



REVIEW OF COMPENSATION TO RELATIVES
RESPONSE TO CONSULTATION PAPER 14 BY THE
AUSTRALIAN LAWYERS ALLIANCE

The Australian Lawyers Alliance (ALA) has provided preliminary submissions in respect of this review dated 4 February 2011. These submissions respond to the questions posed in the Consultation Paper 14 Compensation to Relatives 14 May 2011.

Chapter 6

- 6.1 As set out in its original submission, the ALA supports a change to the current law to end reductions in 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.
- 6.2 The ALA does not seek to raise additional arguments beyond those in the position paper.
- 6.3 The ALA supports the abolition of the *Strikwerda* principle in relation to dust diseases cases generally and supports the reasons for this change as identified in the Consultation Paper. The ALA notes the contents of the consultation paper at paragraphs 6.39 through to 6.46 and agrees with the comments therein.
- 6.4 It is likely the abolition of the *Strikwerda* principle will only affect a limited number of cases and is unlikely to result in an increase in filings in the DDT or affect the manner in which cases in the DDT are conducted.
- 6.5 Given the limited number of cases the abolition of the *Strikwerda* principle is likely to affect it is unlikely there will any significant consequence for defendants or insurers. There appears to be no evidence that the liabilities of defendants would be materially affected by the proposed amendment. If the change would have substantial effect on insurance premiums the insurers concerned ought to have been able to produce evidence to say so.
- 6.6 The Consultation Paper identifies the submissions advanced by the ALA for the abolition of the *Strikwerda* principle.

Chapter 7

- 7.1 The ALA supports the position that the recovery of damages for non-economic loss in estate actions should not be restricted to those cases where proceedings were already on foot at the time of death. The need to issue proceedings in a claim prior to death places significant emotional and physical pressure on victims and their families. The ALA notes and agrees with the contents of paragraphs 7.1, 7.4, 7.5 and 7.6.

Any amendment to s12B of the *Dust Diseases Tribunal Act* should apply to all dust diseases and not just asbestos-related diseases.

The ALA disagrees that the proposed changes would result in parties delaying filing of proceedings until after death. Proceedings would still be filed quickly and efficiently as many victims find comfort in knowing that compensation has been received and will be available to take care of their families.

- 7.2 The ALA would not oppose a time limit for proceedings to be commenced from the time of death (12 months seems reasonable). Power should be given to the Dust Diseases Tribunal to grant leave for filing of proceedings after that time in exceptional circumstances.

CHAPTER 8

- 8.1 The ALA supports the provision of a solatium in all cases of wrongful death to provide compensation for the loss of a loved one. It is recognised this will require a whole of government approach with amendments to the *Civil Liability Act* (the Attorney General's responsibility) and *Motor Accidents Compensation Act 1999* (the Finance Minister's responsibility). It is noted that there is already a death benefit available under the *Workers Compensation Act 1987*.

The creation of an award for solatium is supported for all the reasons set out in the Consultation Paper – including the importance of society recognising the grief and suffering of those who are wrongfully deprived of the life and company of a close loved one.

The terms and conditions on which such an award should be available are addressed further below in response to subsequent questions posed by the consultation paper.

The principled position of the Australian Lawyers Alliance is that there is no valid basis for distinguishing between compensation recipients and that an award of solatium should be generally available rather than restricted to dust cases.

- 8.2 Solatium is not a right that would be exercised by either the injured/deceased accident victim or their estate. In jurisdictions where it is available solatium is awarded to close family, irrespective of compensation paid to the injured and/or their estate. If a right to recover solatium were established, then it would be a new head of damage and effectively (given the provisions of Part 3 of the *Civil Liability Act*) the creation of a new cause of action.

Currently, a tortfeasor who causes injury is liable for both the pain and suffering of the victim and the mental harm inflicted on close family. In principle, there should not be any difference with a delayed death rather than injury – liability for the victim's pain and suffering and the mental harm of close family.

It might be argued that those recovering a payment for solatium would have to give credit for any such payment or award if pursuing a claim for mental harm as a consequence of the tortfeasor's wrongdoing. However, mental harm damages do not include an allowance for grief, therefore a solatium is compensation for a different loss than mental harm and there is therefore no reason why the solatium should be offset against a claim for mental harm damages.

- 8.3 Yes the solatium should be added to the list of excluded benefits for the purposes of s3 the *Compensation to Relatives Act* because the Act provides for recovery of damages by dependants for loss of financial support and the loss of the provision of domestic services. These are measurable financial losses. They compensation for an entirely different loss to a solatium.
- 8.4 The political reality of introducing a new right (a claim for solatium) is that insurers need to be able to price the risk into insurance premiums. If solatium claims are going to impose undue burdens upon insurance premiums, then there will be little political will to implement reform. It is a political reality that the class of those eligible to recover must be narrow.

There is a relationship between the amount of money that can be made available for a solatium payment and the breadth of the class to whom it can be paid. The preference of the Australian Lawyers Alliance is to see more substantial payments being made to a narrower class, rather than minimal payments being made to a broader class.

Without discounting the grief that many suffer at the death of a close family member, the most acute suffering is usually for those who lose a spouse (including defacto partner) and parents who lose children. The English regime under the *Fatal Accidents Act 1976* is in similar terms to the *Civil Liability Act 1936* (SA). Much as the Australian Lawyers Alliance would like to see a more generous scheme, a relatively narrow

category of eligibility represents the best prospects of having such a benefit introduced.

- 8.5 One of the considerations in introducing a benefit is the cost of administration of that benefit. If relatively small sums are to be fought over then the insurance premium dollar is not being well directed. The Australian Lawyers Alliance recommends administrative simplicity and the avoidance of disputes. One flat payment to all those eligible avoids administrative costs, avoids the need for "*complex claims*" and avoids what Lord Pearce so eloquently described as the "*premium on protestations of misery*".

A flat payment with no discretionary element to all eligible class members of a narrow class is the simplest, quickest and cheapest means of delivering a solatium payment and also represents the best political prospects for its introduction.

- 8.6 If the previous submission that a flat payment should be made is adopted, then the legislation does not need to provide for guidance in relation to its assessment (other than as to the class to be eligible for the award).

CHAPTER 9

- 9.1 Consistent with previous submissions from the Australian Lawyers Alliance, all those who have a delayed wrongful death are worthy of compensation for their pain and suffering. It is accepted that a long and lingering death from mesothelioma has a particular misery to it. It is also accepted that delayed wrongful deaths outside of the dust diseases sphere are relatively rare. Nonetheless, there is no sound reason in principle to treat dust diseases differently.

On the other hand, the Australian Lawyers Alliance sees little principled basis for awarding compensation for non-economic loss in cases of instantaneous wrongful death. There is no "*pain and suffering*" experienced. In such cases, insurance monies are best directed towards the living by way of creation of an entitlement to solatium and the existing cause of action for mental harm.

- 9.2 It is important to separate between the two separate causes of action available to dependents. If the deceased or their estate is awarded non-economic loss, then there is no sound reason in principle to take that into account in any action under the *Compensation to Relatives Act* which is for loss of financial support from the deceased.

Indeed, there is no principled reason to make any deduction in an action for mental harm or solatium, as these are to compensate the grief of the survivors, rather than the pain and suffering (for a closed period) of the deceased.

- 9.3 Where a person has a cause of action for damages arising from a wrongful injury, but dies of unrelated causes, they are currently entitled to recover their non-economic loss for the closed period of their post injury life. The estate is entitled to pursue an action to recover not only the non-economic loss, but also the lost earnings (up to the time of the unrelated death).

In such a case, there is no right on the part of anyone else to sue for nervous shock at the death. The death was not caused by the wrongful act. There is a right on the part of others to sue for mental harm in relation to the original injury and they should still be entitled to do so without offset.

CHAPTER 10

- 10.1 The ALA supports the reasons for a broad approach of excluding all benefits accruing to dependants as a result of the wrongful death for the purpose of the assessment of damages in a dependants' action, as set out in paragraph 10.15 of the paper.

The ALA supports that that amendment enlarging the category of excluded benefits should not be confined to dust diseases case and should apply across the board as expressed in paragraph 10.34 of the Consultation Paper.

The ALA does not support a monetary value cap on the excluded benefits.

The ALA does not seek to raise additional arguments beyond those set out in the position paper.

The ALA appreciates the opportunity to make further submissions. If any clarification or expansion on these issues or submissions would assist please do not hesitate to contact us.