IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D4 of 2015

BETWEEN:

ALCAN GOVE PTY LTD
(ACN 000 453 663)
Appellant

and

ZORKO ZABIC
Respondent

APPELLANT'S SUBMISSIONS

PART I: INTERNET CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. The issues in the appeal are encapsulated within these questions:

   (a) What is the test to be applied in determining whether sufficient damage has been suffered to ground an action in negligence? How is this test to be applied when dealing with injuries or diseases of insidious or gradual onset?

   (b) Does a cause of action for a negligently inflicted mesothelioma arise at the time the asbestos was inhaled – or does the cause of action only arise much later when the symptoms of the disease become apparent?

   (c) As a result – is the respondent's claim for damages against the appellant barred by the *Return to Work Act 1986 (NT)*?

3. The respondent has raised issues under a Notice of Contention, but this has only been done very recently and no detail of the argument has been provided. The appellant will address those matters in its Reply.

BARTIER PERRY
Level 10/77 Castlereagh Street
SYDNEY NSW 2000

Telephone: (02) 8281 7800
Fax: (02) 8281 7838
Ref: David Greenhalgh

PART III: *JUDICIARY ACT* NOTICES

4. The respondent has issued notices under s78B of the *Judiciary Act 1903*.

PART IV: CITATION OF DECISIONS BELOW

5. Neither decision below is reported:

   (a) At trial – *Zabic v Alcan Gove Pty Ltd* [2015] NTSC 1;

   (b) On appeal – *Zabic v Alcan Gove Pty Ltd* [2015] NTCA 2.

PART V: FACTUAL NARRATIVE

6. Between 1974 and 1977 Zorko Zabic was employed by Alcan Gove Pty Ltd as a manual labourer. Mr Zabic worked at Alcan's alumina refinery near Nhulunbuy on the Gove Peninsula. In the ordinary course of his work Mr Zabic regularly removed and replaced insulation products which contained asbestos, and the trial judge accepted that Mr Zabic inhaled asbestos during this work.

7. Between November 2013 and January 2014 Mr Zabic began to experience chest pain and breathlessness. A medical investigation showed that these were the first symptoms of malignant mesothelioma – a cancer almost invariably caused by asbestos.

8. There was no dispute over the medical and scientific issues. The evidence described how inhaled asbestos fibres can cause changes to the cells in a part of the lung known as the mesothelium, but these changes remain dormant for many years. In some people a "*malignant transformation*" may occur, and if it does this might result in mesothelioma. Only a very small proportion of people exposed to asbestos contract mesothelioma. Mr Zabic conceded that "*it would not have been possible, immediately prior to 1 January 1987, to state that the changes in the plaintiff's mesothelial cells (or any genetic abnormalities) would probably lead to the development of malignant mesothelioma*" {TJ at [60]}.

9. The parties agreed that it was certain that the disease of mesothelioma commences no earlier than five years before the onset of any symptoms. It follows that Mr Zabic could not have contracted his mesothelioma any earlier than November 2008.

10. In August 2014 Mr Zabic commenced proceedings claiming common law damages from Alcan. The claim was pleaded and presented solely on the basis of Alcan's negligence. A trial was conducted before Barr J in the Supreme Court of the Northern Territory. Most of the relevant facts were agreed, including the amount of damages to be awarded in the event that Mr Zabic succeeded. Alcan raised a specific issue in defence of the claim – ie whether or not Mr Zabic's entitlement to make a claim for common law damages had been abolished by the *Return to Work Act 1986 (NT)*[1].

11. Although it does not appear to have been canvassed in either Court below, there have been amendments to the relevant provisions of the *Return to Work Act* over the years. The arguments which are raised in this appeal *might* mean that there is some significance as to when the *Return to Work Act* had its effect – on one argument it may be the original form of the Act; on the other argument it may be the form of the Act just before Mr Zabic's symptoms became apparent in late 2013. Alcan's submission is that the amendments are immaterial to the arguments – but for the sake of accuracy the two potentially relevant forms of the relevant parts of the *Return to Work Act* are attached as an annexure to this submission.

12. Section 52 is in Part 5 of the *Return to Work Act.* Section 52(1) was subject to slight amendment. Originally it provided that, subject to s189, that "*no cause of action for damages in favour of a worker ... shall arise or lie against the employer of the worker*". The section subsequently provided that, again subject to s189, that "*no action for damages in favour of a worker ... shall lie against ... the employer of the worker*".

13. Section 52(2) of the *Return to Work Act* has remained in its original form:

> *s52(2) The purpose of subsection (1) is to ensure that, so far as the legislative power of the Legislative Assembly permits, no action for damages at common law shall lie in the Territory or otherwise in the circumstances described in that subsection and nothing in this Act shall be construed as derogating from that purpose.*

14. The definition of "*injury*" has undergone minor amendment over time, but at all times was defined to mean "*a physical or mental injury arising before or after the*

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[1] The Act was originally titled the *Work Health Act 1986.* In 2007 its name was changed to the *Workers Rehabilitation and Compensation Act 1986* (see s5 of the *Law Reform (Work Health) Amendment Act 2007*). Since 22 May 2015 the Act has been the *Return to Work Act 1986* (see the *Workers Rehabilitation and Compensation Amendment Act 2015*)

commencement of the relevant provision of this Act out of or in the course of" the employment. "*Injury*" has always been defined to include a "*disease*" and the aggravation of a pre-existing disease. The word "*disease*" is defined to include "*a physical or mental ailment ... whether of sudden or gradual development and whether contracted before or after the commencement of Part 5 of the Act*".

15. Section 189(1), to which s52 is expressly subject, has only undergone amendment to correct gender references. It provides as follows:

> *(1) Where a cause of action in respect of an injury to or death of a person arising out of or in the course of his or her employment arose before the commencement of this section, a claim or action (including a claim or action at common law) in respect of that injury or death may be made, commenced or continued after the commencement of this section as if this Act had never commenced and for that purpose the repealed Act shall be deemed to continue in force.*

16. Section 189(1) commenced on 1 January 1987.

17. Barr J dismissed Mr Zabic's claim on the basis that his cause of action was barred by s52 of the WRC Act. In doing so Barr J applied the decision of the NSW Court of Appeal in *Orica Limited v CGU Insurance Limited* (2003) 59 NSWLR 14 and did so for two reasons: first, he said that was unable to distinguish *Orica v CGU* and felt duty-bound to follow it; and – even if he was not bound by *Orica v CGU* – he said that he found the reasoning of each of the judges in the NSW Court of Appeal on the critical issue to be "*persuasive*" {TJ at [67], [68]}.

18. Mr Zabic appealed this decision to the Court of Appeal of the Northern Territory. The NT Court of Appeal (Riley CJ and Southwood and Hiley J) allowed the appeal and held that the cause of action had arisen before 1987 and was thus preserved by operation of s189 of the *Return to Work Act*.

19. In a joint judgment the NT Court of Appeal held that the "*cause of action arose when the changes of his mesothelial cells commenced which was prior to 1 January 1987*" {CA at [4]}. In arriving at this conclusion, it said "*hindsight is permitted in determining when a cause of action accrues*" {CA at [47]; see also [48]}.

20. The NT Court of Appeal accepted that as at 1 January 1987 it was not known whether Mr Zabic would or would not contract any other asbestos-related disease, but in answer to Alcan's submission that this meant that there was no "*damage*" as at 1 January 1987, said that "*Although the medical evidence was to the effect that a*

person with abnormalities in the mesothelial cells may or may not acquire malignant mesothelioma, [Mr Zabic's] condition was such that the cells would so develop. That conclusion is now established, albeit with the benefit of hindsight" {CA at [58]}.

PART VI: APPELLANT'S ARGUMENT

21. The decision of the NT Court of Appeal was made in error.

22. The question to be resolved was whether Mr Zabic had a cause of action *as at* 1 January 1987. Plainly, he did not. Mr Zabic did not experience symptoms until late 2013 or early 2014 {TJ at [54]}. As at 1 January 1987 he had suffered some cellular changes – but these were dormant and were likely to remain dormant[2]. It was agreed that it was not possible as at 1 January 1987 to know whether or not a mesothelioma would develop. All that had accrued as at 1 January 1987 was a *risk* that Mr Zabic would contract mesothelioma.

23. Whether or not Mr Zabic had a cause of action as at 1 January 1987 can be tested in different ways. For example, had Mr Zabic sued alleging that he had contracted mesothelioma on 1 January 1987 his action would have been dismissed. Another test (adopted by the trial judge) was to look at each element of the claim for loss and damage – by 1987 Mr Zabic had not suffered any of the problems upon which he based his claim {see TJ at [69]}.

24. Mr Zabic did not sue on the basis that before 1 January 1987 he had a heightened risk of contracting mesothelioma. Had he done so, his action would have failed because a risk of an adverse condition, even if it is produced by negligence, does not constitute damage sufficient to complete a tortious cause of action: see *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; see also *Tabet v Gett* (2010) 240 CLR 537. The position is the same in the UK – *Gregg v Scott* [2005] 2 AC 176.

25. Apart from matters of general principle, the clear weight of the authorities – set out below – shows that as a matter of precedent Mr Zabic did *not* have a cause of action as at 1 January 1987. One strand of these authorities looks at the issue of sufficiency

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[2] It is important not to overstate the significance of "*cellular changes*"; any number of everyday occurrences cause cellular changes, and not just exposure to carcinogens (think about tobacco smoke, sunbaking, or even just the ageing process)

of damage; the other looks specifically at the circumstances which surround an insidious disease like mesothelioma.

What is the minimum damage required to give rise to a cause of action?

26. It is trite law that damage is an essential element in a claim in negligence; without damage the tort is incomplete. But what amount of damage is necessary to complete the tort? Or, put another way, what is the minimum amount of damage which must be suffered before a negligently inflicted injury becomes compensable?

27. There is little authority directly on point – no doubt this is because, as Lord Hoffman observed in *Rothwell v Chemical & Insulating Co Ltd* [2008] 1 AC 281 at [8] "*people do not often go to the trouble of bringing actions to recover damages for trivial injuries, the question of how trivial is trivial has seldom arisen directly*".

28. Alcan's submission – made in accordance with the authorities set out below – is that before there can be a cause of action, a claimant must have suffered *real* or *actual* damage, and must have begun to feel effects or symptoms of that damage which are more than *minimal*, *negligible* or *trivial*.

29. The Australian cases are not specific; the High Court has not been required to look at the sufficiency of injury issue, and has only been required to state the general proposition about the need for some damage to be demonstrated: see *Williams v Milotin* (1957) 97 CLR 465 per the Court at 474; *Hawkins v Clayton* (1987) 164 CLR 539 per Deane J at 587 and Gaudron J at 599; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 per Mason CJ, Dawson, Gaudron and McHugh JJ at 526-7 ("*a plaintiff can only recover compensation for actual loss or damage incurred, as distinct from potential or likely damage*"); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 per Callinan J at [363].

30. There are two decisions from the United Kingdom which require closer consideration: *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 and the decision mentioned above, *Rothwell v Chemical & Insulating*.

31. *Cartledge v Jopling* requires consideration because it is often misunderstood. The issue was whether negligence actions were statute-barred under s26 of the *Limitation Act 1939 (UK)*. The claimants were not suffering symptoms and were unaware that they had suffered any physical damage – but it was found as a fact that silica to

which they had been exposed had caused damage to their lungs which would have been detected upon an x-ray examination. This revealed what was described as a "*mischief*" arising under the *Limitation Act* because, as Lord Reid put it (at 772) the statute carried a "*necessary implication*" that "*where fraud or mistake is not involved, time begins to run whether or not the damage could be discovered*". This, as each of their Lordships observed, was a regrettable outcome which was at odds with the position at common law. Lord Reid (at 772) put the matter most pointedly – "*It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action*" (see also his Lordship's commentary on this decision in *Central Asbestos Co Ltd v Dodd* [1973] AC 518 at 528-9).

32. In other words, *Cartledge v Jopling* was just another decision stating that, at common law, a cause of action will not arise until the damage is sufficiently serious so that the claimant suffers its effects. In this respect all members of the panel agreed with the speech delivered by Lord Pearce (at 779) who saw the question as whether a claimant has suffered "*material damage by any physical changes in his body*" and said that "*Evidence that those changes are not felt by him and may never be felt tells in favour of the damage coming within the principle of de minimis non curat lex*": see also Lord Reid at 771 and Lord Evershed at 774.

33. *Rothwell v Chemical & Insulating* is important because it is a case where the issue of the sufficiency of damage was *the* issue. Workers had developed asbestos-related pleural plaques (and some had developed consequential anxiety). The issue was whether the claimants were entitled to compensation. Pleural plaques were described by Lord Hoffman (at [1]) as "*areas of fibrous thickening of the pleural membrane which surrounds the lungs. Save in very exceptional cases, they cause no symptoms. Nor do they cause other asbestos-related diseases. But they signal the presence in the lungs and pleura of asbestos fibres which may independently cause life-threatening or fatal diseases such as asbestosis or mesothelioma. In consequence, a diagnosis of pleural plaques may cause the patient to contemplate his future with anxiety or even suffer clinical depression*". In other words, pleural plaques are a real physical change – but the House unanimously held that they did not constitute sufficient damage to give rise to a cause of action.

34. Lord Hoffman (at [7]) described the degree of damage necessary to found a claim as "*an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability*". Lord Hope said (at [39]) that a cause of action accrues where the damage is "*beyond what can be regarded as negligible*" or "*real damage, as distinct from damage which is purely minimal*" and (at [47]) added "*But it can at least be said that an injury which is without any symptoms at all because it cannot be seen or felt and which will not lead to some other event that is harmful has no consequences that will attract an award of damages. Damages are given for injuries that cause harm, not injuries that are harmless*": see also Lord Scott at [64]; Lord Rodger at [87].

35. It is submitted that, on the basis of those general authorities set out above, any changes that Mr Zabic may have had as at 1 January 1987 were insufficient to provide the damage necessary to complete a claim in negligence. It is further submitted that the general position is strongly confirmed by the authorities set out below – which have considered the question by reference to mesothelioma and other analogous insidious diseases.

Mesothelioma – when does sufficient "*damage*" occur?

36. In addition to those cases which deal with the general principle, there have been instances where appellate courts have been required to address the specific issue as to when a cause of action arose in respect of an insidious disease[3]. An insidious disease can be of (at least) two types: there can be those cases where, after some period, a malignancy is triggered (mesothelioma and lung cancer would fall into that class); and there are those diseases which, although the result of a cumulative process, produce no or minimal symptoms and go unrecognised for many years (industrial deafness and pneumoconiosis would fall into this class). The authorities – except the decision currently under appeal – deal with the matter in way consistent with the conclusion that no cause of action arose until the symptoms became apparent.

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[3] There have been two *nisi prius* decisions which are not canvassed in these submissions. They come to opposite results: *Footner v Broken Hill Associated Smelters Pty Ltd* (1983) 33 SASR 58 (which supports Alcan's argument); *Martindale v Burrows* [1997] 1 QdR 243 (which supports Mr Zabic's argument)

37. There are two cases decided by the NSW Court of Appeal on point. The first, *Orica Limited v CGU Insurance Limited* (2003) 59 NSWLR 14, dealt with mesothelioma; the second, *Lay v Employers Mutual Limited* (2005) 66 NSWLR 270, dealt with an asbestos-induced lung cancer.

38. *Orica v CGU* arose in the context of determining whether any or which of a number of insurance policies responded to meet a particular mesothelioma claim, but on the way to resolving that specifically raised the issue as to whether, and when, a liability would have arisen for common law damages. All three judges of the NSW Court of Appeal arrived at the same result on the relevant issue (although Santow JA dissented in the result, that dissent related solely to the construction of the insurance policy).

39. On the issue as to whether a liability for common law damages had arisen Spigelman CJ (at [32]) said "*The 'injury' occasioned at the time of penetration of the lung by a fibre ... is so negligible in and of itself, as distinct from its potential, that it does not constitute damage that is compensable at common law*". Mason P said (at [72]) that any common law "*liability remained inchoate, in the eyes of tort law, because damage is the gist of the relevant cause or causes of action*" and because of this (at [75]) "*the worker could not have claimed negligence damages without damage*". Santow JA said (at [149]) "*In the present case, had the employee in 1961 sought to bring proceedings for his increased risk of contracting mesothelioma, it is clear he could not have succeeded then*".

40. The NSW Court of Appeal took a similar position in *Lay v EMI.* In that case the question arose in relation to a worker's claim for damages for a lung cancer to which asbestos had been materially contributed. The issue was whether a particular insurance policy responded to the claim. The issue of common law liability arose as a side issue and Bryson JA said (at [18]) it would "*be unjust to adopt too early an accrual date so as to entitle the person to sue for damages based on susceptibility to adverse outcomes before adverse outcome had emerged and before it could be known whether one ever would*". Santow JA (at [1]) and McColl JA (at [2]) agreed with Bryson JA.

41. There are also two decisions decided in the United Kingdom which arrive at a similar result. The first, *Brown v North British Steel Foundry Ltd* (1968) SC 51 dealt with

pneumoconiosis induced by silica; the other, *BAI (Run Off) Ltd v Durham (the "Trigger Litigation"* [2012] UKSC 14; [2012] 1 WLR 867 dealt with mesothelioma.

42. In *Brown v North British Steel* a worker had inhaled silica in the course of his work between 1941 and 1949 and contracted pneumoconiosis in 1955. Scotland only introduced a limitation period in 1954, and the legislation provided that "*nothing in this Act shall affect any action or proceeding if the cause of action arose before the passing thereof*": see s7 of the *Law Reform (Limitation of Actions etc) Act 1954 (Scot)*. The worker died, and in an action brought on behalf of his estate in 1962 it was argued that his cause of action had arisen *before* 1954 – the argument had to be put that way because otherwise the claim was statute-barred. The Scottish Court of Session unanimously held the claim was statute-barred.

43. It is submitted that the reasons for the decision of the Court of Session apply with equal force here. Lord President Clyde, said (at 64) that "*In 1949, and indeed at any time prior to 1 January 1955, no Court could competently have awarded damages for any harm that had been done to this workman, for admittedly at that stage he had not sustained any*". Lord Guthrie observed (at 68) that "*Between 1941 and 1949 the deceased did not suffer from pneumoconiosis, and was not at all disabled from work by the inhalation of dust. Therefore, if an action had been raised shortly after May 1949, it could not have succeeded, since it could not have been averred or proved that the deceased suffered from the pneumoconiosis which is the gist of his claim*". Lord Migdale observed (at 70) that "*It was clear on the evidence that pneumoconiosis does not inevitably follow on the inhalation of noxious dust. Accordingly the deceased could not have raised an action founded on the bare averment that he had been exposed to noxious dust. He would also have to aver that as a result of that exposure he had contracted pneumoconiosis. There is nothing to show that he had it at that time*".

44. In the *Trigger Litigation* a group of cases were collected for consideration in an attempt to resolve how, and in what circumstances, an employer's liability insurance policy would respond to mesothelioma claims. The principal decision of the UK Supreme Court was delivered by Lord Mance (with whom Lord Kerr agreed) who said this (at [64]):

> *"Despite the apparent clarity of the suggested distinction between liability for a risk and for a disease, no cause of action at all exists unless and until mesothelioma actually develops. Neither the exposure to asbestos nor the risk that this may one day lead to mesothelioma or some other disease is by itself an injury giving rise to any cause of action."*

45. Lord Clarke said (at [77]) "*The employee's cause of action is not that he was exposed to the risk of mesothelioma. He has no claim unless he in fact suffers the disease. It is the disease which represents the damage which completes the cause of action and it is only then that his cause of action accrues and the relevant time limit begins to run*". Lord Dyson (at [90]) agreed with both Lord Mance and Lord Clarke.

46. And apart from those two decisions, there are other UK cases which say that no cause of action arises until symptoms became apparent. The decision in *Cartledge v Jopling* (so far as it was considering the common law as opposed to the statute) was perfectly consistent with this result. In *Barker v Corus UK Ltd* [2006] 2 AC 572, during the course of considering a refinement to the "*Fairchild exception*", a majority of the House reaffirmed that it was not until the mesothelioma arose that the claimant had a cause of action: see Lord Hoffman at [48]; Lord Scott at [53]; Baroness Hale at [120]. In *Rothwell v Chemical & Insulating* where Lord Hope said (at [50]) of the fact that the workers who had developed pleural plaques stood at a risk of contracting some much worse disease, including mesothelioma, that "*Time has not yet begun to run against any of the claimants who may have the misfortune of developing an asbestos-related disease in the future which is actionable*".

47. This leaves one appellate decision which is to the contrary – that is the decision currently under appeal. For reasons set out above, it is respectfully submitted that it was decided in error – inconsistently with principle, and contrary to the clear weight of precedent. In addition to those matters, there is one particular matter upon which the NT Court of Appeal focused, and which led it into error.

48. The NT Court of Appeal explicitly employed what it described as "*hindsight*" in concluding in 2014 that Mr Zabic had a cause of action in 1987 – "*hindsight is permitted in determining when a cause of action accrues*" {CA at [47]; see also [48], [58]}. That statement, with respect, is an error of law.

49. The NT Court of Appeal {at [47]} identifies the legal principle for using hindsight in this way as "*Hindsight is frequently employed when one is endeavouring to ascertain*

the cause or causes of an injury or damage which does not become manifest until sometime later". That statement is no more than a truism: determining the cause of an event will always involve a Court examining and evaluating antecedent events. That has nothing to do with the present issue. And it is not obvious as to how such a conclusion can conform with the *agreed* fact that it was not possible to know as at 1 January 1987 as to whether or not a mesothelioma would develop. It is also a statement contrary to precedent: see *Orica v CGU* per Mason P at [72] and Santow JA at [149].

10 **Was Mr Zabic's claim barred by statute?**

50. It follows that Mr Zabic could not bring his mesothelioma claim within the terms of s189(1) of the *Return to Work Act* – that is, no cause of action had arisen as at 1 January 1987. In that event the consequences are that his claim was barred by operation of s52 of the *Return to Work Act*. His rights, which have a substantial value, are governed by the scheme set up under the *Return to Work Act*.

PART VII: APPLICABLE STATUTORY PROVISIONS

51. Annexed to these submissions are two small bundles of legislation containing the relevant provisions in the *Return to Work Act*, comprising:

20 (a) Section 3 – containing the definitions of "*injury*" and "*disease*";

(b) Section 52; and

(c) Section 189.

52. The first bundle is the legislation at enactment. The second bundle is the legislation at November 2013 – and relevant sections continue in that same form.

PART VIII: ORDERS SOUGHT

53. The appellant seeks the following orders:

(a) Appeal allowed;

(b) Set aside the orders of the Court of Appeal made on 2 April 2015 and, in lieu thereof, order:

(i) Appeal dismissed;

(ii) The appellant is to pay the respondent's costs at first instance and on appeal, such costs to be agreed or taxed;

(c) The appellant to pay the respondent's costs.

PART IX: LENGTH OF ARGUMENT

54. We estimate the appellant's argument will take less than two hours.

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Dated: 19 June 2015

Geoffrey Watson
Tel: 9151 2040
Fax: 9233 1850
watson@newchambers.com.au

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James Sheller
Tel: 9151 2040
Fax: 9233 1850
sheller@newchambers.com.au

NORTHERN TERRITORY OF AUSTRALIA

No. 49 of 1986

AN ACT

to promote occupational health and safety in the Territory to prevent industrial injuries and diseases, to promote the rehabilitation and maximum recovery from incapacity of injured workers, to provide financial compensation to workers incapacitated from industrial injuries or diseases and to the dependants of workers who die as the results of such injuries or diseases, to establish certain bodies and a fund for the proper administration of the Act, and for related purposes

[Assented to 16 December, 1986]

BE it enacted by the Legislative Assembly of the Northern Territory of Australia, with the assent as provided by the *Northern Territory (Self-Government) Act* 1978 of the Commonwealth, as follows:

PART I - PRELIMINARY

1. SHORT TITLE

This Act may be cited as the *Work Health Act 1986*.

2. COMMENCEMENT

(1) Sections 1, 2 and 194 and Part II shall come into operation on the day on which the Administrator's assent to this Act is declared.

(2) The remaining provisions of this Act shall come into operation on such date or dates as is or are fixed by the Administrator by notice in the *Gazette*.

3. INTERPRETATION

(1) In this Act, unless the contrary intention appears -

"act" includes an omission;

"approved" means approved by the Authority or the Minister;

"Authority" means the Work Health Authority established by section 6;

"average weekly earnings" means the Average Weekly Earnings for Full Time Adult Persons, Weekly Ordinary Time Earnings for the Northern Territory last published by the Australian Statistician before 1 January before the date in respect of which they are required under this Act to be assessed;

"benefit" includes an advantage of any kind;

"Chief Executive Officer" means the person appointed under section 8(1) as Chief Executive Officer of the Authority and includes a person appointed under section 9(1) to act as the Chief Executive Officer while he is so acting;

"compensation" means a benefit, or an amount paid or payable, under this Act as the result of an injury to a worker and, in sections 132 to 137 inclusive and section 167, includes -

(a) an amount in settlement of a claim for compensation; and

(b) costs payable to a worker by an employer in relation to a claim for compensation;

"Court" means the Work Health Court;

"disease" includes a physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development and whether contracted before or after the commencement of Part V;

"employer" means a person by or for whom a worker is engaged or works or, in relation to a member of the Legislative Assembly, a Judge, a magistrate or a member of the Police Force, means the Territory;

"impairment" means a temporary or permanent bodily or mental abnormality or loss caused by an injury;

"incapacity" means an inability or limited ability to undertake paid work because of an injury;

"incident" means an event occurring at, or a situation arising in, a workplace which results in an injury;

"independent contractor" means a natural person who has a current certificate of exemption issued to him under section 58 by the Authority;

"industrial agreement" means an agreement which wholly or partly regulates terms or conditions of employment;

"industrial award" means -

(a) an award or determination relating to the terms and conditions of employment of a worker made under an Act; or

(b) an award or a certified agreement made under the *Conciliation and Arbitration Act 1904* of the Commonwealth;

"injury", in relation to a worker, means a physical or mental injury arising before or after the commencement of the relevant provision of this Act out of or in the course of his employment and includes -

(a) a disease; and

(b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease;

"insurer" means -

(a) a body corporate authorized under the *Insurance Act 1973* of the Commonwealth to carry on insurance business; or

(b) the Territory Insurance Office established under the *Territory Insurance Office Act*,

and includes a person who, at the time a relevant policy of insurance or indemnity was taken out, was authorized as referred to in paragraph (a);

"Registrar" means the Registrar of the Court appointed under section 100;

"repealed Act" means the Acts repealed by section 188, as in force immediately before the commencement of that section;

"seaman" means a person employed or engaged in any capacity on board a ship;

(f) weekly payments shall not be payable in respect of a period during which the owner or charterer of the ship is liable to pay the expenses of maintenance of an injured seaman; and

(g) notwithstanding any limitation of liability in any other law in force in the Territory, compensation shall be paid in full.

(3) Without prejudice to any other means of proof available -

(a) a ship shall be deemed to have been lost with all hands on board if it is shown by an official return produced out of official custody or other evidence that the ship left a port of departure not later than 12 months before the institution of proceedings under this Act and has not been heard of since that departure; and

(b) a duplicate agreement or list of the crew of a ship lost with all hands made out and produced by the proper officer out of official custody shall, in the absence of proof to the contrary, be sufficient evidence that the seamen named were on board at the time the ship was lost.

52. ABOLITION OF CERTAIN RIGHTS TO BRING ACTION

(1) Subject to section 189, no cause of action for damages in favour of a worker or a dependant of a worker shall arise or lie against the employer of the worker or the Nominal Insurer in respect of -

(a) an injury to the worker; or

(b) the death of the worker -

(i) as a result of; or

(ii) materially contributed to by,

an injury.

(2) The purpose of subsection (1) is to ensure that, so far as the legislative power of the Legislative Assembly permits, no action for damages at common law shall lie in the Territory or otherwise in the circumstances described in that subsection and nothing in this Act shall be construed as derogating from that purpose.

(3) Except as provided by this Act, no action for compensation or a benefit of any kind by a worker or a dependant of a worker shall lie in the Territory against the employer of the worker in respect of -

(a) an injury to the worker; or

(b) the death of the worker -

(i) as a result of; or

(ii) materially contributed to by,

an injury.

53. COMPENSATION IN RESPECT OF INJURIES

Subject to this Part, where a worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his -

(a) death;

(b) impairment; or

(c) incapacity,

there is payable by his employer to the worker or the worker's dependants, in accordance with this Part, such compensation as is prescribed.

54. ENTITLEMENT TO OTHER COMPENSATION

(1) In this section "another law" means -

(a) a law of the Commonwealth; or

(b) a law in force in a place outside the Territory.

(2) This section applies where an injury is caused to a worker which gives him or his dependants a right to claim compensation or a right of action under another law in circumstances where the injury would otherwise have entitled him or his dependants to compensation under this Part.

(3) Subject to subsection (4), if -

(a) compensation has not been paid or damages have not been recovered; and

(b) an award of compensation or judgment for damages has not been given or entered,

in respect of an injury to a worker, under another law, the worker is, or in the case of his death, his dependants are, entitled to compensation under this Part as if there were no right to claim compensation or right of action under another law.

(4) Where a person -

(a) receives compensation under this Part in respect of an injury to a worker; and

(q) prescribing interest to be paid for the purposes of section 131(3) by an employer on amounts owing to an insurer;

(r) prescribing the powers of the Authority or officers in relation to investigations at workplaces; and

(s) prescribing penalties, not exceeding $1,000, for a breach of the Regulations.

PART IX - REPEAL, SAVINGS AND TRANSITIONAL

188. REPEAL

The Acts listed in Schedule 3 are repealed.

189. CLAIM, &c., BEFORE OR AFTER COMMENCEMENT OF ACT

(1) Where a cause of action in respect of an injury to or death of a person arising out of or in the course of his employment arose before the commencement of this section, a claim or action (including a claim or action at common law) in respect of that injury or death may be made, commenced or continued after the commencement of this section as if this Act had never commenced and for that purpose the repealed Act shall be deemed to continue in force.

(2) Notwithstanding subsection (1), a person may claim compensation under this Act in respect of an injury or death referred to in that subsection and on his so doing this Act shall apply as if the injury or death occurred after the commencement of this section, and subsection (1) shall have no effect.

190. NOMINAL INSURER CONTINUES FOR CERTAIN PURPOSES

(1) For the purposes of the commencing, continuing or enforcing of a claim or action by or against the Nominal Insurer in respect of an injury to a person, or the death of a person as the result of an injury, arising out of or in the course of the employment of the person, the Nominal Insurer established by section 150 is the same person as the Nominal Insurer established by section 16D of the repealed Act.

(2) Where before the commencement of section 164 the Nominal Insurer as then constituted made an estimate or determination under section 16Q of the repealed Act in respect of the year commencing 1 July 1986, that estimate or determination shall, for the purposes of section 164, be deemed to have been made and approved under section 164 and any amount contributed to the former Fund before that commencement as a result of such a determination shall be taken into account in determining a persons liability to contribute to the Fund after that commencement.

NORTHERN TERRITORY OF AUSTRALIA

As in force at 1 July 2013

WORKERS REHABILITATION AND COMPENSATION ACT

An Act about workers' rehabilitation and compensation

Part 1 Preliminary matters

1 Short title

This Act may be cited as the *Workers Rehabilitation and Compensation Act*.

3 Interpretation

(1) In this Act:

ABN has the same meaning as in the *Income Tax Assessment Act 1997* of the Commonwealth.

act includes an omission.

acting in an official capacity, in relation to an inspector, means the inspector is exercising powers or performing functions under, or otherwise related to the administration of, this Act.

appointed member, of the Council, means a member appointed under section 10(1)(b).

approved means approved by the Authority or the Minister.

approved form means a form approved by the Authority for the purposes of the provision in which the expression occurs.

Authority means the Work Health Authority continued under the *Work Health Administration Act*.

average weekly earnings means the Average Weekly Earnings for Full Time Adult Persons, Weekly Ordinary Time Earnings for the Northern Territory last published by the Australian

Statistician before 1 January before the date in respect of which they are required under this Act to be assessed.

benefit includes an advantage of any kind.

Chair, of the Council, includes the Deputy Chair while acting as the Chair.

compensation means a benefit, or an amount paid or payable, under this Act as the result of an injury to a worker and, in sections 132 to 137 inclusive and section 167, includes:

(a) an amount in settlement of a claim for compensation; and

(b) costs payable to a worker by an employer in relation to a claim for compensation.

Council means the Workers Rehabilitation and Compensation Advisory Council.

Court means the Work Health Court continued under the *Work Health Administration Act*.

disease includes a physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development and whether contracted before or after the commencement of Part 5.

employer means a person by or for whom a worker is engaged or works or, in relation to a member of the Legislative Assembly, a Judge, a magistrate or a member of the Police Force, means the Territory.

impairment means a temporary or permanent bodily or mental abnormality or loss caused by an injury.

incapacity means an inability or limited ability to undertake paid work because of an injury.

incident means an event occurring at, or a situation arising in, a workplace which results in an injury.

industrial agreement means an agreement which wholly or partly regulates terms or conditions of employment.

industrial award means:

(a) an award or determination relating to the terms and conditions of employment of a worker made under an Act; or

(b) an award or a certified agreement made under the *Workplace Relations Act 1996* of the Commonwealth.

injury, in relation to a worker, means a physical or mental injury arising before or after the commencement of the relevant provision of this Act out of or in the course of his or her employment and includes:

(a) a disease; and

(b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease,

but does not include an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment.

inspector means an inspector under section 7A.

insurer means:

(a) a body corporate authorised under the *Insurance Act 1973* of the Commonwealth to carry on insurance business; or

(b) the Territory Insurance Office established under the *Territory Insurance Office Act*,

and includes a person who, at the time a relevant policy of insurance or indemnity was taken out, was authorised as referred to in paragraph (a).

PAYG provisions means the provisions of Division 12 of Schedule 1 to the *Taxation Administration Act 1953* of the Commonwealth.

plant includes machinery, pressure vessels, equipment, appliances, implements, scaffolding and tools, any component thereof and anything fitted, connected or appurtenant thereto.

registrar means:

(a) the registrar of the Court; or

(b) a judicial registrar of the Court.

repealed Act means the Acts repealed by section 188, as in force immediately before the commencement of that section.

(3) Without prejudice to any other means of proof available, for proceedings under this Act:

(a) a ship is taken to have been lost with all hands on board if:

(i) the ship was expected to arrive at a port at a time; and

(ii) the ship did not arrive and has not been heard of for at least 12 months since that time; and

(b) an official list of the crew, or the certificate of a proper authority stating that certain sailors were on board the ship, in the absence of proof to the contrary, is sufficient evidence that the sailors were on board the ship at the time of its loss.

52 Abolition of certain rights to bring action

(1) Subject to section 189, no action for damages in favour of a worker or a dependant of a worker shall lie against:

(a) the employer of the worker;

(b) any person who, at the relevant time, was a worker employed by the same employer as the deceased or injured worker; or

(c) the Nominal Insurer,

in respect of:

(d) an injury to the worker; or

(e) the death of the worker:

(i) as a result of; or

(ii) materially contributed to by,

an injury.

(1A) In subsection (1) ***injury*** does not include an injury inflicted or caused by, or as the result of an action or omission of, a worker employed by the same employer as the deceased or injured worker in circumstances in which the employer of the worker would not be liable under section 22A of the *Law Reform (Miscellaneous Provisions) Act* to indemnify the first-mentioned worker in relation to any liability incurred by him or her or her in relation to the injury.

(2) The purpose of subsection (1) is to ensure that, so far as the legislative power of the Legislative Assembly permits, no action for damages at common law shall lie in the Territory or otherwise in the circumstances described in that subsection and nothing in this Act shall be construed as derogating from that purpose.

(3) Except as provided by this Act, no action for compensation or a benefit of any kind by a worker or a dependant of a worker shall lie in the Territory against the employer of the worker in respect of:

(a) an injury to the worker; or

(b) the death of the worker:

(i) as a result of; or

(ii) materially contributed to by,

an injury.

53 Compensation in respect of injuries

(1) Subject to this Part, if a Territory worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his or her:

(a) death;

(b) impairment; or

(c) incapacity,

there is payable by his or her employer to the worker or the worker's dependants, in accordance with this Part, such compensation as is prescribed.

(2) Compensation under this Act is payable only in respect of employment that is connected with the Territory.

(3) The fact that a worker is outside the Territory when the worker suffers an injury does not prevent compensation being payable under this Act in respect of employment that is connected with the Territory.

(4) Compensation under this Act does not apply in respect of the employment of a worker on a ship if the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) applies to the worker's employment.

53AA Worker's employment connected with a State

(1) A worker's employment is connected with a particular jurisdiction if:

(a) the worker usually works in that employment in that jurisdiction; or

(b) if no jurisdiction or no one jurisdiction is identified by paragraph (a) – the worker is usually based in the jurisdiction for the purposes of that employment; or

(ii) the person failed at a material time to observe that provision of the approved code of practice,

that matter shall be taken as proved unless the court is satisfied that in respect of that matter the person complied with that provision of this Act otherwise than by way of observance of that provision of the approved code of practice.

Part 9 Repeal, savings and transitional matters for Work Health Act 1986

188 Repeal

The Acts listed in Schedule 3 are repealed.

189 Claim etc. before or after commencement of Act

(1) Where a cause of action in respect of an injury to or death of a person arising out of or in the course of his or her employment arose before the commencement of this section, a claim or action (including a claim or action at common law) in respect of that injury or death may be made, commenced or continued after the commencement of this section as if this Act had never commenced and for that purpose the repealed Act shall be deemed to continue in force.

(2) Notwithstanding subsection (1) but subject to subsection (3), a person may claim compensation under this Act in respect of an injury or death referred to in that subsection and on his or her so doing this Act shall apply as if the injury or death occurred after the commencement of this section, and subsection (1) shall have no effect.

(3) Nothing in subsection (2) shall be construed as permitting a claim for compensation to be made under this Act in respect of an injury to or the death of a person arising out of or in the course of the person's employment before the commencement of this Act where, in respect of that injury or death, compensation has been paid:

(a) under the repealed Act;

(b) under any other law in force in the Territory relating to the payment of compensation in respect of the injury or death of the person arising out of or in the course of the person's employment; or

(c) at common law.

(4) Where, but for subsection (2), a person would have been entitled to weekly incapacity benefits under this Act in respect of an injury that occurred before 1 January 1987:

(a) the person is entitled to weekly incapacity benefits payable at the rate determined under section 65(7) of this Act as in force immediately before 15 October 1991 multiplied by the average weekly earnings at the date of payment and divided by the average weekly earnings at 15 October 1991; and

(b) subsection (1) has no effect.

190 Nominal Insurer continues for certain purposes

(1) For the purposes of the commencing, continuing or enforcing of a claim or action by or against the Nominal Insurer in respect of an injury to a person, or the death of a person as the result of an injury, arising out of or in the course of the employment of the person, the Nominal Insurer established by section 150 is the same person as the Nominal Insurer established by section 16D of the repealed Act.

(2) Where before the commencement of section 164 the Nominal Insurer as then constituted made an estimate or determination under section 16Q of the repealed Act in respect of the year commencing 1 July 1986, that estimate or determination shall, for the purposes of section 164, be deemed to have been made and approved under section 164 and any amount contributed to the former Fund before that commencement as a result of such a determination shall be taken into account in determining a persons liability to contribute to the Fund after that commencement.

191 Continuation etc. of existing policies

Where immediately before the commencement of Part 7 there was in force a policy of insurance or indemnity issued in pursuance of the repealed Act, that policy shall, on that commencement, be deemed to have been issued in the terms of Schedule 2 and, subject to this Act, shall continue in force, and it shall not be cancelled or lapse without the approval in writing of the Authority.

192 Continuation of self-insurance

Where immediately before the commencement of Part 7 an employer was authorized under section 18(1) of the repealed Act to undertake the liability to pay compensation to his or her own workers he or she shall, on and from that commencement, for a period of 3 months, be a self-insurer for the purposes of this Act as if, on that commencement, the Authority approved the employer, under section 117, to self-insure during that period,