

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

The Civil Liability Amendment (Provisional Damages for Dust Diseases) Bill 2024 (the Bill) amends the *Civil Liability Act 2002* (Civil Liability Act) to introduce a new provisional damages regime. These provisions will allow a plaintiff, who has suffered personal injury from a dust disease arising out of the inhalation of asbestos or silica dust, to seek an award of damages on a provisional basis and later seek a subsequent award of damages under certain circumstances (for convenience this is referred to as the ‘provisional damages regime’ in this Explanatory Memorandum). This is a change from the general ‘once and for all’ basis on which damages are determined, where a plaintiff receives damages in a lump sum without being able to claim again should a more serious disease eventuate.

The Bill amends the *Limitation Act 2005* so that no limitation period applies in respect of a subsequent dust disease action for subsequent damages.

Amendments are also made to the Civil Liability Act, the *Law Reform (Miscellaneous Provisions) Act 1941*, the *Workers Compensation and Injury Management Act 2023*, and the *Workers’ Compensation and Injury Management Act 1981*, to align claims in relation to silica-related disease with that of asbestos.

Part 1 - Preliminary

Clause 1 Short title

The Act will be known as the *Civil Liability Amendment (Provisional Damages for Dust Diseases) Act 2024* once enacted.

Clause 2 Commencement

Clause 2 provides for commencement of the Act.

Clause 2(1)(a) provides that Part 1 of the Bill comes into operation on the day on which the Act receives Royal Assent.

Clause 2(1)(d) provides that the rest of the Act, being the substantive provisions, commence on a day fixed by proclamation. This allows for preparatory work to be conducted by the Supreme Court before the new provisional damages regime becomes available.

Clauses 2(1)(b), 2(1)(c), 2(2) and 2(3) are required as the Bill makes amendments to either the *Workers Compensation and Injury Management Act 2023*, which has not yet commenced full operation, or to the *Workers’ Compensation and Injury Management Act 1981*, which is currently in force, depending on the timing of the proclamation under clause 2(1)(a) and the timing of proclamations required for the commencement of relevant provisions of the *Workers Compensation and Injury Management Act 2023*.

Part 2 – Civil Liability Act 2002 amended

Clause 3 Act amended

This clause provides that the provisions in Part 2 amend the Civil Liability Act.

Clause 4 Section 3A amended

The Table in section 3A(1) of the Civil Liability Act provides for the exclusion of certain provisions of that Act for specified classes of damages. While the Table may be amended by Regulations, the amendments have been made by the Bill to ensure that all relevant matters can be considered by Parliament at the same time.

Clause 4(a) amends item 3 of the Table by adding new Division 5 to column 3. Division 5 is the new provisional damages regime introduced into the Civil Liability Act by this Bill. The addition of Division 5 ensures that the new Division 5 provisions are applicable to claims under the *Workers Compensation and Injury Management Act 2023* or the *Workers' Compensation and Injury Management Act 1981*, depending on proclamation timing. An amendment of the Table also appears at section 625 of the *Workers Compensation and Injury Management Act 2023*, which is to ensure the references within the second column of item 3 reflect that new legislation.

Clause 4(b) amends item 6 of the Table by adding a reference to 'silica' in column 2 and new 'Division 5' to column 3. This amendment aligns the treatment of personal injury claims resulting from the inhalation of silica with that of asbestos and ensures that the new Division 5 provisions are applicable to such personal injury claims.

Clause 5 Part 2 Division 5 inserted

Clause 5 inserts a new Division 5 into the Civil Liability Act which contains the provisions for the provisional damages regime.

Proposed Subdivision 1 — Preliminary

Proposed section 15AA sets out the definitions for the purposes of this Division. Most of the definitions refer to the proposed sections in which the terms appear. Of specific note is that 'Court' means the Supreme Court. This means that Plaintiffs that wish to make use of the provisional damages regime must do so in the Supreme Court (see also the transitional provision at proposed section 15AO(4)).

Proposed section 15AB explains the meaning of the term 'dust disease' for the purposes of the Civil Liability Act. Section 15AB(1) provides the general meaning, referring to a pathological condition of the lungs, pleura or peritoneum that has resulted from the inhalation of asbestos or silica. Section 15AB(2) is a non-exhaustive provision that provides certainty in respect of certain known pathological conditions that can result from the inhalation of asbestos or silica.

Proposed Subdivision 2 — Provisional damages

This subdivision sets out the provisions relating to the initial action that is made under the provisional damages regime.

Proposed section 15AC provides the legal basis for a Plaintiff to claim provisional damages in their initial action claiming personal injury damages for a dust disease. To avail themselves of this option the Plaintiff must commence the claim in the Supreme Court, nominate provisional damages as the remedy required, and specify one or more subsequent diseases that the Plaintiff may develop wholly or partly as a result of the act or omission giving rise to the cause of action.

Proposed section 15AD ensures that when damages are calculated for the provisional damages claim, the Court does not factor in any likelihood of the Plaintiff developing a subsequent dust disease.

Proposed section 15AE deals with the situation where the initial action is settled out of court. The provision requires the settlement agreement specify any subsequent dust disease that the plaintiff claims they may develop; whether or not the defendant admits liability for the dust disease and any subsequent dust disease that is specified; and whether or not the plaintiff is barred from commencing a subsequent action in relation to any specified subsequent dust disease.

Proposed section 15AF deals with the manner of addressing the initial action in court when it is settled by agreement. Section 15AF(1) contemplates the scenario where the initial action is settled on a provisional damages basis and requires the initial action be discontinued. This allows the Plaintiff to return to the Court at a later time should a relevant subsequent dust disease eventuate. Section 15AF(2) allows the initial action to be dismissed when it has been settled on the basis that the Plaintiff is barred from commencing a subsequent action. This provision retains the Court's discretion as to how to deal with the finalisation of the matter which also thereby retains a discontinuance as an option.

Proposed Subdivision 3 — Subsequent damages

This subdivision sets out the provisions relating to any subsequent action that is made under the provisional damages regime.

Proposed section 15AG(1) confirms the Court's power to award personal injury damages for a subsequent dust disease. Section 15AG(2) provides that the Supreme Court has sole jurisdiction for such an action.

Proposed section 15AG(3) provides that the subsequent dust disease must have been specified in the initial claim as required by section 15AC(2)(b).

Proposed sections 15AG(4) and (5) provide that a plaintiff may bring multiple subsequent actions as subsequent dust diseases eventuate but not if a subsequent dust disease was already the subject of a subsequent action.

Proposed section 15AG(6) prevents a plaintiff from commencing a subsequent action in circumstances where a prior settlement of the initial action or another subsequent action specified a bar.

Proposed sections 15AH(1) sets out the definitions of terms used in this section, that is:

information includes any document;

non-publication order means an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information);

publication, in relation to information, means the dissemination of information to the public or a section of the public by any means, including (a) in a book, newspaper, magazine or other written publication; and (b) by radio broadcast, television, a website, an online facility or other electronic means;

suppression order means an order that prohibits or restricts the disclosure of information (by publication or otherwise).

Proposed section 15AH(2) provides that the Court is to consider, and give effect to, the terms of settlement agreements in any subsequent action. In particular, but without limiting any other relevant matter, the Court must consider the payments already made to the Plaintiff and the reasons for those payments. This is specified in proposed section 15AK(b).

Such settlement agreements are likely to contain sensitive information, so the Court is provided powers to make suppression orders or non-publication orders, subject to any exceptions or conditions as the Court thinks fit, as provided in proposed new sections 15AH(3), (4), (5) and (6).

Proposed section 15AH(7) provides that this section does not limit or otherwise affect any powers that the Court has apart from this section to regulate its proceedings or to deal with a contempt of the Court.

Proposed section 15AI provides that the Court may:

- (a) admit into evidence any evidence admitted in the initial action or any other subsequent action; and
- (b) make a finding of fact that has been made in the initial action or any other subsequent action.

Any subsequent action will be treated as a new action. This provision therefore ensures that the Court has the discretion to avoid the repetition of evidence that was already presented in the initial action or any other subsequent action.

Proposed section 15AJ provides that only 1 award of subsequent damages can be made for each subsequent dust disease that is claimed in a subsequent action.

Proposed section 15AK ensures that a plaintiff is not over-compensated. The Court, when determining the amount of subsequent damages to award must take into account any amount:

- (a) awarded to the plaintiff (i) in the initial action by way of provisional damages; and (ii) in any other subsequent action by way of subsequent damages;
and
- (b) received by the plaintiff in settlement of (i) the initial action; or (ii) any other subsequent action.

Proposed section 15AL deals with the situation when a subsequent action is settled out of court. The provision requires the settlement agreement specify any subsequent dust disease that the plaintiff claims they may develop; whether or not the defendant admits liability for the dust disease and any subsequent dust disease that is specified; and whether or not the plaintiff is barred from commencing a subsequent action in relation to any specified subsequent dust disease.

Proposed section 15AM deals with the manner of addressing a subsequent action in court when it is settled by agreement. Section 15AM(1) contemplates the scenario where a subsequent action is settled on a provisional damages basis and requires the subsequent

action be discontinued. This allows the Plaintiff to return to the Court at a later time should a relevant subsequent dust disease eventuate. Section 15AM(2) allows a subsequent action to be dismissed when it has been settled on the basis that the Plaintiff is barred from commencing another subsequent action. This provision retains the Court's discretion as to how to deal with the finalisation of the matter, and therefore discontinuance remains an option.

Proposed section 15AN provides for the manner in which the Court is to determine the costs in relation to a subsequent action. The Court must have regard to:

- (a) any amount of costs awarded in relation to (i) the initial action; and (ii) any other subsequent action; and
- (b) if costs were awarded under paragraph (a) whether a basis for which costs were awarded is duplicated in a basis for which costs are subsequently claimed.

Proposed Subdivision 4 — Transitional provisions

This subdivision sets out the manner in which it is determined whether the new provisional damages regime may apply to actions commenced before the proclamation day.

Proclamation day is defined at proposed section 15AO(1) to mean the day on which the *Civil Liability Amendment (Provisional Damages for Dust Diseases) Act 2024* Part 2 comes into operation.

Section 15AO(2) provides that when an action in respect of a dust disease suffered by a plaintiff for which personal injury damages are claimed is commenced before proclamation day, the claim may be amended to specify-

- (a) that provisional damages are the remedy required; and
- (b) a subsequent dust disease or more than 1 subsequent dust disease that the plaintiff may develop, wholly or partly as a result of the act or omission giving rise to the cause of action.

This allows the matter to proceed under the new provisional damages regime.

In accordance with proposed section 15AO(3), such a matter cannot proceed under the new provisional damages regime if, before proclamation day -

- (a) the hearing of the action has commenced; or
- (b) damages have been awarded or a settlement reached in the action.

Proposed section 15AO(4) provides that if a claim is commenced in a court other than the Supreme Court and the claim is amended in accordance with section 15AO(2), a registrar of the court in which the action was commenced, for example the District Court, must transfer the action to the Supreme Court.

Part 3 – Law Reform (Miscellaneous Provisions) Act 1941 amended

Clause 6 Act amended

This clause provides that the provisions in Part 3 amend the *Law Reform (Miscellaneous Provisions) Act 1941*. The provisions under Part 3 of the Bill align the treatment of silica-related personal injury claims with that of asbestos in the context of causes of action that survive for the benefit of the estate of a deceased person. Section 4(1) of the *Law Reform (Miscellaneous Provisions) Act 1941* provides for the survival of causes of action for the benefit of the estate on the death of a person. Section 4(2) limits the damages that may be recoverable in such circumstances.

Clause 7 Section 4 amended

Clause 7(1) amends section 4 of the *Law Reform (Miscellaneous Provisions) Act 1941* by inserting an explanation of the term *proceedings* in new subsection (1A). The term includes an initial action and a subsequent action (as those terms are defined in the *Civil Liability Act 2002* Part 2 Division 5), which are proceedings commenced under the new provisional damages regime. *Proceedings* also covers proceedings that relate to the inhalation of silica as described at proposed subsection 4(3).

Clause 7(2) amends section 4 by inserting reference to subsection (3).

Clause 7(3) amends section 4 by inserting a new subsection (3). This new subsection, which mirrors current subsection 4(2a) which applies to asbestos, provides that section 4(2)(d) does not apply if -

- (a) the death of the person occurs after the day on which the *Civil Liability Amendment (Provisional Damages for Dust Diseases) Act 2024* Part 3 comes into operation; and
- (b) the death results from a latent injury that resulted from the inhalation of silica which has been caused by the act or omission giving rise to the cause of action; and
- (c) that person had instituted proceedings in respect of the cause of action that were pending at the time of death.

The effect of these amendments is that, where the provisions in new subsection (3) apply, the estate may recover the damages contemplated at subsection (2)(d), that is, damages for the pain or suffering of the deceased or for any bodily or mental harm suffered by the deceased or for the curtailment of the deceased's expectation of life.

Part 4 – *Limitation Act 2005* amended

Clause 8 Act amended

This clause provides that the provisions in Part 4 amend the *Limitation Act 2005*.

Clause 9 Section 6B inserted

Clause 9 inserts new section 6B. Section 6B(1) provides that despite anything in this or any other Act, no limitation period applies to a subsequent action for subsequent damages in respect of a subsequent dust disease (as those terms are defined in the *Civil Liability Act 2002* Part 2 Division 5). New section 6B(2) provides that this section applies regardless of whether the action is brought in tort (including trespass), in contract, under statute or otherwise.

Limitation periods will continue to apply to the initial action as defined in the *Civil Liability Act 2002* Part 2 Division 5 and for a dust disease action that is brought outside of the provisional damages regime.

Part 5 – *Workers Compensation and Injury Management Act 2023* amended

Clause 10 Act amended

This clause provides that the provisions in Part 5 amend the *Workers Compensation and Injury Management Act 2023*. If and when the clauses of Part 5 of the Bill come into operation is determined with reference to the commencement clause at clause 2 of the Bill.

Clause 11 Section 416 amended

Section 416 of the *Workers Compensation and Injury Management Act 2023* falls within Division 2 of Part 7 of that Act. Division 2 provides for constraints on an award of damages in an action against a worker's employer and restrictions on when such an action may be commenced. Section 416 is a list of classes of damages in respect of which those constraints and restrictions in Division 2 do not apply.

Clause 11 amends section 416 to add to the list, at new paragraph (g), an award of subsequent damages to which the *Civil Liability Act 2002* Part 2 Division 5 applies. Division 2 continues to apply in respect of the initial action as defined in the *Civil Liability Act 2002* Part 2 Division 5.

Clause 12 Section 625 amended

Clause 12 inserts a reference to Division 5 (of the *Civil Liability Act 2002*, as inserted by this Bill) into section 625 of the *Workers Compensation and Injury Management Act 2023*. Section 625 is a consequential amendment to the Table in section 3A of the *Civil Liability Act* to update the details in item 3 of the Table to refer to the *Workers Compensation and Injury Management Act 2023* and the relevant provisions in that Act.

Part 6 – *Workers' Compensation and Injury Management Act 1981* amended

Clause 13 Act amended

This clause provides that the provisions in Part 6 amend the *Workers' Compensation and Injury Management Act 1981*. If and when the clauses of Part 6 of the Bill come into operation is determined with reference to the commencement clause at clause 2 of the Bill.

Clause 14 Section 93B amended

In a similar way to section 416 of the *Workers Compensation and Injury Management Act 2023* referred to above, section 93B of the *Workers' Compensation and Injury Management Act 1981* is a list of classes of damages in respect of which those constraints and restrictions in Division 2 of Part IV of the *Workers' Compensation and Injury Management Act 1981* do not apply. Clause 14 amends section 93B to add to the list, at new paragraph (d), an award of subsequent damages to which the *Civil Liability Act 2002* Part 2 Division 5 applies.