 2 years of retirement age or above retirement age in which case weekly payments are payable for a period of incapacity falling within 2 years after the commencement of the incapacity.	65 unless worker is over 64 at time of injury, in which case max. 1 year. If a worker's employment would allow the worker to continue beyond age 65 the Tribunal may determine that weekly payments may continue for a specified period.	65 unless worker is over 64.5 at time of injury, in which case max 6 months.	65 unless worker is over 63 years at time of injury, in which case maximum 2 years is payable.	65 unless worker is over 63 years at time of injury, in which case max 2 years whether continuous or cumulative Seacare: 65 unless worker is over 64 at time of injury, in which case it is max. 12 months from time of injury.	65 unless: If a worker is between 63 and 64 years at time of injury, max. 2 years. If a worker is 64 at time of injury, max.1 year. All subject to an election to be entitled to compensation rather than superannuation.

\* as at 30 June 2010

## 4.2 MEDICAL TREATMENT BENEFITS

Medical treatments benefits are provided by all jurisdictions to compensate workers for medical or hospitalisation costs they incur as a result of their injury. Several schemes provide time or maximum expense limits but most of these also include the capacity for exceptions to be made in certain circumstances. Typically asbestos disease sufferers will satisfy these requirements, increasing their access to medical benefits, if not making it unlimited.

**TABLE 4.2 – MEDICAL AND HOSPITAL BENEFITS AS AT 30 SEPTEMBER 2010 (MODIFIED FROM THE COMPARISON OF WORKERS' COMPENSATION ARRANGEMENTS IN AUSTRALIA AND NEW ZEALAND [SAFE WORK AUSTRALIA 2011])**

Jurisdiction	Calculation	Limits
<b>New South Wales</b>	All reasonable costs – s8(2)(D) ( <i>Workers' Compensation (Dust Diseases) Act 1942</i> ; s60(1) <i>Workers Compensation Act 1987</i> ).	Statutory maximum for medical and hospital expenses is \$50 000.  But on application to the Dust Diseases Board medical expenses that are "reasonably necessary" can be granted indefinitely.
<b>Victoria</b>	All reasonable costs – s99.	Entitlement to medical and like services ceases 52 weeks after the entitlement to weekly payments ceases or, if compensation is payable only for medical and like services, 52 weeks after this entitlement commences – s99AD(1) & (2).  In certain circumstances, entitlement does not cease (e.g. if worker's health or ability to undertake activities of daily living or remain at work or surgery is required) – s99AC(5).  Entitlement does not cease if common law damages received or voluntary settlement of weekly payments received – s99AD(4).  If injury is a severe injury or results in death, counselling services will be provided to family members, not exceeding \$5,410 – s99(1)(b). Injured workers also have an entitlement to attendant care – s99(1).
<b>Queensland</b>	Medical treatment or hospitalisation that they consider reasonable, having regard to the injury. The Authority may impose conditions. Insurer must pay the cost of the medical treatment – s210.	Only available until lump sum compensation is paid – s128B.
<b>Western Australia</b>	Reasonable expenses incurred – Schedule 1, clause 17.	30% of prescribed amount (\$55 018). An additional \$50 000 can be granted by the Dispute Resolution Directorate where the worker's social and financial circumstances justify it – Schedule 1, clause 18A(1).  If a worker meets an exceptional medical circumstances test and has a whole person impairment of not less than 15%, they may apply for additional medical and related expenses capped at \$250 000. Workers granted such an extension are excluded from seeking common law damages – Schedule 1, clause 18A.

**TABLE 4.2 – MEDICAL AND HOSPITAL BENEFITS AS AT 30 SEPTEMBER 2010 (MODIFIED FROM THE COMPARISON OF WORKERS' COMPENSATION ARRANGEMENTS IN AUSTRALIA AND NEW ZEALAND [SAFE WORK AUSTRALIA 2011])**

Jurisdiction	Calculation	Limits
<b>South Australia</b>	<p>A worker is entitled to be compensated for reasonable costs, reasonably incurred in consequence of having suffered a compensable disability, (or the regulated amount where applicable) of:</p> <ol style="list-style-type: none"> <li>medical services</li> <li>hospitalisation and all associated medical, surgical and nursing services</li> <li>approved rehabilitation</li> <li>cost of travelling or transportation for the purpose of receiving medical services, hospitalisation or approved rehabilitation</li> <li>accommodation if necessary for medical or rehabilitation purposes</li> <li>attendance by nurse, etc in certain circumstances</li> <li>provision, maintenance, replacement or repair of therapeutic appliances</li> <li>medicines and other material purchased on the prescription or recommendation of a medical report, and</li> <li>other costs or classes of costs authorised by WorkCover – s32(1) and (2).</li> </ol>	No limit.
<b>Tasmania</b>	Reasonable expenses necessarily incurred by the worker as a result of the injury for medical services, hospital services, nursing services, constant attendant services, rehabilitation services and ambulance services – s75(1) (a).	<p>Entitlement to medical and like services ceases 52 weeks after the entitlement to weekly payments is terminated or, if compensation is payable only for medical and like services, 52 weeks after this entitlement commences.</p> <p>In certain circumstances, entitlement does not cease (e.g. if worker's health or ability to undertake activities of daily living or remain at work or surgery is required).</p>
<b>Northern Territory</b>	All reasonable costs.	No limit – s73.
<b>Australian Capital Territory</b> *	<p>Employer is liable to pay for the cost of medical treatment reasonably obtained in relation to the injury, and for the cost of rehabilitation services – s70.</p> <p>Employer is liable to pay for hospital treatment – s73.</p>	<p>The total amount payable must not be more than the maximum amount for each of the following: medical treatment consisting of the repair or replacement of a worker's contact lenses, crutches, prosthesis, spectacles or other artificial aid and damage or loss of clothing.</p> <p>The maximum amount means an amount agreed between employer and worker or \$617,63, CPI indexed – s70.</p>
<b>Commonwealth</b>	<p><b>Comcare and Seacare:</b> All reasonable costs.</p> <p><b>DVA:</b></p> <ol style="list-style-type: none"> <li>All reasonable costs</li> <li>Schedule items (if condition is chronic and member has discharged from the ADF).</li> </ol>	<p><b>Comcare:</b> No limit – appropriate costs – s16.</p> <p><b>Seacare:</b> No limit – s28.</p> <p><b>DVA:</b></p> <ol style="list-style-type: none"> <li>No limit – s276</li> <li>Per statutory schedule.</li> </ol>
<b>New Zealand</b>	Regulated or contract rates for treatment, and reasonable costs associated with social and vocational rehabilitation – s69(1)(a).	Prior approval of expenditure is required except for acute treatment, and all costs approved by contract or regulations – Schedule 1, Part 1, s1.

\* as at 30 June 2010.

### 4.3 BENEFITS TO DEPENDANTS ON DEATH OF WORKER

In the event that an asbestos related injury leads to the death of a worker, most jurisdictions have a benefit structure in place that provides lump sum payments, funeral costs and weekly payments for dependants. Queensland stands alone as the only jurisdiction that does not provide compensation to a worker's dependents other than assistance with reasonable funeral expenses.

Table 4.3 summaries the major benefits available to dependants as at 30 September 2010.

**TABLE 4.3 – MAJOR BENEFITS AVAILABLE TO DEPENDANTS AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction</b>	<b>Lump sum</b>	<b>Weekly payments to dependent spouse</b>	<b>Weekly payment to dependent children</b>	<b>Other</b>
<b>New South Wales</b> <sup>11</sup>	\$268,375 – s8(2B)(b)(i). Note: On 7 December 2010 the <i>Workers' Compensation (Dust Diseases) Act 1942</i> was amended to allow for lump sum death benefits to be increased to \$311,050. This increase will take place over three increments with the first increment being \$268,375 and the 2 <sup>nd</sup> payable from 7.12.12 being \$ 291,040.	\$238.80 – s8(2B)(b)(iii). Amount can also be redeemed as a lump sum under s82E of the <i>Workers' Compensation (Dust Diseases) Act 1942</i> .	\$119.10 – s8(2B)(b)(iii).	Reasonable funeral expenses up to \$9000 – s8(2)(a).
<b>Victoria</b>	\$511,920 – s92A.	First 13 weeks after death: 95% of worker's pre-injury pay, to a maximum of twice the State average weekly earnings – s92B(3)(a). 14 weeks to 3 years: 50% of the worker's pre-injury pay, to a maximum of twice the State average weekly earnings – s92B(3)(b). Provisional pension under s92B(3)(a) may be paid for a period of up to 12 weeks – s92D.	10% of 'ordinary time earnings' payable weekly to each dependent family member until 16 or to 25 for a full-time student or apprentice (where spouse is totally dependent): s92B(9). Where orphaned children are the only eligible surviving dependants, they receive entitlements equivalent to those for a sole surviving partner – s92B(5).	Reasonable funeral expenses up to \$9300: s99(1)(c), 99AA(2). Provisional payments under s92D for: medical expenses under s99(1)(a) up to \$7630. family counselling services under s99(1)(b) up to max (\$5410) funeral under s99(1)(c).
<b>Queensland</b>	None.	None.	None.	Reasonable funeral expenses up to \$9,950 – s128D(2)(b).
<b>Western Australia</b>	In some circumstances a lump sum of the notional residual entitlement of the worker, less any payments already made to the worker – sch 1, cl 1B.	If the worker was receiving weekly payments for total incapacity, wholly dependent spouse, child or parent will receive aggregate weekly payments at the rate received by the worker for a year – sch 1, cl 1(2). If there is more than one of the above person, amount apportioned between them.	\$48.10 to 16 – sch 1, cl 1A. \$48.10 up to the age of 21 if they are a full time student – sch 1, cl 1A. Arbitrator retains an absolute discretion to order a child receive continued support until they reach 21 – sch 1, cl 1A.	Funeral expenses \$8,606 – sch 1, cl 17(2).

TABLE 4.3 – MAJOR BENEFITS AVAILABLE TO DEPENDANTS AS AT 30 SEPTEMBER 2010

Jurisdiction	Lump sum	Weekly payments to dependent spouse	Weekly payment to dependent children	Other
<b>South Australia</b>	\$426,255 – \$45A.	\$602.05 – s44(1). Payments cease on date payments would have ceased had the worker survived but had been permanently incapacitated – s44(8).	Orphaned children: 25% of deceased's notional weekly earnings for a totally dependent child, less depending on degree of dependency. Not orphaned: 12.5% of deceased's notional weekly earnings for a totally dependant child, less depending on degree of dependency – s44(1). Payments cease on date payments would have ceased had the worker survived but had been permanently incapacitated – s44(8).	Funeral expenses \$7,570 – s45B and regulation 15(1)-(1a).
<b>Tasmania</b>	\$266,376.05 – s67.	100% of weekly payment that would have been payable to worker for 26 weeks, stepping down to 80% after 78 weeks, limited to 2 years – s67A.		Reasonable cost of burial or cremation.
<b>Northern Territory</b>	\$299,910 – s62.	None.	\$115.35 – s63.	Funeral expenses \$5,998.20 – s62.
<b>Australian Capital Territory*</b>	\$185,288 – s50.	None.	\$61.76 – s77.	Funeral expenses \$4941 – s77.
<b>Commonwealth</b>	<b>SRC Act</b> \$442,177.76 – s17. <b>Seacare</b> \$442,177.76 – s29(3). <b>DVA</b> \$610 497.95 (age based maximum amount for partner). \$125 319.80 (additional amount for partner where a <i>service death</i> as defined). \$75 191.88 (for each "other dependant").	<b>SRC Act</b> None. <b>Seacare</b> None. <b>DVA</b> \$362.55 for life (if aged base lump sum not chosen).	<b>SRC Act</b> \$121.60 – s17(5). <b>Seacare</b> \$121.60 – s29(5). <b>DVA</b> \$82.71	Funeral expenses <b>SRC Act</b> \$10,138.75– s18(4). <b>Seacare</b> \$5 513.67 – s30(2). <b>MRCA</b> \$10,138.75
<b>New Zealand</b>	Spouse: NZ\$5940.91. Each child or other dependant: NZ\$2970.47.	Spouse: 60% of the long-term rate of weekly compensation that the earner would have received.	Each child and other dependant: 20% of the weekly compensation. Note: If total entitlement exceeds 100% individual entitlements are reduced on a pro rata basis.	Funeral grant: NZ\$5541.23 Child care payments: NZ\$126.33 for a single child, NZ\$75.79 each if there are more than two children, and a total of NZ\$176.86 for 3 or more children.

\* as at 30 June 2010

# 5. Time limitations to claims

## Overview

### 5.1 STATUTORY LIMITATION

There are three different approaches to the time in which an injured worker has to bring a claim for statutory compensation under the main workers' compensation schemes. First, New South Wales, DVA and Western Australia set no time limit. Second, Victoria, Queensland, Tasmania, the Northern Territory and the Australian Capital Territory set strict limits of between seven days and six months from either the day the worker became aware of the injury, or the date of diagnosis by a doctor. Finally, South Australia and the Commonwealth schemes set abstract limits, requiring workers to report their injury "as soon as practicable" after they become aware of the injury.

### 5.2 COMMON LAW LIMITATION

There are broadly two ways in which the Limitation Acts of the various Australian jurisdictions deal with actions for damages regarding asbestos-related diseases. New South Wales, Victoria, Queensland and the Northern Territory simply exclude such injuries from the operation of their respective Limitation Acts. The remaining jurisdictions, with the exception of Tasmania and South Australia, prescribe that the relevant limitation period does not begin to run until the injury comes to the person's knowledge, or when it ought to have come to their knowledge (the date of discoverability).

Tasmania differs slightly by having a limitation period from the date of discoverability (three years) and a maximum limitation period (twelve years). However, a judge has the discretion to extend the maximum period to a limitation period from the date of discoverability, having regard to the justice of the case.

South Australia abolished access to common law damages for workers compensation claims on 3 December 1992 as the requirement for a worker to prove negligence on the part of an employer was seen as inconsistent with the concept of no fault legislation.

The standard limitation period from the date of actual knowledge, or discoverability, is three years, with the exception of Western Australia, where it is six years.

In Western Australia and Tasmania the knowledge test is measured by what the claimant might reasonably have been expected to know, making it an objective test. In South Australia and the ACT the test is measured only by what the claimant actually knew, making it a subjective test.

In Western Australia and Tasmania causes of action that accrue before the commencement of their respective Acts have different limitation periods. In Tasmania a three year limitation period applies, while in Western Australia the applicable limitation period is that which would have applied before the commencement of the Act.

**TABLE 5.1 – LIMITATIONS TO CLAIMS AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction</b>	<b>Statutory limitation</b>	<b>Common Law limitation</b>
<b>New South Wales</b>  <b><i>Dust Diseases Tribunal Act 1989</i></b>	None.	None – s12A.
<b>Victoria</b>  <b><i>Accident Compensation Act 1985</i></b>  <b><i>Limitations of Actions Act 1936</i></b>	<p>30 days after the worker becomes aware of the injury – s102(1).</p> <p>Limit may be waived or extended in certain circumstances – s102(6).</p>	<p><i>Limitation of Actions Act 1958</i> s 5(1)(a): 6 years from date cause of action accrued for actions found on tort including actions for damages for breach of a statutory duty.</p> <p>Note: this is the limitation period prior to amendment of the Act in 2002 which continues to apply to actions for damages under Part IV of the <i>Accident Compensation Act 1985</i> as per s 40(a) <i>Limitation of Actions (Amendment) Act 2002</i>.</p> <p>Section 5(1A) <i>Limitation of Actions Act 1958</i> (limitation period prior to 2002 amendments as per above) provides:</p> <p>An action for damages for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries consisting of a disease or disorder contracted by any person may be brought not more than 6 years from, and the cause of action shall be taken to have accrued on, the date on which the person first knows —</p> <ol style="list-style-type: none"> <li>that he has suffered those personal injuries; and</li> <li>that those personal injuries were caused by the act or omission of some person.</li> </ol> <p>For ‘dust related conditions’ including asbestosis, asbestos induced carcinoma, asbestos related pleural diseases, mesothelioma in Schedule 1 of the <i>Administration and Probate Act 1958</i>, s29 provides:</p> <ol style="list-style-type: none"> <li>Subject to the provisions of this section, on the death of any person, all causes of action subsisting against or vested in him shall survive against or (as the case may be) for the benefit of his estate: ....</li> <li>...</li> </ol> <p>2A. Where—</p> <ol style="list-style-type: none"> <li>a cause of action survives under subsection (1) for the benefit of the estate of a deceased person; and</li> <li>the death of that person is from a dust-related condition which has been caused by the act or omission which gives rise to the cause of action; and</li> <li>proceedings in respect of that cause of action were commenced by that person before his or her death— the damages recoverable for the benefit of the estate of that person shall include damages for all or any of the following—</li> <li>that person's pain or suffering;</li> <li>any bodily or mental harm suffered by that person;</li> <li>the curtailment of that person's expectation of life.</li> </ol>

**TABLE 5.1 – LIMITATIONS TO CLAIMS AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction</b>	<b>Statutory limitation</b>	<b>Common Law limitation</b>
<b>Queensland</b>  <i>Workers Compensation and Rehabilitation Act 2003</i>  <i>Limitations of Actions Act 1974</i>	6 months from date of doctor's diagnosis – ss131, 36A.	None – s11(2).
<b>Western Australia</b>  <i>Workers' Compensation and Injury Management Act 1981</i>  <i>Limitation Act 2005</i>	Silent.	<p>If a cause of action accrues after the commencement of the Act (15 November 2005), a limitation period of 6 years begins to accrue when the person 'has knowledge of the relevant facts' – s13 and s56(1).</p> <p>'Knowledge of relevant facts' includes knowledge that the injury was: significant and attributable to an act or omission of the defendant – s56(2).</p> <p>An injury is 'significant' if the applicant would reasonably have considered it 'sufficiently serious to justify the person's commencing an action for damages' – s56(3).</p> <p>A person's knowledge includes knowledge which the person might reasonably have been expected to acquire –</p> <ul style="list-style-type: none"> <li>a) from facts observable or ascertainable by the person; or</li> <li>b) from facts ascertainable by the person with the help of medical or other appropriate expert advice which it is reasonable for the person to seek,</li> </ul> <p>but a person is not to be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as the person has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice – s56(5).</p> <p><u>Accrual before commencement</u></p> <p>In cases where the cause of action accrues before the commencement of the Act (15 November 2005), the applicable limitation period is that which would have applied before commencement of the Act – s6(2).</p>
<b>South Australia</b>  <i>Workers Rehabilitation and Compensation Act 1986</i>	<p>6 months from day entitlement to make claim arises (the prescribed period) – s51(1)(a).</p> <p>Exceptions apply including ignorance, mistake, absence from the State or any other reasonable excuse – s52(3) (b).</p>	Access to common law damages abolished on 3 December 1992.



**TABLE 5.1 – LIMITATIONS TO CLAIMS AS AT 30 SEPTEMBER 2010**

<b>Jurisdiction</b>	<b>Statutory limitation</b>	<b>Common Law limitation</b>
<b>Tasmania</b>  <b><i>Workers' Rehabilitation and Compensation Act 1988</i></b>  <b><i>Limitation Act 1974</i></b>	6 months from day on which worker became totally or partially incapacitated, or date certified as incapacitated by a doctor – ss32, 3(5).	<p>If a cause of action accrues after the commencement of the Act (1 January 1975), actions for damages are limited to either 3 years commencing on the date of discoverability, or 12 years commencing on the date of the act or omission that gave rise to the action; whichever is earlier – s5A(3).</p> <p>However, a judge may extend the 12 year limitation period to the expiry of 3 years commencing on the date of discoverability having regard to the justice of the case – s5A(5).</p> <p>The “date of discoverability” means the date when the plaintiff knew or ought to have known that personal injury or death –</p> <ul style="list-style-type: none"> <li>a) had occurred; and</li> <li>b) was attributable to the conduct of the defendant; and</li> <li>c) was sufficiently significant to warrant bringing proceedings – s2(1).</li> </ul> <p><u>Accrual before commencement</u></p> <p>In cases where the cause of action accrued before the commencement day (1 January 1975), a 3 year limitation period applies – s5.</p>
<b>Northern Territory</b>  <b><i>Workers' Rehabilitation and Compensation Act 2009</i></b>  <b><i>Limitation Act 1981</i></b>	Within 6 months of the incapacity arising from the disease – s182.	No limitation for asbestos disease sufferers – s12(2).
<b>Australian Capital Territory*</b>  <b><i>Workers Compensation Act 1951</i></b>  <b><i>Limitation Act 1985</i></b>	7 days after date of the start of the incapacity, or the date when medical treatment was first received, whichever is earlier – s39 and s27.	A 3 year limitation period begins to run when injured person first knows that the injury includes a disease and that the injury is related to someone else's act or omission – s16B(2).
<b>Commonwealth</b>  <b><i>Safety Rehabilitation and Compensation Act 1988</i></b>  <b><i>Seafarers Rehabilitation and Compensation Act 1992</i></b>  <b><i>Military Rehabilitation and Compensation Act 2004</i></b>	<p><b>SRC Act</b></p> <p>As soon as practically possible after worker becomes aware of the injury – s53.</p> <p><b>Seacare</b></p> <p>As soon as practicable after the workers becomes aware of the injury – s62.</p> <p><b>DVA</b></p> <p>None.</p>	
<b>New Zealand</b>  <b><i>Accident Compensation Act 2001</i></b>	<p>The deemed date of injury is the earlier of:</p> <ul style="list-style-type: none"> <li>1<sup>st</sup> date of treatment</li> <li>1<sup>st</sup> date of incapacity</li> </ul> <p>– s37.</p>	

\* as at 30 June 2010

## 5.3 TRANSITIONAL PROVISIONS

Not all injured workers are covered under current workers' compensation legislation because their *date of injury* may have preceded the introduction of that legislation, particularly for long latency diseases. However, most jurisdictions provide for workers' compensation payments to be made to people who would have had an entitlement to compensation under preceding legislation, or for some transitional arrangements to apply to those people.

For example, in Queensland, injuries that occurred before 1 January 1991 are covered by the *Workers' Compensation Act 1916*, injuries that occurred between 1 January 1991 and 1 February 1997 are covered by the *Workers' Compensation Act 1990* and injuries that occurred on or after 1 February 1997 and before 1 July 2003 are covered by the *WorkCover Queensland Act 1996*.

In other circumstances an injured worker may need to meet certain criteria in order for an injury that occurred when previous legislation was in force to be covered under the current legislation. For example, a Commonwealth employee who was injured prior to 1988 would only be entitled to compensation under the *Safety, Rehabilitation and Compensation Act 1988* if there was an entitlement under the preceding piece of legislation.

**TABLE 5.2 – TRANSITIONAL LEGISLATION PROVISIONS AS AT 30 SEPTEMBER 2010**

Jurisdiction	Legislation
<b>New South Wales</b>	<i>Workers' Compensation Act 1926.</i>
<b>Victoria</b>	<a href="#"><i>Workers Compensation Act 1958.</i></a>
<b>Queensland</b>	<a href="#"><i>Workers' Compensation Act 1916.</i></a> <a href="#"><i>Workers' Compensation Act 1990.</i></a> <a href="#"><i>WorkCover Queensland Act 1996.</i></a>
<b>Western Australia</b>	<a href="#"><i>Workers' Compensation and Injury Management Act 1981.</i></a>
<b>South Australia</b>	The <i>Workers Compensation Act 1971</i> may still apply to injuries with a date of injury prior to 30 September 1987, the date on which the 1986 Act commenced.
<b>Tasmania</b>	<i>Workers Compensation Act 1927</i> (for injuries prior to 15 November 1988). <i>Workers' (Occupational Diseases) Relief Fund Act 1954.</i>
<b>Northern Territory</b>	<i>Workmen's Compensation Ordinance 1949.</i> <i>Workmen's Compensation Act 1979.</i>
<b>Australian Capital Territory*</b>	The ACT legislation is a consolidation of previous enactments.
<b>Commonwealth Comcare</b>	A person who has a date of injury under a previous Act (the <a href="#">1971</a> , <a href="#">1930</a> or 1912 Acts) is entitled to compensation under the 1988 Act provided compensation for that injury would have been payable under the earlier Act. A person is not entitled to compensation under the 1988 Act if compensation was not payable in respect of an injury suffered under a previous Act.
<b>Commonwealth Seacare</b>	A person who has a date of injury under the <i>Seamen's Compensation Act 1911</i> is entitled to compensation under the 1992 Act provided compensation for that injury would have been payable under the earlier Act. A person is not entitled to compensation under the 1988 Act if compensation was not payable in respect of an injury suffered under a previous Act.
<b>Commonwealth DVA</b>	<a href="#"><i>Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004.</i></a>
<b>New Zealand</b>	<a href="#"><i>Accident Insurance (Transitional Provisions) Act 2000.</i></a> <a href="#"><i>Accident Insurance Act 1998.</i></a> <a href="#"><i>Accident Rehabilitation and Compensation Insurance Act 1992.</i></a> <a href="#"><i>Accident Compensation Act 1982.</i></a> <i>Accident Compensation Act 1972.</i>

\* as at 30 June 2010

# 6. Exclusionary provisions

In most jurisdictions, workers' compensation legislation contains exclusionary provisions. These provisions set out certain circumstances in which workers' compensation will be denied.

Each jurisdiction generally has three main groups of exclusionary provisions that are most likely to apply to workers with asbestos related disease. First, there are provisions that exclude workers from claiming compensation in multiple jurisdictions. Second, there are provisions to insure that only those workers who can demonstrate a sufficient connection to the jurisdiction in question can claim compensation. Finally, there are provisions that apply to ensure that people who exhibit reckless or wilful behaviour in the workplace are on the whole excluded from receiving workers' compensation benefits.

Additionally, many jurisdictions have a range of provisions that exclude compensation claims in specific circumstances. Some of these, along with the main exclusionary provisions, are extracted in Table 6.1 below.

**TABLE 6 – EXCLUSIONARY PROVISIONS TO COMPENSATION AS AT 30 SEPTEMBER 2010**

Jurisdiction	Exclusionary provisions
<b>New South Wales</b>  <b><i>Workers Compensation (Dust Diseases) Act 1942</i></b>  <b><i>Workplace Injury Management and Workers Compensation Act 1998</i></b>  <b><i>Workers Compensation Act 1987</i></b>	<p>No compensation or reduced compensation for those already receiving compensation in respect of a dust disease under an Act of any other State or Territory – s8AA (1942 Act).</p> <p>A person receiving compensation under the 1942 Act is prohibited from receiving compensation under the Principal Act or any other Act in force in NSW relating to any injuries received, disablement or industrial disease – s8(6) (1942 Act).</p> <p>If it is proved that an injury to a worker is solely attributable to the serious and wilful misconduct of the worker, compensation is not payable in respect of that injury, unless the injury results in death or serious and permanent disablement – s14(2) (1987 Act).</p> <p>Compensation is not payable:</p> <ul style="list-style-type: none"> <li>• in respect of any injury to or death of a worker caused by an intentional self-inflicted injury – s14(3) (1987 Act)</li> <li>• to a member of the Police Service who is a contributor to the Police Superannuation Fund under the <i>Police Regulation (Superannuation) Act 1906</i> – s4 (1998 Act)</li> <li>• to a person whose employment is casual (that is for 1 period only of not more than 5 working days) and who is employed otherwise than for the purposes of the employer's trade or business – s4 (1998 Act)</li> <li>• to an officer of a religious or other voluntary association, who is employed upon duties for the association outside the officer's ordinary working hours, so far as the employment on those duties is concerned, if the officer's remuneration from the association does not exceed \$700 per year – s4 (1998 Act).</li> </ul> <p>Under section 8AA of the <i>Workers' Compensation (Dust Diseases) Act 1942</i> compensation is not payable:</p> <ul style="list-style-type: none"> <li>• employees of the Commonwealth Government</li> <li>• workers in or about a mine to which the <i>Coal Mines Regulation Act 1912</i> applies (those workers are covered by other State legislation)</li> <li>• persons whose exposure to the inhalation of dust occurred in the course of their employment outside of New South Wales</li> <li>• persons whose exposure to dust occurred while self employed.</li> </ul>

**TABLE 6 – EXCLUSIONARY PROVISIONS TO COMPENSATION AS AT 30 SEPTEMBER 2010**

Jurisdiction	Exclusionary provisions
<p><b>Victoria</b></p> <p><i><b>Accident Compensation Act 1985</b></i></p>	<p>In the case of Victoria while there are some statutory exclusions from entitlement to compensation, if the injury results in death or severe injury, compensation may still be payable.</p> <p>No compensation for those who have received compensation or an action for damages is pending in respect of the injury under the law of any place outside Victoria – s85.</p> <p>Entitlement to compensation only if employment connected with Victoria – s80.</p> <p>If it is proved that before commencing employment an employer in writing requested that the worker disclose all pre-existing injuries and diseases, and the worker did not disclose the information, compensation is not payable for any recurrence, aggravation, acceleration, exacerbation or deterioration – s82(7).</p> <p>If it is proved that an injury to a worker (whether or not intended to be inflicted) was deliberately or wilfully self-inflicted, there is no entitlement to compensation in respect of that injury – s82(3).</p> <p>If it is proved that an injury to a worker is attributable to the worker's serious and wilful misconduct (including being under the influence of intoxicating liquor or a drug) there is no entitlement to compensation in respect of that injury unless the injury results in death or serious and permanent disablement – ss82(4) &amp; (5).</p> <p>Where a worker, knowing they have an asbestos related disease, fails to disclose that to a prospective employer after they are requested to do so in writing and they subsequently allege the new employment has aggravated their disease – ss82(7) &amp; (8).</p>
<p><b>Queensland</b></p> <p><i><b>Workers Compensation and Rehabilitation Act 2003</b></i></p>	<p>No compensation for those who receive compensation for the same injury under a law of a place other than Queensland – s116.</p> <p>Employment must be connected with Queensland – s113.</p> <p>Compensation is not payable:</p> <ul style="list-style-type: none"> <li>• for an injury sustained by a worker if the injury is intentionally self-inflicted – s129</li> <li>• for an injury caused by the serious and wilful misconduct of the worker, unless it results in death or injury and/or could result in a WRI<sup>12</sup> of 50% or more – s130(1)</li> <li>• if the injury, caused by misconduct, could result in WRI of 50% or more arising from a psychiatric or psychological injury or combining a psychiatric or psychological injury and another injury – s130(2).</li> </ul>
<p><b>Western Australia</b></p> <p><i><b>Workers' Compensation and Rehabilitation Act 1981</b></i></p>	<p>No compensation for those who have received compensation under the laws of a place other than Western Australia; or have obtained a judgement against the employer independently of the 1986 Act – s23.</p> <p>Compensation not payable unless employment connected with Western Australia – s20.</p> <p>If, after receiving compensation for an asbestos related condition, a worker is subsequently employed in any processes entailing substantial exposure to asbestos dust, they are not entitled to any further compensation in respect of any aggravation or acceleration of that condition – s35.</p> <p>Compensation not payable if, since the worker was last employed in the State in employment involving exposure to asbestos, the worker has been absent from the State for more than 6 months and, during that period, was employed in employment involving exposure to asbestos – s33.</p> <p>No further compensation payable to workers who have received the full amount of compensation, even if they are subsequently employed in process entailing exposure to mineral dust – s46(2).</p> <p>If it is proved that the injury of a worker is attributable to their–</p> <ol style="list-style-type: none"> <li>a) voluntary consumption of alcoholic liquor or of a drug of addiction, or both, which impairs the proper functioning of their faculties</li> <li>b) failure, without reasonable excuse, proof of which is on them, to use protective equipment, clothing or accessories provided by their employer for the worker's use; or</li> <li>c) other serious and wilful misconduct any compensation claimed in respect of that injury shall be disallowed unless the injury has serious and permanent effects or results in death – s22.</li> </ol> <p>Compensation is not payable for an injury or death of a person before operation of Section 3 of the <i>Workers Compensation Act Amendment Act (No. 2) 1977</i>.</p>

**TABLE 6 – EXCLUSIONARY PROVISIONS TO COMPENSATION AS AT 30 SEPTEMBER 2010**

Jurisdiction	Exclusionary provisions
<p><b>South Australia</b></p> <p><i><b>Workers Rehabilitation and Compensation Act 1986</b></i></p>	<p>Compensation not payable in respect of a disability to the extent that compensation has been received in respect of the same disability under the laws of a place other than South Australia – s55.</p> <p>Employment must be connected with South Australia – s6.</p> <p>If a worker suffers 2 or more compensable disabilities arising from the same trauma is not entitled to receive compensation in excess of the prescribed sum – s43.</p> <p>Effect of misconduct etc: – s30B</p> <ol style="list-style-type: none"> <li>1. A worker who is acting in connection with, and for the purposes of, the employer's trade or business is presumed to be acting in the course of employment despite the fact that: <ol style="list-style-type: none"> <li>a) the worker is acting in contravention of a statutory or other regulation applicable to the employment; or</li> <li>b) the worker is acting without, or in contravention of, instructions from the employer.</li> </ol> </li> <li>2. However <ol style="list-style-type: none"> <li>a) a worker will not be presumed to be acting in the course of employment if the worker is guilty of misconduct or acts in contravention of instructions from the employer during the course of an attendance under section 30(3); and</li> <li>b) a disability is not compensable if it is established on the balance of probabilities that the disability is wholly or predominantly attributable to: <ol style="list-style-type: none"> <li>(i) serious and wilful misconduct on the part of the worker; or</li> <li>(ii) the influence of alcohol or a drug voluntarily consumed by the worker (other than a drug lawfully obtained and consumed in a reasonable quantity by the worker).</li> </ol> </li> </ol> </li> <li>3. Subsection (2)(a) does not apply in a case of death or permanent total incapacity for work and subsection (2)(b) does not apply in a case of death or serious and permanent disability – s30B(3).</li> </ol>
<p><b>Tasmania</b></p> <p><i><b>Workers' Rehabilitation and Compensation ACT 1988</b></i></p>	<p>Compensation not payable in respect of an injury to the extent that compensation has been received under the law of a place other than Tasmania – s31E.</p> <p>Tasmania must be the state where the worker usually works in their employment – s31A.</p> <p>Compensation not payable in respect of any disease that the worker wilfully and falsely represented himself in writing as not having previously suffered from – s25.</p> <p>Compensation not payable in respect of a disability to the extent that compensation has been received in respect of the same disability under the laws of a place other than South Australia – s55.</p> <p>Compensation is not payable:</p> <ul style="list-style-type: none"> <li>• if the injury is attributable to the serious and wilful misconduct of the worker, unless it results in death or serious and permanent incapacity; or</li> <li>• if the injury is an intentional self-inflicted injury.</li> </ul> <p>The Act does not apply to any person –</p> <ol style="list-style-type: none"> <li>a) whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business; or</li> <li>b) who is an outworker; or</li> <li>c) who is a domestic servant in a private family, and has not completed 48 hours' employment with the same employer at the time when he suffers injury; or</li> <li>d) who is a member of the crew of a fishing boat, and is remunerated wholly or mainly by a share in the profits or gross earnings of that boat; or</li> <li>e) notwithstanding section s4D, who is participating in an approved program of work for unemployment payment under the <i>Social Security Act 1991</i> of the Commonwealth –</li> </ol> <ul style="list-style-type: none"> <li>• and no such person shall be deemed to be a worker within the meaning of this Act – s4(5).</li> </ul>
<p><b>Northern Territory</b></p> <p><i><b>Workers Rehabilitation and Compensation Act 2009</b></i></p>	<p>Compensation not payable if compensation or damages have been recovered under another applicable law; or an award of compensation or judgement for damages has been made under another applicable law – s54.</p> <p>The Northern Territory must be jurisdiction in which the worker usually works in the employment in question – ss53, 53AA.</p> <p>Compensation is not payable in respect of an injury to a worker that was deliberately self-inflicted or attributable to his or her serious and wilful misconduct, unless the injury results in his or her death or permanent or long term incapacity – s57(1).</p>

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Jurisdiction	Exclusionary provisions
<p><b>Australian Capital Territory*</b></p> <p><b><i>Workers Compensation Act 1951</i></b></p>	<p>Compensation not payable to the extent that compensation under the workers compensation law of an external Territory or place outside Australia has been received in relation to the same injury – s36F.</p> <p>Compensation only payable if the ACT is the Territory where the worker usually works in the employment in question – s36B.</p> <p>A worker who has suffered 2 or more losses because of an injury is not entitled to receive more than the maximum loss amount in compensation under the Act – s53.</p> <p>Compensation is not payable if the injury to, or death of, the worker is caused by:</p> <ul style="list-style-type: none"> <li>• an intentionally self-inflicted injury – s82(2)</li> <li>• the worker's serious and wilful misconduct, unless the injury results in the death or serious and permanent disablement – s82(3)</li> <li>• the worker being imprisoned – s83</li> <li>• his or her engagement in professional sporting activity – s84.</li> </ul>

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Jurisdiction	Exclusionary provisions
<p><b>Commonwealth</b></p> <p><i><b>Safety Rehabilitation and Compensation Act 1988</b></i></p> <p><i><b>Seafarers Rehabilitation and Compensation Act 1992</b></i></p> <p><i><b>Military Rehabilitation and Compensation Act 2004</b></i></p>	<p><b>Comcare:</b></p> <p>Compensation is not payable in respect of:</p> <ul style="list-style-type: none"> <li>• any period during which the worker is imprisoned – s23(2)</li> <li>• a disease, if the employee, for the purposes connected with his/her employment or proposed employment has made a wilful and false representation that he/she did not suffer, or had not previously suffered, from that disease – s7(7)</li> <li>• any injury, disease or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment – s5A(1)</li> <li>• an injury that is intentionally self-inflicted – s14(2)</li> <li>• an injury that is caused by the serious and wilful misconduct of the worker including under the influence of alcohol or a non-prescribed drug, but is not intentionally self inflicted, unless the injury results in death, or serious and permanent impairment – s14(2) &amp; s14(3) or</li> <li>• an injury sustained because the employee voluntarily and unreasonably submitted to an abnormal risk of injury – s6(3)</li> <li>• an injury sustained while the employee is travelling between their place of residence and usual place of work – s6(1C) or</li> <li>• an injury sustained while the employee is travelling to or from a place of education or one of the places prescribed in paragraph 6(1)(f) - ss6(2).</li> </ul> <p><b>Seacare:</b></p> <p>Compensation not payable to the extent that it has already been paid by a State for the same injury – s139.</p> <p>Act excludes the operation of any law of State or Territory relating to worker's compensation in so far as it applies to an employee's injury – s139A.</p> <p>Compensation is not payable in respect of:</p> <ul style="list-style-type: none"> <li>• any period during which the employee is imprisoned – s38(3)</li> <li>• an injury that is intentionally self-inflicted</li> <li>• an injury caused by the serious and wilful misconduct of the worker including under the influence of alcohol or a non-prescribed drug, unless the injury results in death, or serious and permanent impairment s12 &amp; s26(3)</li> <li>• where a worker made a wilful and false representation that he/she suffered from a disease or an aggravation of a disease: – s10(7).</li> </ul> <p><b>DVA:</b></p> <p>Liability will not be accepted for an injury or disease if the injury or disease arose from, or was aggravated by, a serious default or wilful act (including drug or alcohol consumption), a serious breach of discipline or was self-inflicted, whilst a member.</p> <p>The above exclusion does not apply if the person is seriously and permanently impaired by the injury or disease, or dies as a result.</p> <p>Additionally, liability will not be accepted if:</p> <ul style="list-style-type: none"> <li>• the injury or disease resulted from, or was aggravated by, reasonable counselling in relation to performance as a member, or a failure to obtain a promotion transfer or benefit as a member</li> <li>• the injury, disease or death resulted from an accident that occurred on a journey undertaken on peacetime service where the journey was made by an indirect route for a reason not connected with performance of the member's duties that substantially increased the risk of the injury, disease or death occurring</li> <li>• the injury, disease or death resulted from an accident that occurred on a journey undertaken on peacetime service that was substantially delayed or interrupted for a reason not connected with performance of the member's duties in a way that substantially increased the risk of the injury, disease or death occurring</li> <li>• in regards to the injury, disease or death, a wilfully false representation in connection with proposed or actual service that the person had not suffered at any time from the injury or disease to which the claim relates, or</li> <li>• the injury, disease or death is due only to the personal use of tobacco products and no other cause is determined to have been contributory.</li> </ul>
<p><b>New Zealand</b></p> <p><i><b>Accident Compensation Act 2001</b></i></p>	<p>Compensation is not payable:</p> <ul style="list-style-type: none"> <li>• where the injury or death is due to suicide or wilfully self-inflicted injury – s119</li> <li>• where the claimant becomes entitled to it because of the death of another person and they have been convicted in New Zealand or another country of the murder of the person: – s120</li> <li>• where the claimant is in prison. – s121</li> <li>• where the claimant was injured committing an offence for which they are imprisoned and that offence is punishable by a maximum term of imprisonment of 2 years or more – s 122.</li> </ul>

\* as at 30 June 2010

## Footnotes

- 1 Workers' Compensation (Dust Disease) Act 1942.
- 2 Due to statutory changes to scheme on 12/11/97, benefit rates depend on date of entitlement.
- 3 Note: If injury is attributable to a trauma that occurred before 30/9/1987, compensation arrangements under the *Workers Compensation Act 1971* (SA) are applicable.
- 4 Average Weekly Earnings
- 5 Amount increases with number of dependent children: \$170.10 (2); \$281.80 (3); \$396.30 (4); plus \$114.30 for each child in excess of 4.
- 6 Australian Bureau of Statistics Average Weekly Earnings.
- 7 Average Weekly Ordinary Time Earnings of Full-time Adults (no limit for DVA under the MRC Act)
- 8 Instead of weekly payments and less any weekly payments already received.
- 9 Amount as at 30 September 2010.
- 10 Normal weekly earnings.
- 11 *Workers' Compensation (Dust Disease) Act 1942.*
- 12 Work Related Impairment.