

31 January 2011

The Hon James Wood AO QC  
Chairperson  
NSW Law Reform Commission  
DX 1227 SYDNEY

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Dear Chairperson,

**Review of Compensation to Relatives**

I refer to your letter of 1 December 2010 concerning the review of a number of aspects of the law relating to compensation to relatives. Thank you for providing AICF an opportunity to make a preliminary submission to this inquiry.

Asbestos Injuries Compensation Fund Limited (AICF) manages the Asbestos Injuries Compensation Fund trusts, and in doing so manages claims for personal injury compensation relating to asbestos related disease resulting from exposure to or use of products manufactured or distributed by the former James Hardie companies Amaca Pty Limited and Amaba Pty Limited (both under NSW administered winding up). AICF has been managing the affairs of these companies and managing claims against the companies since February 2007.

AICF manages many hundreds of claims each year, and in the financial year ending 31 March 2010 paid over \$93 million to compensation claimants. In the previous financial year, over \$100 million was paid to compensation claimants. AICF has extensive experience in the management of claims for compensation arising out of exposure to asbestos products.

With this background in mind, we respectfully offer the following comments in relation to the Law Reform Commission's inquiry.

1. What is the issue or concern giving rise to the reference to the Law Reform Commission? It is not clear from the inquiry's Terms of Reference, or from the announcement by the Attorney General, that there is a particular issue or concern with the way in which the law in this area currently operates. It is difficult to analyse and discuss the merits of amending the law in the absence of a clearly articulated issue or concern with the way the law currently operates.
2. The first term of reference requires the Commission to consider the merits of what is known as the "*Strikwerda*" principle. As the Attorney General noted in his announcement of the reference to the Law Reform Commission, the principle is a long established one, originating in the United Kingdom and subsequently confirmed as long ago as 1945 in the High Court of Australia.

We are not aware of any commentary indicating any fundamental error in logic or legal analysis with the operation of this principle. On the contrary, and bearing in mind the fundamental principle of damages being to compensate for loss, the principle appears to have been accepted for many years (certainly since 1945) as being sound in law and in its operation.

3. The Commission's second term of reference mentions the potential need for further economic modeling. AICF supports the need for a careful analysis of the economic impact of any amendment of the law in this area. This is because the suggested change would operate to remove a deduction that is currently made during the process of calculating damages in compensation to relatives matters. Logic suggests that the removal of a deduction, by definition, must operate to increase the amount of damages payable to the relatives concerned. What is the rational basis for this increase?

AICF has very limited experience of a reform of this nature in Victoria. The very small number of claims finalised since the law was changed in that State, and the difficulty of ensuring that any pre and post reform comparison of damages awards is being undertaken on a genuine "like with like" basis, has meant that to date it is not possible to form a view, on a proper empirical basis, of the financial impact of the reform in that State.

4. The Commission's third term of reference requires the Commission to have regard to equity implications, in terms of fairness between defendants and claimants, and as between different categories of claimants. In this regard, it is not clear why the law should operate in one way with respect to dust related claims, and in other ways in respect to other forms of legal liability. In our respectful submission, legal principles for establishing liability, and for determining compensation when liability is found to exist, should be consistent across all forms of conduct in society. We are not aware of any logical or rational basis for conferring additional financial benefits on one group of widows and relatives, and not others.

This is especially the case with respect to dust related claims in New South Wales. Where the asbestos related disease results from exposure and inhalation of fibres during the course of employment, a range of benefits are currently available on a no fault basis from the Dust Disease Board of NSW. These benefits include the payment of a lump sum amount, payable on the death of the affected worker, currently being increased to \$311,050. AICF respectfully submits that the Commission should take account of the total nature and range of benefits available to widows and relatives of people who sustain asbestos related disease in New South Wales when considering the changes covered by this inquiry.

No fault compensation following death from asbestos related disease, along the lines provided by the Dust Diseases Board of NSW, is not available in all Australian States and Territories. For this reason, AICF submits that any analysis of the law relating to compensation to relatives in other States and Territories should take careful account of the total nature and range of benefits available to widows and families in those jurisdictions, and not just the nature of damages available in compensation to relatives claims.

5. When considering the potential financial impact of a reform of this nature, it is important to consider the impact of the reform on the cost of claims currently being made and paid. Perhaps more importantly, though, is the need to consider and analyse the extent to which the reform may have an impact on what has been called the propensity to claim.

If the reforms make claims of this nature more attractive (because they are more rewarding to claimants and plaintiffs), there is likely to be an increase in the number of claims over time. Hence, rather than being a simple increase in the cost of current claims, the reform may result in a much larger increase in the overall cost of claims if the propensity to claim is made more attractive.

It is always difficult to assess the likely future impact on reforms to personal injury damages awards, because it can be difficult to assess the impact on claiming behaviour as well as any direct financial impact of the reform. Nevertheless, behavioural change has been a key result of reforms to personal injury damages in other areas in the past.

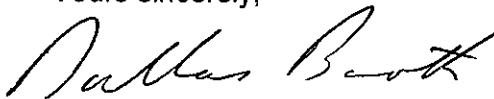
6. As noted above, logic suggests that a reform of this nature is likely to increase the cost of compensation claims in these types of matters. If enacted, the reforms would come at a time when the AICF Trust is needing to rely on a substantial loan facility, being provided by the New South Wales Government, with the support of the Federal Government, to be able to continue paying compensation claims in full as they fall due for payment. Any increase in claims costs will have a direct impact on the amount of drawings that will need to be made under that loan facility. AICF respectfully suggests that this is not the time to be making changes which are likely to add to the funding challenges currently being faced by the AICF Trusts.

In conclusion –

- The *Strikwerda* principle is one of long standing in the law;
- There is no clear issue or concern with the operation of the law in this area;
- Any comparison of the law across Australia should take full account of all forms of compensation and damages available in each jurisdiction to families and relatives of people who die from asbestos related disease; and
- Any analysis of the potential impact of the reform must take account not only of the impact on the cost of current claims, but also on the potential to increase the number and cost of claims of this nature in the future.

Please do not hesitate to contact me if you have any questions in relation to this submission.

Yours sincerely,



Dallas Booth  
Chief Executive Officer

