



## **Compensation to Relatives – NSW Law Reform Commission Consultation Paper 14**

**Submission by Insurance Council of Australia**

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## INTRODUCTION

The Insurance Council of Australia (ICA) welcomes the release of the NSW Law Reform Commission's (LRC) Consultation Paper No. 14 into Compensation to Relatives (Consultation Paper) in May 2011 and is pleased to contribute further to the NSW Law Reform Commission's Review (Review) which will consider the law that relates to the provision of damages to the relatives and dependants of victims of wrongful deaths.

We understand that this review has arisen in the context of proposed legislation introduced by the Greens in November 2010 in the Legislative Assembly which refers to the 2005 New South Wales Court of Appeal decision of *Bi (Contracting) Pty Ltd v Eileen Sylvia Strikwerda and Anor (Strikwerda)*.<sup>1</sup> In that case the court decided that the widow's damages in proceedings in the Dust Diseases Tribunal should be offset by reason of the fact that as a widow she would receive a financial benefit in the form of a distribution from her husband's estate that included the general damages he had received for his claim for asbestosis.

We also understand that while the LRC Review is primarily focussed on asbestos related claims (as a result of the application of *Strikwerda*) it will also consider the laws in place concerning other types of claims arising from the wrongful death of a person.

As a matter of general principle, insurers believe that different damages regimes have been put in place by the NSW Government to provide appropriate compensation to the dependents of people who are killed by a wrongdoer. In doing so, the NSW Government has ensured that a balance is maintained between the appropriate level of compensation and the financial burden to the community which bears the cost of the scheme.

We submit that the current state of the law represents an appropriate balance of the needs of those affected by the wrongful death of a relative and the obligations of businesses and insurers which manage the claims in this state.

In these circumstances the ICA believes that there is no publicly identified need to change the regimes currently in place in both dust disease claims and other claims more generally. Our submission will accordingly provide general high level feedback on the various options presented in LRC Paper 14 rather than responding to each question posed by the LRC.

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<sup>1</sup> [2005] NSWCA 288

## **OPTION 1: Maintain the Current Law**

**The first option is simply to maintain the law in its current state, resulting in the continued deduction of any damages for non-economic loss, that are awarded in estate actions and that increase a dependant's inheritance, from the damages awarded in that dependant's action.<sup>2</sup>**

This is the insurance industry's preferred position. As a matter of general principle, insurers believe that different damages regimes have been put in place by the NSW Government to provide appropriate compensation to the dependents of people who are killed by a wrongdoer in a variety of circumstances. In doing so, the NSW government has ensured that a balance is maintained between the appropriate level of compensation and the financial burden to the community which bears the cost of the scheme.

In the area of dust disease claims, following intense and sustained community interest in the latent onset and often fatal consequences of exposure to asbestos dust and fibre, the NSW Government has put in place particular arrangements which are significantly different in scope and effect than those which occur in the different damages schemes in NSW and in other states.

It is evident that the impetus driving government policy which instituted these particular arrangements in dust disease claims did not affect other damages schemes in NSW, including claims arising from workplace and motor vehicle accidents. Accordingly these particular arrangements, which have been implemented over a period of time, were limited to dust disease claims.

We submit that the current state of the law in relation to dust disease claims represents the NSW Government's policy balance between the needs of the unfortunate sufferers of asbestos related diseases and the obligations of businesses and insurers which manage the claims in this area.

Following our view that the appropriate balance is currently in place, the ICA submits that the current law under *Strikwerda* is consistent with the principle of preventing over compensation and accordingly should be retained.

## **OPTION 2: Abolish the Strikwerda Principle**

**The second option is to follow the approach taken in WA, SA and Victoria, by abolishing the Strikwerda principle in relation to dust diseases cases by disregarding the damages for non-economic loss awarded in an estate action in the assessment of damages in a dependant's action.<sup>3</sup>**

We note that although *Strikwerda* was handed down by the NSW Court of Appeal in 2005 to date there has been no change in government policy in NSW concerning the assessment of damages in estate claims and dependant's actions although other amendments to the dust diseases legislation have been made in the period.<sup>4</sup> The ICA

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<sup>2</sup> Option 1 is discussed in the Consultation Paper at Chapter 6

<sup>3</sup> Option 2 is also discussed in the Consultation Paper at Chapter 6

<sup>4</sup> A full list of the amendments is available on the NSW Legislation website at <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+63+1989+cd+0+N>

submits that the number of amendments made to the legislation since 2005 indicate that the government had sufficient opportunity to act in the event they wish to alter the law in this area.

We refer to our comments in Option 1 above on the differences between the dust diseases scheme in NSW and other damages schemes such as CTP and public liability.

The subject of *Strikwerda*, namely the effect of general damages in estate claims on subsequent actions by dependents is only one example of the particular arrangements for dust disease claims which have been implemented as NSW Government policy.<sup>5</sup> Another example is the death benefits paid to widows and family<sup>6</sup> which are not deducted from any damages ultimately awarded in any action continued on behalf of the estate, irrespective of whether a claim for economic loss forms part of the estate claim.<sup>7</sup>

The ICA submits, in the light of the particular arrangements in place in NSW, which provides benefits in addition to those in other jurisdictions, as well as the compensation and the damages available to those who suffer dust diseases and their dependents, that the concept of consistency between jurisdictions is not appropriate in the circumstances. Notwithstanding the legislation introduced in WA, SA or Victoria, we submit that no similar action is warranted in NSW and that *Strikwerda* should not be abolished.

### **OPTION 3: Expand the Entitlement to Damages for Non-Economic Loss in Estate Actions to Dust-Disease Actions Commenced After Death**

**This option would remove the limitation that confines the recovery of damages for non-economic loss in estate actions to those cases where proceedings were already on foot at the time of death.<sup>8</sup>**

The experience of our members is that most dust disease claims, due to their latency, are in fact commenced before the death of the claimant in the Dust Diseases Tribunal. That body is very experienced in responding to the needs of very ill plaintiffs and well versed in the speedy management of these claims.

However, the ICA submits that the removal of this provision without appropriate safeguards concerning the time period in which an action can be brought and a clear definition of the type of claim brought may have unintended consequences. The proposal may allow a large number of claims which had not previously been brought to be commenced. In this regard we submit that a thorough actuarial assessment of this proposal be undertaken to test its feasibility.

For the reasons noted above, the ICA does not consider that there are the relevant public policy concerns which would warrant an amendment to the provision that dust disease proceedings be brought before the death of the claimant.

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<sup>5</sup> Other differences include the institution of a specialised Tribunal – the Dust Disease Tribunal and the particular rules in place concerning issues and evidence before the tribunal as discussed in Chapter 3 of the Consultation Paper

<sup>6</sup> \$268,375 lump sum to dependent relatives under Section 8 (2B)(b)(i) *Workers Compensation (Dust Diseases) Act 1942* and \$243.60 weekly payment to dependent spouses under Section 8 (2B)(b)(ii) *Workers Compensation (Dust Diseases) Act 1942*

<sup>7</sup> Section 12D *Dust Diseases Tribunal Act 1989*

<sup>8</sup> Option 3 is discussed in the Consultation Paper at Chapter 7

#### **OPTION 4: Introduce Damages for Grief Suffered by Relatives**

**This option would allow a court or tribunal to award damages for the grief suffered by family members in wrongful death cases, that is, for “solatium” or “damages for bereavement”, to ensure that relatives have some appropriate legal recognition of the grief and sorrow that the death of a family member causes.<sup>9</sup>**

The ICA believes that the role of the insurance industry is not to comment directly on the level of benefits available under a particular scheme as this is a matter for government policy. However we submit that this type of damage is non-compensatory in nature.

Damages schemes in NSW seek to recompense injured and affected claimants for their loss arising out of a negligent act and put them, as far as possible in the position they were in prior to the accident. This new head of damage, which will give rise to new causes of action is not based on this principle and as such is not supported by the insurance industry in either the dust disease context or more generally.

Rather, as been suggested, that this type of action will discourage small nervous shock claims<sup>10</sup>, the ICA submits that it may give rise to additional friction costs in the assessment of these damages which may outweigh the benefit sought.

In a non dust context the ICA submits that any change in this regard is likely to affect the consistency of claims costs, and the transparent and predictable nature of those factors which are taken into account by insurers when undertaking premium calculations.

For the reasons noted above, the insurers do not consider that there are the relevant public policy concerns which would warrant an expansion of damages available as suggested. We also submit that a thorough actuarial assessment of this proposal be undertaken to test its feasibility.

#### **OPTION 5: Expand the Entitlement to Damages for Non-Economic Loss in Estate Actions to All Cases**

**A radical option would be to amend the Law Reform (Miscellaneous Provisions) Act 1944 (NSW) by allowing claimants in estate actions to recover damages for non-economic loss in all situations, whether or not the cause of action that was vested in the deceased, and survived his or her death, related to a dust disease.<sup>11</sup>**

The ICA notes that this option is characterised as “radical” in the Consultation Paper and refers to our comments under Options 1 and 2 above. We submit that no amendment to the law governing damages in dependent’s actions outside the dust disease scheme is required. We submit that there are no relevant public policy concerns which would require the overturn of established common law principle in this regard.

The ICA submits that an extension of the entitlement to damages for non-economic loss in all estate claims may have unintended consequences. The proposal may allow a large number of claims which had not previously been brought to be commenced. In this regard

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<sup>9</sup> Option 4 is discussed in the Consultation Paper at Chapter 8

<sup>10</sup> Consultation Paper, p74

<sup>11</sup> Option 5 is discussed in the Consultation Paper at Chapter 9

we submit that a thorough actuarial assessment of this proposal be undertaken to test its feasibility.

### **OPTION 6: Alter the Basis of Assessment of Damages in a Dependant's Action**

**A final and far-reaching option would deal more generally with the deductions that must be made in a dependant's action, for example, by providing that all benefits accruing to the estate are to be disregarded, as is currently the case in England and Wales.<sup>12</sup>**

Once again the ICA notes that this option is characterised as "far reaching" in the Consultation Paper and refer to our comments under Options 1 to 5 above. The measures introduced in England in 1976 are discussed in the Consultation Paper. We note that the legislation was originally introduced in the England to deal with various issues which had arisen in the law of succession and that it was only subsequently that they were interpreted widely to exclude all benefits accruing to dependents following a wrongful death.<sup>13</sup>

A subsequent Law Commission Review in 1999 recommended that the legislation be amended to replace the general exclusion with one which specifically lists the types of benefits excluded from the assessment of damages awarded to dependents.<sup>14</sup>

As a result the ICA submits submit that no amendment to the law governing the assessment of damages in dependent's actions generally is required. We submit that there are no relevant public policy concerns which would require the overturn of established common law principle in this regard, particularly having regard to the Law Commission's recommendations in 1999.

The ICA further submits that altering the basis of assessment of damages in dependants' actions may have unintended consequences. The proposal may allow a large number of claims which had not previously been brought to be commenced. In this regard we submit that a thorough actuarial assessment of this proposal be undertaken to test its feasibility.

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<sup>12</sup> Option 6 is discussed in the Consultation Paper at Chapter 10

<sup>13</sup> Consultation Paper, p89

<sup>14</sup> Consultation Paper, p91