

CIVIL LIABILITY AMENDMENT (PROVISIONAL DAMAGES FOR DUST DISEASES) BILL 2024

Introduction and First Reading

Bill introduced, on motion by **Mr J.R. Quigley (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR J.R. QUIGLEY (Butler — Attorney General) [10.32 am]: I move —

That the bill be now read a second time.

In October 2016, the Law Reform Commission of Western Australia tabled its final report on project 106, *Provisional damages and damages for gratuitous services*, which, among other things, recommended that the “once and for all” rule be modified in Western Australia through the introduction of a provisional damages regime. Currently, Western Australian plaintiffs who have suffered personal injury are awarded damages on the basis of the “once and for all” rule. This means that damages are assessed at a single stage, cannot be subsequently enlarged and are calculated on a lump sum. If a claim for damages is caused by an act or omission, then all the damages for past and future injury caused, or potentially caused, by that act or omission must be determined in the one award of damage.

The risks of asbestos-related diseases are well known, as is the historical significance of the disease on the Western Australian community. The tragic legacy of asbestos, however, is not over and continues to be felt in Western Australia today, with the rate of mesothelioma diagnosis, a terminal asbestos-related disease, remaining at nearly twice the national average in 2020. Asbestos disease rates in Western Australia have often been referred to as occurring in waves. The first wave consisted of miners and manufacturers. That was followed by the second wave of construction workers, carpenters and other tradespeople exposed to asbestos fibres from building materials. Tragically, a third wave of home handypeople is now presenting for the first time with this deadly disease relating to their exposure to existing asbestos products in the home whilst carrying out renovations or maintenance.

Diseases arising from asbestos exposure are characterised by long latency periods between the exposure and the development of symptoms, and a single exposure to asbestos can result in multiple diseases. Mortality rates associated with asbestos-related diseases such as lung cancer and mesothelioma are very high. Legislation across Australia and within Western Australia recognises the particular risk of asbestos-related disease by affording it special status in workers compensation schemes and in civil proceedings.

There is now an emerging trend of cases of silica-related diseases—namely, accelerated silicosis—in Australia, and silica has now widely been heralded as the asbestos of the 2020s. Silicosis is an aggressive form of pneumoconiosis and is caused by the inhalation of large amounts of very fine silica dust. For those who unfortunately contract silicosis or accelerated silicosis, there is no cure, and it may have fatal consequences. In the past, silica exposure was a well-known occupational hazard in sandblasting, tunnelling and goldmining, but this was brought under control through government regulation and enforcement. However, an increasing number of cases and deaths are being reported nationwide in relation to construction workers such as stonemasons who work with engineered or artificial stone products to make kitchen and bathroom benchtops. These engineered stone products have a silica concentration of up to 90 per cent, compared with 40 per cent with natural stone products.

In 2023, WorkSafe Western Australia and WorkCover WA reported that the state had recorded 48 cases of silicosis since 2018, and 43 involved workers employed in the engineered stone industry. Persons at risk of contracting silica-related diseases include stonemasons, builder’s labourers and carpenters who are engaged to fit premade kitchen benchtops containing engineered stone into private residences onsite. This is now the most common cause of silicosis, a condition that can be fatal without a lung transplant. Even with a lung transplant, life expectancy is markedly reduced. The risks posed by silica exposure have been nationally recognised, recently culminating in a unanimous decision by all work health and safety ministers in Australia to limit the use, supply and manufacture of engineered stone.

Given the special nature of asbestos and silica with which one exposure event can lead to multiple, different diseases, the usual way of awarding damages on a “once and for all” basis is inappropriate. Inhalation of asbestos or silica can cause a number of debilitating diseases, some of which are latent and do not occur until many years after exposure. For example, if a person successfully resolves a claim for a non-malignant dust-related disease such as asbestosis or simple silicosis, they are unable to bring further proceedings in the unfortunate event that they later developed a malignancy such as mesothelioma or lung cancer related to the same exposure. At present, individuals in Western Australia afflicted with asbestosis and silicosis face a difficult choice: either pursue a claim immediately, risking the loss of compensation for a potentially fatal disease down the line, or refrain from action, risking the possibility of receiving no compensation for their current ailment.

To address this inequity, several states have adopted legislation introducing provisions for provisional damages. This bill will aim to align Western Australia with New South Wales, Victoria, Tasmania, and South Australia to ensure a fairer and more just approach to compensating sufferers of asbestos and silica-related diseases.

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Attention should be drawn to the 2006 agreement between the state government of New South Wales and James Hardie Industries to establish the asbestos injuries compensation fund, otherwise known as AICF, to meet James Hardie's asbestos liabilities when a former James Hardie company is a respondent. The agreement contains an adverse-action provision that allows the agreement to be amended by the AICF to preclude any claims being made against the fund when any adverse or discriminatory legislation is introduced by the New South Wales government or by other Australian governments.

To address this concern, the Western Australian government will engage with the New South Wales government and the AICF. Should the agreement be amended by the New South Wales government and the AICF, which at this stage appears to be likely, Western Australian applicants with asbestos actions against former James Hardie companies will not have access to the provisional-damages regime; however, they will be able to settle a once-and-for-all basis. That is sad.

I now turn to the specifics of the bill. Let me start by addressing part 1 and the seemingly complicated commencement clause. Quite simply, the substantive provisions of the act will commence on a day fixed by proclamation. The complication arises from the touch points between this bill and the Workers' Compensation and Injury Management Act 1981. Members will recall that the Workers Compensation and Injury Management Bill 2023 was passed by Parliament last year and is due to commence on 1 July 2024. For this reason, the commencement clauses of this bill have been drafted to ensure that the correct amendments will be made to the Workers' Compensation and Injury Management Act 1981 or the Workers Compensation and Injury Management Act 2023, depending on when the various pieces of legislation commence. For ease of reference, I will refer to the Workers' Compensation and Injury Management Act 1981 as the 1981 workers compensation act and the Workers Compensation and Injury Management Act 2023 as the 2023 workers compensation act.

Part 2 of the bill will amend the Civil Liability Act 2002. Clause 4(b) will amend the table at section 3A of the act and assign silica the same status as asbestos as a special category of personal injury to which certain provisions of the act will not apply. Clause 4(b) will insert a reference to the proposed new provisional-damages regime, the operative provisions of which are contained in proposed new part 2, division 5, of the Civil Liability Act 2002. The effect of these amendments is that the proposed new provisional-damages regime will apply to items 6 and 3, being cases of personal injury arising from the inhalation of asbestos or silica and certain damages to which the 1981 workers compensation act or the 2023 workers compensation act apply, as the case may be.

Clause 5 will insert new "Division 5 — Provisional and subsequent damages" into part 2 of the Civil Liability Act 2002. In effect, the clause will allow the plaintiff who has suffered personal injury arising out of the inhalation of asbestos or silica to seek an award of damages on a provisional basis and then later, after being awarded provisional damages or reaching a settlement, seek a subsequent award of damages under certain circumstances. For example, if a person suffering from asbestos is either awarded or agrees to damages on a provisional basis, they will be able to seek subsequent damages 10 years later if they develop mesothelioma and certain criteria are met.

The commencement of an initial action in respect of a dust disease for which personal injury damages are claimed is dealt with by proposed section 15AC. In order to avail themselves of this option, a plaintiff will be required to nominate in the commencement documentation provisional damages as the remedy sought and specify the dust diseases that they may develop as a result of the act or omission giving rise to the cause of action.

In order to utilise the proposed new provisional-damages regime, a plaintiff must elect into the regime at the commencement of the initial action. It is pertinent to mention here that the bill contains transitional provisions, proposed section 15AO, to allow for a claim to be amended when an initial action commenced before the proclamation date of this bill if the hearing of the action has not already commenced or a settlement has not been reached.

Considering that a significant portion of personal injury cases reach resolution through agreements, the proposed new provisional-damages regime will thoroughly address this eventuality within proposed sections 15AE and 15AF. Like the commencement of the initial action, proposed section 15AE will require a settlement agreement to specify any subsequent dust disease that the plaintiff may develop as a result of the act or omission giving rise to the cause of action. The settlement agreement must also specify whether the defendant admits liability for the current and the potential subsequent dust diseases and whether or not the plaintiff is barred from commencing a subsequent action in relation to any of the subsequent dust diseases they have specified. If such a settlement agreement does not bar the plaintiff, proposed section 15AF(1) will require the court to discontinue the action,

allowing the plaintiff to return to court under a separate action. If the settlement agreement does bar the plaintiff, proposed section 15AF(2) will allow the court the discretion to dismiss or discontinue the action.

Following an award or settlement of an initial action on a provisional-damages basis, proposed section 15AG will allow the plaintiff to commence a subsequent action in respect of a subsequent dust disease in certain circumstances. In order to avail themselves of this option, the subsequent action must be for a subsequent dust disease expressly specified in the documents that commenced the initial action. There will be no limit to the number of subsequent actions that can be commenced as long as each subsequent action relates to a different but previously specified dust disease and the action in relation to that dust disease has not been barred by a court award or settlement of the initial or any subsequent action.

On this point, it is important to note that proposed section 15AI will allow the court in a subsequent action to admit any evidence or to make any finding of fact that has been admitted or made in the initial or subsequent actions. Given that a key objective of this regime is that individuals who seek to claim an award of provisional damages will have access to procedures that are expeditious, the discretion afforded to the court by this amendment will avoid unnecessary repetition and expedite the process for a class of people for whom time is of the essence.

Given that a number of asbestos and silica disease claims are likely to be resolved through confidential settlements and parties will continue to be permitted to resolve claims on a once-and-for-all basis, or may bar causes of action in relation to specific dust diseases, it is important that the court will be able to consider whether the operation of the regime was contemplated in the settlement. Proposed section 15AH will provide for this and will require that the court must give effect to the terms of settlement agreements. In order to balance concerns regarding the court's access to confidential deeds of settlement, proposed section 15AH will also provide for the making of suppression or non-publication orders in relation to any terms of a settlement agreement.

Having dealt with the key amendments to the Civil Liability Act 2002, I now move to part 3 of the bill, which will amend section 4 of the Law Reform (Miscellaneous Provisions) Act 1941. Section 4 provides that all causes of action vested in a deceased individual shall survive for the benefit of their estate. The damages recoverable for the benefit of the estate, however, are extremely limited. Included in the limitations are damages in regard to pain and suffering, bodily or mental harm, or the curtailment of life expectancy. Currently, this section does not apply to asbestos disease sufferers who ultimately died as a result of the disease when proceedings in respect of damages had been instituted by that person and were pending at the time of their death.

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Proposed new section 4(3) inserted by clause 7 of the bill will amend the act to treat silica disease sufferers in the same way as asbestos disease sufferers in the context of damages recoverable by the estate. The effect of these amendments is that in the unfortunate event of a silica disease sufferer's death before resolution of proceedings they had commenced, the additional scope of damages available to the estate of an asbestos disease sufferer will be available to the estate of a silica disease sufferer.

I turn now to deal with the limitation periods with regard to provisional damages. I note that the Workers Compensation and Injury Management Act 2023 contains silica amendments to sections 55, 56 and 57 of the Limitation Act 2005. Those amendments bring the treatment of silica in line with that of asbestos with regard to limitation periods for those types of matters. Part 4 of this bill will amend the Limitation Act 2005 so that no limitation period applies to a subsequent action for subsequent damages in respect of a subsequent dust disease. The limitation period in relation to initial actions will not be impacted by this bill and the current limitation period will continue to apply to the initial action, as defined in the Civil Liability Act 2002, and for a dust disease action that is brought outside of the provisional damages regime. Not imposing a time limit on subsequent actions ensures a more efficient and fairer process for victims of dust-related diseases. This approach is focused on the plaintiff and considers the likelihood that this new claim would be the result of a very serious disease, probably terminal, with significant accompanying trauma.

Lastly, I turn to parts 5 and 6 of the bill, which will make amendments to both the Workers Compensation and Injury Management Act 2023 and the Workers' Compensation and Injury Management Act 1981 to contemplate all possible timings of the Workers Compensation Act 2023 and the bill coming into force. Clause 11 of the bill will amend section 416 of the new Workers Compensation Act 2023. This section of the act falls within a division of the act that provides for constraints on an award of damages in a common law action against a worker's employer and restrictions on when such an action may be commenced.

Section 416 contains a list of classes of damages to which those constraints and restrictions in the division do not apply. Clause 11 will amend section 416 to add subsequent damages to the list of classes of damages to which the division does not apply. I note that this division of the act will continue to apply to the initial action for provisional damages. The effect of this is that the processes and procedures set out in the Workers Compensation Act 2023, such as claim processes, election to pursue damages, assessment thresholds, deductions and recoveries will apply

to the initial action. However, if a person has received an award of provisional damages or has entered into a settlement on a provisional basis, the Workers Compensation Act 2023 will not apply when the plaintiff makes an application to the court for subsequent damages in respect of a new dust disease. Additionally, the plaintiff or worker will not be able to seek workers compensation in relation to their new condition or disease if it arises from the same cause of action once they have successfully claimed provisional damages. The general principle is that once a plaintiff has elected to pursue common law damages, and if any damages are payable, a plaintiff will not be able to seek statutory workers compensation.

Clause 14 of the bill mirrors the function of clause 11, albeit applied to the Workers' Compensation and Injury Management Act 1981, along with its pertinent provisions. Activation of this clause is contingent upon the bill commencing prior to 1 July, coinciding with the scheduled commencement of the Workers Compensation Act 2023.

Returning to the Workers Compensation and Injury Management Act 2023, clause 12 will amend section 625 of that act. Section 625 itself is a consequential amendment to the table in section 3A of the Civil Liability Act 2002, replacing references to the Workers' Compensation and Injury Management Act 1981 with reference to the Workers Compensation and Injury Management Act 2023. The amendment to section 625, specified in clause 12, mirrors the function of section 4A of the Civil Liability Act.

The bill will, in most circumstances, remove barriers to fair compensation for individuals afflicted with dust diseases resulting from past, present or future exposure to asbestos or silica dust and aims to strike a balance between the unique circumstances of asbestos and silica dust disease sufferers while also considering the uncertainty and liability created for defendants. The provisional damages approach is appropriate for asbestos and silica-related conditions due to their latency periods, the range of diseases they may cause and their potentially fatal consequences. Given the enduring impact of asbestos and the unfolding implications of silica exposure in Western Australia, this bill will provide Western Australians suffering from these diseases with greater access to just and fair compensation.

I commend the bill to the house and table the explanatory memorandum.

Debate adjourned, on motion by **Ms M.J. Davies**.