

31 January 2011

The Chairperson  
NSW Law Reform Commission  
DX 1227 SYDNEY

**FAXED**  
31.01.2011

Level 11  
51 DrUITt Street  
Sydney NSW 2000

PO Box 1584  
Sydney NSW 2001

www.slatergordon.com.au

Correspondence to:  
Joanne Wade  
Legal Assistant: Nicole Hoare

Ph: [REDACTED]  
Fax: [REDACTED]

Our Ref: Joanne Wade

**By Fax and DX : 02 8061 9376**

Dear Mr Wood

### **Review of Compensation to Relatives**

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Thank you for the opportunity to comment on the legislation governing the provision of damages for Compensation to Relatives. I have noted the Terms of Reference.

Below, I have provided my thoughts on some of the issues identified in the Terms of Reference, informed by the experience of my firm in acting on behalf of victims of asbestos diseases over many years.

#### ***B.I (Contracting) Pty Ltd v Strikwerda & Anor [2005] NSWCA 288***

The issues raised by this case are relevant to claims made by asbestos disease victims who are in paid employment at the time of their illness. The number of these cases each year is relatively few, however, the principles held in *Strikwerda* can have a large impact on these individual's claims.

Currently, if an asbestos disease victim, who was in paid employment at the time of their illness, dies before their claim is finalised, then the amount received by the Estate in general damages is to be set-off against any amounts claimed by dependants. Essentially, dependants damages entitlements are reduced by *any pecuniary gains*, such gains include general damages awarded to the Estate.

A number of States in Australia have passed legislation to overcome this issue including –

- 1 South Australia in the *Civil Liability Act 1936* (amended in February 2006);
- 2 Western Australia in the *Fatal Accidents Amendment Act 2008*; and
- 3 Victoria in the *Asbestos Diseases Compensation Act 2008*.

New South Wales currently falls behind the other States. By passing legislation to overcome *Strikwerda* it will ensure greater equality and fairness for asbestos victims in the treatment of their compensation.

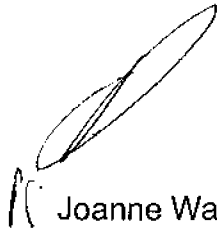
I support amendments to the *Compensation to Relatives Act 1987*, the *law Reform (Miscellaneous provisions) Act 1944*, the *Dust Diseases Tribunal Act 1989* and the *Civil Liability Act 2002*. I note there is currently a Bill before the Parliament, the *Dust Diseases Tribunal Amendment (Damages – Deceased's Dependants) Bill 2010*. The proposed amendments in that Bill will, in my view, overcome the *Strikwerda* principle and should be made.

I note there is some concern that this will have an impact on the insurance industry and the James Hardie Compensation Fund. However, in my experience Compensation to Relatives claims (and the application of the *Strikwerda* principle) are relatively few. It should not have a large impact on the insurance industry nor the James Hardie Compensation Fund given the small number of these types of claims. Further, three other States have already passed legislation to overturn the *Strickwerda* principle in those States.

### Further Consultation

Please do not hesitate to contact me if you have any questions about the above matters. I am happy to meet with a representative of the Review to discuss the issues raised above, if you wish.

Yours faithfully



Joanne Wade  
Practice Group Leader  
**SLATER & GORDON**