

**ASBESTOS DISEASES COMPENSATION BILL 2013**

*Introduction and First Reading*

Bill introduced, on motion by **Hon Kate Doust (Deputy Leader of the Opposition)**, and read a first time.

*Second Reading*

**HON KATE DOUST (South Metropolitan — Deputy Leader of the Opposition)** [10.15 am]: I move —

That the bill be now read a second time.

The Asbestos Diseases Compensation Bill 2013 is a standalone piece of legislation that provides provisional damages for people suffering from asbestos-related conditions; and provides damages to compensate for loss or impairment of an asbestos disease sufferer's capacity to perform domestic services for another person—commonly known as Sullivan v Gordon damages.

Australia, tragically, boasts one of the highest rates of asbestos-related disease, including mesothelioma, asbestosis and lung cancer, found anywhere in the world. Mesothelioma is a fatal and aggressive cancer of the outer lung lining—the pleura—or the lining of the abdominal cavity—the peritoneum. Mesothelioma is exclusively caused by asbestos exposure, including very short periods of exposure to asbestos and to very low amounts of asbestos. The latency period between time of exposure to asbestos and diagnosis is generally 20 to 40 years, and sometimes even longer. In some cases, a person can be exposed to a very low amount of asbestos and will not experience any symptoms or be diagnosed with the illness until 30 years later. The average life expectancy prognosis of a mesothelioma sufferer is nine to 12 months. There is currently no cure for mesothelioma.

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 Australia's rate will peak at 18 000 sufferers by 2020. In Western Australia, 1 631 people—1 408 men and 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. The infamous mine achieved national notoriety as an industrial disaster, as noted in the classic Midnight Oil song *Blue Sky Mine*.

The high incidence of asbestos-related diseases in Western Australia 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 Western Australia from 1921 to 1987. The prevalence of asbestos disease rates in Western Australia 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 bill will provide greater justice for asbestos disease sufferers by allowing for a court to award provisional damages and damages to compensate for any loss or impairment of an injured person's capacity to perform domestic services for another person.

Given the special nature of asbestos-related diseases, the traditional way of awarding damages is inappropriate. Currently, when a court in Western Australia awards common law damages to an injured person, it does so on a "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), 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. For example, 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. Therefore until now, Western Australian asbestosis sufferers have faced an agonising dilemma 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. In order to remedy this injustice, many states have enacted legislation to overcome this problem by allowing for provisional damages including New South Wales, Victoria and South Australia. This bill will bring Western

Australia into line with other states and provide greater justice and fairness in the treatment of compensation for asbestos disease sufferers.

Clause 4(1)(a) of the bill allows a court to award damages for asbestos-related conditions to be settled on a provisional basis. This means that a person can be awarded damages for an asbestos-related condition on the assumption that they will not develop another condition. Clause 4(1)(b) provides that a further award of damages can then be sought if a person develops a subsequent condition from asbestos exposure. For example, if a person suffering from asbestosis is awarded damages, they can seek further damages if they develop mesothelioma. Provisional damages will only be available for people who have asbestos-related conditions. These conditions are defined at clause 3 of the bill as asbestosis, asbestos-induced carcinoma, asbestos-related pleural diseases or mesothelioma.

Clause 4(2) provides that only one subsequent claim can be made for an asbestos-related condition. This means that if a person makes an initial claim, they can only make one more claim for any other condition.

Clause 4(3) of the bill allows that a court may have regard to an initial award of damages for an asbestos-related condition when assessing the amount of damages to be awarded in a subsequent claim for an asbestos-related condition.

Clause 4(4) of the bill 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. These types of damages are more commonly known as *Sullivan v Gordon* damages. In many instances, a person who contracts an asbestos-related disease will be providing care for other 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) 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 therefore 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, the commercial cost of replacing that care and services is 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. Consequently, in essence, a *Sullivan v Gordon* head of damage can be defined as being to compensate the claimant in situations in which 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] and in *Thomas v Kula* [2001]. However, in a judgement delivered on 21 October 2005 in *CSR Limited v Eddy* [2005] 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. Some states have legislated to redress the harsh effect of the *CSR Limited v Eddy* decision and have reinstated *Sullivan v Gordon* damages including South Australia, Victoria, Queensland and New South Wales. The bill will bring Western Australia into line with these other states.

In summary, the bill will provide provisional damages for asbestos-related conditions and ensure that asbestos victims are able 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.

The tragic legacy of asbestos is not over and continues to be felt in Western Australia today. Australia is now seeing a third wave of people being diagnosed with mesothelioma. The first wave consisted of miners and manufacturers. This was followed by the second wave of construction workers, carpenters and other trades people exposed to asbestos fibres from building materials. Tragically, a third wave of home handy people are now being diagnosed with this deadly disease, with those people being exposed to existing asbestos products in the home whilst carrying out renovations or maintenance.

The bill will ensure that the Western Australian position regarding the treatment of asbestos-related claims is consistent and on par with most other states and territories and that just and fair compensation is available for people suffering from asbestos-related diseases.

I would like to thank Robert and Rosemary Vojakovic and the team at the Asbestos Diseases Society of Australia for their hard work and ongoing commitment to asbestos disease sufferers and their families in Western Australia. Thanks go also to Laine McDonald, Siri Siriwardene and John Gordon for their assistance in drafting the bill.

Pursuant to Standing Order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party. Nor does

this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth. I hereby table the explanatory memorandum and commend the bill to the house.

[See paper 937.]

Debate adjourned, pursuant to standing orders.