



Research Service,
Parliamentary Library,
Department of Parliamentary Services

D-Brief No. 5, 2008

ASBESTOS DISEASES COMPENSATION BILL 2008

An examination of the Asbestos Diseases Compensation Bill 2008, the history of asbestos use in Australia, and law in other jurisdictions.

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November 2008

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Number 5
October 2008

Asbestos Diseases Compensation Bill 2008

NB: Readers should note that this paper was prepared prior to the passage of the Asbestos Diseases Compensation Bill 2008 through the Victorian Parliament. It was passed by the Legislative Council on 13 November 2008. Readers interested in this Act as passed should visit the Victorian Legislation and Parliamentary Documents website @ <http://www.dms.dpc.vic.gov.au>.

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Introduction

On 7 October 2008, the Victorian Government introduced a Bill to allow victims of asbestos-related diseases to be awarded provisional damages. The Asbestos Diseases Compensation Bill 2008 ('the Bill') is stand-alone legislation, and also makes consequential amendments to the *Accident Compensation Act 1985* and the *Wrongs Act 1958*. It follows a stated commitment from the Brumby Government in May 2008 to introduce new laws on asbestos-related diseases compensation.

Glossary of Key Terms

Asbestos	A commercial term encompassing around 30 silicate-derived mineral deposits, which may be divided into two categories: serpentine asbestos, which consists of curly fibres and includes chrysolite (or white) asbestos; the second group is amphibole asbestos, consisting of tiny 'needle-shaped' fibres, and includes crocidolite (or blue) asbestos and amosite (brown) asbestos. ¹
Asbestos-related Diseases	Severe forms of 'dust disease' caused by inhalation of asbestos fibres. Symptoms include coughing, shortness of breath and a 'clubbing' of the fingers.
Asbestosis	A non-cancerous condition involving a scarring of the lungs (fibrosis) causing shortness of breath which may eventually be fatal. The sufferer becomes more susceptible to other respiratory conditions such as bronchitis and pneumonia. Asbestosis is attributed to high exposure to asbestos, and has a relatively shorter latency period than other asbestos-related diseases. ² The term originated in 1927. ³
Mesothelioma	A fatal and aggressive cancer of the outer lung lining (pleura) or the lining of the abdominal cavity (peritoneum). These linings become a 'hard tumour mass' that compress the lungs or intestine. ⁴ Mesothelioma is almost exclusively caused by asbestos exposure; some victims have been exposed to asbestos for as little as two or three months through everyday activities. ⁵ Exposure to blue asbestos is the most common cause. While the latency period is up to 40 years or more, once diagnosed victims live on average a further nine months.
Pleural Disease	Benign lung conditions, including 'Pleural Plaques', which involve thickening patches on the lung lining (pleura). These may remain non-fatal or develop into more serious respiratory diseases.
Lung Cancer (carcinoma)	Cancer originating in the airways or tissue of the lung. ⁶ Asbestos is a carcinogen that may cause, or contribute to, cancer of the lung.

¹ T. Blundell (2006) 'Asbestos-related Disease Compensation 2006: at the crossroads', *Journal of Occupational Health and Safety – Australia New Zealand*, vol. 22, no. 5, p. 429.

² S. Girvan & A. Smee (2005) 'Paying for Asbestos: Part 1', *Australian and New Zealand Institute of Insurance and Finance Journal*, vol. 28, no. 2, April/May, p. 25.

³ G. Haigh (2006) *Asbestos House: The Secret History of James Hardie Industries*, Carlton North, Scribe Publications, p. 27; Blundell (2006) op. cit., p. 431.

⁴ See further: Blundell (2006) op. cit., p. 431; B. Hills (1989) *Blue Murder: Two Thousand Doomed to Die – The Shocking Truth About Wittenoom's Deadly Dust*, South Melbourne, Sun Books, pp. 58–59; Girvan & Smee (2005) op. cit., p. 25.

⁵ Hills (1989) op. cit., p. 60. See also: Blundell (2006) op. cit., p. 431.

⁶ Blundell (2006) op. cit., p. 435.

1. Formal Government Apology

On 15 October 2008, the Premier John Brumby made a formal apology to victims of asbestos-related diseases and their families.⁷ The apology was made during a regional sitting of the Legislative Assembly at Churchill, in Gippsland's Latrobe Valley, site of the state's coal-fired power stations and home to families affected by exposure to asbestos.⁸ *The Age* reported in June 2008 that 146,000 employees and contractors worked in the Latrobe Valley power stations from 1921 to the 1980s.⁹

The Premier described the Latrobe Valley as 'the powerhouse of the Victorian economy', which fuelled manufacturing and population growth during the first half of the twentieth century and without which Victoria would not be as prosperous today.¹⁰ In recognising the significance of the region's electricity industry, the Premier acknowledged the damage caused to the local community through the use of asbestos at the former State Electricity Commission of Victoria (SECV) power stations. He described the consequences of asbestos exposure to local workers and their families as 'an injury that has been ignored for too long':

On behalf of the Victorian government and the community I want to say sorry and to express our regret for the pain and suffering felt by some former power industry workers and their families where caused by asbestos exposure at the former SECV. Some workers and families have endured intolerable suffering, including the slow and painful effects of lung cancer, asbestosis and mesothelioma. The government sincerely apologises to these workers and their families for the injuries caused by the exposure at the SECV.¹¹

The Premier stated that while asbestos use was banned in Victoria in 2003, its effects are ongoing. To illustrate, the Premier told the story of a local man, married with two children, who was diagnosed with mesothelioma in his early 40s despite having never worked with asbestos:

He was exposed to asbestos as a child when his father would come home from work at the power station with asbestos on his clothes and give his child a cuddle, as you do when you come home from work.¹²

As the Premier explained, the man's father, 'who had unwittingly exposed his son to asbestos, had to watch him suffer and die at the age of 44'. The Premier noted that there are many other 'truly heartbreaking' cases like this that demonstrate the human cost of asbestos use.¹³

The Premier told the House that it is 'unacceptable' that a person could be exposed to a deadly substance 'through the course of their work', and stated that he hoped this apology 'goes some way to bring closure and resolution for families who are suffering from asbestos-related diseases'.¹⁴

⁷ Several Members in the Legislative Council made statements about the apology on 16 October; see further: Victoria, Legislative Council (2008) *Debates*, Bk. 14, pp. 4457, 4485, 4508.

⁸ See further: C. Egan (2008) 'Why the Valley needs to hear "sorry"', *The Sunday Age*, June 8, p. 4.

⁹ *ibid.*

¹⁰ Victoria, Legislative Assembly (2008) *Debates*, Bk. 14, p. 4108.

¹¹ *ibid.*, p. 4109.

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*

History of asbestos use in Australia

Asbestos is a broad term encompassing several fibrous mineral deposits.¹⁵ Of these, chrysolite (white asbestos), crocidolite (blue asbestos) and amosite (brown asbestos) were mined or used in Australia.¹⁶ Prized for its lightweight, heat resistant qualities, asbestos was used in Australia from about 1900 to 1987 in commercial manufacturing and construction, as well as in domestic environments.¹⁷ Consumption of asbestos products peaked in Australia around 1970, and it has been argued that Australia had one of the highest consumption rates per-capita in the world.¹⁸

Much of the asbestos fibre used in Australia during this period was imported from South Africa and Canada.¹⁹ A small number of asbestos mines operated in Australia. Blue asbestos, the most deadly form, was mined at Wittenoom in the Pilbara region of Western Australia. Established by Lang Hancock in 1938, the mine was taken over by a subsidiary of the Colonial Sugar Refining Company (CSR) in the 1940s, and closed in 1966. Other mines included Baryulgil and Woodsreef in New South Wales, which both produced white asbestos for James Hardie Industries and operated until 1976 and 1983 respectively.²⁰

James Hardie was the largest producer of asbestos products in Australia.²¹ Founded in 1888 and based in Sydney, the company manufactured asbestos materials at plants in Sydney, Perth, Adelaide and Melbourne.²² It was James Hardie that introduced fibre-cement, or 'fibro', to Australia. A mixture of cement, asbestos fibre and water, fibro was a durable and cheap building material which became enormously popular in the post-Second World War housing boom; even former Prime Minister Gough Whitlam and the architect Robin Boyd had houses made with fibro.²³ As Haigh observed:

In a hot land, it did not retain heat. In a big land, it was light and easy to transport. In a land where Jack was allegedly as good as his master, it was as suitable for handsome Californian bungalows as it was for working men's cottages.²⁴

It is estimated that around one-third of homes built in Australia between 1945 and 1987 contain asbestos; in New South Wales alone, over half of all new homes built between 1945 and 1954 contained James Hardie fibro sheets.²⁵ In public buildings such as hospitals and schools, asbestos was used to insulate walls and ceilings,

¹⁵ W. Laursen (2004) 'The Rising Asbestos Toll', *Australian Science*, November/December, p. 27.

¹⁶ Blundell (2006) op. cit., p. 429. The colour terms (white, blue and brown) are most commonly used to refer to these types of asbestos, and therefore shall be used in this paper.

¹⁷ For example: insulation, flue pipes, cladding, brake pads, plaster patching compounds, backing boards for bathroom and floor tiles; see further: G. Wragg (1995) *The Asbestos Time Bomb*, Annandale, Catalyst Press, pp. 76–79.

¹⁸ Australian Safety and Compensation Council (2008) *Mesothelioma in Australia: Incidence, 1982 to 2004, Deaths 1997 to 2005*, Commonwealth of Australia, p. 5; Girvan & Smee (2005) op. cit., p. 25.

¹⁹ Mines operated in the Northern Cape Province of South Africa, and Quebec and British Columbia in Canada.

²⁰ J. McCulloch (2007) 'The Mine at Baryulgil: work, knowledge, and asbestos disease', *Labour History*, vol. 92, viewed 21 October 2008, <<http://www.historycooperative.org/journals/lab/92/mcculloch.html>>; M. Peacock (2008) 'Abandoned asbestos mine causes community outrage', *7:30 Report – ABC Television*, Online Transcript, viewed 22 October 2008, <<http://www.abc.net.au/7.30/content/2008/s2334536.htm>>.

²¹ See especially: Laursen (2004) 'The Rising Asbestos Toll', op. cit., p. 27; McCulloch (2007) op. cit.

²² McCulloch (2007) op. cit., p. 1.

²³ Haigh (2006) op. cit., p. 71–72.

²⁴ *ibid.*, p. 70.

²⁵ Laursen (2004) op. cit., p. 27; McCulloch (2007) op. cit. See also: Australian Council of Trade Unions (2007) *Media Fact Sheet*, viewed 23 October 2008, <<http://www.actu.asn.au/Images/Dynamic/attachments/5055/James%20Hardie%20Fact%20Sheet%2080207.doc>>.

while in heavy industries, asbestos cladding was essential for its heat resistance and durability.²⁶ In the power stations of the Latrobe Valley in Victoria, asbestos lagging was 'cut to shape with just a pair of heavy duty scissors and wad punches' to use on the joinings between pipes, boiler doors, valves and other fittings.²⁷

Asbestos health hazards

The popularity of asbestos products has ensured that Australia has the highest recorded rate of mesothelioma in the world.²⁸ The long latency period between exposure to asbestos and the diagnoses of a related illness can be anywhere from 15 to 40 years or more. As such, the incidence of mesothelioma in Australia is rapidly increasing; there were 596 new diagnoses of mesothelioma in 2004, up from 156 in 1982.²⁹ It is estimated that the number of new mesothelioma cases will peak in Australia around 2020, claiming another 22,000 lives.³⁰ Asbestos-related lung cancer will continue to claim another 44,000 lives.³¹

The incidence of asbestos-related diseases will follow what has been termed the three 'waves of exposure', which are periods of asbestos use and proliferation in Australia. The first wave relates to the mining of asbestos, a practice which ceased in 1983. It is believed that this wave is now in decline.³² The second wave relates to the manufacturing, transport and use of asbestos products, particularly by factory workers, dockworkers and construction workers. The incidence of asbestos-related disease amongst this group of workers and their relatives is continuing. The third wave relates to asbestos that exists in the built environment, and may directly involve home renovators or asbestos removalists. It is believed that such cases 'may continue at a low level almost indefinitely'.³³

In a similar manner, knowledge of the risks of asbestos exposure developed in stages. Asbestosis was the first asbestos-related disease to be widely recognised; by the mid 1950s, the link between asbestos and lung cancer was established.³⁴ Finally, there came the most aggressive condition – mesothelioma.³⁵

Reports on the link between asbestos exposure and respiratory illness appeared overseas around the turn of the last century.³⁶ By the early 1930s, evidence and awareness of asbestosis was increasing; a number of British government reports documented the occupational hazards of asbestos, while in South Africa an international conference on silicosis made note of asbestosis as a 'new occupational

²⁶ Wragg (1995) op. cit., p. 20; Haigh (2006) op. cit., pp. 70–72.

²⁷ Wragg (1995) op. cit., p. 20.

²⁸ McCulloch (2007) op. cit.; F. Burstin (2007) 'Choose: life, or the kids' future', *Herald Sun*, 30 August, p. 15.

²⁹ Australian Safety and Compensation Council (2008) *Mesothelioma in Australia: Incidence, 1982 to 2004, Deaths 1997 to 2005*, Commonwealth of Australia, p. 4.

³⁰ *ibid.*, p. 6; Egan (2008) op. cit., p. 4; B. Schneiders (2008) 'Unions call for urgent asbestos probe', *The Age*, 28 April, p. 4.

³¹ Egan (2008) op. cit., p. 4.

³² Girvan & Smee (2005) op. cit., p. 25.

³³ *ibid.*

³⁴ Blundell (2006) op. cit., p. 435. See also: L. Braun & S. Kisting (2006) 'Asbestos-related Disease in South Africa: the social production of an invisible epidemic', *American Journal of Public Health*, August, vol. 96, no. 8, p. 1386.

³⁵ Hills (1989) op. cit., p. 59; Braun & Kisting (2006) op. cit., p. 1386.

³⁶ See further: Blundell (2006) op. cit., p. 430; Laursen (2004) op. cit., p. 28; Wragg (1995) op. cit., p. 3.

disease'.³⁷ In the United States during the late 1920s and early 1930s, corporations settled a number of claims from workers afflicted with asbestosis.³⁸

In Australia, various jurisdictions established standards of acceptable asbestos exposure during the post-Second World War era. In Victoria, exposure was set at five million particles per cubic foot of air, or approximately 172 fibres per cubic centimetre, under the *Harmful Gases, Vapours, Fumes, Mists, Smokes and Dusts Regulations 1945*.³⁹ A similar standard was adopted in Western Australia, reflecting 'the maximum workplace pollution level accepted throughout the world asbestos industry'.⁴⁰ This limit was vastly curtailed by the late 1960s, when the National Health and Medical Research Council recommended a maximum of four fibres per cubic centimetre of air; it was further reduced to two fibres per cubic centimetre of air in Victoria in the late 1970s.⁴¹

As various authors and historians on the subject have noted, adherence to these standards in asbestos mines was near impossible for lack of resources and resolve. The dry, fibrous nature of asbestos ensured that mine shafts, mills and ancillary buildings were thick with dust. As Hills reported:

... in the mill it was blinding. One hundred-watt light bulbs hanging from the ceiling of the tin shed looked like candles, one worker recalls. When you walked in, you had to get within a couple of feet of a man to recognise him, because their faces were coated with dust like pancake make-up.⁴²

At power stations in the Latrobe Valley, the use of asbestos to join and insulate equipment was a 'primitive and extremely dusty operation' which often involved tipping loose bags of asbestos fibre into drums before mixing it into a paste. As Wragg noted:

... the entire area of the power station was continuously blanketed by clouds of circulating and recirculating fibre.⁴³

The risks of asbestos exposure gradually became public knowledge. The first wave of mesothelioma victims from the Wittenoom blue asbestos mine emerged between 1961 and 1965, and by the early 1970s mainstream media outlets were investigating the industry.⁴⁴ In Melbourne during 1977–78, railway workers modifying asbestos-insulated train carriages went on strike. In the Latrobe Valley in 1979, the SECV established the Asbestos Task Force, in order to assess asbestos use in the power stations.⁴⁵ That same year the Asbestos Diseases Society of Australia (ADSA) was founded; it remains a prominent support and advocacy service for victims and their families.

The 1980s saw a raft of legal claims against asbestos manufacturers and mine operators in Australia and around the world. These actions brought to light evidence

³⁷ Wragg (1995) op. cit., pp. 4, 7; Braun & Kisting (2006) op. cit., p. 1386.

³⁸ Hills (1989) op. cit., p. 194; Haigh (2006) op. cit., p. 30.

³⁹ Haigh (2006) op. cit., p. 43; Blundell (2006) op. cit., p. 431.

⁴⁰ Hills (1989) op. cit., p. 50.

⁴¹ Blundell (2006) op. cit., p. 431. Queensland, Tasmania, New South Wales and Western Australia also introduced strict regulations in the 1970s: see further, Haigh (2006) op. cit., p. 114.

⁴² Hills (1989) op. cit., p. 22.

⁴³ Wragg (1995) op. cit., pp. 19–22; see also: H. H. Walker & A. D. LaMontagne (2004) *Work and Health in the Latrobe Valley: Community Perspectives on Asbestos Issues*, Final Report, Parkville, University of Melbourne Centre for the Study of Health and Society.

⁴⁴ Hills (1989) op. cit., pp. 57, 197; Haigh (2006) op. cit., pp. 108–111.

⁴⁵ Wragg (1995) op. cit., p. 37.

of exactly when each company became aware of the dangers of asbestos exposure, and their efforts (or lack thereof) to address the problem. Harold Pilmer was the first victim to successfully sue for common law damages in Australia, against hardware firm McPherson Ltd. Represented by Slater and Gordon, Pilmer was awarded more than \$200,000 in the Victorian Supreme Court in 1985.⁴⁶

In 1986, Slater and Gordon achieved a more than \$140,000 settlement with the SECV on behalf of former employee James McEwan, who was also dying of mesothelioma.⁴⁷ The Age has reported that since 1976 the State Government insurance authority has paid \$52.6 million to former SECV workers, and estimated that a further \$369 million is yet to be awarded by the Victorian Managed Insurance Authority.⁴⁸

Slater and Gordon went on to win landmark cases against CSR in the Victorian and Western Australian Supreme Courts throughout 1988. It was established that management at Wittenoom had been notified of the health risks associated with asbestos exposure around the time that CSR and its subsidiary, Midalco, had taken over the mine.⁴⁹ By this stage many hundreds of former Wittenoom employees and their families had been diagnosed with asbestos-related diseases; the mine achieved national notoriety as an industrial disaster, as noted in the popular Midnight Oil song of 1990, 'Blue Sky Mine'.

It is believed that James Hardie was aware of the health risks associated with asbestos exposure in the late 1930s, after the Western Australian Commissioner of Public Health and Chief Inspector of Factories found respiratory disorders amongst James Hardie workers.⁵⁰ James Hardie has been subject to legal action from victims of asbestos exposure since 1939, the most famous of these being Bernie Banton, who was the public face of a long campaign by the Australian Council of Trade Unions (ACTU) and victim support groups.⁵¹ This campaign has only recently achieved a final agreement with James Hardie.⁵²

Litigation against negligent employers and manufacturers continues today, as a result of the second and third waves of asbestos exposure. In February 2008 the Western Australian Supreme Court awarded more than \$840,000 to former motor mechanic Antonino Lo Presti, who suffers from severe fibrosis from his exposure to asbestos in brake linings. According to the plaintiff's representatives, Slater and Gordon, the verdict sets a precedent as the first of its kind for a mechanic against a car company in Australia.⁵³

The use of blue and brown asbestos was banned in Australia during the 1980s. On 18 May 2001, the Workplace Relations Ministers' Council agreed to ban the importation, manufacture and use of white asbestos products, coming into force on 31 December 2003, under the *National Model Regulations for the Control of Workplace Hazardous Substances* [NOHSC:1005(1994)].

⁴⁶ Haigh (2006) op. cit., pp. 146–147.

⁴⁷ *ibid.*, p. 147.

⁴⁸ Egan (2008) op. cit., p. 4.

⁴⁹ Haigh (2006) op. cit., pp. 146–151; Hills (1989) op. cit., pp. 103–127.

⁵⁰ Hills (1989) op. cit., p. 195; Laursen (2004) op. cit., p. 28; Haigh (2006) op. cit., pp. 81, 91, 139.

⁵¹ Australian Council of Trade Unions (2007) op. cit.

⁵² See further: P. Robinson (2004) 'We'll make Hardie pay, vow unions', *The Age*, 26 October, p. 4; J. Staley (2004) 'Parallel universes: James Hardie and asbestos victims', *The Age*, 28 October, p. 14; E. Sexton (2008) 'Call to change asbestos compo plan', *The Age*, 13 June, p. 2.

⁵³ (2008) 'Former Ford mechanic wins landmark asbestos compensation', *The West*, 19 February.

2. The Bill

In May 2008 the Brumby Government pledged to introduce new laws on asbestos compensation, enabling Victorians 'who have contracted and been compensated for asbestosis the right to seek further compensation if they develop mesothelioma and asbestos-related cancers'. The Government stated that compensation payments would 'match the severe impact of those conditions', and that while the new laws will be of particular benefit to workers they 'will also be available to other members of the Victorian community'.⁵⁴

In the second reading speech of 9 October 2008, the Minister for WorkCover Mr Tim Holding stated that the Bill fulfils the Brumby Government's commitment to institute provisional damages for asbestos victims. He stated that the Bill will make Victorian law 'consistent with most other States and Territories', thereby ensuring 'greater equality and fairness in the treatment and compensation of asbestos-related claims'.

The Minister described the current awarding of damages under the common law principle of finality as 'inappropriate', given the progressive nature of asbestos-related diseases:

Until now, Victorians with asbestos-related conditions have faced a difficult legal choice. They could either make a claim at an early stage of the disease and be prevented from receiving compensation if a fatal injury later developed or wait and risk the possibility of not being compensated for the original injury.⁵⁵

To illustrate the importance of provisional damages, the Minister paid tribute to Bernie Banton, who 'would not have been able to receive compensation for his mesothelioma claim' in Victoria.⁵⁶

The Minister also outlined the amendments to the Accident Compensation Act and the Wrongs Act. The Accident Compensation Act will be amended to 'provide expedient processes and procedures for workers with asbestos-related conditions', allowing a worker's serious injury application to be heard at the same time as their claim for damages.⁵⁷ If the worker dies before the serious injury application is resolved, the serious injury threshold will be deemed to have been met; the Minister described this as 'a good outcome for families of workers who have died from an asbestos-related condition before their common law claim could be resolved'.⁵⁸

The Minister stated that the Wrongs Act will be amended 'to ensure that where a person has died from a dust-related condition, no account is taken of the benefit a dependent received from general damages paid to the deceased's estate in a subsequent dependent's claim'.⁵⁹ This means that if a victim of an asbestos-related disease dies before their claim for pain and suffering, curtailment of life and bodily and mental harm is resolved, their family can still bring a claim for damages for their economic loss; the amount they receive as beneficiaries of the deceased person's estate will not be taken into account. Currently, any damages sought by a victim cannot be recovered by their estate should they die before the claim is finalised. The Minister explained that as claims can involve 'complex litigation', 'there is a high risk that a person may die before their action is finalised'. The amendments will therefore

⁵⁴ Office of the Premier (2008) *A Fairer Deal for Asbestos Sufferers*, media release, 23 May.

⁵⁵ Victoria, Legislative Assembly (2008) *Debates*, Bk. 13, p. 4069.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ *ibid.*, p. 4070.

⁵⁹ *ibid.*, p. 4069.

mean that 'a person's claim for these damages survives the person's death for the benefit of his or her estate'.⁶⁰

In 2000, the Victorian Government amended the *Administration and Probate Act 1958* to ensure that claims for damages would survive their death for the benefit of their dependents. Recently however, a loophole within Victorian legislation has been identified, in part due to a New South Wales Court of Appeal ruling which reduced a widow's damages by the amount of general damages she received from her deceased husband's estate. Union groups and a Victorian family who were disadvantaged by this loophole have lobbied the Premier and Attorney-General to amend the legislation.⁶¹ As the Minister stated in the second reading speech, it is 'undesirable' and 'unfair' to take into account damages awarded to a victim of an asbestos-related condition 'in order to reduce compensation paid to their dependents'.⁶²

Purpose

The Bill's purpose is threefold, as set out in Part 1:

- 'permit the awarding of provisional damages to persons suffering from asbestos-related conditions; and
- amend the Accident Compensation Act 1985 in relation to proceedings that relate to asbestos-related conditions; and
- amend the Wrongs Act 1958 in relation to dependents' claims for damages arising from deaths caused by dust-related conditions'

Importantly, Section 3 defines what constitutes an asbestos-related condition:

- asbestosis
- asbestos-induced carcinoma (i.e. lung cancer)
- asbestos-related pleural diseases
- mesothelioma.

These terms may be found in the glossary section of this paper.

The Bill states that pleural plaques alone are not an asbestos-related condition. While pleural plaques are 'a marker of prior asbestos exposure', they 'do not constitute a compensable injury'.

Provisional Damages

Part 2 of the Bill provides for provisional damages. Section 4 enables a court to award provisional damages 'on the assumption that the injured person will not develop another asbestos-related condition'. The court may then award further damages at a future date if the injured person develops another asbestos-related condition. This is referred to in the Bill as 'the subsequent award'.

It should be noted that the Explanatory Memorandum states that an injured person can choose to 'have their damages awarded by a court' or to settle their claim 'on a provisional or once and for all basis'.

⁶⁰ *ibid.*, p. 4070.

⁶¹ N. Higginbottom (2008) 'Asbestos law costs compo', *The Age*, 21 July, p. 7.

⁶² Victoria, Legislative Assembly (2008) *Debates*, Bk. 13, op. cit., p. 4071.

Section 5 provides for only one subsequent award of damages for a further asbestos-related condition. Under Section 6, the court may have regard to the initial payment. Under Section 7, regard must also be paid to the legal costs incurred in the initial payment when determining legal costs to be paid in the subsequent award. The Bill states that this is to 'ensure that legal costs awarded in a subsequent action are not in respect of work undertaken for the purposes of the initial action'. Section 7(3) outlines the particular factors that the court must consider on this matter.

Amendments to the Accident Compensation Act 1985

Part 3 of the Bill provides for consequential amendments to the Accident Compensation Act 1985. Under Section 9, a new Division 9B will be inserted into Part IV of the Act. This new Section 135BB follows on from the existing clause (135BA) relating to claims by workers who are at imminent risk of death.

Section 135BB sets out the expedited process for a worker suffering from an asbestos-related condition who has an entitlement to claim damages in accordance with the existing Division 9 clauses of the Act, and has commenced proceedings. Under Section 135BB(3), the worker must apply to an Associate Judge of the Supreme Court within 30 days of proceedings having commenced, for 'an order allowing leave for the worker to proceed nunc pro tunc' (i.e. retroactively) and 'for an order allowing an expedited hearing of the proceedings' if there is an imminent risk of death from the asbestos-related condition. Section 135BB(4) states that the Associate Judge must be satisfied 'on the balance of probabilities' that the injury arising 'out of, or in the course of, or due to the nature of' employment is an asbestos-related condition.

Under Section 135BB, should the Associate Judge refuse to grant the orders referred to in Section 135BB(3), then the Associate Judge must order that proceedings be 'struck out' on the grounds that they do not apply to the section and were not brought in accordance with relevant sections 134AB and 134A.

As the Minister explained during the second reading speech, a worker who has an asbestos-related condition must satisfy a serious injury threshold when claiming damages, the meaning of which is set out under Section 134AB(38) or 135A(19) of the Accident Compensation Act. Section 135BB(7) states that if a worker dies from the asbestos-related condition 'before the hearing of the proceeding', then the serious injury is established.

Amendments to the Wrongs Act 1958

Part 4 of the Bill makes various amendments to Part 3 of the Wrongs Act 1958. Firstly, Section 12 of the Bill inserts a new Section 19(1A), to follow Section 19(1) which provides for the assessment of damages. The new Section 19(1A) provides that in assessing damages in any action under Part 3, two things shall not be taken into account:

- 'any damages under section 29(2A) of the Administration and Probate Act 1958 recovered or recoverable for the benefit of the estate of the deceased person; or
- any share of those damages paid or likely to be paid to any person for whose benefit the action under this Part is brought'

Section 13 of the Bill inserts a new Section 23AE into the Wrongs Act. It provides that Section 19(1A) applies to any action brought under Part 3 of the Wrongs Act before or after Section 12 of the Bill has commenced. It will not apply however, to an action 'if damages were awarded or a settlement was reached' before the commencement of Section 12 of the Bill.

3. Current Victorian Legislation

The manufacture, use, re-use, installation and supply of asbestos and asbestos-containing products was banned in Victoria under the *Occupational Health and Safety (Asbestos) Regulations 2003*, which supported the national ban. These regulations come under the *Dangerous Goods Act 1985*.

In Victoria, asbestos-related claims are managed by the Victorian WorkCover Authority (or WorkSafe Victoria), including allegations of negligence under common law.

4. Legislation and compensation in other Australian jurisdictions

According to Girvan and Smee, mechanisms for compensation in Australia are 'dependent upon the nature of the compensation sought, which in turn is dependent on the circumstances of the exposure to asbestos'.⁶³ Therefore, a person affected by asbestos in their workplace may pursue compensation through an occupational compensation scheme or through common law if there is an allegation of negligence. Damages may concern loss of income and earning capacity, pain and suffering, and past and future medical expenses.⁶⁴

Commonwealth employees are covered under the compensation scheme ComCare, which manages claims under the *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005*. When this legislation was passed, it was estimated that Commonwealth liabilities for asbestos would total \$0.9 billion over the next 50 years.⁶⁵

As the Minister noted in the second reading speech, Victoria and Tasmania are the only states in which victims of asbestos-related diseases cannot claim provisional damages or 'an administrative equivalent'. Outlined below are the mechanisms for compensation in New South Wales and Western Australia.

New South Wales

New South Wales is considered to have the best system of compensating victims of asbestos-related diseases compared with other Australian states, through the Dust Diseases Board and the Dust Diseases Tribunal.⁶⁶

The Dust Diseases Board was established in the late 1940s and administers 'no fault' workers compensation; the Board made payments of \$49.6 million in the year until 30

⁶³ Girvan & Smee (2005) op. cit., p. 26.

⁶⁴ *ibid.*, p. 27.

⁶⁵ Australia, House of Representatives (2005) *Debates*, no. 9, 25 May.

⁶⁶ Blundell (2006) op. cit., p. 439.

June 2003.⁶⁷ These payments are either made weekly, for medical expenses, or – in case of death – in a lump sum to the deceased's partner.⁶⁸

The Dust Diseases Tribunal was established by the New South Wales Government under the *Dust Diseases Tribunal Act 1989*. It has the same power as the Supreme Court of New South Wales, but has exclusive jurisdiction to hear claims of negligence in relation to death or injury from dust-related conditions. Claims are able to be expedited should the victims be seriously ill. The Tribunal has facilities on site for particularly ill plaintiffs (such as oxygen tanks), and is also able to take evidence from a plaintiff at their home or by their hospital bed. The Tribunal is the only one of its kind in Australia for asbestos-related diseases.⁶⁹ As of 2005, mediation between parties is mandatory before a claim can be heard by Tribunal judges.⁷⁰

Western Australia

Workers compensation in Western Australia comes under the *Workers' Compensation and Injury Management Act 1981*, and is administered by WorkCover Western Australia. Claims for compensation for asbestos-related diseases are assessed by the Industrial Diseases Medical Panel, which consists of physicians specialising in respiratory and occupational diseases. The Panel is able to hear oral evidence from a claimant's physician, and can make determinations in absentia if the claimant is hospitalised or unable to travel.

⁶⁷ Girvan & Smees (2005) op. cit., p. 27.

⁶⁸ Blundell (2006) op. cit., p. 439.

⁶⁹ Girvan & Smees (2005) op. cit., p. 26.

⁷⁰ Blundell (2006) op. cit., p. 440.

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