

COMPENSATORY MECHANISMS

We are going to take a look at compensation for dust diseases in Australia and compare the Australian regimes with some overseas models, in particular, USA and UK.

Australia

Dust Diseases Board and Dust Diseases Tribunal

NSW is the only state in Australia to have a specialist Dust Diseases compensation scheme which provides worker entitlements and common law damages. The Dust Diseases Board administers workers' compensation claims and there also exists in NSW the Dust Diseases Tribunal which is a specialist court dealing with common law claims resulting from specified dust diseases and other dust-related conditions.

The funding for the Dust Diseases Board is by a dust disease levy that is payable in addition to the basic workers compensation tariff levied against all employers.

Workers compensation in States other than NSW

In states other than NSW, claims by employees affected by Dust Diseases can be made under the various state workers compensation scheme.

Common Law Damages

Whereas a "no fault" compensation system exists for workers in all States in Australia, persons that have been affected by Asbestos Disease who are able to prove negligence as required according to the applicable common law can bring a common law claim.

Outside of NSW, claimants are entitled to pursue their common law rights in a similar manner to the way in which common law rights are pursued for other product losses. Generally, the heads of damages for dust disease claims are the similar to damages awarded for other personal injury claims but the uniqueness of Dust Diseases means that there are some differences.

USA

Turning to the USA, the legal regime is substantially different to Australia the UK. Damages awarded tend to be higher, and there is greater recognition of unimpaired claimants. Two areas of noticeable difference is that the USA judicial system more readily permits class actions and there are substantial differences in the Federal Bankruptcy laws.

It is possible that there will be some far reaching changes in the USA with the possible implementation of The Fairness in Asbestos Injury Resolution Act ('FAIR Act'). The legislation was passed by a USA Senate Judiciary Committee in July 2003 but has not yet been enacted primarily due to implementation and operational issues.

Compensation Mechanism in the UK

As for compensation in the UK, in short, the mechanisms are very similar to Australia. In the UK claimants have the option of pursuing statutory benefits under the workers compensation legislation or pursuing common law damages.

One differentiating factor between the UK and Australian system is the establishment of a Policyholders fund to meet the shortfall created by the event of insolvency of an insurance company.

This is significant because in the UK, it is estimated that the insurance industry will meet approximately 50% of the asbestos cost, and through the establishment of the Policyholders Protection Board, the insurance industry obligation to meet its share of the cost is satisfactorily guaranteed.

Europe

In Europe, compensation of asbestos related injuries varies from one country to the next. In general European countries have traditionally stronger social insurance tradition.

3.4 Insolvency Procedures in Australia and Overseas

Turning to insolvency procedures,

The reason for considering this is because it is possible that without a longer term solution, there will be further distress on companies with asbestos liabilities leading to unsatisfactory outcomes for claimants.

In Australia, the options essentially boil down to either the appointment of an administrator, the appointment of a Liquidator or provisional Liquidator or implementation of a Scheme of Arrangement. None of these options are particularly viable because they do not adequately address the contingent creditors, these being the presently unreported asbestos victims.

In the USA, a debtor company has the option of filing for Chapter 11 protection, and this form of protection has been extensively used in the USA by companies as a means of managing their asbestos liabilities.

Chapter 11 provides a company with a moratorium on claims thereby relieving it immediately of substantial legal whilst it continues to trade. Claimants are then paid pursuant to an approved plan of reorganisation.

The introduction of Chapter 11 style procedures in Australia has been touted, but has received a negative response from banks and lending institutions. The main criticism is that it significantly reduces the powers of creditors in favour of debtor companies.

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BARRIERS TO CHANGE

Stakeholder Preferences

We'll come back to the analyse the Stakeholders but it is worthy to note from the outset that the Stakeholders are key to the implementation of change because without their cooperation it will be near impossible to introduce change to compensation for asbestos in Australia.

State Law Inconsistency

Given that compensation for asbestos is governed by the relevant State legislation Claimants seeking workers compensation or common law damages must bring their claims under the relevant State law.

There has recently been substantive changes in tort reform in most Australian States and Territories, however Dust Diseases are excluded from tort reform in all States.

In the absence of such reforms it is likely that superimposed inflationary cost increases will.

Furthermore where inconsistencies between the States exist, it is likely that forum shopping will continue. The extent of forum shopping for Dust Diseases in Australia is the subject of contention although, for example, there is a high incidence of claimants bringing there claims in the NSW DDB or DDT who are not resident in the State.

Inconsistency in the Law of Negligence.

Underpinning the inconsistency in State Law is a basic inconsistency between the States in the application of the law of negligence. There an argument that not only should the law of negligence be consistent with other States, but also that there should be no difference between the substantive law of negligence applicable to Dust Disease claims as are applicable to any other type of claim for personal injury.

The reason why the application of negligence in tort is different for Dust Diseases is because of the unique character of asbestos, such as the latency of asbestos disease, and also because it is highly emotive.

There are a number of specific areas where common law negligence for Dust Diseases is inconsistent with other personal injuries.

Examples include **Causation** where the use of scientific evidence plays an important role, **Awards for Gratuitous Care, Exemplary Damages, Joint and Several Liability**

Contribution Estimation and Agreement

Contribution Issues between Defendants

Contribution to the funding for asbestos claimants is the cornerstone of an alternative compensation mechanism. There are possibly 2 main sources for non government contribution –

That is the typical defendants and their insurers.

The issue for defendants is how their contribution might be determined, and we can look to the FAIR Act for some guidance on this issue. Contribution of defendants would also be determined by the application of joint and several liability to certain disease types.

Contribution Issues between Insurers

The issue of contribution between insurers is more difficult. There are often multiple insurers on multiple contracts and some may argue that their exposure is determined by alternative trigger theories. Again we can look to the FAIR Act for some guidance.

The FAIR Act

In relation to funding, the FAIR Act proposes that funding will be achieved through four layers the vast majority of which is proposed to come from mandatory contributions, split 50% between defendants and 50% between insurers, spread over 27 years.

Individual defendant contribution will be based on company's prior exposure and then into sub-tiers based on revenue.

As regards to insurers, The FAIR Act does not establish an allocation formula but creates an Insurance Commission, which determines the amount that each insurer is obligated to pay into the Fund.

POSSIBLE SOLUTIONS

Turning to the possible solutions, it is necessary to bear in mind some overriding objectives

6.4 Objectives

There are probably three broad objectives.

Appropriate Compensation for Victims

Firstly, any alternative compensation scheme must provide claimants receive with appropriate level of compensation.

Administrative Ease for Claimants

Secondly, there must be administrative efficiency for claimants. This is particularly so for mesothelioma victims where life expectancy after diagnosis is particularly short.

Equity for all Stakeholders

Finally there is a need for equity for all stakeholders. There is an argument that the current common law system has the potential to create inequitable outcomes for certain stakeholders, and these inequities will increase over time as more claims emerge from people exposed outside the workplace.

In the absence of a fair compensation system it can be envisaged that some defendants will become insolvent and will not be able to fully compensate claimants which would leave an unfair situation for claimants which the Government would have difficulty ignoring.

6. Possible Solutions

Consideration of the possible solutions must start with the basic question, and that is whether there is a desire for an administrative system or whether the court based system should be retained. Somewhere in between there is a hybrid approach that assumes that the compensation mechanism is underpinned by an administrative system but incorporates elements of the court-based system.

6.2 Court Based Common Law

A Court Based system exists in most Australian States that allows claimants to pursue their common law rights.

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Advantages

It is argued by some claimants and representative groups that the court based common law system represents the best option for claimants because it provides for individual assessment and that in turn enables victims to receive commensurate compensation. Furthermore, it is argued that this court based system is responsive to a changing environment where it is possible that unanticipated heads of damage may arise, and an administrative system of compensation may not provide for such damages.

Disadvantages

The primary argument against the current system is that it is expensive primarily due to frictional costs associated with legal costs.

It has also been argued that it produces inconsistent results because of the different State laws and encourages forum shopping. Not only is it argued that the defendant groups are disadvantaged by the current system, it is argued that the claimants may be disadvantaged if the current system is unsustainable, and this will lead to insolvencies that will in turn disadvantage claimants.

6.3 Schemes

A Schemes of Arrangement typically provides that a company pays its creditors a diminished amount, but equally, it can be used by a company to pay certain types of creditors. It can also be effective in removing legal costs because the manner in which claimants prove their claim and the level of benefit is prescribed by the Scheme.

The problem with company Schemes is that they don't solve the market problem. At best they only provide a piecemeal approach for distressed companies.

6.4 Hybrid Approach

A hybrid assumes that the compensation mechanism is underpinned by an administrative system but incorporates elements of the court-based system or leaves open to claimants to pursue their common law rights outside of the administrative scheme.

6.5 Some examples may include claimant opt in or opt out, defendant opt in or opt out, or a limited scope of operation.

Administrative System

The final option considering is a fully administrative Scheme approach to asbestos compensation in Australia.

An Administrative Scheme is effectively a government-mandated monopoly that provides compensation to injured parties. Examples of such schemes would be Germany, although as already noted, common law entitlements in Germany are rather low. The main attraction to an administrative scheme is that it can significantly reduce the frictional costs

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6.6 The disadvantages of an administrative scheme is that such a scheme may offer less flexibility with respect to a claimant's circumstances and therefore may be prejudicial to some claimants.

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Improved Social Awareness

Apart from the possibility of changing the legal environment, there continues to be a need for improved social awareness and medical research.

One topical issue of late has been initiative of local government authorities to issue pink slips for homes which would need to be obtained prior to demolition work and would be part of the conveyancing process.

Conclusion

It is apparent that the problems with asbestos in Australia is not likely to diminish in the short term, and there will remain a demand that a sustainable and equitable solution is found.

There is a genuine desire by stakeholders to efficiently deliver appropriate compensation to asbestos victims, but there will likely need to be some changes.

In the event that the current system is maintained then it is likely that;

- The increasing demands to fund asbestos claims will place stress on defendant companies and their insurers.
- This pressure on defendants and insurers will likely lead to insolvencies that, under the current insolvency regime will produce unsatisfactory results for claimants.
- As a result of the unsatisfactory outcomes under the insolvency process, the claimants will look for alternative funding sources of compensation, which will start with the Government and then turn to the peripheral defendants.
- The lack of consistency between the States will mean that inconsistent results are achieved such that some claimants may perceive they are disadvantaged, which will encourage forum shopping.
- The continuation and possible increase in forum shopping will lead to piecemeal legislation by different States.

The inevitable conclusion of the scenario outlined above is wholly unsatisfactory.

The issue boils down to how we might deliver an appropriate level of compensation in the most efficient manner. In the circumstances it might not be unreasonable to adopt a hybrid approach that adopts;

- The administrative processes of the DDB and DDT implemented throughout Australia
- The funding principles of the FAIR Act are adopted