ASBESTOS DISEASES COMPENSATION BILL 2013

EXPLANATORY MEMORANDUM

OVERVIEW OF THE BILL

An important stage in providing greater justice for asbestos disease sufferers in Western Australia is the introduction of the Asbestos Diseases Compensation Bill.

Australia tragically boasts one of the highest rates of asbestos related disease – including mesothelioma, asbestosis and lung cancer – found anywhere in the world. The long latency period between exposure to asbestos and the diagnosis of a related illness can be 20 to 40 years (or more). The incidence of mesothelioma in Australia is increasing: in 2008 there were 661 new cases of mesothelioma in Australia, up from 591 in 2006 and 156 in 1982. Researchers predict that the Australia’s rate will peak at 18,000 sufferers by 2020.

In Western Australia, 1,631 people (1,408 men, 223 women) were diagnosed with mesothelioma between 1960 and 2008. This awful legacy stems from one of Australia’s largest industrial disasters – the mining of blue asbestos in the infamous town of Wittenoom from 1940 to 1966. Not only was blue asbestos mined, but asbestos tailings were spread around the town to build roads, driveways, footpaths, backyards, school playgrounds and the local racecourse.

It also stems from the enormous scale of post-World War II building construction using asbestos cement materials manufactured at the two James Hardie factories in Rivervale and Welshpool. Asbestos cement products were commonly manufactured in WA from 1921 to 1987. The prevalence of asbestos disease rates in WA is also attributable to the widespread use of asbestos insulation materials in industry including at refineries and power stations.

Against this tragic backdrop, the introduction of the Asbestos Diseases Compensation Bill will provide greater justice for asbestos disease sufferers by allowing for a Court to award provisional damages and damages to compensate any loss or impairment of an injured person’s capacity to perform domestic services for another person (commonly known as Sullivan v Gordon damages).

Under current Western Australian law, people with an asbestos related disease can only claim common law compensation once. This means if someone gets compensation for asbestosis, and they later develop mesothelioma, they can get no further compensation. The Asbestos Diseases Compensation Bill 2013 will allow a Court to award damages on a provisional basis for an asbestos disease sufferer’s first illness and a further award of damages in the unfortunate event that the person goes on to develop a more serious asbestos related illness.

This removes the current agonising dilemma facing asbestosis sufferers in having to gamble on whether to make a claim now and to cut off any compensation for a more serious fatal disease or to wait and do nothing, potentially missing out on getting any compensation at all for their existing asbestosis.
The Asbestos Diseases Compensation Bill 2013 also allows asbestos victims to recover damages for loss of capacity to perform domestic services for another person such as for a young child, elderly parent or partner with a disability (known as *Sullivan v Gordon* damages).

**NOTES ON CLAUSES**

**Long title**

The long title is a formal description of the purposes of the Act, as denoted in the introduction.

**Clause 1** **Short title**

This clause provides the short title of the Act.

**Clause 2** **Commencement**

Provides for the Act to come into operation on 2 months after assent, or on an earlier day to be fixed by proclamation.

**Clause 3** **Interpretation**

Contains the definitions required for the purposes of the Act.

“Asbestos disease” means one or more of the following:

**Asbestosis:** A non-cancerous condition involving a scarring of the lungs (fibrosis) causing shortness of breath which may eventually be fatal. The sufferer becomes more susceptible to other respiratory conditions such as bronchitis and pneumonia. Asbestosis is attributed to high exposure to asbestos, and has a relatively shorter latency period than other asbestos-related diseases.

**Asbestos induced carcinoma:** More commonly referred to as “lung cancer”, this is cancer originating in the airways or tissue of the lung. Asbestos is a carcinogen that may cause, or contribute to, cancer of the lung.

**Asbestos related pleural disease:** Benign lung conditions related to the lung lining (pleura) including, parietal pleural plaques, benign asbestos effusion, rounded atelectasis and diffuse pleural fibrosis. These may remain non-fatal or develop into more serious respiratory diseases.

**Mesothelioma:** A fatal and aggressive cancer of the outer lung lining (pleura) or the lining of the abdominal cavity (peritoneum). Mesothelioma is exclusively caused by asbestos exposure; including very short periods of exposure to asbestos. The latency period between time of exposure to asbestos and diagnosis is generally 20 to 40 years (or more). The median life expectancy prognosis of a mesothelioma sufferer is 9 to 12 months. There are currently no cures for mesothelioma.
Clause 4  Damages

Subclause (1) allows for a Court to award provisional damages to an injured person in an asbestos disease action.

Currently, when a court in Western Australia awards common law damages to an injured person, it currently does so on an “once-and-for-all” basis. This means that if a claim for damages is caused by an act or omission, then all damages for past and future injury caused or potentially caused by that act or omission must be determined in the one award of damage. This principle has been derived from the ancient case of Fitter v Veal (1701) 12 Mod Rep 542; 88 ER 1506; 1 Ld Raym 339, 692 in which the Plaintiff recovered a small award of damages for an assault. Subsequently, as a result of the same assault, a small portion of his skull had to be removed and he was not permitted to bring a second action.

In the instance of asbestos disease sufferers, the injustice arising from application of this principle is clear. This is because inhalation of asbestos can cause a number of debilitating diseases, all of which are latent and do not occur until many years after the exposure to asbestos. Presently, if a person has been exposed to asbestos in Western Australia he or she can only bring a claim on a full and final basis and will be prevented from bringing a further legal claim should he or she be diagnosed with another asbestos disease in the future. In other words, if a person successfully resolves a claim for asbestosis, they are unable to bring further proceedings in the unfortunate event that they later developed an asbestos related malignancy such as mesothelioma or lung cancer.

Subclause (1)(a) provides a remedy for this injustice by allowing a Court to award provisional damages to injured person who is suffering from an asbestos related disease for the asbestos related disease they are now suffering from.

Subclause (1)(b) allows a Court to award damages at a future date if the injured person does develop another asbestos disease.

Subclause (2) states that only one subsequent award of damages can be made to an injured person if an award of provisional damages has been previously made.

Subclause (3) allows for a Court to have regard to damages made on a provisional basis when assessing damages to be awarded in a subsequent action for damages for another asbestos disease suffered by that person.

Subclause (4) is intended to restore the effect of Sullivan v Gordon (1999) 47 NSWLR 319 in allowing a Court to award damages to compensate any loss or impairment of an injured person’s capacity to perform domestic services for another person.

In certain circumstances, a person who contracts an asbestos related disease will be providing care for dependent members of their family. For example, they may be caring for a wife who has had a stroke or for a disabled grandchild. This asbestos disease sufferer, as a result of their illness, would have the consequent need to engage others to provide those services or the care that they previously provided.
The New South Wales Court of Appeal in *Sullivan v Gordon* (1999) 47 NSWLR 319 allowed an injured claimant to recover damages for loss of capacity to perform gratuitous services for other persons (in this case, the claimant’s children).

*Sullivan v Gordon* damages have consequently come to stand for the proposition that if a claimant is deprived by injury of the capacity to provide care to other persons, and the desire of the claimant to provide that care constitutes a need, then the commercial cost of replacing that care and services are recoverable as a separate head of damage. The required “need” may include circumstances involving young children, a spouse suffering from osteoarthritis or disabled members of a household, to cite a few examples.

Therefore, a *Sullivan v Gordon* head of damage can be defined as being to compensate the claimant in situations where the claimant can no longer provide gratuitous services to another person or persons due to the claimant’s incapacity arising from the illness.

Courts in Western Australia have applied *Sullivan v Gordon* including in *Easther v Amaca Pty Ltd (formerly James Hardie & Coy Pty Ltd)* [2001] WASC 328 and in *Thomas v Kula* [2001] WASCA 362.

However, in a judgement delivered on 21 October 2005 in *CSR Limited v Eddy* [2005] HCA 64, the High Court considered *Sullivan v Gordon* damages for the first time and held that the case (and, by implication, all Australian cases following it) should be overruled.

Subclause (4) restores the effect of *Sullivan v Gordon* and allows a Court to award damages to compensate any loss or impairment of an injured person’s capacity to perform domestic services for another person.

**Clause 5  Regulations**

This clause provides for the prescribing of regulations to give effect to the purposes of the Act.

**Clause 6  Schedule 1 Transitional provision**

Subclause (1) provides that the Act applies to causes of action arising and actions commenced before or after the commencement of this Act.

However, subclause (2) provides that subclause (1) does not apply to an action commenced before the commencement of this Act if the trial has commenced before the commencement of this Act.