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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**ASBESTOS-RELATED CLAIMS (MANAGEMENT OF COMMONWEALTH
LIABILITIES) BILL 2005**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations,
the Honourable Kevin Andrews MP)

ASBESTOS-RELATED CLAIMS (MANAGEMENT OF COMMONWEALTH LIABILITIES) BILL 2005

OUTLINE

The purpose of this Bill is to ensure a more efficient and therefore more equitable handling of asbestos-related conditions (ARC) common law claims made against the Australian Government. This Bill would centralise the management of ARC common law claims within Comcare.

To achieve this the Bill would:

- make Comcare rather than the Commonwealth, Commonwealth authorities or Government Business Enterprises (GBEs) liable for all ARC common law claims;
- provide Comcare with an additional function of assuming and managing all Commonwealth ARC liabilities;
- provide financial arrangements for Comcare to meet all its assumed liabilities.

Comcare is responsible for workplace safety, rehabilitation and compensation in the Commonwealth jurisdiction. Comcare is established as a separate legal entity with the legal liability to pay compensation to employees or former employees of the Australian Government in accordance with the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

At present, although Comcare does not assume a legal liability for common law claims, it may take over the running of certain employee claims for non-economic loss and certain claims involving third parties. The Bill would allow Comcare to also assume the whole of the Australian Government's common law liability for ARCs. 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.

Apart from claims in relation to employees (or former employees) it is predicted 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.

The Bill would implement 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. 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 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.

Current Australian Government liabilities for asbestos claims are estimated at \$0.9 billion over the next 50 years. 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.

The ARC (MCL) 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*.

FINANCIAL IMPACT STATEMENT

The legislation provides for the transfer of the Commonwealth's asbestos common law liabilities to Comcare, and creates a Special Appropriation to allow Comcare to pay these liabilities.

While it is expected that the centralisation of the Government's asbestos-related liabilities will result in improved efficiencies in the management of these liabilities, it is not expected that the legislation will have significant effect on the level of these liabilities. The Government made provision in the 2005-06 budget for the centralised management of common law asbestos claims against the Australian Government.

ASBESTOS-RELATED CLAIMS (CENTRALISATION OF CLAIMS MANAGEMENT) BILL 2005

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 – Short title

1.1 This is a formal provision specifying the short title of the Act.

Clause 2 – Commencement

1.2 This clause sets out a table, the effect of which will be that, other than Part 1 (which will commence on the day on which the Act receives Royal Assent), the remaining Parts of the Act will come into operation on 1 July 2005 or 7 days after the date of Royal Assent, if later than 1 July 2005.

Clause 3 – Definitions

1.3 Clause 3 contains all the terms that have a particular meaning for the purposes of this Bill. Several terms are defined in this clause including:

- ‘asbestos-related claim’ means a claim made by a person suffering from an asbestos-related condition for the payment of compensation or damages from the Commonwealth or Commonwealth authority. This definition is relevant for clause 5 as it is the point when an asbestos-related claim is made that liability for that claim will transfer from the Commonwealth or Commonwealth authority to Comcare.

The definition of ‘asbestos-related claim’ also includes a claim for the payment of compensation or damages to a person who is the dependant of a person who died from an asbestos-related condition arising from their ability to bring an action for the recovery of damages from the person who was liable for the death (for example, under the *Compensation to Relatives Act 1897 NSW*).
- ‘asbestos-related condition’ (ARC) is defined to include asbestosis, asbestos-induced carcinoma, non-malignant asbestos-related pleural disease, mesothelioma and any other condition caused by exposure to asbestos. The reason for subclause (e) is to ensure that Comcare’s ability to manage all asbestos-related claims flowing from the reassignment of liability is not limited because a particular ARC does not form part of the definition. This is relevant if a new condition is discovered after commencement as without subclause (e) liabilities relating to it would not be assumed by or transferred to Comcare.
- ‘claim’ means any type of action taken by the person with an ARC to enforce his or her claim. It is not just limited to formal legal proceedings; it can include a letter of demand.

- ‘Commonwealth authority’ is defined as a body corporate established by a law of the Commonwealth or a Territory for a public purpose (other than a law of the Northern Territory, Australian Capital Territory and Norfolk Island). Commonwealth authority also means a body corporate incorporated under a law of the Commonwealth or a State or Territory in which the Commonwealth (or a body corporate mentioned in subclause (a)) has a controlling interest and a body corporate that is declared by the Minister to be a Commonwealth authority. However, Commonwealth authority does not mean a body declared by the Minister not to fall into the category of Commonwealth authority for the purposes of the Bill. This would also include a subsidiary of such a body. The Australian Postal Corporation and Telstra Corporation Limited are also expressly excluded from the definition of Commonwealth authority because of a statutory indemnity that exists in relation to the liabilities of those bodies.
- ‘contract of insurance’ means any indemnity or guarantee given in relation to an ARC liability.
- ‘court’ has an extended meaning not limited to proceedings before a court or tribunal but can include, for example, any mediation that might take place outside a court or tribunal by consent of the parties.
- ‘liability’ means actual, contingent or potential liabilities. A liability can be incurred by the Commonwealth or a Commonwealth authority where there is a duty and this duty is breached resulting in damage. A liability can arise when damage is such that a cause of action has crystallised. A liability can also arise because the existence of a duty and its alleged breach has given rise to the foundation of a cause of action.

However, liability does not mean a duty or obligation of the Commonwealth or Commonwealth authority to pay damages under an order made, judgment delivered or settlement entered into before the commencement of the Part.
- ‘subject to appeal’ means that a judgment or order is subject to appeal until any applicable time limits for lodging the appeal have expired, including any extension of those time limits and if an appeal is lodged against the judgement or order, until the appeal and any subsequent appeal have been concluded.

Clause 4 - Declarations – Commonwealth authorities

1.4 Subclause (1) would allow the Minister to declare a body that the Commonwealth or a Commonwealth entity has a substantial interest in to be a Commonwealth authority. 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.

1.5 Subclause (2) would allow the Minister to declare a body not to be a Commonwealth authority. 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.

1.6 Subclause (3) would require the Minister to publish the declaration in the *Australian Government Gazette*. However, subclause (4) would provide that failure to publish the declaration would not make it invalid.

1.7 Subclause (5) is included to alert readers to the fact that an instrument made under subclause (1) or (2) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. The instruments are not legislative in character as they are applying the law (as set out in this Bill) to particular cases rather than determining the law or altering its content.

1.8 The notes at the end of subclauses (1) and (2) point to the application of section 33(3) of the *Acts Interpretation Act 1901* which deals with the amendment and revocation of such instruments.

PART 2 – TRANSFER OF LIABILITIES

Clause 5 – Transfer of liabilities to Comcare

2.1 Subclause (1) applies to an asbestos-related claim made against the Commonwealth or a Commonwealth authority on or before this Bill commences. The effect of subclause (1) is that the making of the asbestos-related claim by a person would be the trigger for liability for that claim to transfer to Comcare. Comcare would become the successor in law to the Commonwealth or a Commonwealth authority for the liability relating to the claim, effectively becoming substituted for the Commonwealth or a Commonwealth authority in respect of the transferred liability. This would mean that Comcare would be in the position to ‘stand in the shoes’ of the Commonwealth or Commonwealth authority for all purposes relating to the claim. For example, Comcare would be substituted as the party to any proceedings underway and have the same rights as any defendant in proceedings including the right to join others, to sue third parties or to appeal judgments.

2.2 Subclause (2) applies to an asbestos-related claim made against the Commonwealth or a Commonwealth authority after the Bill commences. In this circumstance the effect of subclause (2) is that the making of the asbestos-related claim by a person would be the trigger for liability for that claim to transfer to Comcare. Again, Comcare would become the successor in law to the Commonwealth or a Commonwealth authority in relation to a claim relating to the liability.

2.3 The effect of subclause (3) is to allow a person with an asbestos-related claim against the Commonwealth or a Commonwealth authority after commencement to make the claim against Comcare.

Clause 6 – Transfer of liabilities from Comcare

2.4 Subclause (1) would enable the Minister to declare that a liability that became a liability of Comcare due to the making of an asbestos-related claim against a Commonwealth authority is no longer the liability of Comcare. This would not only be in relation to a particular liability but also a class of liabilities; for example, all the liabilities relating to a particular event.

2.5 This clause only allows the prospective retransfer of liabilities. For example, if on commencement a liability is transferred to Comcare and a month later the Minister retransfers it to the original entity then for that month Comcare will have had responsibility for managing that liability.

2.6 This clause is necessary to allow for the retransfer of any unintentionally transferred liabilities. A retransfer of liability would only be to a body that is a Commonwealth authority or was a Commonwealth authority or successor of a Commonwealth authority. It is also necessary to deal with any future events - for example, if a restructure of a Commonwealth authority resulted in the privatisation of a particular part of that authority then it may no longer be appropriate for Comcare to be assigned the liabilities related to that particular part.

2.7 Subclause (3) would require the Minister to publish the declaration in the *Australian Government Gazette*. However, subclause (4) would provide that failure to publish the declaration would not make it invalid.

2.8 Subclause (5) is included to alert readers to the fact that an instrument made under subclause (1) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. The instruments are not legislative in character as they are applying the law (as set out in this Bill) to particular cases rather than determining the law or altering its content. Subclause (6) would not allow the Minister to revoke or vary a declaration made under subclause (1).

Clause 7 – Certain consequences of transfer

2.9 This clause clarifies, for the avoidance of any doubt, the types of rights that would become those of Comcare or another receiver as a result of it becoming a successor in law in relation to a transferred liability. For example the receiver:

- would gain any benefit under a contract of insurance that relates to the liability;
- could take over any action to enforce the liability including taking steps it considers necessary to conclude proceedings and enforce judgements.

2.10 Subclause 7(4) would require the transferor to comply with any reasonable requirement of the receiver relating to the conduct of any action in respect of the liability, or made for the purposes of assisting the receiver to manage the liability, including a reasonable requirement that the transferor sign any documents. Examples of requirements that would not be regarded as reasonable would be requirements that would involve breaches of the Australian Public Service Code of Conduct, or breaches of the law generally.

PART 3 – FINANCE AND ADMINISTRATION

Clause 8 – Appropriation in respect of certain liabilities transferred to Comcare

3.1 This clause provides that the Consolidated Revenue Fund is appropriated to the extent necessary for Comcare to discharge a liability that has been transferred to it under the Bill.

Clause 9 – Money of Comcare

3.2 This clause will provide for the Finance Minister to give directions in relation to the timing and amounts of payments made to Comcare under clause 8.

Clause 10 – Access to records

3.3 This clause will allow Comcare to access information and documents in the possession, custody or control of the Commonwealth or a Commonwealth authority relating to ARC liabilities to enable them to effectively manage asbestos-related claims.

Clause 11 – Disclosure of information

3.4 This clause will enable Comcare to request, by notice in writing, from a chief executive officer of an entity, documents or information relating to an ARC liability. The chief executive officer would be required to comply with the request and could not be prevented from doing so because another law prevented the disclosure of information. Subsection (4) would provide that the chief executive officer would not be in breach of any law, or be subject to any civil penalty proceedings, merely because of their compliance with the notice. The protections in subsection (4) would also apply to any person that assists the chief executive officer to meet his or her obligation under subsection (1).

Clause 12 – Additional function of Comcare

3.5 Section 69 of the SRC Act sets out the functions of Comcare. Clause 12 will provide Comcare with the additional function of assuming and managing all the liabilities that become the liabilities of Comcare under clauses 5 and 6. The note at the bottom of this clause refers to section 70 of the SRC Act which gives Comcare the power to do all things that are necessary or convenient to be done for, or in connection with, the performance of its functions.

Clause 13 – Directions by Minister

3.6 This clause will empower the Minister to give general directions to Comcare, otherwise than in relation to a particular case.

Clause 14 – Consent required for delegation

3.7 Clause 14 would qualify the effect of section 73B of the SRC Act by requiring Comcare to obtain the written consent of the Minister before it delegates its claims management function under this Bill. The approval of the Minister is required due to the important and sensitive nature of the claims. The delegation of claims management responsibilities would only take place in

circumstances where a Commonwealth entity or authority, for whatever reason, had more expertise or experience with dealing with a certain class of asbestos-related claims.

Subclause 14(2) would make it clear that it is not necessary for Comcare to obtain the consent of the Minister in order to delegate its function under this Bill to a member of the staff of Comcare or a consultant to Comcare as this is essential to enable Comcare staff to handle claims.

Clause 15 – Compensation for acquisition of property

3.8 Clause 15 is a safety net provision to ensure that if this Bill had an unintended consequence of denying a right to a person to a claim for damages for an ARC against the Commonwealth or a Commonwealth authority, then that person could be compensated for the extinguishment of that right. For example, this may occur in circumstances 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.

Clause 16 – Regulations

3.9 This clause provides regulation making powers for the purposes of the Act. The Governor-General may make regulations for matters required or permitted under the Bill to be prescribed; or necessary or convenient to be prescribed for carrying out or giving effect to this Bill. This is a standard power contained in many Acts which allows regulations to be made where some issues are not specifically addressed in the primary legislation.