

Civil Liability (Dust Diseases) and Other Legislation Amendment Bill 2005

Explanatory Notes

General Outline

Objectives of the Legislation

The proposed legislation provides for amendments to a number of Acts to improve procedures in dust-related personal injury claims. The proposed legislation:

- Allows for awards of general damages to be made where the plaintiff dies prior to final determination of the claim; and
- Clarifies the point in time at which knowledge of the nature and extent of a personal injury will constitute a material fact of a decisive character for the purposes of extending a limitation period for the claim

The proposed legislation also provides for amendment of the *Civil Liability Act 2003*, so far as it relates to the limit of damages that may be awarded for economic loss in a personal injury claim, in response to the Supreme Court decision in the matter of *Doughty v Cassidy*.

In addition, the legislation provides a clarification of the exceptions to application of the *Personal Injuries Proceedings Act 2002* to better reflect the original intention of Parliament that a single claim will only be required to proceed through one form of pre-court procedure.

Reasons for the objectives and how they will be achieved

The incidence of dust-related conditions affecting Queenslanders continues to rise. These types of conditions have the potential to dramatically affect a person's life, with some dust-related conditions causing death within a very short time from diagnosis. In such instances, a claimant will not always be able to complete the normal court processes prior to their death. This has implications for the amount of damages awarded for the claim. Currently,

where a claimant dies prior to judgment being given in the matter, their claim for general damages ceases without any benefit to their estate. The proposed amendment to the *Succession Act 1981* allows the claim for general damages to survive their death.

The diagnosis of dust-related conditions can be uncertain from a legal perspective. Normally, the condition manifests a substantial time after the actual exposure, requiring an extension of time to be sought under the *Limitation of Actions Act 1974*. Also, more serious dust-related conditions can start from lower level health problems, but this progression is not always the case. As a result, when seeking an extension, argument can ensue as to whether knowledge of the earlier health problems constitutes a “material fact of a decisive character” for the purposes of the test under the Act. The proposed amendment clarifies that the knowledge of the nature and extent of the personal injury will constitute a material fact of a decisive character when the person knows the dust-related condition will significantly affect the person’s amenities of life, or their life expectancy.

The decision of the Supreme Court in *Doughty v Cassidy* had the effect of limiting the awards of damages that may be made for economic loss in personal injury claims further than what was originally intended by Parliament. The proposed amendment makes Parliament’s original intention clear given the decision.

The *Personal Injuries Proceedings Act 2002* is proposed to be amended to better reflect the original intention of Parliament that, where a person makes a personal injury claim, then they will only be required to enter into one pre-court procedure so far as a claim against an individual respondent is concerned.

Administrative cost to Government of implementation

There is no administrative cost to government in implementation of the provisions.

Consistency with Fundamental Legislative Principles

The proposed legislation provides for the retrospective application of the amendments to the *Succession Act 1981*, the *Limitation of Actions Act 1974*, the *Civil Liability Act 2003*, and the *Personal Injuries Proceedings Act 2002*.

Consultation

Community

The Australian Lawyers Alliance, Bar Association of Queensland, Queensland Asbestos Related Disease Support Society Incorporated and the Queensland Law Society have been consulted on the proposed amendments.

Government

The Department of Premier and Cabinet, Queensland Treasury through the Office of the Insurance Commissioner on behalf of the Motor Accident Insurance Commission and Queensland Government Insurance Fund, the Department of Industrial Relations and WorkCover Queensland have been consulted.

Notes on Provisions

Part 1 Preliminary

Clause 1 provides the short title of the Bill for citation purposes.

Clause 2 provides that Division 1 of Part 2 of the Bill is to amend the *Succession Act 1981*.

Clause 3 amends section 66 of the *Succession Act 1981* by inserting three new subsections. Proposed subsection 2A amends the general principle in section 66 that awards for general damages are not to be made where a claimant dies prior to judgment of a claim. The proposed clause provides that awards of general damages in a claim based upon the incidence of a dust-related condition may be made after the death of a claimant in circumstances where the claimant has filed the proceedings prior to their death, and the person dies either as a result of the dust-related condition or as a result of an incident which is related to or caused by the dust-related condition. For example, where a person has both a heart condition and

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asbestosis, and they have commenced legal proceedings based upon having contracted asbestosis, then an award of general damages will be awardable if the person dies and the evidence provides the person has died at least in part as a result of the asbestosis, such as where a person dies from a heart condition made worse by asbestosis. The dust-related condition does not have to be the primary cause of death, but the death must be connected to it.

Proposed subsection 2B ensures that an argument that a tobacco related disease is within the definition of “dust-related condition” may not be made. Proposed subsection 10 inserts the definition of “dust-related condition” into section 66, referring to the definition contained within the *Civil Liability Act 2003* as being the definition for the purposes of the *Succession Act 1981*. The proposed subsection also provides that the term “personal injury” is interpreted so that it includes the contraction of a disease.

Clause 4 inserts a new section 75 within the *Succession Act 1981* to provide that the amended section 66 has retrospective effect. That is, it does not matter that the cause of action arose prior to the commencement of the amendments. Proposed section 75 provides that the amendments apply to all proceedings whether filed before or after the commencement of the amended section 66 except for those which have been determined either by way of settlement or court decision. It does not matter that the incident occurred prior to commencement of the provision.

Clause 5 provides that Division 2 of Part 2 of the Bill amends the *Limitation of Actions Act 1974*.

Clause 6 inserts a new section 30A in to the *Limitation of Actions Act 1974*. The proposed new section provides that the material facts relating to the nature and extent of the dust-related condition will not be decisive in character unless they provide the person with knowledge, or it is within their means of knowledge, that the condition will be a contributing factor to significant loss of amenities, or expectation, of life.

For example, a person is diagnosed with pleural plaques on 2 January 1996. At the time, the doctor states that, given the person’s history of exposure to asbestos, the person may develop asbestosis. On 2 January 2005 the person is diagnosed with asbestosis, and advised that this disease will develop to the point where it will significantly affect their life. The relevant time at which there is a material fact of a decisive character for the purposes of the proposed section 30A is 2 January 2005. A further example is where a person is diagnosed with mild or an early form of asbestosis on 2 January 1996. At the time, the doctor states the disease may develop into a

significant injury. On 2 January 2005 the person is informed the asbestosis has deteriorated, and advised that this disease will develop to the point where it will significantly affect their life. The relevant time at which there is a material fact of a decisive character for the purposes of the proposed section 30A is 2 January 2005.

Proposed subsection (3) ensures an argument that a tobacco related disease is within the definition of “dust-related condition” may not be made. The clause inserts the definition of “dust-related condition”, referring to the definition contained within the *Civil Liability Act 2003* as being the definition for the purposes of the new section.

Clause 7 provides the transitional arrangements for incidents that have occurred prior to commencement of the proposed section 30A of the *Limitation of Actions Act 1974*. The proposed section provides that, irrespective of when the incident occurred, the amendments will apply to all matters other than those which have either been dealt with finally by a Court in its original jurisdiction, or have been settled or discontinued.

Clause 8 provides that Division 1 of Part 3 of the Bill amends the *Civil Liability Act 2003*.

Clause 9 replaces section 54 of the *Civil Liability Act 2003* in response to the Supreme Court of Queensland decision of *Doughty v Cassidy* [2004] QSC 366. In that decision, it was found a Court will normally be required to undertake the following calculation to assess economic loss: $A - B = C$, where A equals the total capacity lost expressed by reference to a period of time, B equals the amount by which the total is to be reduced for various factors relevant to the case, and C is the amount to be awarded for the period of loss. The effect of the decision was to limit the amount the Court could determine for A, and not to limit C as was intended when the provision was originally passed.

The amendment provides that the limit of the amount to be awarded (C in the above calculation) is to be an amount equal to the limit specified in the current subsection (2). The limit is defined by reference to lost earning capacity expressed as a capacity on a per week basis, and is 3 times average weekly earnings per week (defined in Schedule 2 of the *Civil Liability Act 2003*). The limit is also expressed as the "present value" of that capacity, meaning the value prior to being discounted on the basis a portion of the amount would have been earned at some time in the future. Further, the level of earning capacity retained will not affect the calculation.

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For example, a court determines that, pre-injury, a person had an earning capacity of \$500,000 per year. As a result of the injury, the person's earning capacity is reduced to \$300,000 per year. The total capacity lost is therefore \$200,000 per year. The court then determines that it would reduce this amount by 15% on the basis of work history indicating a decline in earnings to \$170,000 per year. This is then further reduced by 5% for the regular changes in life, leaving a total of \$161,500 per year. If the average weekly earnings per week at the time of judgment total \$120,000 per year, then the Court may award \$120,000 per year only, and not the \$161,500. Further, if the Court determines that the person would have earned this amount each year for the next 5 years, it would apply any discounting table to the amount of \$120,000 per year. The section does not require the Court to assess an amount of loss for each and every week, although in appropriate cases a court may continue to discern between different capacities at different times.

The proposed section also amends the heading to section 54 to reflect the fact earning capacity is a part of loss of earnings as a result of the definition of that term within the Act.

Clause 10 inserts a transitional provision which provides the amended method of limiting amounts to be awarded for economic loss is to be applied to all awards of damages for economic loss made under the *Civil Liability Act 2003* after commencement of the provision, irrespective of whether the incident occurred before commencement or not. The provision is not intended to provide a party with a new right to increase their damages for economic loss through an appellate process.

Clause 11 provides that Division 2 of Part 3 of the Bill amends the *Personal Injuries Proceedings Act 2002*.

Clause 12 inserts a new subsection (2) in to section 6 of the *Personal Injuries Proceedings Act 2002* to reflect the original intention of Parliament that claims against a party only be required to proceed through one form of statutory pre-court procedure. In relation to personal injury claims based upon a motor vehicle accident, where the injury suffered comes within the term of "personal injury" or "accidental bodily injury" as provided within the *Motor Accident Insurance Act 1994* or the *Motor Vehicles Insurance Act 1936* (whichever is or was in force at the date of the accident), the claimant is not required to proceed through the pre-court procedure within the *Personal Injuries Proceedings Act 2002* in relation to the claim regulated by either the *Motor Accident Insurance Act 1994* or the *Motor Vehicles Insurance Act 1936*.

In relation to personal injury claims based upon a work related accident, where the injury suffered comes within the term of a injury as provided within the *Workers' Compensation and Rehabilitation Act 2003*, the *WorkCover Queensland Act 1996*, the *Workers' Compensation Act 1990* or the *Workers' Compensation Act 1916* (whichever is or was in force at the date of the accident), the claimant is not required to proceed through the pre-court procedure within the *Personal Injuries Proceedings Act 2002* in relation to the claim to which either the *Workers' Compensation and Rehabilitation Act 2003*, the *WorkCover Queensland Act 1996*, the *Workers' Compensation Act 1990* or the *Workers' Compensation Act 1916* applies.

The differences in wording in each of proposed paragraphs (a) to (g) reflect the differences in language and application of each of the respective pieces of legislation commented upon within each paragraph. The example provided for paragraph (c) is drafted to allow application of the circumstances to each piece of workers' compensation legislation which contains a pre-court procedure.

Clause 13 amends section 81 of the Act by ceasing the continuation of section 51 of the *Personal Injuries Proceedings Act 2002* as it was prior to amendment by the *Civil Liability Act 2003* and as commented upon in the case of *Doughty v Cassidy*, to incidents that occurred prior to 9 April 2003.

Clause 14 inserts two transitional provisions in to the *Personal Injuries Proceedings Act 2002*. The first, proposed section 83, deals with instances in which one claimant is currently proceeding against one respondent through both the pre-court procedure under the *Personal Injuries Proceedings Act 2002*, and under either relevant workers' compensation or motor vehicle accident legislation. The effect of the clause is to stay the pre-court procedure, or the portion of it against that respondent, under the *Personal Injuries Proceedings Act 2002*, with the intention that the procedure or proceedings commenced under the other piece of legislation be completed. Any costs incurred under the stayed procedure which would be claimable under the stayed procedure are then claimable under the procedure which is continued. The stay may be lifted by a Court where the other procedure is incorrectly continued, and the Court considers it appropriate to complete the stayed procedure.

The second provision inserted, proposed section 84, clarifies that the prior application of the former section 51 of the *Personal Injuries Proceedings Act 2002*, as it was prior to its repeal by the *Civil Liability Act 2003* on 9 April 2003, will no longer apply to any assessment of economic loss in a

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personal injury claim. Section 54 of the *Civil Liability Act 2003*, as amended by this Bill, will apply to those incidents in which judgment or final determination has not been made, no matter when the incident occurred. It will not allow an appeal court to amend the amount awarded at first instance.

Clause 15 amends the Dictionary in Schedule 2 of the *Personal Injuries Proceedings Act 2002* by omitting a redundant definition.