



## **Asbestos-related Claims (Management of Commonwealth Liabilities) Bill 2005**

### **Asbestos-related Claims (Management of Commonwealth Liabilities) (Consequential and Transitional Provisions) Bill 2005**

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Law and Bills Digest Section

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## **Asbestos-related Claims (Management of Commonwealth Liabilities) Bill 2005**

### **Asbestos-related Claims (Management of Commonwealth Liabilities) (Consequential and Transitional Provisions) Bill 2005**

**Date Introduced:** 25 May 2005

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** Part 1 of the main Bill commences on Royal Assent. Parts 2 and 3 commence either at the end of 7 days after Royal Assent, or on 1 July 2005, whichever comes later.

### **Purpose**

To transfer the Commonwealth's common law liability for claims for asbestos-related conditions (ARCs) from federal agencies and government business enterprises to Comcare — a Commonwealth statutory authority reporting to the Minister for Employment and Workplace Relations. Comcare is responsible for workplace safety, rehabilitation and compensation in the Commonwealth jurisdiction.

### **Background**

Due to the short time between introduction of this legislation and scheduled debate in the House of Representatives, this digest focuses on key issues only.

#### **The asbestos problem**

Asbestos mining was carried out in Australia principally at Wittenoom (WA) 1940–66, at Baryulgil (NSW) 1940–79, and at Barraba 1918–23 and 1970–83. In addition to claims from the mining of asbestos, however, many claims arise from use of asbestos products in their various forms.

The scale of the asbestos compensation problem in Australia was highlighted in 2004 by the inquiry commissioned by the NSW Government into the management of asbestos-related liabilities by the James Hardie group of companies. The *Report of the special commission of inquiry into the medical research and compensation foundation* (the 'Jackson report') explained that:

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Asbestos was used in Australia during a large part of the last century in the manufacture of building products (particularly sheeting and roofing), pipes, insulation materials, brake linings and other friction products, and other materials. Asbestos, however, carries with it problems. Its fibres can give rise to asbestosis, lung cancer, asbestos-related pleural diseases and mesothelioma. Asbestos-related diseases may take many years after exposure to manifest themselves. Mesothelioma is especially insidious: very slight exposure to asbestos fibre may cause it, the disease may not manifest itself until 40 or more years after the exposure but when it does the course of the disease is most often short, very painful and fatal.<sup>1</sup>

The dangers of asbestos were first raised in the Australian media in 1974.<sup>2</sup> A number of acts and regulations were consequently passed in each state and territory, especially during the period 1978–85.<sup>3</sup> The use of all forms of asbestos was finally banned in Australia from 31 December 2003, except in prescribed circumstances.<sup>4</sup> At the same time, the Commonwealth Government introduced a ban on the import or export of asbestos.<sup>5</sup>

The first successful negligence claim in relation to an asbestos disease was heard in 1985, and damages of \$222 500 were awarded.<sup>6</sup>

Estimates of Australia's total liability for future asbestos claims start around \$6 billion.<sup>7</sup> Apart from the James Hardie group, fellow corporate heavy weights CSR and BHP Billiton are targets, and federal and state governments also have substantial asbestos liabilities. Claims are not limited to those who worked in asbestos mines and factories. Former power station, shipyard and dock workers, railway labourers and members of the defence force, especially the Navy, are at significant risk from asbestos-related diseases. As the Jackson report noted, these diseases can take decades to develop—a major difficulty for compensation planning. Since 1945 about 7000 Australians have died from this disease, estimated to rise to 18 000 by 2020. Other asbestos-related cancers may be around 30—40 000 by the same time.<sup>8</sup>

Current Australian Government liabilities for asbestos claims are estimated at \$0.9 billion over the next 50 years.<sup>9</sup> The explanatory memorandum states that apart from claims in relation to Commonwealth employees or former employees, it is predicted that Comcare would manage ARC common law claims from:

- former waterside workers
- contractors and sub-contractors
- tenants of Australian Government owned and/or constructed premises
- family members of employees who were themselves exposed through contaminated clothing or other means
- visitors
- bystanders, and
- dependants of persons in any of the above categories.<sup>10</sup>

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## Approach in the Bill

The explanatory memorandum notes that the Bill implements a recommendation made by an Asbestos-related Disease Inter-Departmental Committee (IDC) established in 2002 to review the management of asbestos related compensation claims against the Australian Government. The IDC recommended the establishment of a central asbestos claims unit within Comcare to manage all ARC common law claims against the Australian Government. According to the explanatory memorandum:

The IDC made this recommendation based on the view that the decentralised approach was resulting in some inefficiencies and inconsistencies in case management across portfolios, including inconsistent admissions of liability. The IDC considered that having a centralised body like Comcare to manage claims against Australian Government agencies with ARD [asbestos-related disease] exposure would overcome the difficulty of attributing liability to individual portfolios given the effluxion of time and changes to various Administrative Arrangements Orders. It would also enable prompt settlement of claims, which is particularly important where death-bed litigants are involved.<sup>11</sup>

The explanatory memorandum notes further that the Bill would allow Comcare to assume the whole of the Australian Government's common law liability for ARCs. It explains that:

This will not only relate to the liability for claims from Australian Government employees but any person (or dependant) who claims to have suffered damage from exposure to asbestos for which the Australian Government may be liable. Currently, non-employee ARC common law claims are managed by portfolios, requiring each portfolio to take responsibility for case management.<sup>12</sup>

## **ALP/Australian Democrat/Greens policy position/commitments**

When the Bill was introduced Australian Greens Senator Kerry Nettle expressed concern about possible low-level caps on compensation payouts from the Commonwealth to victims of asbestos-related disease. Senator Nettle said:

The Greens do not object to centralising the management of the claims with Comcare. However, we are concerned about how several aspects of the bill will affect people suffering asbestos-related diseases and their families ...

People making claims would have the option of accepting a compensation figure determined by Comcare or taking a private legal action, which is expensive and time-consuming, especially for people who might have only a short time to live. Comcare's liabilities are governed by the Safety, Rehabilitation and Compensation Act, which prohibits a court from awarding a payout higher than \$110,000 for non-economic loss (including loss of expectation of life). This means an effective cap on all Commonwealth claims of \$110,000, which is a long way short of the average payouts

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by the NSW Dust and Diseases Tribunal of around \$250,000. The average claim for mesothelioma is around \$300,000.

The Greens are also concerned about provisions in the bill that would allow the minister to effectively remove any Commonwealth body from the reach of the compensation provisions, without having to notify parliament or enable parliament to overturn the decision.<sup>13</sup>

## Key issues

In a general sense the idea behind the Bill appears sensible, namely to centralise the Commonwealth's asbestos-related liabilities in Comcare, which has an established system for compensation payments. However, as the Greens have identified, there are a number of potential issues with specific provisions of the Bill.

### Potential cap on payouts

The explanatory memorandum states that the Bill:

... would not affect the ability of an employee to elect to institute action for the recovery of damages for non-economic loss - instead of receiving compensation under the SRC Act. It would also not affect any statutory caps on the awarding of common law damages such as limitations imposed by s. 45 of the SRC Act and s. 389 of the *Military Rehabilitation and Compensation Act 2004*.<sup>14</sup>

Liabilities of employees or former employees of the Commonwealth or Commonwealth authorities transferred to Comcare would be governed by the compensation scheme set out in the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). Under s 45 of the SRC Act, a claimant can either:

- (a) accept an amount of compensation determined by Comcare paid under sections 24, 25, or 27 of the SRC Act in respect of an injury resulting in permanent impairment; or
- (b) elect to bring a common law action (i.e. a private legal action) against the Commonwealth. In this case, however, s 45 (4) prohibits a court from awarding a payout greater than \$110 000 for 'non-economic loss' (i.e. the main claim for pain and suffering, loss of expectation of life, loss of enjoyment of life etc).

Parliament might ask why Comcare would offer a person any more than \$110 000 for non-economic loss under (a) if it knows that the person cannot get anything more than this under (b). Section 389 of the *Military Rehabilitation and Compensation Act* contains a similar provision, also limiting common law payouts for non-economic loss to \$110 000.

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While the Bill transfers the liability for all asbestos-related claims against the Commonwealth or (declared) Commonwealth authorities to Comcare, it is not clear whether the limit on pay-outs under the SRC Act would apply to people other than employees or former employees (eg family members, visitors, bystanders etc). Parliament might request further advice on this issue.

Figures in the Jackson report indicate that the average mesothelioma claim in June 2003 against members of the James Hardie Group was around \$280 000 to \$300 000.<sup>15</sup> An [article](#) in *The Age* on 12 January 2004 said that pay-outs from the NSW Dust Diseases Tribunal ‘now average about \$250 000’.<sup>16</sup> Informal advice from the tribunal in May 2005 was that the average was around \$150 000.<sup>17</sup> These figures would include amounts for ‘economic’ or pecuniary loss (eg loss of earning capacity, medical and rehabilitation expenses, care needs).

On this basis Parliament might seek further advice as to whether a cap of \$110 000 for non-economic loss is appropriate for asbestos-related injuries resulting in permanent impairment.

### **Just compensation**

According to the explanatory memorandum:

The Bill would not alter the fundamental ARC liability of the Australian Government. The Bill should have no impact on the ability of a current or prospective claimant to recover damages for an ARC from the Australian Government. To ensure against any unforeseen consequences of this Bill a safeguard is included to protect the rights of claimants.<sup>18</sup>

**Clause 15** provides where the operation of the Bill means that a person has been deprived of ‘property’ ‘otherwise than on just terms’, the Commonwealth is liable to pay a reasonable amount of compensation to the person. If there is no agreement on a ‘reasonable’ amount, the person can bring a further legal action against the Commonwealth. The explanatory memorandum describes this as a ‘safety net’ provision.<sup>19</sup> It says this could apply, for example:

... where Comcare has retransferred a liability to an entity that did not have the means to discharge that liability. If that situation did occur, this clause would provide for sufficient funding to meet those liabilities.<sup>20</sup>

There is an inalienable right under s 51 (31) of the Australian Constitution to recover fair compensation if the Commonwealth deprives a person of legal property, so from the point of view of claimants it adds nothing for this to be covered by a specific provision in the Bill. The meaning of ‘acquisition of property’ and ‘just terms’ in clause 15 is specifically linked to the meaning of these terms in s 51 (31) of the Constitution. While purportedly included as a ‘safety net’ for claimants, the real purpose of clause 15 may be to protect the

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Bill from invalidity if a claimant is deprived of some or all of a legal claim without fair compensation.<sup>21</sup>

More importantly from a practical perspective, however, most claimants with asbestos-related injuries will not have sufficient life-span and/or resources to initiate a further potentially complex and expensive legal action to recover additional compensation. This is especially so because actions under clause 15 may involve complicated constitutional issues.

In particular, despite the assertion in the explanatory memorandum that clause 15 will be available to ‘prospective claimants’, it appears that people who are yet to discover an asbestos-related condition may be unable to use clause 15 to seek additional compensation.

A valid common law legal claim has traditionally been recognised as ‘property’. In *Georgardis* (1994)<sup>22</sup> the High Court held that a statutory provision which purported to extinguish the right to sue for common law damages violated s 51(31) of the Constitution. The majority said that ‘acquisition of property’:

... extends to the extinguishment of a *vested* cause of action, at least where the extinguishment results in a direct benefit or financial gain (which, of course, includes liability being brought to an end without payment or other satisfaction) and the cause of action is one that arises under the general law.<sup>23</sup>

The judgment in *Georgardis* was applied by the High Court in *Mewett* (1997).<sup>24</sup>

So people with existing legal claims — i.e. those that have already *vested* — that are transferred to Comcare under the Bill would be able to use clause 15 if Comcare caps their payout at a level lower than they may otherwise have been entitled to. But those people who will develop asbestos-related diseases in the future do not yet have *vested* claims. They will not be able to claim that introduction of the Bill deprived them of an existing legal right or property. Therefore they could not use clause 15 to seek additional compensation if, for example, Comcare limits their payout to \$110 000 even though the normal common law figure for their particular condition was much higher.

### Declaration of ‘Commonwealth authorities’

Under **clause 4** of the Bill, the Minister can declare that a body in which the Commonwealth or a Commonwealth entity has a substantial interest is a ‘Commonwealth authority’. The explanatory memorandum notes that:

This would mean that if an asbestos-related claim is made by a person against a body that the Minister has declared to be a Commonwealth authority, there would be a reassignment of the liability for the claim to Comcare at the time the claim is made.<sup>25</sup>

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Clause 4 also allows the Minister to declare a body not to be a Commonwealth authority. The explanatory memorandum states:

This would mean that if an asbestos-related claim is made by a person against that body after the date the instrument is made the liability for that claim would not flow to Comcare. However, Comcare would remain responsible for any asbestos-related claim made during the time it was a Commonwealth authority.<sup>26</sup>

**Clause 6** contains similar provisions regarding the transfer of liabilities from Comcare to another body.

There are a number of issues with these clauses:

- There appears to be potential for confusion as to which Commonwealth bodies have been declared and which have not. Will it be clear to people whether they should go to Comcare or not? Why not transfer all liabilities to Comcare rather than making these subject to individual declarations?
- Subclauses 4(3) and 6(3) require the Minister to publish the declaration in the *Australian Government Gazette*. However, subclauses 4(4) and 6(4) provide that failure to publish declarations would not make them invalid.
  - So liabilities could be transferred to Comcare without anyone actually being informed about this and potentially without any notification even in the *Gazette*.
- Subclauses 4(5) and 6(5) state that such declarations are not ‘legislative instruments’ within the meaning of section 5 of the *Legislative Instruments Act 2003*.
  - This means there is no requirement to table them in Parliament and they are not disallowable instruments. So Parliament will not get the opportunity to discuss whether transfer of a liability to Comcare, or transfer of a liability from Comcare, is appropriate in the particular circumstances
  - One option would be to require such instruments to be tabled and to be subject to disallowance by the Parliament. Another option under the *Legislative Instruments Act* would be to require them to be tabled only, but not make them disallowable.

## Endnotes

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- 1 D. F. Jackson QC, *Report of the special commission of inquiry into the medical research and compensation foundation*, September 2004, Part A, p. 17, available at <http://www.cabinet.nsw.gov.au/hardie/PartA.pdf>.

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- 2 'Is this killer in your home?' (cover story), *Bulletin*, 6 July 1974, pp. 30–33.
- 3 A list of current legislation is included as Appendix A in: *Asbestos: code of practice for the safe removal of asbestos* (NOHSC: 2002 (1988)), Canberra: National Occupational Health and Safety Commission, 2002,  
<http://www.nohsc.gov.au/PDF/Standards/Codes/AsbestosCode.pdf>
- 4 The ban was effected through amendments to the National Model Regulations for the Control of Workplace Hazardous Substances, by the National Occupational Health and Safety Commission (NOHSC), acting under section 38 of the NOHSC Act,  
<http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200401491?OpenDocument>.
- 5 Customs (Prohibited Imports) Amendment Regulations 2003 (No. 10), Statutory Rule 2003 No. 321,  
<http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/asmade/bynumber/96E32ED54181807ACA256F700080EE5C?OpenDocument>, and Customs (Prohibited Exports) Amendment Regulations 2003 (No 6), Statutory Rule 2003 No. 320,  
<http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/asmade/bynumber/357C8840277BDED1CA256F700080EE59?OpenDocument>.
- 6 *Pilmer v McPherson's Limited*, Supreme Court of Victoria (unreported), 1985; an appeal was dismissed: *McPherson's Ltd v Pilmer, Harold Simpson*, Supreme Court of Victoria (unreported), 26 November 1985, <http://vsc.sirsi.net.au/Judgments/Civil/239906.pdf>.
7. Beth Quinlivan, 'Asbestos: Powder traces', *Business Review Weekly*, 2 June 2004. See Peter Prince, Jerome Davidson and Susan Dudley, *In the shadow of the corporate veil: James Hardie and asbestos compensation*, Parliamentary Library Research Note No. 12 2004-05, at: <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn12.pdf>. Quinlivan, op. cit.
- 8 Quinlivan, op. cit.
- 9 Explanatory memorandum, p. 2.
- 10 *ibid.*, p. 1.
- 11 *ibid.*, pp. 1–2.
- 12 *ibid.*, p. 1.
- 13 K. Nettle, '[Government asbestos claims bill raises concerns](#)', *Australian Greens media release*, 25 May 2005, at: <http://www.greens.org.au/mediacentre/mediareleases/senatornettle/250505a>.
- 14 Explanatory memorandum, p. 2.
- 15 Jackson report, p.55 (para 3.33).
16. <http://www.theage.com.au/articles/2004/01/11/1073769452839.html>.
- 17 Conversation with author 31.5.05.
- 18 Explanatory memorandum, p. 2.
- 19 *ibid.*, p. 9.

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- 20 *ibid.*
- 21 See Parliamentary Counsel, Drafting Direction 1993, No. 9, *Severability provisions—Constitutional limitations and prohibitions*, para 3 (Acquisition of property).
- 22 179 CLR 297.
- 23 *ibid.*, at 305 (Mason CJ, Deane and Gaudron JJ). Emphasis added.
- 24 191 CLR 471.
- 25 Explanatory memorandum, p. 4.
- 26 *ibid.*

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