

Civil Liability and Other Legislation Amendment Bill 2009

Explanatory Notes

Objectives of the Bill

The objective of the Civil Liability and Other Legislation Amendment Bill 2009 is to improve the civil liability and personal injury regime in Queensland.

The Bill includes amendments to the following:

- *Civil Liability Act 2002* (CLA);
- *Civil Liability Regulation 2003* (CLR);
- *Law Reform Act 1995* (LRA);
- *Limitation of Actions Act 1974* (LAA);
- *Motor Accident Insurance Act 1994* (MAIA);
- *Motor Accident Insurance Regulation 2004* (MAIR);
- *Personal Injuries Proceedings Act 2002* (PIPA); and
- *Personal Injuries Proceedings Regulation 2002* (PIPR).

Reasons for the Bill

The amendments contained in the Bill, which are in response to stakeholder feedback, will:

- re-base and facilitate the future indexation of monetary amounts in the CLA, the MAIA and the PIPA, including the legal costs threshold and the caps on general damages;
- ensure that a de facto partner of an injured person can claim damages for loss of consortium;
- remove the requirement in the PIPA that parties must sign a certificate of readiness for trial prior to the compulsory conference;

- streamline the process under the PIPA if parties agree to the urgent commencement of proceedings;
- abolish the statutory limitation period for dust-disease related personal injury claims;
- reinstate damages for the loss of a claimant's capacity to provide gratuitous domestic services (also known as *Sullivan v. Gordon* damages);
- amend the definition of 'community organisation' in section 38 of the CLA to ensure that a volunteer undertaking community work for a Parents and Citizens Association is entitled to the protection from liability provided by section 39; and
- clarify the operation of section 43 of the CLA.

Achievement of the Objectives

The Bill achieves the objectives by making the amendments to the legislation as described below.

Estimated Cost for Government Implementation

Implementation of the Bill is not expected to result in any additional costs to Government.

Consistency with Fundamental Legislative Principles

The proposed amendment to the LAA to abolish the statutory limitation period for dust-disease related personal injury claims will have retrospective operation if:

- judgment has not been given in relation to the action;
- the action has not been settled or discontinued; or
- an application to extend the limitation has not previously been made.

While the retrospective removal of the statutory limitation period for dust-related conditions may adversely affect insurers and defendants, the amendment will mean that a person suffering from a dust-related condition will no longer need to make an application to the court to extend the limitation period before pursuing their claim. The retrospective removal of

this hurdle will deliver significant benefits to those suffering from a dust-related condition by improving their access to justice and reducing the cost and stress associated with pursuing a claim. It is justified on the basis that:

- many of the current cases of dust-related disease arise from exposure to asbestos during the 1950s, 1960s and 1970s when few, if any, adequate precautions were taken to protect workers and others; and
- dust-related conditions are often characterised by a rapid onset of symptoms, with death sometimes occurring within a very short time from diagnosis.

In addition to the retrospective amendment, the Bill also includes amendments to the CLA, the MAIA and the PIPA to allow certain monetary amounts to be prescribed by regulation. While this may give rise to a delegation of legislative power, these amendments are justified on the basis that they are required in order to facilitate the annual indexation of the amounts.

Consultation

Targeted consultation has been undertaken with the Queensland Law Society, the Bar Association of Queensland, the Australian Lawyers' Alliance, the Motor Accident Insurance Commission, the Insurance Council of Australia and a number of insurance companies currently operating in Queensland.

Notes on Provisions

Part 1 Preliminary

Clause 1 establishes the short title of the Act as the *Civil Liability and Other Legislation Amendment Act 2009*.

Clause 2 provides for the commencement of the Act.

Part 2 **Amendment of Civil Liability Act 2003**

Clause 3 provides that part 2 amends the *Civil Liability Act 2003*.

Clause 4 inserts a new subsection 5(3). This subsection ensures that damages for gratuitous domestic services provided by an injured person (refer to clause 10) are available to claimants who have suffered injuries that:

- are dust-related; or
- result from smoking or other use of tobacco products or exposure to tobacco smoke.

Clause 5 amends subsection 7(1). This amendment is required as a result of the introduction of a new statutory cause of action by clause 10.

Clause 6 makes a minor amendment to the definition of ‘*community organisation*’ in section 38 to ensure that persons who undertake volunteer work for a Parents and Citizens Association are entitled to the protection from liability provided by section 39 of the Act.

Clause 7 clarifies the operation of section 43 of the CLA. Under this section, a volunteer is not protected from personal liability if the liability is a liability that is required under statute to be insured against. Clause 6 amends section 43 to clarify that the protection from liability is only excluded where the statutory requirement to insure applies to the volunteer as insured. An example of a statutory requirement that may apply to a volunteer as insured is the requirement in the MAIA that a person must not drive an uninsured vehicle.

Clause 8 amends subsection 58(1)(b) to allow the threshold for entitlement to damages for loss of consortium or loss of servitium to be prescribed by regulation. This will facilitate the future indexation of the amount in accordance with proposed new section 75 (refer to clause 14 below).

Clause 9 makes minor consequential amendments to section 59 required as a result of the following clause.

Clause 10 inserts a new section 59A. The purpose of new section 59A is to partially re-instate damages for loss of an injured person’s capacity to provide gratuitous domestic services (also known as *Sullivan v. Gordon* damages). This amendment is in response to the decision of the High

Court in *CSR Limited v Eddy* [2005] HCA 64 which held that damages for loss of capacity to provide gratuitous domestic services are not part of the common law of Australia.

An example of damages that may be awarded under new section 59A is damages for loss of an injured parent's capacity to care for their disabled child.

Under new section 59A, damages for loss of an injured person's capacity to provide gratuitous domestic services may only be awarded by a court if:

- the injured person died because of the injuries suffered or general damages for the injured person are assessed at the amount prescribed for section 58;
- the recipient was a member of the injured person's household when the relevant injury happened;
- before the relevant injury happened the injured person provided the services to the recipient;
- the recipient was, or will be, incapable of performing the services personally because of their age or physical or mental incapacity;
- but for the injury, the injured person would have provided the services for at least six hours per week for at least a period of six months; and
- the need for the services is reasonable in all the circumstances.

The relevant time to assess whether the recipient was a member of the injured person's household and whether the injured person previously provided the services to the recipient is when the relevant injury happened. If the symptoms of the injury are not immediately apparent, the relevant injury is taken to have happened when the nature and extent of the injury was known. For example, if the injury is mesothelioma, the relevant time to assess whether the recipient was a member of the injured person's household is at the time of diagnosis and not at the time of exposure to the asbestos.

The purpose of the requirement that the recipient was not, or will not be, capable of performing the services themselves is to ensure that the services which the injured person has lost the capacity to provide are necessary. By way of example, an adult child with no particular disabilities or incapacities would be capable of cooking their own meals and doing their

own washing and cleaning, notwithstanding that prior to the injury the injured parent performed these tasks for them.

The purpose of the time requirements in new subsection 59A(2)(e) is to ensure that section 59A damages are only awarded if the recipient has an ongoing need for significant services. However, new subsections 59A(3) and (4) will allow a court to disregard certain periods of time when the recipient would have not have been in the care of the injured person when determining whether the services would have been provided to the recipient for at least six hours a week for a period of at least six months.

New section 59A makes special provision for unborn children of the injured person.

It is not proposed to insert a definition for '*domestic services*'. The particular domestic services that might be reasonable in a claim will depend upon the circumstances of the case.

Clause 10 also inserts new sections 59B, 59C and 59D.

The purpose of new section 59B is to avoid double recovery for the same loss by addressing potential overlap between section 59A damages and other damages or compensation recovered or recoverable by the injured person or the recipient. These other damages or compensation could include:

- damages for gratuitous services provided to the injured person (as limited by section 59 of the CLA);
- rehabilitation services paid by an insurer under the MAIA; and
- damages recovered by the recipient as part of a dependency claim or loss of consortium action.

New subsection 59C(1) lists the factors a court must take into account when deciding the value of any gratuitous services that the injured person has lost the capacity to provide. Consistent with the common law, a court will be required to take account of the claimant's capacity to provide the services before the relevant injury happened and to make an allowance for the vicissitudes or contingencies of life. For example, an injured person who at the time the relevant injury happened was already suffering from Parkinson's disease might reasonably be expected to have a declining capacity to provide the services.

Under new subsection 59C(2), a court may award damages for those years that an injured person would have provided the services but for the

shortening of their life by reason of the wrongful act, neglect or default. These years are sometimes referred to as the 'lost years'.

New subsection 59C(4) ensures that a court cannot compensate an injured person for loss of their capacity to provide gratuitous domestic services by any other means, for example by way of an amount awarded as part of general damages.

New section 59D will avoid double recovery for the same loss by preventing a person, including a recipient, from recovering damages for a loss if the injured person has previously recovered section 59A damages in relation to that loss.

Clause 11 amends subsection 60(1) to clarify that a court cannot order the payment of interest on an award of damages for gratuitous services provided to an injured person.

Clause 12 amends sections 62 to allow the amounts used for the calculation of general damages to be prescribed by regulation. This will facilitate the future indexation of the amounts in accordance with proposed new section 75 (refer to clause 14 below).

Clause 13 amends section 64 to facilitate the annual indexation of the threshold above which the court is required to inform parties of a proposed award (so that parties can investigate the options and appropriateness of a structured settlement).

Clause 14 inserts a new section 75 to outline the method by which annual indexation should occur. Under proposed new subsection 75(2), monetary amounts will be adjusted on 1 July each year by the percentage change in average weekly earnings over the preceding 4 quarters.

Clause 15 inserts a transitional provision required as a result of the amendments made in the previous clauses. Proposed new section 85 will ensure that damages for an injured person's loss of capacity to provide gratuitous domestic services are only available in relation to breaches of duty that happen after 1 July 2010.

Clause 15 also inserts a new section 86 to clarify that the Bill does not affect the power of Governor in Council to further amend the CLR or repeal it.

Clause 16 inserts two new definitions required as a result of the amendments made by the previous clauses.

Part 3 **Amendment of Civil Liability Regulation 2003**

Clause 17 provides that part 3 amends the *Civil Liability Regulation 2003*.

Clauses 18-20 amend the CLR to prescribe the monetary amounts previously included in the CLA.

As a result of the amendments, for injuries occurring on and from 1 July 2010:

- the threshold amount for entitlement to damages for loss of consortium (currently \$30,000) and section 59A damages will be \$35,340;
- the amounts used in the calculation of general damages will be increased by approximately 17.8%; and
- the threshold above which the court is required to inform parties of a proposed award (currently \$100,000) will be increased to \$117,800.

Part 4 **Amendment of Law Reform Act 1995**

Clause 21 provides that part 4 amends the *Law Reform Act 1995*.

At present, damages for loss or impairment of consortium are available to the husband of an injured person under common law and to the wife of an injured person under existing section 13 of the LRA.

Clause 22 amends section 13 of the LRA so that damages for loss or impairment of consortium are available to the ‘*spouse*’ of an injured person. Under the *Acts Interpretation Act 1954*, the term ‘*spouse*’ includes a de-facto partner of an injured person.

Part 5 **Amendment of Limitation of Actions Act 1974**

Clause 23 provides that part 5 amends the *Limitation of Actions Act 1974*.

Clause 24 makes a minor consequential amendment required as a result of the amendment in the following clause.

Clause 25 amends section 11 of the LAA to abolish the statutory limitation period for personal injury resulting from a dust-related condition.

New subsection 11(3) ensures that the statutory limitation period still applies to personal injury resulting from smoking or other use of tobacco products or exposure to tobacco smoke.

Clauses 26-29 make minor consequential amendments.

Clause 30 inserts a transitional provision for the amendment made by clause 25. The effect of the transitional provision is that the removal of the statutory limitation period for dust-related conditions will apply to injuries occurring both before and after commencement of the amendments provided that:

- judgment has not been given in the action;
- the action has not been settled or discontinued; and
- there has not been a previous unsuccessful application to extend the statutory limitation period.

Part 6 **Amendment of Motor Accident Insurance Act 1994**

Clause 31 provides that part 6 amends the *Motor Accident Insurance Act 1994*.

Under sections 51C and 55F of the MAIA;

- if the mandatory final offer is \$50,000 or less, the mandatory final offer must be exclusive of costs;

- if the mandatory final offer is more than \$30,000 and less than \$50,000 there is a cap of \$2,500 on the costs that can be recovered; and
- there are limits on what costs are recoverable when a matter proceeds to trial and the court awards \$50,000 or less in damages.

Clauses 33 and 34 amend sections 51C and 55F of the MAIA so that:

- if the mandatory final offer is equal to or less than the '*upper offer limit*', the mandatory final offer must be exclusive of costs;
- if the mandatory final offer is more than the '*lower offer limit*' but not more than the '*upper offer limit*' there is a '*declared costs limit*'; and
- there are limits on what costs are recoverable when a matter proceeds to trial and the court awards damages equal to or less than the '*upper offer limit*'.

Clause 32 amends section 4 to insert a definition of '*upper offer limit*', '*lower offer limit*' and '*declared costs limit*'. The terms are defined to mean the amount prescribed under a regulation. This will facilitate the annual indexation of the amounts in accordance with new section 100A (refer to clause 35).

Clause 35 inserts a new section 100A to outline the method by which annual indexation will occur. Under proposed new section 100A(2), monetary amounts will be adjusted on 1 July each year by the percentage change in average weekly earnings over the preceding 4 quarters.

Clause 36 clarifies that the Bill does not affect the power of Governor in Council to further amend the MAIR or repeal it.

Part 7 Amendment of Motor Accident Insurance Regulation 2004

Clause 37 provides that part 7 amends the *Motor Accident Insurance Regulation 2004*.

Clauses 38 and 39 amend the MAIR to prescribe the monetary amounts previously included in the PIPA.

As a result of the amendments, for injuries occurring after 1 July 2010:

- the ‘*upper offer limit*’ will be \$58,900;
- the ‘*lower offer limit*’ will be \$35,340; and
- The ‘*declared costs limit*’ will be \$2,950.

Part 8 Amendment of Personal Injuries Proceedings Act 2002

Clause 40 provides that part 8 amends the *Personal Injuries Proceedings Act 2002*.

Clause 41 amends section 37 of the PIPA to remove the requirement that parties must sign a certificate of readiness for trial prior to the compulsory conference. This amendment will address concerns that a party cannot certify that it is ready for trial prior to receipt of pleadings and the completion of discovery and interrogatories.

Clause 42 amends section 40 of the PIPA so that:

- if the mandatory final offer is equal to or less than the ‘*upper offer limit*’, the mandatory final offer must be exclusive of costs; and
- if the mandatory final offer is more than the ‘*lower offer limit*’ but not more than the ‘*upper offer limit*’ there is a ‘*declared costs limit*’.

Clause 43 makes a minor technical amendment required as a result of the amendment in the following clause.

Clause 44 inserts a new section 44. Unlike existing section 43 which requires the leave of the court, proposed new section 44 will provide a mechanism for urgent proceedings to be started by agreement. Pursuant to new subsection 43A(8), urgent proceedings started by agreement will be stayed until such time as the claimant complies with the pre-court procedures or the proceeding is discontinued or otherwise ends.

Clause 45 amends section 56 of the PIPA to allow the monetary amounts in the section to be prescribed by regulation. This will facilitate the annual indexation of the amounts in accordance with new section 75A (refer to clause 46).

Clause 46 inserts a new section 75A to outline the method by which annual indexation will occur. Under proposed new subsection 75A(2), monetary amounts will be adjusted on 1 July each year by the percentage change in average weekly earnings over the preceding 4 quarters.

Clause 47 clarifies that the Bill does not affect the power of Governor in Council to further amend the PIPR or repeal it.

Clause 48 amends the schedule to insert a definition of ‘*upper offer limit*’, and less than ‘*lower offer limit*’ and ‘*declared costs limit*’. The terms are defined to mean the amount prescribed under a regulation. This will facilitate the annual indexation of the amounts in accordance with new section 75A (refer to clause 46).

Part 9 **Amendment of Personal Injuries Proceedings Regulation 2002**

Clause 49 provides that part 9 amends the *Personal Injuries Proceedings Regulation 2002*.

Clauses 50 and 51 amend the PIPR to prescribe the amounts previously included in the PIPA.

As a result of the amendments, for injuries occurring after 1 July 2010:

- the ‘*upper offer limit*’ will be \$58,900;
- the ‘*lower offer limit*’ will be \$35,340; and
- the ‘*declared costs limit*’ will be \$2,950.