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27 January 2011

Hon James Wood AO QC
Chairperson
NSW Law Reform Commission
DX 1227
SYDNEY
By fax: 8061 9376
By email: nsw_lrc@agd.nsw.gov.au

Dear Sir

Review of Compensation to Relatives Laws

We refer to your letter of 1 December 2010 inviting preliminary submissions in relation to the inquiry regarding the legislation governing the provision of damages, including the *Compensation to Relatives Act 1897*, *Law Reform (Miscellaneous Provisions) Act 1989* and *Civil Liability Act 2002*.

Our firm acts for a number of clients who would be impacted by any amendments to the relevant legislation.

We have had the opportunity to read the speeches from Hansard in relation to the matter and are familiar with the background of this inquiry.

We are aware that the statutory amendments currently under consideration relate only to the claims made by relatives of persons affected by asbestos related diseases.

We request that you reconsider the proposed amendment and recommend that Parliament not proceed with same.

Our submissions regarding the proposed amendments are as follows:

- 1 The decision in *BI (Contracting) Pty Ltd v Strikwerda* 2005 NSWCA 288 was not a new development. It was merely an application of principles that have existed in law for many years.

We refer you to the judgment of Dixon J in the High Court in *Public Trustee v Zoanetti* (1945) 70 CLR 266 and in particular the following:

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"Two rules are clearly settled. One is that what is recoverable for the benefit of the widow or other relative of the deceased is the pecuniary loss resulting from his death and that nothing may be recovered by way of solatium for the suffering that his death caused to his widow or relatives...."

"The other is that in ascertaining the pecuniary loss resulting from his death, there must be taken into consideration, on the one side, the reasonable expectation of benefit upon which the claimant would have been entitled to rely, had his life not been brought to an end, and, on the other side, the pecuniary benefits, arising upon his death, to which the claimant had a reasonable expectation, whether as of right or otherwise. For example, if the deceased leaves property which under his will or on intestacy the widow takes a share or interest, the effect upon her financial position of her taking that share or interest must be taken into account as against her loss of those material benefits which depended upon the continuance of her husband's life."

In essence to fail to take into account any financial benefit that accrues to the widow as a result of the death would mean that the widow is overcompensated.

The proposed amendment, would in our submission, have the effect of disregarding a fundamental principle of assessment of damages, namely that they are to compensate for loss and do no more. Accordingly, in our submission, there ought to remain a deduction for any benefits received by the claimant from the deceased's claim for damages.

- 2 The proposed amendment would in effect differentiate between widows and relatives of asbestos victims and widows and relatives of victims of other tortiously received injuries.

Widows and relatives who bring claims pursuant to the *Compensation to Relatives Act 1897* would continue to have their entitlements calculated in accordance with the principles set out by the Court of Appeal in *Strikwerda*.

Should the proposed amendments be legislated then widows and relatives of asbestos victims would in effect, receive a benefit which other widows and relatives of victims would not.

There is no basis, in our submission, to treat widows and relatives of different victims differently, and certainly, there is no basis, in our submission to confer additional financial benefits on one type of relative or another.

There is no evidence that the widows and relatives of asbestos victims are likely to suffer greater financial loss than the widows and relatives of other victims.

- 3 You may be aware that asbestos victims in NSW who contracted their asbestos disease as a result of inhalation of asbestos dust and fibres during the course of their employment in NSW are entitled to benefits from the Dust Diseases Board of NSW.

Benefits are also payable to the widows of these asbestos victims and their dependent children.



The benefits payable include:

- a lump sum payment upon death of the victim. This lump sum is currently \$245,700. It will increase to \$311,050 over three years;
- weekly income benefits to the date of death of the widow or re-marriage by the widow whichever is the earlier;
- payment of funeral expenses as regulated.

The lump sum benefit is not taken into consideration by the Dust Diseases Tribunal when an award of damages is made to the estate of the deceased. Accordingly, most widows may expect to receive a lump sum payment of general damages from the estate of the deceased as well as an additional lump sum from the Dust Diseases Board.

The weekly payment made to the widow and/or family of the asbestos victim is made regardless of whether or not a claim for economic loss is made in the estate claim.

When these benefits are taken into consideration, then it would appear in our submission, that widows and relatives of asbestos victims are adequately compensated for the financial losses which they encounter as a result of the demise of the asbestos victim.

We note the benefits payable by the Dust Diseases Board are not available to other victims of tortiously received injuries and yet, as we have submitted above at point 2, the widows and relatives of asbestos victims are being offered by the proposed amendments, even further financial benefits.

- 4 The proposed amendments have been introduced in a number of other State jurisdictions. However, as we understand it, those States do not offer benefits such as those conferred by the Dust Diseases Board to the families of asbestos victims. Therefore, in our submission, it is not reasonable to rely in this instance on the amendments introduced in other States.

We understand the proposed amendments have not been introduced in the State of Queensland. That State has a similar statutory scheme to that of the Dust Diseases Board, whereby additional financial assistance is offered to the families of asbestos victims.

In our submission, the fact that the State of Queensland has refrained from making such an amendment, supports our submission that it is not reasonable in this situation in NSW to follow the steps taken by Western Australia, Victoria and South Australia.

We note references in the speech recorded in Hansard to the impact which the proposed amendment would have on the size of future claims. It is our preliminary submission that it is too early to calculate the impact on future claims. Our expectation is that the number of claims will increase because of the larger benefits which claimants could expect to receive should the



proposed amendments be legislated. We reserve our right to make further submissions in respect of this aspect as the inquiry continues.

We confirm we do not have any objection to this submission being published.

Please continue to keep us informed regarding the progress of the inquiry.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Con Gotis-Graham'.

Janet Abboud
Senior Associate

Con Gotis-Graham
Partner

