

Asbestos Diseases Compensation Bill 2013

Insurance & Risk Update

The Asbestos Diseases Compensation Bill 2013 (the Bill) was introduced into parliament by the Honourable Kate Doust, MLC, as a private members bill. It received its second reading on 31 October 2013 and was adjourned to 19 November 2013.

The purpose of the Bill is twofold:

1. To allow the court to award provisional damages to a person suffering from an asbestos disease so that if they go on to develop a further asbestos disease they can claim damages a second time. For example a person suffering from asbestosis can obtain provisional damages for that disease and if they develop mesothelioma, can claim a second time for that disease; and
2. To introduce *Sullivan v Gordon* damages, i.e. damages for the loss of the injured person's capacity to perform domestic services for another person.

The Act is to be retrospective and applied to causes of action arising and actions commenced before or after the commencement of the Act.

We see a number of issues with the Bill in its current form:

1. Interpretation - Section 3 of the Bill

Section 3 defines an asbestos disease, asbestos disease action and injured person.

The definition of asbestos disease makes three separate causation references and are potentially confusing and inconsistent.

An "asbestos disease" means:

(b) for carcinoma it is asbestos *induced*;

Who does this affect?

- Persons suffering from an asbestos disease
- Compensation payers

Article Highlights

- The adjourned second reading of the Asbestos Diseases Compensation Bill 2013 is scheduled for 19 November 2013.
- A number of issues have been identified with the Bill in its current form;
 - Interpretation - Section 3 of the Bill
 - Damages
 - Retrospectivity
- Comments or submissions to the Bill should be made to the Attorney General ideally before 19 November 2013.

(c) for pleural disease it is asbestos *related*;

(e) for any other disease or pathological condition *resulting* from exposure to asbestos.

The definition of “injured person” includes a reference to a person who has suffered from an asbestos disease. This extended definition will therefore capture deceased persons and a person who has had a lung cancer successfully removed and potentially those with pleural plaques.

This has the potential to broaden the scope of what is considered to be an asbestos related injury.

2. Damages

Section 4(1) and (2) enables the Court to make an initial damages award for an asbestos disease and one subsequent award if the person suffers a different asbestos disease to the first action.

Section 4(3) - This sub-section directs the Court may have regard to previously awarded damages when assessing damages for subsequent asbestos disease.

The difficulty with this section is that it raises significant questions of how the Court may have regard to the previous damages award and what value and components of the previous award are to be taken into account.

Section 4(4) introduces the *Sullivan v Gordon* damages component and rather than leaving it open to the court for argument, compels (must) the Court to compensate for any loss or impairment of the injured persons *capacity* to perform domestic services for another person.

There is no constraint on the need for the services, reasonableness of the services and the person to whom the services are rendered.

The section talks about the injured person’s *capacity* to perform domestic services, not about what domestic services the injured person in fact performed for another, or might reasonably be likely to provide in the future.

All a person need prove is a capacity, and the Court has no discretion. Theoretically anybody who had a capacity to perform domestic services for somebody else can therefore make a claim even though they have never provided those services.

Additionally the wording of this sub-section creates the possibility of double damages being awarded.

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3. Retrospectivity

Given the proposed Act is retrospective, it raises all the normal issues associated with retrospectivity and in addition raises the question of whether previously settled non malignancy claims could be enlivened.

If you wish to make submissions or comments to the Government on the Bill, they should be made to the Attorney General ideally before **19 November 2013**.

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