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15 June 2011

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

Dear Sir

REVIEW OF COMPENSATION TO RELATIVES LAWS

We refer to Consultation Paper 14 - Compensation to Relatives released by the NSW Law Reform Commission (**NSWLRC**).

We also refer to our preliminary submission dated 27 January 2011 and to our attendances before the Commission as part of its consultation process on 11 April 2011 and 23 May 2011.

We have noted the options for reform which have been put forward by NSWLRC for comment. We provide our specific response to each of the questions asked by the NSWLRC with respect to each option adopting the same format as in the Consultation Paper.

RETAIN THE CURRENT LAW OR ABOLISH THE *STRIKWERDA* PRINCIPLE IN RELATION TO DUST DISEASES CASES

Question 6.1 - Should the current law, which reduces the award of damages in dependants' actions by reference to the amount recovered by way of damages for non-economic loss in an estate action, be retained in relation to dust disease cases?

1 We refer to the submissions made in our letter of 27 January 2011 and confirm we remain of the view that the current law should be retained.

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Question 6.2 - Are there reasons in addition to those that we have identified above which support not changing the law?

2 In addition to the submissions made in our letter of 27January 2011, we note that the fundamental principle at common law is that the Plaintiff be placed in the same position as he or she would have been in if the wrong had not been committed.

3 It is our submission that the abolition of the *Strikwerda* principle would place Plaintiffs in a better position than they would otherwise have been in. This is because the Plaintiff would receive both the benefit of lump sum damages from the estate proceedings and damages payable under a dependency claim.

4 This submission is supported further by the fact that the assessment of non-economic loss damages in the Dust Diseases Tribunal (**DDT**) does not include a deduction for any compensation payable or already paid under the dust diseases compensation scheme.

Question 6.3 - Should the *Strikwerda* principle be abolished in relation to dust diseases cases?

5 There is no principle or reason for the differentiation of the treatment of dust disease victims from other victims of wrongful acts and omissions.

6 We note the reference to *"crisis settlements"* (Consultation Paper paragraph 6.39) as an alleged result of the *Strikwerda* principle. We are not aware of any such *crisis settlements* or any settlements at an *undervalue* occurring. In our experience, claims which are compromised are done so because of liability issues and not because of the proximity of the victim's death or any other reasons related to potential dependency actions.

7 We note that in NSW dust disease victims are already treated differently to other victims of work related injuries. As noted in the Consultation Paper (paragraph 6.47), of "*the four States, it is only NSW that has a specific dust disease workers compensation scheme. In three other States, the statutory benefits are the same as those applying to workers under each State's general workers compensation scheme.... NSW claims result in higher payouts than those seen in the other States.*"

8 Therefore, it would appear that there is already an existing inequity between victims of dust diseases and victims of other wrongful work injuries. This would only be accentuated if the *Strikwerda* principle was to be abolished only in relation to dust diseases cases.

9 In our submission to suggest *"that the victims of asbestos-related diseases and their dependants should be treated as a special case"* (Unions NSW and Asbestos Disease Foundation of Australia, *Preliminary Submission*) is offensive to the many other victims of wrongful acts and omissions who have their own pain and suffering to contend with.

10 In our submission to distinguish asbestos victims from other victims on the grounds that *"the overall history of the use of asbestos for many years, without any public warning having been given of its dangers, despite the existence of knowledge in some circles of its propensity to cause harm"* (Consultation Paper paragraph 6.50) is to in effect, introduce

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an element of punitive damages into the award of damages for asbestos-related victims. Punitive damages are not awarded for victims of wrongful acts or omissions in New South Wales.

11 In any event, this assertion at paragraph 6.50 is, in our submission, inaccurate and misleading.

12 To use the reasoning suggested at paragraph 6.50 as a circumstance for the differential treatment of asbestos-related victims to other victims, equates in our submission, to the introduction of punitive damages in asbestos-related claims. This, in our submission, would represent a significant departure from the common law in New South Wales.

Question 6.4 - Is it likely that the abolition of the *Strikwerda* principle will lead to an increase in filings in the Dust Disease Tribunal or in the manner in which cases in that Tribunal are conducted?

13 It is our submission, that we anticipate a greater number of claims will be filed in the Dust Disease Tribunal.

14 We expect a greater number of dependency claims to be filed by elderly widows who shortly before their spouse's demise would have been in receipt of government pensions. Following the demise of the spouse, the pension would be halved.

15 If *Strikwerda* is abolished, we anticipate a dependency claim (arising from the loss of the spouse's pension) would be more commercially viable.

16 Furthermore, we expect that a greater number of claims for loss of domestic services would be made as they too would also be more commercially viable if the *Strikwerda* principle was to be abolished. We note in that regard the fairly wide class of persons who can potentially claim damages for loss of domestic services and the definition of need and dependency. It can include grandchildren to whom child care was provided before the onset of symptoms (see *Amaca Pty Ltd v Novek* [2009] NSWCA 50) and for whom a need can be established.

Question 6.5 - Is it likely that abolition of the *Strikwerda* principle will have significant financial consequences for defendants or insurers?

17 For the reasons we have set out in response to Question 6.4 above, we believe that the abolition of the *Strikwerda* principle will have significant financial consequences for defendants or insurers.

Question 6.6 - Are there any reasons other than those mentioned in this chapter in favour of abolishing the *Strikwerda* principle?

18 No.

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EXPAND ENTITLEMENT TO DAMAGES FOR NON-ECONOMIC LOSS IN ESTATE ACTIONS TO DUST DISEASE ACTIONS COMMENCED AFTER DEATH

Question 7.1 (1) - Should the requirement in s12B of the *Dust Diseases Tribunal Act 1989* (NSW), that the victim commence an action in the Dust Diseases Tribunal before his or her death, as a precondition for recovery of damages for non-economic loss in an estate action, be repealed in relation to:

(a) all dust diseases; or

(b) asbestos-related diseases only?

19 In our submission there is no basis for the amending of s12B to allow for damages for non-economic loss damages to be recovered in circumstances where proceedings are commenced after the victim's death.

20 This issue was the subject of lengthy submissions at the time of the drafting of the *Dust Diseases Tribunal Regulations*. The Claims Resolution Process has worked effectively and has, in our submission, lead to the timely resolution of the majority of claims commenced in the Dust Diseases Tribunal. Those which have not resolved prior to the victim's demise, have been essentially because of significant liability/ evidentiary issues within the Plaintiff's claim.

21 We note the reference to the current requirement placing *"significant pressure on asbestos victims and their families"* (Consultation Paper paragraph 7.4).

22 We do not concede that these pressures (which are stated to be the seeking of legal advice and ensuring a claim is lodged) exist in reality. If these pressures do exist, then in our submission they are no different to those pressures faced by victims of wrongful acts or omissions, other than dust victims.

23 In our submission these pressures would not only continue with the suggested amendment to s12B but also be increased.

24 This is because the gathering of evidence required to prove the victim's claim will be easier whilst the victim is alive than after the victim's demise. Ultimately, unless there is any pressure on victims to obtain legal advice prior to their demise, they will not be made aware of the evidentiary issues which they will need to address. Plaintiffs in Estate actions will discover this we expect, only too late for such evidence to be gathered.

25 Defendants, in our submissions, would be prejudiced by the suggested amendment to s12B. Contrary to the assertions of paragraph 7.12 of the Consultation Paper, in claims which involve liability issues, most Plaintiffs are cross-examined and/or particulars requested from their solicitors during the lifetime of the victim. Defendants' recovery actions often cannot be pursued without direct evidence from the victim, which of course, can only be obtained during the lifetime of the victim.

26 We note the reference to *"the recovery of damages for non-economic loss in the possibly rare case where identification or diagnosis of a dust or asbestos-related diseases as a causative factor in the victim's death, only emerged during a post mortem examination."* (Consultation Paper paragraph 7.6).

27 We are not aware of any Estate claims which were commenced after the victim's death as a result of diagnosis being made during a post-mortem examination. In our experience, the majority if not all of asbestos victims, are aware of the possibility of an asbestos related diagnosis at the time or shortly after their symptoms commence. This is due to two reasons:

(a) Medical knowledge and expertise is such that the possibility of an asbestos related illness is flagged to victims during the process of diagnosis,

(b) Most victims are questioned in relation to any possible asbestos exposure during the process of diagnosis.

28 Therefore, in our experience, even those victims who are unsure of the certainty of their diagnosis but can recall exposure to asbestos during some period of their lifetime, commence Court proceedings during their lifetime regardless of the certainty of the diagnosis.

29 Therefore, in our submission, this is not an issue which should influence whether s12B should be amended.

30 Finally, we note that other than claims commenced in the Dust Diseases Tribunal, non-economic loss damages do not survive the death of a victim even if the victim's claim was commenced before his/her death. Therefore, dust disease claimants are already in receipt of an advantage which victims of other wrongful acts or omissions do not have the benefit.

31 To amend s12B as suggested would result in an increase in the inequity between dust disease victims and victims of other wrongful acts or omissions.

<u>Question 7.1 (2) - Should such amendments be limited so as to allow such proceedings to be commenced within the period of 12 months following the death, or otherwise made conditional upon the Dust Diseases Tribunal granting leave for filing proceedings after the victim's death?</u>

32 It is our submission that no such amendment should be made.

33 Clearly, if such an amendment was to be made (and we do not submit that it should), a limitation period would need to be considered. Given that post-mortem examinations are conducted generally almost immediately upon the demise of the victim, we suggest that the limitation period be limited to 3 months, and that any such proceedings which are commenced be commenced only with the filing of both a Statement of Claim and Statement of Particulars.

34 We refer to the submissions which we have made to 7.1(1) above, particularly in relation to evidentiary issues. The particulars which defendants require to examine the liability

issues in a claim are usually contained in the Statement of Particulars. The later this is provided, the more prejudiced a defendant is with regards to its investigations.

35 In our submission, if the suggested amendment was made, there is no reason why following the demise of a victim, the Statement of Particulars cannot be filed at the same time as the Statement of Claim.

SOLATIUM OR BEREAVEMENT DAMAGES

Question 8.1 - Should NSW provide for the award of solatium in dependants' actions:

(a) generally; or

(b) only in dust disease cases and, in that respect, applicable to all such diseases, or only to a selected category of disease?

36 It is our submission that solatium or bereavement damages should be considered in greater depth before the law in NSW is amended to include any award of solatium in dependants' actions generally.

37 There are numerous issues which require consideration. These include, but are not limited to:

- the definition of dependants (query whether this would be limited to immediate and close family members or available to extended family members as well some of whom may not have had any significant contact or relationship with the victim for years) and whether that definition is too wide or narrow to encompass the range of persons who would feel such grief or emotional harm to be entitled to damages;
- the manner in which a Court or Tribunal is to assess whether a person has suffered grief and/or emotional harm which is referable to the victim's sufferings and not just to the loss of the victim itself;
- the manner in which a Court or Tribunal is to assess the extent of the damages which are to be payable to a person who has suffered grief and/or emotional harm.

38 As noted at paragraphs 8.6 and 8.7 of the Consultation Paper, there could be a blurring of the distinction between solatium damages and nervous shock damages.

39 It is our submission that solatium or bereavement damages should not be introduced generally across claims in NSW. We expect that the availability of such damages would have a material effect on claim incidence. Furthermore, whilst the actual damages component may be relatively small compared to other heads of damages, the costs of pursuing such a claim (including expert fees) would be significant and are likely to be as much as, if not greater than, the damages recoverable.

40 Defendants who are routinely involved in dust diseases legislation, as most of our clients are, would bear a significant financial burden if such damages were introduced.

41 It is our submission that there are no grounds for the introduction of solatium or bereavement damages in dust diseases cases of any nature. To limit the introduction of solatium or bereavement damages to dependants of dust disease victims would increase the inequities between dust disease victims and victims of other wrongful acts or omissions as discussed above.

42 In relation to claims made against Amaca Pty Ltd and/or Amaba Pty Ltd, in our submission solatium and/or bereavement damages to dependants would not be a payable liability pursuant to the Amended and Restated Final Funding Agreement (FFA) on the basis that those damages would not be payable as a result of no personal exposure of the dependants to asbestos.

43 We note in that regard the recent decision of the Supreme Court of NSW on 2 March 2011 in *Asbestos Injuries Compensation Fund Limited* [2011] NSWSC 97.

Question 8.2 - If solatium were recoverable, which of the following approaches to its introduction would be preferable:

(a) the right to claim solatium is added to the existing heads of available damages; or

(b) solatium takes the place of the estate's entitlement to recover damages for non-economic loss in dust diseases cases.

44 In our submission, the answer to this question would depend upon the range of damages which are to be awarded for solatium in the event solatium becomes recoverable.

45 Clearly, there should be an avoidance of the situation where there is in effect, a double recovery of damages.

46 We note in that regard that most victims refer to the pain and grief which they experience whilst watching their families' pain and grief. This is taken into consideration at the time of the assessment of the victim's non-economic loss damages.

Question 8.3 - If solatium is available, should it be an excluded benefit for the purposes of s3 of the *Compensation to Relatives Act 1897* (NSW)?

47 It is our submission that solatium should not be an excluded benefit for the purpose of s3 of the *Compensation to Relatives Act 1897* (NSW). To allow solatium to be an excluded benefit would amount to double compensation.

Question 8.4 - Which family members should be entitled to claim for solatium, were NSW to introduce such a head of damage?

48 We note the class of person on whose behalf dependants' actions can be brought in New South Wales. If the same persons were to be entitled to claim for solatium, then this could have a significant financial impact on defendants and their insurers.

49 At the same time, to limit the class of persons to those on whose behalf dependants' actions can be brought in NSW could prejudice other family members (such as

grandchildren) or close friends (such as neighbours of excessive number of years) who would have suffered the same grief. Clearly, to expand the class to include such persons, would be extremely financially detrimental.

50 The fact that neither case leads to a reasonable outcome, adds force to our submission that there is no basis or need for solatium in NSW.

Question 8.5 - In what circumstances, if any, and on what terms should the dependants or relatives of victims of wrongful death be entitled to damages for awards of solatium?

51 We note the issues discussed at paragraphs 8.35 to 8.40 of the Consultation Paper. We maintain our submission that solatium should not be made available in NSW.

52 Should solatium become available in NSW, then we submit that as a starting point, family relationship should not automatically entitle a person to an award of solatium. Should there be an automatic entitlement, then this would have significant financial consequences for defendants and their insurers.

53 The question of proof of entitlement is extremely problematic. It would, in our submission, require the obtaining and/or retaining of experts to assess and analyse the grief suffered by a dependant or relative. This adds to costs which ultimately would be payable by defendants and/or their insurers.

54 Furthermore, there is the question of whether there should be a threshold - at what stage does the normal grief suffered by a relative or dependent upon the death of a loved one become compensable? We agree with the difficulties outlined at paragraph 8.40 of the Consultation Paper regarding the use of "objective evaluation".

55 In our submission, assessment of grief is too subjective to be conducted objectively and at the same time, only objective evaluations could bring an element of consistency to such awards.

56 In our submission the difficulties regarding the assessment of damages in awards of solatium add more force to the submission that solatium should not be made available in NSW.

Question 8.6 - Should any legislation allowing for an award of solatium provide guidance in relation to its assessment?

57 In our submission if an award of solatium is to be made available in New South Wales (and again, we submit it should not), then it will be imperative that legislation provide guidance in relation to its assessment.

58 We suggest that experts be consulted with regards to the assessment of solatium.

59 We also suggest that the legislation provide guidance with regards to threshold issues (such as who will be entitled and the circumstances in which entitlement can arise) as well as the range of damages which could be awarded.

60 We refer in that regard to our comments at paragraph 37 above wherein we discussed who could potentially qualify for such damages. In our opinion, the legislature will need to clarify whether the relationship itself qualifies one for a claim, or whether further more intimate involvement with the victim during the years prior to the onset of his/her illness ought to be established.

61 We refer the Commission to the claims made pursuant to section 15B of the *Civil Liability Act 2002* (damages for loss of domestic services). Since the introduction of this head of damage, we have seen a significant increase in the number of claims being made for this head of damage. The circumstances which have given rise to an alleged entitlement to this head of damage range from lawn mowing services provided by a spouse or partner to babysitting / grandparent visits provided by victims to their grandchildren.

62 It is our submission that the latter type of claims were not in the contemplation of Parliament at the time the legislation was enacted. Yet, in our experience, a large number of these claims are being allowed. The damages claimed may range from $75,000 to $300,000.

63 In any event, the threshold set by Parliament in this instance has not proven difficult for most Plaintiffs to meet.

64 We doubt Parliament had intended to impose such a financial burden on defendants and/or their insurers at the time the legislation was enacted. However, this has been the result.

65 If it is Parliament's intention to limit the class of persons who would be potentially entitled to make a claim for solatium, then careful consideration should be given to the drafting of the definition of the class of persons.

66 Furthermore, if it is Parliament's intention to provide damages for only a certain level of grief or bereavement, then this too should be carefully drafted into the legislation.

EXPAND THE ENTITLEMENT TO DAMAGES FOR NON-ECONOMIC LOSS IN ESTATE ACTIONS

Question 9.1 - Should damages for non-economic loss be available in an estate action in any of the following circumstances:

(a) in all cases of wrongful death regardless of cause; or

(b) in all cases of delayed wrongful death?

67 In our submission whilst such an extension would be *"relatively straightforward"* (Consultation Paper, paragraph 9.2) it would have significant financial consequences for defendants and/or their insurers.

68 We suggest that all insurers and/or defendant solicitors be invited to make submissions with regards to this option before the option is considered further and certainly before

any conclusion is reached as to whether *"the impact may not be significant"* (Consultation Paper, paragraph 9.8).

69 We maintain our earlier submission that victims of dust diseases are already treated favourably when compared to victims of other wrongful acts or omissions and the reforms suggested would only result in a greater inequity between the different classes of victims.

70 Furthermore, we again consider the statement *"the fact that the nature of the suffering of dust disease victims, and particularly those suffering from mesothelioma, asbestosis and lung cancers attributable to other forms of exposure to dust, and its impact on relatives, differ from that which is likely to be experienced in other cases of wrongful death"* (Consultation Paper, paragraph 9.11) to be offensive to victims of wrongful acts or omissions other than dust disease victims. We doubt that the relatives or dependants of victims of cases of wrongful death not caused by dust would agree with this quoted statement.

Question 9.2 - If damages for non-economic loss are made generally available in estate actions, should they be taken into account when damages are assessed in dependants' actions?

71 It is our submission that the *Strikwerda* principle ought to apply should damages for non-economic loss be made generally available in estate actions for the reasons we have set out above and in our preliminary submissions.

Question 9.3 - Where a person has a cause of action for damages arising from a wrongful injury but dies of an unrelated cause before recovery of those damages, should damages for non-economic loss be excluded from the damages that may be recovered in an estate action in relation to the wrongful injury?

72 It is our submission that the *Strikwerda* principle ought to apply to this type of dependency claim on the basis that to not do so, would amount to double compensation.

ALTER THE LIST OF BENEFITS WHICH ARE TO BE DISREGARDED WHEN ASSESSING DAMAGES IN DEPENDANTS' ACTIONS

Question 10.1 (1) - Should the list of benefits which are to be disregarded when assessing damages in dependants' actions, in accordance with s 3 of the *Compensation to Relatives Act 1897* (NSW) be enlarged and, if so, what additional benefits should be excluded?

73 In our submission the list of benefits to be disregarded does not require expansion and should not be enlarged. To increase the type of excepted benefits would result, in our submission, in double compensation which would flow onto a substantial increase in damages awards.

Question 10.1 (2) - If such an amendment is made, should it apply generally or be confined to dust disease cases?

74 In our submission, there is no basis upon which to treat the dependants of dust disease victims more favourably that the dependants of victims of other wrongful deaths. To

make such an exception would require studies on the financial needs of dust disease victims.

75 There is simply no evidence to suggest that the dependants of dust disease victims are financially worse off than the victims of other wrongful deaths. This is the type of evidence, which in our submission, would be required in order to warrant a confinement of such an amendment to dust diseases cases.

76 We maintain our general submission that such an amendment is not required in NSW and would have a significant financial impact on defendants and/or their insurers should it be made generally.

Question 10.1 (3) - If such an amendment were to include benefits acquired through inheritance:

(c) should there be a monetary value cap on the excluded benefits and, if so, what should that cap be and should it be subject to indexation; or

(d) should some factor other than a monetary value cap be adopted as the criterion for exclusion and, if so, what should it be?

77 It is our submission that maintaining the *Strikwerda* principle would eliminate the need to discuss this option.

78 It is difficult to place a monetary value cap on the excluded benefit acquired through inheritance. Although we have not undertaken specific research into inheritance issues, we expect the most valuable item within an estate will be real estate property, and within that, the family home. The value of real estate will depend upon many factors, but predominantly, its location and its use.

79 Value of real estate property across NSW varies significantly depending upon location and use.

80 In our submission it is extremely difficult to set a monetary cap on an excluded benefit acquired through inheritance which would be equitable to the different claimants.

Question 10.2 - Are there any reasons for or against enlarging the list of excluded benefits that have not been mentioned in this chapter?

81 We maintain our general submission that the list of excluded benefits should not be enlarged as this would have serious financial implications for defendants and/or their insurers.

GENERAL

We maintain our preliminary submission that there is no substantial grounds for the abolition of the *Strikwerda* principle in dust diseases cases.

We submit that to abolish the *Strikwerda* principle in general would result in a significant increase in claims across NSW in general which we anticipate will be reflected in higher insurance

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premiums. Furthermore, the abolition of the principle would in effect, result in double compensation which would be contrary to the principles of common law.

In addition, the abolition of the *Strikwerda* principle in dust diseases cases only would result in an increase in the inequities which already exist between victims of dust diseases and victims of other wrongful acts or omissions. There is no basis, in our submission, for this inequitable treatment.

In our submission the alternative options put forward in the Consultation Paper are not required in NSW for the reasons we have set out above.

We request that we continue to be kept informed of the progress of the Inquiry.

Please note that we again, do not object to this submission being published.

Yours sincerely

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