NSW Government Response to

NSW Law Reform Commission Report 131
Compensation to Relatives

Diseases caused by asbestos are horrific, devastating victims and their families. Whilst recognising that no amount of financial compensation will ever make up for the harm suffered, the NSW Government is committed to ensuring justice for asbestos victims, including by ensuring that they and their families continue to receive appropriate compensation.

New South Wales was at the forefront of the fight to ensure that James Hardie took responsibility for providing compensation to victims of its former Australian subsidiaries. The NSW Government established the Jackson Special Commission of Inquiry in 2004 and, with Unions and victims representatives, subsequently negotiated an agreement (the ***AICF Funding Agreement***) with James Hardie under which it is required to provide funding to the Asbestos Injuries Compensation Fund (AICF) of around $1.5 billion (net present value) over an expected forty years to fund personal injuries claims by Australian asbestos victims.

Given that claims against the former James Hardie subsidiaries account for a significant proportion of the total number of Australian asbestos-related injuries claims, this funding agreement is critical to the ongoing ability of Australian asbestos victims, now and well into the future, to access compensation.

In 2010, the NSW Government and Commonwealth Government also entered into a loan facility agreement to provide a line of credit to the AICF to ensure that it can continue to pay all payable claims in full and on time, notwithstanding a cyclical downturn in James Hardie's global cash flows. A first draw-down (which has since been repaid) of $29.7 million was provided under the loan earlier this year. The provision of loan funding under this agreement does not reduce in any way James Hardie's obligation to provide funding to the AICF to pay asbestos injuries claims.

Law Reform Commission Report

In 2010, the then NSW Attorney General asked the NSW Law Reform Commission (the ***LRC***) to inquire into the legislation governing damages in the context of compensation to relatives of dust disease victims and, in particular, whether the common law 'Strikwerda' principle should be overturned by legislation.

The LRC report No. 131, 'Compensation to relatives', October 2011 was tabled in Parliament on 9 November 2011. The recommendations of the LRC are set out in Attachment A.

When it made its recommendations, the LRC accepted that there were sound policy arguments for and against the proposed changes, but recommended the key proposals "on balance".

In doing so, the LRC noted that it was not in a position to undertake any actuarial assessments as to the likely impact of the proposals, but said that its "general impression" was that the changes would not significantly increase filings or the costs of claims (paragraph 2.115; paragraph 3.30). It advised that it would be prudent for the Government to procure an independent actuarial assessment (paragraph 2.117).

In relation to its recommendation to abolish the Strikwerda principle (recommendation 2.1) the LRC also stated that the Government should first obtain legal advice as to any possible impacts on the funding agreement with James Hardie and AICF (paragraph 2.111). The LRC

did not appear to consider the possibility that its other key recommendation (recommendation 3.1) might also have implications for the funding agreement.

Legal Advice

The Solicitor General advises (Attachment B) that the implementation of the key recommendations for legislative change made by the LRC would breach the AICF Funding Agreement. In particular, they would breach clause 13.2(g) of the Agreement, which includes an undertaking by the NSW Government that it will not "legislate to reduce or increase damages for dust diseases".

Actuarial Advice

In light of the LRC recommendation that an independent actuary be appointed to assess the financial impact of the proposed changes, preliminary discussions were held with potential actuaries. However, it became clear from these approaches that those actuaries would not be in a position to provide a meaningful assessment as they do not have direct access to the claims database of the AICF.

Accordingly, the Government requested that the AICF's professional actuary, KPMG, undertake the assessment and that this assessment be peer reviewed by a Government appointed independent actuary (Taylor Fry).

A copy of the KPMG actuarial report, which incorporates comments made by Taylor Fry in its peer review, is attached (Attachment C).

KPMG estimates that implementing the LRC recommendations would increase the AICF's potential liabilities by an amount in the range of $23.4 million to $182.3 million.

Whilst there were some differences of view between KPMG and Taylor Fry (see pages v-vii of the KPMG report), Taylor Fry confirmed, in its peer review, that the overall approach taken by KPMG was appropriate and reasonable.

Conclusion

It is through the AICF Funding Agreement that James Hardie now has a legal obligation to compensate the Australian asbestos victims of its former subsidiaries. The AICF Funding Agreement was ratified by a vote of James Hardie shareholders globally. Particularly given the longevity of the Agreement, and its importance in providing certainty of ongoing compensation funding to victims, it is imperative that all parties comply with their obligations under that Agreement.

The Government actively monitors compliance by James Hardie and AICF with their obligations under the AICF Funding Agreement. The Government would not tolerate a deliberate breach of the AICF Funding Agreement by James Hardie, and it would be inappropriate for the Government itself to knowingly and unilaterally breach the Agreement.

Contrary to the LRC's general impression when it wrote its report, the actuarial assessment shows that the impact of implementing the LRC's recommendations would be material. The net present value of all asbestos claims payable by the AICF in respect of New South Wales is estimated to be around $700 million. In that context, the potential increase in liabilities identified in the actuarial assessment would clearly not be insignificant.

In circumstances where the LRC recognised that there were policy arguments both for and against the proposed reforms, the receipt of this legal and actuarial advice (which was not available to the LRC) has led the Government to conclude that it would not be appropriate to implement the LRC's key recommendations.

The Government's summary comments in response to each of the LRC's recommendations are set out in the table in Attachment A.

Whilst the Government is conscious that this response will disappoint some asbestos victims and their families, who would have potentially stood to gain some additional compensation should the LRC's recommendations be adopted, it is important that the Government considers the long-term interests of providing certainty of continued compensation to all asbestos victims, both current and future generations.

Attachment A: LRC Recommendations and Government Comment

Law Reform Commission (LRC) Recommendation	Government Comment
Recommendation 2.1 Section 3(3) of the *Compensation to Relatives Act 1897* (NSW) should be amended to insert a direction that in assessing damages in a claim under that Act, a court is not to take into account any damages recovered or recoverable for the benefit of the estate of the deceased person under s 12B of the *Dust Diseases Tribunal Act 1989* (NSW).	The AICF Funding Agreement, signed by the NSW Government in 2006, includes a legally binding undertaking that the Government will not "legislate to reduce or increase damages for dust diseases". Before considering this recommendation, the Government obtained legal and actuarial advice as recommended by the LRC. The actuarial advice indicates that the likely financial impact of the proposed change would be significant. The legal advice is that implementation of the LRC recommendation would breach that Agreement.
Recommendation 2.2 Section 2(2)(a)(ii) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) should be amended to read as follows: (ii) any damages for the loss of the capacity of the person to provide domestic services or the loss of capacity of the person to earn, or for the loss of future probable earnings of the person, during such time after the person's death as the person would have survived but for the act or omission which gives rise to the cause of action	The AICF Funding Agreement, signed by the NSW Government in 2006, includes a legally binding undertaking that the Government will not "legislate to reduce or increase damages for dust diseases". The Government has obtained legal advice that implementation of this recommendation would breach that Agreement (in this case, by potentially reducing damages for dust disease). In any event, the LRC recommended this change in order to reduce uncertainty, particularly should Recommendation 2.1 be adopted.
Recommendation 2.3 A further review should be undertaken of the Claims Resolution Process and of the contributions assessment mechanism.	Amendments to the Claims Resolution Process will be proposed in the staged repeal and remaking of the Dust Diseases Tribunal Regulation 2007. Stakeholders will be given the opportunity to comment on the Claims Resolution Process, the proposed regulation and regulatory impact statement as part of that exercise. The consultation process is expected to commence in the next few months.

Recommendation 3.1 Section 12B of the *Dust Diseases Tribunal Act 1989* (NSW) should be amended: (1) to allow recovery of damages for non-economic loss by an estate, so long as proceedings have been commenced by the victim before his or her death, or by the estate no later than 12 months after the victim's death; and (2) to require, in the case of proceedings commenced after the victim's death, that both the Statement of Claim and the Statement of Particulars are filed and served within the 12-month limit.	The AICF Funding Agreement, signed by the NSW Government in 2006, includes a legally binding undertaking that the Government will not "legislate to reduce or increase damages for dust diseases". Before considering this recommendation, the Government obtained legal and actuarial advice. The actuarial advice indicates that the likely financial impact of the proposed change would be significant. The legal advice is that implementation of this recommendation would breach that Agreement. The Department of Attorney General and Justice will consult with the Dust Diseases Board and asbestos victims' support groups to ensure that all practical steps are being taken to ensure that victims who are diagnosed with dust diseases are made aware of their potential entitlement to claim compensation at common law and encouraged to seek legal advice about their rights as soon as possible, in order to avoid a situation where a victim passes away without having been aware of a possible common law claim.
Recommendation 3.2 Section 12B of the *Dust Diseases Tribunal Act 1989* (NSW) should be amended to allow the joinder of defendants and cross defendants after the death of the victim.	Section 12B does not prevent the joinder of defendants and cross-defendants after the death of the victim. Section 17(5) of the Act expressly allows joinder of a party at any stage. A majority of the NSW Court of Appeal held in *Amaca Pty Ltd v Cremer* [2006] NSWCA 164, however, that where a defendant is joined under section 17(5), proceedings cannot be considered to have been commenced as regards that particular defendant until that defendant was in fact joined. Accordingly, if a defendant is joined after a victim's death then section 12B does not apply in so far as that particular defendant is concerned (section 12B will continue to apply to any other defendant(s)). The Solicitor General has advised that this recommendation would not have the effect of either reducing or increasing the damages

	payable for dust diseases, and would simply affect the identity of the defendants who are liable to pay, or share in the payment of, those damages rather than affecting the quantum of damages payable. In any event, the proposed amendment appears unnecessary given that the decision in *Amaca v Cremer* is consistent with the current requirement in section 12B that requires proceedings to be commenced prior to the victim's death if non-economic loss is to be recovered. For the reasons given above in relation to recommendation 3.1, it is not proposed to change that requirement.

Attachment B: Legal Advice from the Solicitor General

NEW SOUTH WALES

SOLICITOR GENERAL

QUESTION OF WHETHER JAMES HARDIE AMENDED AND RESTATED FINAL FUNDING AGREEMENT WOULD BE BREACHED BY IMPLEMENTATION OF RECOMMENDATIONS OF LAW REFORM COMMISSION IN RELATION TO COMPENSATION TO RELATIVES

We have been asked by the Crown Solicitor, who acts for the Director General of the Department of Premier and Cabinet, to advise in relation to the implementation of recommendations ("the Recommendations") of a report of the New South Wales Law Reform Commission entitled "Compensation to Relatives" and dated October 2011 ("the Report").

A question has arisen as to whether implementation of the Recommendations would conflict with obligations undertaken by the State pursuant to the Amended and Restated Final Funding Agreement ("AFFA") entered into on 21 November 2006 between the State of New South Wales, James Hardie Industries NV ("JHINV"), James Hardie 117 Pty Ltd ("the Performing Subsidiary") and the Asbestos Injuries Compensation Fund Limited ("the Trustee").

Specifically, our opinion in sought as to whether implementation of the Recommendations would amount to a breach of AFFA, in particular Clause 13 of AFFA.

Amended and Restated Final Funding Agreement

AFFA provides for the long-term funding of future Australian asbestos-related personal injury claims against former JHINV group companies, namely Amaca Pty Ltd, Amaba Pty Ltd and ABN60 Pty Ltd ("the Liable Entities"), as well as certain asbestos-related claims against Marlew Pty Ltd ("Marlew").

Clause 4.2(d) of AFFA imposes on the Trustee an obligation to pay these claims, described as SPF Funded Liabilities. SPF Funded Liabilities are defined to include Proven Claims, which in turn comprise Personal Asbestos Claims (essentially, claims against the Liable Entities) and Marlew Claims.

Where the Trustee has made a payment in respect of a Personal Asbestos Claim, it is entitled to an indemnity in respect of that payment from the relevant Liable Entity, together with interest on the amount of the payment. See Clause 4.7 of AFFA and s 36(2) of the James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005.

Under Clause 6, the Performing Subsidiary is nominated as the entity primarily responsible to pay JHINV's contributions under AFFA.

Clause 9 imposes on the Performing Subsidiary an obligation to make funding payments to the Trustee. The payments include an amount by way of initial funding (Clause 9.2) as well as annual payments (Clause 9.3). The annual payments comprise an amount that is the lesser of (a) an Annual Contribution Amount and (b) the greater of an amount calculated according to the JHINV group's cashflow and zero. The Annual Contribution Amount comprises the Period Actuarial Estimate (calculated by reference to actuarial estimates of the present value of the liabilities of the Liable Entities and Marlew in respect of asbestos-related claims), plus an amount equal to estimated operating expenses of the Trustee and Liable Entities, less the value of the net assets held by the Trustee and Liable Entities, plus an amount equal to repayments of principal due under certain loan agreements (Clause 9.4(a)).

The Performing Subsidiary's obligations are guaranteed by JHINV (Clause 10).

Recommendations of the Law Reform Commission

The Report makes six recommendations, the text of which are set out below:

Chapter 2 – Retain or abolish the *Strikwerda* principle

2.1 Section 3(3) of the *Compensation to Relatives Act* 1897 (NSW) should be amended to insert a direction that in assessing damages in a claim under that Act, a court is not to take into account any damages recovered or recoverable for the benefit of the estate of the deceased person under s 128 of the *Dust Diseases Tribunal Act 1989* (NSW).

2.2 Section 2(2)(a)(ii) of the *Law Reform Miscellaneous Provisions) Act 1944* (NSW) should be amended to read as follows:

(ii) any damages for the loss of the capacity of the person to provide domestic services or the loss of capacity of the person to earn, or for the loss of future probable earnings of the person, during such time after the person's death as the person would have survived but for the act or omission which gives rise to the cause of action.

2.3 A further review should be undertaken of the Claims Resolution Process and of the contributions assessment mechanism.

Chapter 3 – Remove the pre-death commencement requirement in dust diseases actions

3.1 Section 12B of the *Dust Diseases Tribunal Act 1989* (NSW) should be amended

(1) to allow recovery of damages for non-economic loss by an estate, so long as proceedings have been commenced by the victim before his or her death, or by the estate no later than 12 months after the victim's death; and

(2) to require, in the case of proceedings commenced after the victim's death, that both the Statement of Claim and the Statement of Particulars are filed and served within the 12-month limit.

3.2 Section 12B of the *Dust Diseases Tribunal Act 1989* (NSW) should be amended to allow the joinder of defendants and cross defendants after the death of the victim.

Would implementation of the Recommendations amount to a breach of AFFA?

It has been suggested that the Recommendations may, if implemented, breach either Clause 13.2(a) (read together with Clause 13.2(b)) or Clause 13.2(g) of AFFA. We consider each of these clauses separately.

Clause 13.2(a)

Pursuant to Clause 13.2(a), the NSW government undertakes not to undertake any adverse legislative action directed at any member of the JHINV Group, the Trustee or any of the Liable Entities in relation to, relevantly, Asbestos Liabilities (defined to include any liabilities of the Liable Entities and Marlew in connection with asbestos).

Clause 13.2(b) provides:

> Without limitation, legislative action shall be taken to be adverse if:
>
> (i) it denies to or in relation to any of the Trustee, any member of the JHINV Group or any of the Liable Entities benefits or advantages which are provided or available to others in similar circumstances; or
>
> (ii) it operates by reference to any of the Trustee, any member of the JHINV Group or any of the Liable Entities, this deed or any of the Related Agreements or an attribute which only one or more of them possesses;
>
> (iii) it amends or repeals all or part of the Transaction Legislation or Release Legislation in a manner which would adversely affect any member of the JHINV Group, the Trustee or the Liable Entities, unless such amendment or repeal has been agreed in advance in writing by JHINV acting reasonably;
>
> (iv) notwithstanding the fact that the legislative action may not on its face contravene the provisions of this **Clause 13** (for example because it applies generally), having regard to the nature or circumstances of the legislative action, it would be concluded that the purpose of the legislative action was or a material purpose of the legislative action included having the effect of increasing any of the amounts that but for such action would have been payable under this deed or in respect of payments of the liabilities to be funded hereunder and the legislative action has or will have the result or effect of increasing any of such amounts.

It will be observed that legislation that does not fall within paras (i), (ii) or (iii) may nevertheless be taken to be adverse within the terms of para (iv) if it would be concluded that the purpose of the legislation was increasing the amounts payable under the agreement or that "a material purpose of the legislative action included having the effect of increasing" those amounts. This second category may leave open an argument the legislation that had the

effect of increasing the amounts in question included this effect as one of its material purposes, although it is far from clear what the word "material" means in this context. On balance, however, we take the view that the specific purpose required to bring legislation within para (iv) is, at least in part, the purpose of increasing the amounts payable under the agreement.

In our view, for Clause 13.2(b)(iv) to be infringed, the purpose in question must relate specifically to amounts payable or funded under AFFA; it is not sufficient that the legislature's purpose was or included increasing the liabilities of dust diseases defendants generally, which increase would necessarily have an effect of increasing the amounts payable and funded under AFFA. That construction is supported by the following considerations.

First, the other provisions of Clause 13.2 make it clear that the adverse legislative action with which that clause is concerned is action which singles out the JHINV Group, the Trustee or any of the Liable Entities, or treats them differently to other dust diseases defendants. That emerges from Clause 13.2(a), which refers to action "directed at" any member of the JHINV Group, the Trustee or any of the Liable Entities; as well as from the instances of adverse legislative action given in Clauses 13.2(b)(i) and (ii). Further, Clause 13.2(c) contemplates that legislative action will not be adverse if it applies to former asbestos manufacturers or asbestos defendants generally, even if (in some circumstances at least) it might by reason of circumstances have a greater impact on JHINV, the Trustee or the Liable Entities than on other manufacturers or defendants.

Secondly, the circumstances in which AFFA was signed included the desire to avert a threat by the NSW government and other governments to pass legislation imposing liability on the JHINV Group in relation to the asbestos liabilities of the Liable Entities in circumstances where the JHINV Group would not otherwise have been obliged to meet those liabilities: Recitals A(e)(i) and A(m). It was plainly an important part of the agreement that the NSW government would undertake not to pass such legislation – which would necessarily be directed specifically to the JHINV Group – if the JHINV Group agreed to fund the asbestos liabilities of the Liable Entities. That explanation for the inclusion of Clause 13 is inconsistent with a construction that proscribes legislative action that does not relate specifically to the payment obligations of the Trustee or the funding obligations of JHINV under AFFA, but which applies to all dust diseases defendants without discrimination.

Thirdly, the contrary construction would have far-reaching effects which are unlikely have been intended. It would mean that any legislative action which had the potential to increase the amounts payable under AFFA or funded under it would be prohibited, even if it was directed at tort defendants in general and not simply defendants in dust diseases claims. For instance, an amendment to the limits imposed on awards of damages for loss of capacity to provide domestic care services by s 15B of the Civil Liability Act 2002 (a section which applies to all personal injury proceedings and not only dust diseases proceedings) would on this view contravene Clause 13.2.

Would Recommendation 2.1 be a breach of Clause 13.2(a)?

This recommendation is directed at abolishing the principle in BI (Contracting) Pty Ltd v Strikwerda (2005) 3 DDCR 149; [2005] NSWCA 288. That principle provides that where damages are recovered for non-economic loss in a dust diseases estate action (that is, an action by the estate of a dust diseases victim under Law Reform (Miscellaneous Provisions) Act 1944, s 2), any part of those damages that filters through to a dependent by transmission of the deceased's estate must be taken into account when assessing the loss suffered by that dependent in any dependency action brought under the Compensation to Relatives Act 1897 as a result of the death. The principle applies only to dust diseases claims because it is only in such claims that damages for non-economic loss can be recovered in an estate action: Law Reform (Miscellaneous Provisions) Act 1944, s 2(2)(d) and Dust Diseases Tribunal Act, s 12B.

The abolition of this principle is "adverse" to the JHINV Group, the Trustee and the Liable Entities. It has the potential to increase the payments which the Trustee will be required to make, the JHINV Group (via the Performing Subsidiary) required to fund, and the Liable Entities required to indemnify, in cases to which the Liable Entities are parties and an offset under the Strikwerda principle would otherwise have been available.

However, Recommendation 2.1 is not on its face "directed at" any member of the JHINV Group, the Trustee or any of the Liable Entities in relation to their asbestos liabilities. It applies to the asbestos liabilities of dust diseases defendants generally. Accordingly, it seems to us that this recommendation would only contravene Clause 13.2(a) if it fell within Clause 13.2(b)(iv).

Because the amendment proposed by Recommendation 2.1 does not relate specifically to amounts funded or payable under AFFA, and is not otherwise "directed at" the JHINV Group, the Trustee or any of the Liable Entities, we consider that the recommendation would not have the purpose specified in Clause 13.2(b)(iv) and so would not infringe Clause 13.2(a).

Would Recommendation 2.2 be a breach of Clause 13.2(a)?

This recommendation proposes an amendment to s 2 of the Law Reform (Miscellaneous Provisions) Act 1944. Section 2(2)(a)(ii) currently provides that the damages recoverable in an estate action do not include any damages for the loss of the deceased's capacity to earn, or for the loss of the deceased's probable earnings, past the date of his or her death. Recommendation 2.2 would add to those exclusions damages for "the loss of the capacity of the person to provide domestic services", known as Sullivan v Gordon damages (following a decision of the New South Wales Court of Appeal in Sullivan v Gordon (1999) 47 NSWLR 319). Although Sullivan v Gordon was overruled by the High Court in CSR Ltd v Eddy (2005) 226 CLR 1, Sullivan v Gordon damages have in effect been reinstated in New South Wales by the insertion of s 15B into the Civil Liability Act in 2006.

The addition of Sullivan v Gordon damages to the list of exclusions in s 2(2)(a)(ii) is to the benefit of the JHINV Group, the Trustee and the Liable Entities since it reduces the categories of damages that would otherwise have been payable under AFFA or funded under it. The Report discloses that the purpose of the amendment is to avoid the double compensation that might otherwise result where damages for loss of capacity to provide domestic services are sought in an estate action, while at the same time dependents who were the recipients of those services make a claim for their loss in an action under the Compensation to Relatives Act 1897: paras 2.120 to 2.121.

It follows that we do not consider this recommendation if implemented would breach Clause 13.2(a).

Would Recommendation 2.3 be a breach of Clause 13.2(a)?

This recommendation plainly involves neither adverse action nor any legislative action. Accordingly, in our view, is not capable of breaching Clause 13.2(a).

Would Recommendation 3.1 be a breach of Clause 13.2(a)?

This recommendation expands the circumstances in which damages for non-economic loss can be claimed in a dust diseases estate action. Under s 12B of the Dust Diseases Tribunal Act 1989, such damages are recoverable only where proceedings are commenced by the victim before his or her death. Recommendation 3.1 would amend s 12B to allow such damages to be recoverable where proceedings are commenced by the estate within 12 months of the victim's death.

This recommendation is "adverse" in that it has the potential to increase the payments that the Trustee will be required to make, and the JHINV Group required to fund, under AFFA. However, like Recommendation 2.1 it is not "directed at" the Trustee, the JHINV Group or the Liable Entities; nor does it relate specifically to amounts funded or payable under AFFA. Accordingly, for the reasons we have given in respect of Recommendation 2.1, we do not consider this recommendation would if implemented breach Clause 13.2(a).

Would Recommendation 3.2 be a breach of Clause 13.2(a)?

The Report explains that in Amaca Pty Ltd v Cremer (2006) 66 NSWLR 400 the Court of Appeal held that the requirement in s 12B of the Dust Diseases Tribunal Act for proceedings to be commenced by a plaintiff before his or her death precludes an estate from recovering damages for non-economic loss from a defendant joined as an additional party after the plaintiff's death; and further, that it precludes defendants from claiming contribution from another potential defendant if the potential defendant had not been joined before the plaintiff's death: para 3.46. This recommendation proposes an amendment to s 12B that is intended to overcome this problem.

The proposed amendment is intended to benefit plaintiffs and defendants generally. The Report explains at para 3.47:

> This decision [Amaca] has the potential to act to the detriment of a plaintiff in an estate action, where the existence of an additional, or more appropriate, defendant does not emerge, or become known, until after the victim's death. It also has the potential for adversely affecting the defendant, who is subsequently held responsible to pay damages for non-economic loss in an estate action, and who only becomes aware, after the victim's death, of the existence of another party from whom contribution could be sought.

Whether the amendment has an adverse effect on the JHINV Group, the Trustee or any of the Liable Entities will vary from case to case, depending on whether the relevant Liable Entity or Marlew is joined before or after the plaintiff's death. However, in the absence of any suggestion that a Liable Entity or Marlew is more likely to be joined after the plaintiff's death than before, it seems to us difficult to characterise this recommendation as necessarily leading to an increase in the damages payable and funded under AFFA. For that reason, on the information presently available to us, we do not consider that this recommendation would if implemented breach Clause 13.2(a). In any event, it would not breach this clause for the reasons given in relation to Recommendation 2.1

Clause 13.2(g)

Clause 13.2(g) provides:

> The NSW Government acknowledges and agrees that:
>
> (i) damages for dust diseases compensation are determined by common law in New South Wales;
>
> (ii) the NSW Government will not change the common law basis of assessment of damages for dust diseases compensation; and
>
> (iii) accordingly, the NSW Government will not legislate to reduce or increase damages for dust diseases.

Before considering whether any of the Recommendations breach Clause 13.2(g), some preliminary comments should be made about the clause.

Clause 13.2(g)(i) appears to reflect the circumstance that the common law, insofar as it governs the recovery of damages for personal injury for dust diseases, is largely unmodified by statute in NSW. Thus, the Limitation Act 1969 does not apply to dust diseases claims: Dust Diseases Tribunal Act, s 12A. Further, at the time the original final funding agreement was executed (on 1 December 2005), the Civil Liability Act did not apply at all to dust diseases claims: see s 3B(1)(b) of that Act in its original form.

However, the acknowledgment that damages for dust diseases are determined by the common law in NSW is inaccurate in at least three presently relevant respects.

First, as a result of amendments made in 2006, the Civil Liability Act now imposes restrictions on the damages recoverable for gratuitous attendant care services provided to the plaintiff (so-called Griffiths v Kerkemeyer damages) as well as damages for the loss of the plaintiff's capacity to provide domestic services (so-called Sullivan v Gordon damages) in dust diseases cases: ss 3B(1)(b); 15A, 15B and 18(1)(c).

Secondly, the common law did not permit any action for personal injury to be brought or carried on after a person's death: Report para 1.70. Section 2 of the Law Reform (Miscellaneous Provisions) Act 1944 reverses that position. The section applies to tort actions generally, including dust diseases actions.

Thirdly, the common law did not allow compensation to the dependents of a person who died as a result of a wrongful act or omission of another: Consultation Paper, para 4.42. The Compensation to Relatives Act reverses that position by enabling such actions to be brought. It too applies to dependents generally, including dependents of a victim of a dust disease.

Against that background, we turn to Clause 13.2(g)(ii). On one view, that clause would prevent *any* modification to heads of damages for dust diseases which are currently regulated by the unmodified common law: in essence, all heads of damages except Griffiths v Kerkemeyer and Sullivan v Gordon damages. On another view, it would simply prevent the abolition of any common law head of damages. Either way, it does not seem to us that this subclause could apply to changes to damages actions which cannot be brought at common law: in particular, dependency actions under the Compensation to Relatives Act and claims for damages for non-economic loss in an estate action.

Subclause (iii), however, is broader and would, read literally, extend to changes affecting the damages recoverable in dependency actions and clams for non-economic loss in a dust diseases estate action. The word "accordingly" in subclause (iii) suggests that the parties to AFFA were proceeding on the basis that there was no relevant difference between the scope of subclauses (ii) and (iii). That is, they assumed that subclause (ii) captured the universe of changes that could have the effect of reducing or increasing damages for dust diseases. As explained above, that assumption is incorrect: in some respects the common law basis of assessment to damages for dust diseases has been modified by statute; further, there are statutory entitlements to bring claims for damages for dust diseases that could not have been brought at common law. The question is whether the intent of subclause (iii) was to preclude

any legislation reducing or increasing damages for dust diseases, whether by modification of the common law or otherwise.

This question is particularly relevant to Recommendations 2.1 and 3.1 which relate to statutory causes of action under s 3 of the Compensation to Relatives Act and under s.12 of the Dust Diseases Tribunal Act respectively. It might be argued, therefore, that Clause 13.2(g)(iii) has no application to any legislation that might implement these recommendations. On the other hand, it seems unlikely that the intention of this clause was to allow legislation that would significantly increase the liabilities of the Liable Entities. The matter is not free from doubt but, on balance, we prefer the view that Clause 13.2(g) was intended to extend to legislative changes affecting the damages recoverable in dust disease actions.

Would Recommendation 2.1 be a breach of Clause 13.2(g)?

For the reasons explained earlier, this recommendation would increase the damages payable in cases where damages for non-economic loss recovered in an estate action filter through, by transmission, to a dependent who has brought a dependency action under the Compensation to Relatives Act. Accordingly, the recommendation would breach Clause 13.2(g)(iii).

Would Recommendation 2.2 be a breach of Clause 13.2(g)?

This recommendation would have the effect of reducing the damages payable by a defendant in cases where an estate action might otherwise have included a claim for loss of capacity to provide domestic services following the victim's death. This reduction in the damages payable would infringe Clause 13.2(g)(iii).

Would Recommendation 2.3 be a breach of Clause 13.2(g)?

This recommendation, because it involves no legislative action, would not infringe Clause 13.2(g).

Would Recommendation 3.1 be a breach of Clause 13.2(g)?

This recommendation, by expanding the circumstances in which claims for non-economic loss can be brought in an estate action, would have the effect of increasing the damages

payable in such an action. It would, accordingly, breach Clause 13.2(g)(iii).

Would Recommendation 3.2 be a breach of Clause 13.2(g)?

This recommendation does not seem to us to change the common law basis of assessment of damages for dust diseases within Clause 13.2(g)(ii), since it deals with the exercise of a statutory right conferred by s 12B of the Dust Diseases Tribunal Act to bring a claim for damages for non-economic loss which claim could not, under s 2(2)(d) of the Law Reform (Miscellaneous Provisions) Act 1944, otherwise have been brought.

Nor does it seem to us that this recommendation would have the effect of reducing or increasing the damages payable for dust diseases within Clause 13.2(g)(iii). The proposed joinder provisions simply affect the identity of the defendants who are liable to pay, or share in the payment of, those damages rather than affecting the quantum of damages payable.

Other provisions of AFFA

Clause 13.3 of AFFA contains a promise by the NSW government not to undertake any adverse regulatory action. The terms of the clause substantially mirror Clauses 13.2(a) to (f). As such, it does not seem to us that there would be any breach of this clause in circumstances where Clauses 13.2(a) to (f) are not also breached.

We have not been able to identify any other provisions of AFFA which might be breached by the Recommendations.

Please do not hesitate to contact us in relation to any of the matters raised in this advice.

MG Sexton SC

M A Izzo

2 May 2012

Director General

Assistant Director General, Legislation, Policy and Criminal Law Review

Crown Solicitor's Office (Michael Khoury)

Attachment C: Actuarial Report from KPMG

KPMG Actuarial Pty Ltd
Australian Financial Services Licence No. 392050
10 Shelley Street
Sydney NSW 2000

PO Box H67
Australia Square NSW 1215
Australia

ABN: 91 144 686 046
Telephone: +61 2 9335 7000
Facsimile: +61 2 9335 7001
DX: 1056 Sydney
www.kpmg.com.au

Estimation of the potential impact of the recommendations of New South Wales Law Reform Commission Report 131 ("Compensation to Relatives")

Prepared for Asbestos Injuries Compensation Fund Limited ("AICFL")

30 April 2012

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KPMG Actuarial Pty Ltd
Australian Financial Services Licence No. 392050
10 Shelley Street
Sydney NSW 2000

PO Box H67
Australia Square NSW 1215
Australia

ABN: 91 144 686 046
Telephone: +61 2 9335 7000
Facsimile: +61 2 9335 7001
DX: 1056 Sydney
www.kpmg.com.au

30 April 2012

Narreda Grimley
General Manager
Asbestos Injuries Compensation Fund Limited
Suite 1, Level 7, 233 Castlereagh Street
Sydney NSW 2000

Cc The Board of Directors, Asbestos Injuries Compensation Fund Limited

Dear Narreda

ESTIMATION OF THE POTENTIAL IMPACT OF NEW SOUTH WALES LAW REFORM COMMISSION REPORT 131 ("COMPENSATION TO RELATIVES")

Please find enclosed our report assessing the potential financial impact of the New South Wales Law Reform Commission Report 131 entitled "Compensation to Relatives".

Should you have any questions with regard to the content and conclusions of our report, we are available to discuss them.

Yours sincerely

Neil Donlevy MA FIA FIAA
Executive, KPMG Actuarial Pty Limited
Fellow of the Institute of Actuaries (London)
Fellow of the Institute of Actuaries of Australia

Jefferson Gibbs BSc FIA FIAA
Executive, KPMG Actuarial Pty Limited
Fellow of the Institute of Actuaries (London)
Fellow of the Institute of Actuaries of Australia

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Table of Contents

Main Report Sections

Executive Summary

Overview

In October 2011, the New South Wales Law Reform Commission issued Report 131 entitled "Compensation to relatives".

The Law Reform Commission Report 131 makes a number of recommendations including some procedural recommendations. Amongst other things, the Law Reform Commission Report 131 recommends:

- Abolition of the Strikwerda principle, such that there would be no offset of the non-economic loss amount paid under the Estate claim when assessing the Compensation to Relatives/dependency action
- A requirement to allow recovery of damages for non-economic loss when claims are commenced within 12 months after the death of the person.

Throughout this Report we will refer to these collectively as "**Recommendations**".

Recommendation 2.2 of the Law Reform Commission Report 131 addresses changes to the Law Reform (Miscellaneous Provisions) Act 1944 (NSW) as it relates to the loss of gratuitous services.

We have not included an estimate of this component within this report as the size of awards for the gratuitous services varies considerably, depending on individual cases and situations. Accordingly any such estimate would be highly uncertain (in addition to the uncertainties that typically exist for asbestos-related disease liabilities). By contrast, non-economic loss awards have less variation to them and therefore the average size of such awards is more readily estimable.

The Law Reform Commission Report also makes some recommendations in relation to operational and procedural matters. However, we have not addressed these in this report as they are not considered to directly affect the cost of claims.

KPMG Actuarial Pty Ltd ("KPMG Actuarial") has been retained by Asbestos Injuries Compensation Fund Limited ("AICFL") to provide advice to AICFL on the potential financial impact to the AICF of the Recommendations made under Law Reform Commission Report 131.

We understand that on 16 February 2012, a bill entitled "Compensation to Relatives Legislation Amendment (Dust Diseases) Bill 2012" was introduced to the NSW Parliament. Our estimate has not considered the extent to which the Bill aligns with the recommendations contained within New South Wales Law Reform Commission Report 131.

Findings

Our estimates contained within this report are based on the net present value estimate of the potential asbestos-related disease liabilities of the Liable Entities as at 31 March 2011 ($1,478m). Of that, we estimate that the liabilities for claims brought in NSW are approximately $700m (see Section 1.2 for the basis of that estimate).

The table below summarises the results of our estimates of the net present value impact of the Recommendations. We refer readers to the main section of this report to understand the definitions of the "Groups" of claimants referred to in the table below.

Table 1: Summary of Net Present Value Estimates ($m)

Net Present Value ($M)	Mesothelioma		Non-mesothelioma		Total	
	Low	High	Low	High	Low	High
GROUP A	5.2	27.6	1.2	6.3	6.4	33.9
GROUP B	13.8	13.8	3.2	3.2	17.0	17.0
GROUP C	-	106.8	-	24.6	-	131.4
Group A + Group B	19.0	41.4	4.4	9.5	23.4	50.9
All	19.0	148.2	4.4	34.1	23.4	182.3

Note: For Group A and Group B, "low" refers to the NPV as calculated using "Method 1" assumptions and approach, whilst "high" refers to the NPV as calculated using "Method 2" assumptions and approach. They are not to be interpreted as "lower bound" or "upper bound" estimates.

In summary, our findings for Groups A and B are as follows:

- For mesothelioma claims, the potential net present value impact to AICFL (for the groups of claimants where the impact can reasonably be estimated, namely Group A and Group B), is estimated to be between $19m and $41m.
- For non-mesothelioma claims, the potential net present value impact to AICFL (for the groups of claimants where the impact can reasonably be estimated, namely Group A and Group B) is estimated to be between $5m and $10m (based on a 23% uplift factor as discussed in Section 3.6).

For Group C our findings are as follows:

- Due to the scarcity of data on such cases and due to the fact that the reasons as to why such people (or their families or their Estates) do not bring such claims are not known, it is not possible to identify with any precision the proportion of such potential claims that would ultimately result in a claim being brought subsequent to implementation of the Recommendations.

- The actual cost impact of this potential group of claimants cannot be estimated with any degree of accuracy. However, the "upper bound estimate" (which is the estimate if we assume all such cases that are currently not claimed under Common Law were to be claimed under Common Law) could potentially add up to a net present value of $107m for mesothelioma (and potentially a further $24m in relation to non-mesothelioma claims, again applying that 23% uplift factor discussed in Section 3.6).
- For the avoidance of doubt, we have not concluded that 100% of all potential claimants would in fact bring a claim and this range estimate should not be interpreted as such.
- We note that given the broader uncertainties as to the quantification of the totality of asbestos-related disease liabilities, such an estimate should also not be interpreted as a maximum value.
- We also note that we have not included an estimate of the impact of any potential other heads of damage for "Group C" if individuals (or their families or their Estates) in Group C bring a claim (i.e. we have not included the potential for past and future care costs, past economic loss, and so on).

Distribution and Use

This Report has been prepared for the management and Board of Directors of AICFL.

We understand that AICFL may provide this report to James Hardie Industries SE ("JHISE") and the NSW Government in due course.

We understand that the NSW Government has engaged Taylor Fry Consulting Actuaries to review the estimates we have derived.

However, this report is not to be provided to any other third party without the prior written permission of KPMG Actuarial.

We note that Taylor Fry state in their report (at Section 4.2.1.1)

> "Any recipient of this report [the Taylor Fry Report] must also be provided with a complete copy of the Second Draft KPMGA Report."

We clarify here that:

- Taylor Fry and the NSW Government are not authorised to release the Second Draft KPMGA Report (being the draft report dated 25 April 2012) to any party.

- No party is authorised (and no authorisation will be given to any party) to release any draft report prepared by KPMG Actuarial, including (for the avoidance of doubt) the Second Draft KPMGA Report (being the draft report dated 25 April 2012).

To the extent permitted by law, neither KPMG Actuarial nor its Executives, directors or employees will be responsible to third parties (including JHISE and the NSW Government and their respective advisers) for the consequences of any actions they take based upon the opinions expressed with this report, including any use of or purported reliance upon this report. Any reliance placed is that party's sole responsibility.

Where distribution of this report is permitted by KPMG Actuarial, the report may only be distributed in its entirety and judgments about the conclusions and comments drawn from this report should only be made after considering the report in its entirety and with necessary consultation with KPMG Actuarial.

Key uncertainties

Asbestos-related disease liabilities are subject to material uncertainties, most notably given the long duration over which claims are expected to be made, and the potential for material changes in legislation, amongst other aspects, over that timeframe.

Our Annual Actuarial Valuation Report illustrates and discusses key uncertainties.

It should be noted that the estimates contained in this report have been established from the basis of the central estimate of the potential liabilities of the Liable Entities at 31 March 2011.

Readers of this report should be aware that those estimates are themselves subject to inherent and material uncertainties. By way of illustration, our 31 March 2011 Annual Actuarial Valuation Report assessed the discounted central estimate of liabilities at $1.48bn but illustrated a range of sensitivities and illustrated some reasonable scenarios where the liabilities fell to $1.0bn or rose to $2.3bn.

Accordingly, if the ultimate cost of the liabilities of the Liable Entities differs from the $1.48bn included in our 31 March 2011 Annual Actuarial Valuation Report, then our estimates of the potential impact of the Recommendations will also vary from the estimate contained within this report, and potentially by a material amount.

In relation to the specific estimates that form the basis of this report, the uncertainties are exacerbated as:

- The Recommendations have not been implemented and there are a number of factors that affect the final actual cost of these Recommendations;
- The assumptions that underpin our estimate are based on limited data;

- Changes in legislation can lead to changes in claimant behaviour. It is difficult to know or estimate how such behaviour may change following these Recommendations; and
- There are a number of persons (or their families or their Estates) who currently do not bring a Common Law claim even if they do have mesothelioma. It is possible that these Recommendations could change the relative propensity of such individuals (or their families or their Estates) to bring a Common Law claim.

We discuss the specific uncertainties in detail in section 5 of this report.

Peer Review Findings by Taylor Fry Consulting Actuaries

We have perused the Taylor Fry final report that was provided to us on 27 April 2012 ("the Taylor Fry Report").

Comments that follow relate to the Taylor Fry Report and do not relate to any further Taylor Fry report that may be provided after finalisation of our report.

Differences in Approach

Our approach and the approach by Taylor Fry differ in a number of ways.

Perhaps the most relevant difference for readers of this report and the readers of the Taylor Fry Report to understand is the treatment of matters where there is no data available to us to suitably inform an estimate.

Whenever we can, we have sought to determine an assumption based on the use of information and claims data. Our approach, when presented with a matter that requires estimation but for which there is no such data available to make that estimation, is to quantify the range and clearly enunciate to the reader the deliberations or factors that could impact the overall estimate and which could lead to a lower or a higher number. The approach we have undertaken is consistent with the fact that our scope is to assess the potential financial impact and to enable discussion around the context and scale of the estimates. Our scope is not to determine a single point estimate for the purpose of a liability valuation under PS300 (we have noted this report is not prepared to comply with PS300).

Taylor Fry's approach in such circumstances is to speculate an assumption in the absence of any information to inform the estimation of that assumption. As Taylor Fry note in the Taylor Fry Report in relation to this matter:

> "If the intention of the reports is to inform the discussion surrounding the adoption or otherwise of the recommendations, I believe such speculation, suitably qualified, is more valuable than presenting extreme bounds, upper or lower".

There are four key areas where Taylor Fry make this "speculation" in the determination of their "Whatlf?" estimates, namely:

- The assumption by Taylor Fry that Estate claims under Method 2 for "Group A" will be 60% of a typical non-economic loss claim. (We note the factors affecting this matter at Pages 10 and 11 of our report.)
- The assumption by Taylor Fry that Dependant claims under Method 2 for "Group A" will be 80% of a typical non-economic loss claim. (We note the factors affecting this matter at Pages 10 and 11 of our report.)
- The assumption by Taylor Fry as to the level of additional economic damages that would also apply to Group C claims. Taylor Fry has speculated an estimate of $20,800 for Estate claims and $41,600 for Dependant claims. (We note this matter at Pages 14 and 28 of our report.)
- The assumption by Taylor Fry that in relation to "Group C" only 25% of potential claimants would in fact bring a claim. (We note the factors that affect this matter at Pages 13, 14 and 28 of our report.)

Accordingly, when interpreting the Taylor Fry estimates in the context of the KPMG Actuarial estimates, readers should be mindful of these uncertainties and our view that no data readily exists that could assist in supporting the setting of these assumptions.

Important observations regarding Taylor Fry's examination of our report

For the benefit of the readers of this report and the Taylor Fry report, we note for completeness the following observations in relation to Taylor Fry's comments on their examination of our report:

- In relation to the "Group C" estimate, Taylor Fry state that KPMG Actuarial have assumed AICFL will be joined in 65% of the additional claims and that they have adopted the same assumption (see Note 4, Page 40 of the Taylor Fry Report). This is not correct: we have assumed 70% (and we also note that we had assumed 70% in our second draft report, upon which Taylor Fry's report was completed).
- In relation to the Group C estimate, Taylor Fry state that KPMG Actuarial have assumed that 100% of mesothelioma cases not currently resulting in DDT claims (see Note 3, Page 40 of the Taylor Fry Report). This is not the case, KPMG Actuarial have quoted a range 0-100% and stated clearly that we are not in a position to speculate what percentage of these potential claimants would in fact bring a claim given we have no data to inform such an estimate.

Finally, we note the following apparent error in Appendix A.1 "Summary – Present Value of all Diseases" of the Taylor Fry Report:

- The Taylor Fry figures for the "Group A" claims only included Estate claims and they have therefore excluded the costs relating to Dependant claims. Readers should therefore act with caution when using and interpreting this table as it appears to us that this table is not a correct summary of the calculations that follow in Taylor Fry's "Whatlf?" estimates at Appendices A2, A3 and A4.

Comparison of Taylor Fry "Whatlf?" Estimates with KPMG Actuarial Estimates

For "Group A", Taylor Fry have estimated a range of $7.4m to $12.3m (based on our calculations of the correct figures – noting that Appendix A1 appears to have incorrect information contained within it). This compares with the KPMG Actuarial estimate of $6.4m to $33.9m.

For Group B, Taylor Fry have estimated a value of $14.4m. This compares with the KPMG Actuarial estimate of $17.0m.

For Group C, Taylor Fry have estimated a value of $14.2m to $28.5m. This compares with the KPMG Actuarial estimate of $0 to $131.4m with no point estimate provided. The key difference relates to the assumption by Taylor Fry that 25% of potential claimants would bring a Common Law claim. As discussed above, this percentage is not estimable and has been selected on a speculative basis by Taylor Fry.

Readers should exercise caution when comparing the Taylor Fry estimates to our results as they are not, in all cases, directly comparable.

1 Introduction

1.1 Overview

In October 2011, the New South Wales Law Reform Commission issued Report 131 entitled "Compensation to relatives".

The Law Reform Commission Report 131 makes a number of recommendations including some procedural recommendations. Amongst other things, the Law Reform Commission Report 131 recommends:

- Abolition of the Strikwerda principle, such that there would be no offset of the non-economic loss amount paid under the Estate claim, when assessing the Compensation to Relatives/dependency action
- A requirement to allow recovery of damages for non-economic loss when claims are commenced within 12 months after the death of the person.

Throughout this Report we will refer to these collectively as "Recommendations".

Recommendation 2.2 of the Law Reform Commission Report 131 addresses changes to the Law Reform (Miscellaneous Provisions) Act 1944 (NSW) as it relates to the loss of gratuitous services.

We have not included an estimate of this component within this report as the size of awards for the gratuitous services varies considerably, depending on individual cases and situations. Accordingly any such estimate would be highly uncertain (in addition to the uncertainties that typically exist for asbestos-related disease liabilities). By contrast, non-economic loss awards have less variation to them and therefore the average size of such awards is more readily estimable.

The Law Reform Commission Report also makes some recommendations in relation to operational and procedural matters. However, we have not addressed these in this report as they are not considered to directly affect the cost of claims.

KPMG Actuarial Pty Ltd ("KPMG Actuarial") has been retained by Asbestos Injuries Compensation Fund Limited ("AICFL") to provide advice to AICFL on the potential financial impact to the AICF of the Recommendations made under Law Reform Commission Report 131.

We understand that on 16 February 2012, a bill entitled "Compensation to Relatives Legislation Amendment (Dust Diseases) Bill 2012" was introduced to the NSW Parliament. Our estimate has not considered the extent to which the Bill aligns with the recommendations contained within New South Wales Law Reform Commission Report 131.

1.2 Liabilities of the Liable Entities by State

1.2.1 Claim numbers

The chart below shows the proportion of mesothelioma claims reported against the Liable Entities by year in which the claim was reported, split between NSW and the other States.

It can be seen that NSW typically represents around 45% of mesothelioma claims by number.

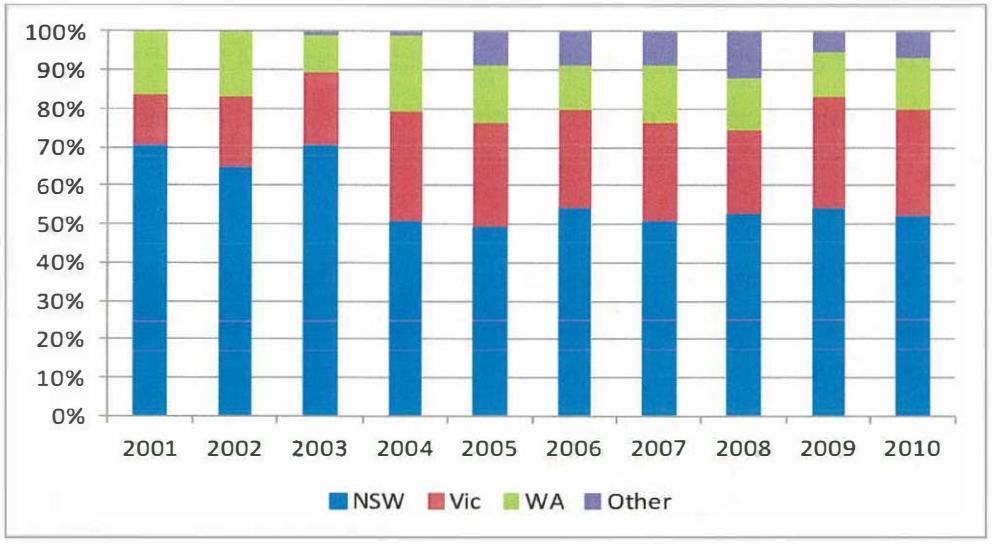
Figure 1: Proportion of mesothelioma claims by State

1.2.2 Claims settlement amounts

The chart below shows the proportion of mesothelioma claims costs that relate to claims brought in NSW and those claims brought outside of NSW.

It can be seen that NSW represents around 50% of mesothelioma claims by cost.

Figure 2: Proportion of mesothelioma costs by State



Analysis of non-mesothelioma claims indicates a slightly lower proportion of costs relating to NSW: around 40%.

1.2.3 Approximate allocation of the liabilities of the Liable Entities by State

We have assumed that approximately 50% of mesothelioma claims costs relate to NSW.

We have assumed that approximately 40% of non-mesothelioma claim costs relate to NSW.

We have no reason to consider that the mix of claims by State will change in the future.

Accordingly, based on a net present value of $1,488m (as at 31 March 2011), an approximate split of the liabilities of the Liable Entities is as follows:

NSW	$700m
Other States	$788m.

1.3 Distribution and Use

This Report has been prepared for the management and Board of Directors of AICFL.

We understand that AICFL may provide this report to JHISE and the NSW Government in due course.

We understand that the NSW Government has engaged Taylor Fry Consulting Actuaries to review the estimates we have derived.

However, this report is not to be provided to any other third party without the prior written permission of KPMG Actuarial.

We note that Taylor Fry state in their report (at Section 4.2.1.1)

> "Any recipient of this report [the Taylor Fry Report] must also be provided with a complete copy of the Second Draft KPMGA Report."

We clarify here that:

- Taylor Fry and the NSW Government are not authorised to release the Second Draft KPMGA Report (being the draft report dated 25 April 2012) to any party.
- No party is authorised (and no authorisation will be given to any party) to release any draft report prepared by KPMG Actuarial, including (for the avoidance of doubt) the Second Draft KPMGA Report (being the draft report dated 25 April 2012).

Furthermore, none of the parties may make reference to our report or the findings contained herein without the prior written permission of KPMG Actuarial.

This report has not been prepared for public release by any of AICFL, JHISE, the NSW Government or Taylor Fry Consulting Actuaries. This report may not be publicly released without the prior written permission of KPMG Actuarial.

To the extent permitted by law, neither KPMG Actuarial nor its Executives, directors or employees will be responsible to third parties (including JHISE and the NSW Government and their respective advisers) for the consequences of any actions they take based upon the opinions expressed with this report, including any use of or purported reliance upon this report. Any reliance placed is that party's sole responsibility.

Where distribution of this report is permitted by KPMG Actuarial, the report may only be distributed in its entirety and judgments about the conclusions and comments drawn from this report should only be made after considering the report in its entirety and with necessary consultation with KPMG Actuarial.

1.4 Reliance and Limitations

KPMG Actuarial has relied upon the accuracy and completeness of the data with which it has been provided by AICFL.

KPMG Actuarial has not verified the accuracy or completeness of the data from AICFL, although we have undertaken steps to test its consistency with data previously received from AICFL. However, KPMG Actuarial has placed reliance on the data previously received, and currently provided, as being accurate and complete in all material respects.

KPMG Actuarial has been provided with data from the Dust Diseases Tribunal Registry. KPMG Actuarial has not been able to verify the accuracy or completeness of that data, nor have we been able to undertake any steps to reconcile the data to other independent sources of information.

This report is inherently limited by the availability of information to quantify the potential impact of a series of recommendations contained within the Law Reform Commission Report 131.

In arriving at our estimates, we have relied upon input and advice from AICFL and their lawyers.

However, where possible we have sought to independently test the validity of the information provided by reference to known data and court cases in the Dust Diseases Tribunal or taking into account our wider experiences with other clients.

We further note that any estimation of liabilities or costs in relation to asbestos-related disease liabilities is subject to material limitations owing to the small number of claims involved each year. This makes the selection of assumptions inherently more difficult.

We note that this report provides an estimate of the impact upon AICFL and the Liable Entities. This report does not provide an estimate of the potential "system-wide" cost of the Recommendations. We note that the relative financial impact of these Recommendations to other defendants and insurers may well be different to that of AICFL and the Liable Entities.

1.5 Uncertainties

Asbestos-related disease liabilities are subject to material uncertainties, most notably given the long duration over which claims are expected to be made, and the potential for material changes in legislation, amongst other aspects, over that timeframe.

Our Annual Actuarial Valuation Report illustrates and discusses key uncertainties.

It should be noted that the estimates contained in this report have been established from the basis of the central estimate of the potential liabilities of the Liable Entities at 31 March 2011.

Readers of this report should be aware that those estimates are themselves subject to inherent and material uncertainties. By way of illustration, our 31 March 2011 Annual Actuarial Valuation Report assessed the discounted central estimate of liabilities at $1.48bn but illustrated a range of sensitivities and illustrated some reasonable scenarios where the liabilities fell to $1.0bn or rose to $2.3bn.

Accordingly, if the ultimate cost of the liabilities of the Liable Entities differs from the $1.48bn included in our 31 March 2011 Annual Actuarial Valuation Report, then our estimates of the potential impact of the Recommendations will also vary from the estimate contained within this report, and potentially by a material amount.

In relation to the specific estimates that form the basis of this report, the uncertainties are exacerbated as:

- The Recommendations have not been implemented and there are a number of factors that affect the final actual cost of these Recommendations;
- The assumptions that underpin our estimate are based on limited data;
- Changes in legislation can lead to changes in claimant behaviour. It is difficult to know or estimate how such behaviour may change following these Recommendations; and
- There are a number of persons (or their families or their Estates) who currently do not bring a Common Law claim even if they do have mesothelioma. It is possible that these Recommendations could change the relative propensity of such individuals (or their families or their Estates) to bring a Common Law claim.

We discuss the specific uncertainties in detail in section 5 of this report.

1.6 Author of the report

This Report is authored by Neil Donlevy, an Executive of KPMG Actuarial Pty Limited, a Fellow of the Institute of Actuaries (London) and a Fellow of the Institute of Actuaries of Australia.

This Report has been reviewed by Jefferson Gibbs, an Executive of KPMG Actuarial Pty Limited, a Fellow of the Institute of Actuaries (London) and a Fellow of the Institute of Actuaries of Australia.

1.7 Compliance with Professional Standards

This report has not been prepared to comply with Professional Standard 300 ("PS300") of the Institute of Actuaries of Australia, "Valuation of General Insurance Claims", which is effective for balance sheet dates occurring after 23 February 2010.

This report is not intended to be a "valuation" of the liabilities of a company, but rather is an estimate of the potential impact of the Recommendations.

We note, however, that the Annual Actuarial Valuation Report prepared at 31 March 2011 (and on which this report relies) was prepared to comply with PS300 (with the exception of two matters, which we disclosed in the Annual Actuarial Valuation Report).

1.8 Annual Actuarial Valuation Report

Our most recent Annual Actuarial Valuation Report for AICFL was prepared at 31 March 2011 and was publicly released on 19 May 2011.

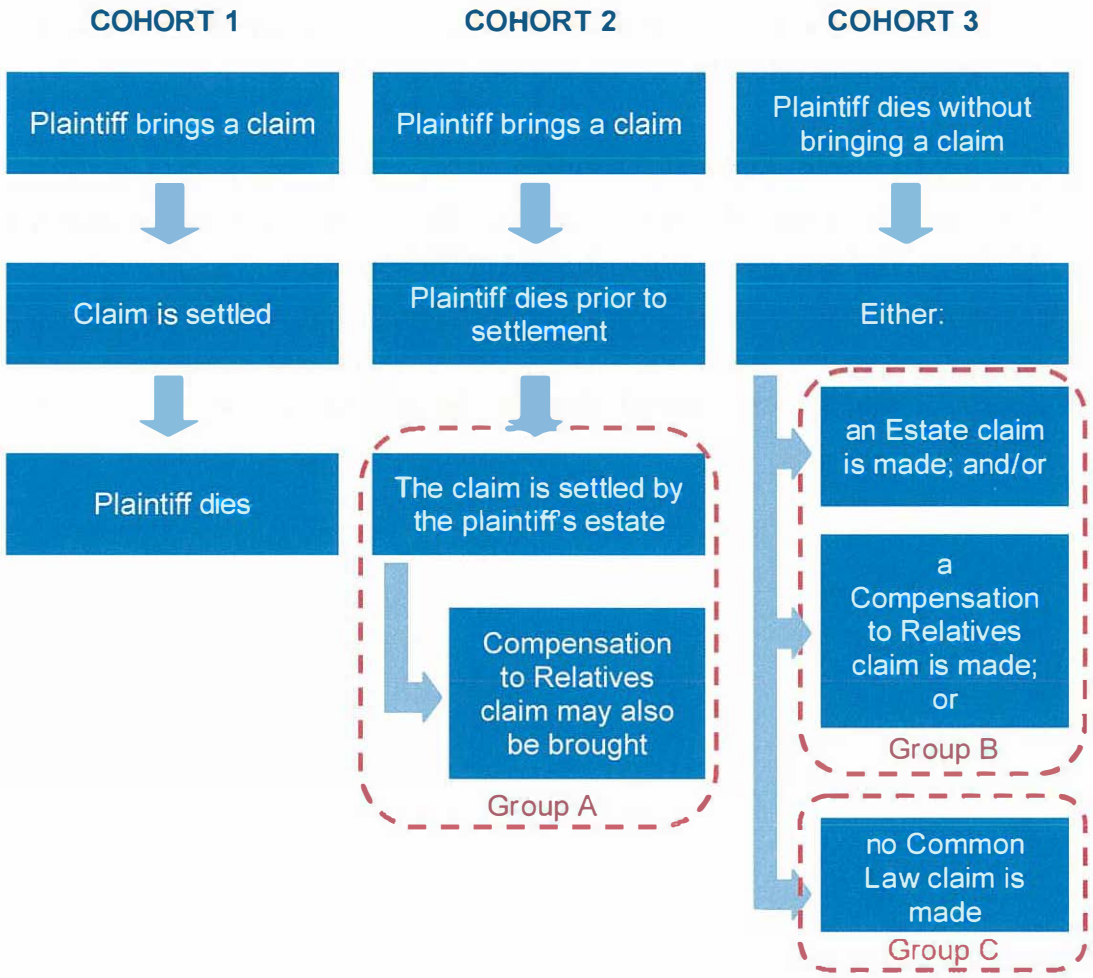
Readers are referred to that Annual Actuarial Valuation Report for additional background on the claims experience, claims trends and background on the nature of the asbestos-related disease claims and liabilities of the Liable Entities.

2 Methodology and Data

2.1 Methodology for quantifying the impact of the Recommendations

The chart below maps out the ways in which a claim may be brought and then considers the way in which the Recommendations may lead to additional costs. This identifies 3 Groups of claims which are used as the platform for our analysis of the financial impact of the Recommendations.

Figure 3: Segmentation of claim actions



The claims in the Cohort 1 will experience no changes in the cost of claims as a result of the Recommendations.

From Cohort 2 and Cohort 3, Groups A, B and C represent those areas where we believe there will be, or may potentially be, a financial impact of the Recommendations.

Further discussion on each cohort of claims follows.

Cohort 1

In Cohort 1, the claimant is able to commence and settle their claim before their death.

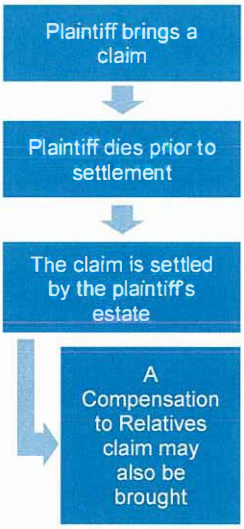
The claim settlement typically includes compensation for past economic loss, future economic loss, costs of medical care and non-economic losses (i.e. general damages for pain and suffering and an amount for loss of expectation of life).

There may also be compensation for *Sullivan v Gordon* and *Griffiths v Kerkemeyer*.

Upon settlement, all obligations are discharged and there are no Estate claims or Compensation to Relatives claims to be brought.

As such, there is no direct impact arising from the Recommendations and the removal of the Strikwerda principle.

Cohort 2 (Group A)



In Cohort 2, the claimant commences a claim but dies prior to the settlement of the claim.

In this case the claim is continued and settled as an Estate claim.

The claim payment of an Estate claim typically includes compensation for past economic losses, cost of medical care and non-economic losses (i.e. general damages for pain and suffering and an allowance for loss of expectation of life). The payment can only consider these costs up to the date of death (i.e. cannot include any costs or payments relating to the period after the date of death).

If a Compensation to Relatives claim is made, the claim typically includes compensation for future economic losses and potentially *Sullivan v Gordon* and *Griffiths v Kerkemeyer* amounts.

However, currently in NSW the Compensation to Relatives payment is adjusted downwards by any non-economic loss payment (made under the Estate claim) to the extent that the payment to the Estate may flow through to the individual(s) bringing the Compensation to Relatives claim.

As such, the implementation of the Recommendations would see the Estate claim be unchanged in value but the Compensation to Relatives claim would increase by an amount equal to (or less than) the non-economic loss amount paid under the Estate claim.

The reason why we use the words "equal to (or less than)" is that:

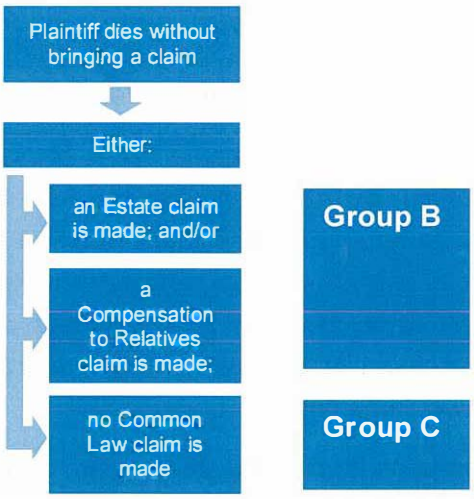
- Not all claims for Compensation to Relatives are brought by individuals who receive full entitlement of the Estate claim. The Compensation to Relatives claim only needs adjusting downwards to the extent the person bringing the Compensation to Relatives claim has benefitted from the Estate claim.
- Some cases don't have a Compensation to Relatives claim brought (for example, if there was no dependency). By way of illustration, a claimant of above a certain age will have no economic loss and there may not be any dependents who can assert financial loss. If no Compensation to Relatives claim is brought, then the Estate claim does involve payment of non-economic loss but there is no application of Strikwerda. The impact of the Recommendations in such a case would be NIL.
- In some cases, even where a Compensation to Relatives claim is brought, the claim is of lower value that the non-economic loss component paid under the Estate claim. In those circumstances, the Compensation to Relatives claim is reduced to zero (i.e. is not negative), so a full netting-off of the non-economic loss payment is not made in this circumstance.

We do not have access to any information that would enable us to assess the extent to which the above factors may result in a "downwards adjustment factor" to be applied to the overall average non-economic loss award assumption to reflect the potential impact of these scenarios.

Any estimation of such an adjustment factor is, at best, speculative.

Accordingly, our approach within this Report is not to apply any such adjustment. However, we note that as a result of this, the impact of the Recommendations upon Group A is potentially lower than we have estimated.

Cohort 3 (Group B and Group C)



In the third cohort, the claimant dies before a claim has been commenced.

In this scenario the person's estate may bring an Estate claim and their dependants may bring a Compensation to Relatives claim (collectively "Group B").

Alternatively, no claim may be brought either by way of an Estate Claim or a Compensation to Relatives claim (the person's family or Estate may bring a claim against the Dust Diseases Board of New South Wales if the exposure was occupational and resulted from working in NSW) (this group of "potential claims" is referred to as "Group C").

In relation to the "Group B" category of claimants:

- The claim payment of an Estate claim typically includes compensation for past economic losses and cost of medical care. Note here that there are no payments in relation to non-economic losses (i.e. general damages for pain and suffering and an allowance for loss of expectation of life).
- If a Compensation to Relatives claim is made, the claim typically includes compensation for future economic losses and potentially *Sullivan v Gordon* and *Griffiths v Kerkemeyer* amounts.

The impact of the Recommendations would be to grant entitlement for the claiming of non-economic loss amounts provided that the claim is brought within 12 months of the death of the person. This would apply to all such Estate claims.

In relation to "Group C", these are potential claimants whose families and/or Estates do not currently bring a claim. This may be because of a number of factors which may include:

- damages for non-economic loss are not currently available for a claim brought post-death and therefore (if the economic loss is NIL or close to NIL), it may be felt that the level of compensation would not warrant going through the claims process; or,
- if the person's asbestos-related disease was a result of occupational exposure in New South Wales, the dependents may be eligible for workers compensation benefits via the Dust Diseases Board of New South Wales and it may be that the benefits available under that system are more than those currently available to them by way of proceedings being brought in the Dust Diseases Tribunal; or,
- they are not aware that they could seek compensation; or
- they may not have sufficient evidence or information as to how the exposure took place to be able to bring a Common Law claim against any defendants.

As a result of the Recommendations, in relation to the above four factors, we consider that in the first two factors the Recommendations will likely lead to a greater likelihood for the families and/or Estate of the person to make a claim.

In relation to the latter two factors in the list, the Recommendations would be unlikely to change the likelihood of whether a claim is brought.

As a consequence, for those cases where claims are not currently brought, there is the potential that some (but unlikely all) of the current matters that do not result in a Common Law claim would result in Common Law claim being brought following implementation of the Recommendations.

We do not have access to any information that would enable us to assess the proportion of those potential claimants whose families and/or Estate would bring a Common Law following implementation of the Recommendations.

Any estimation of such a proportion of potential claimants that would bring a Common Law claim is, at best, speculative.

Accordingly, our approach within this report is not to apply any such adjustment but to instead represent our estimate as a range (with no point estimate provided).

The range reflects the two extreme outcomes, namely:

- No individuals in Group C bring a Common Law claim
- All individuals in Group C bring a Common Law claim

We also note that we have not allowed for the potential that other "heads of damage" (such as past economic loss, medical costs, *Sullivan vs. Gordon* or *Griffiths vs. Kerkemeyer* costs) that may potential by be claimed for this group of "claimants" thereby giving rise to a greater total increase in costs than that quantified above.

We have only estimated the range of outcomes for the non-economic loss component.

2.2 Data

The following data sources were utilised in coming up with our estimated cost:

- AICF claims database as at 31 December 2011.
- Cancer Institute of NSW Monograph – Mesothelioma in New South Wales 2010 (Published by the Cancer Institute of NSW).
- Review of the Dust Diseases claims resolution process – Issues Paper December 2008 (Published by The Attorney General's Department of NSW & The Department of Premier and Cabinet).
- An extract of certain data fields from the Dust Diseases Tribunal ("DDT") data registry provided to us by the Department of Attorney General and Justice on 15 March 2012. This data has generally covered the period 2005-2011.

We note that DDT data for the years 2005 and 2011 and similarly the AICF data for 2011 is only partially complete with respect to a financial year (and AICF year) definition. While we have shown the claims experience for these years in this report for completeness, we have generally excluded it when selecting our assumptions as the volume of data for those years is smaller and potentially less credible than other years.

3 Methodology and assumptions

3.1 Gross Impact Methodology

For Groups A and B, we have considered two methods:

1) Estimating separately the number of Estate and Compensation to Relatives claims, splitting each claim type into pre-death and post-death claims and estimating the potential increase in costs from each of these subgroups.

2) Estimating the combined number of Estate and Compensation to Relatives claims, but splitting these into pre-death and post-death claims to estimate the potential increase in costs.

The reason we have considered these different ways of analysing the AICF's information is that, due to the way claims are recorded, it is possible that some of AICF's claims that are labelled "Estate" have in fact both Estate and Compensation to Relatives aspects contained within them (and vice versa) and therefore placing over-reliance on such a definition could potentially understate our estimates.

Therefore we are cautious to not place an over-reliance on any one assumption and that is why we have also considered estimates that aggregate both these types of claims. Method 2 would provide an "upper range" assumption whilst Method 1 would provide a "lower range" assumption (all other assumptions being equal). Neither of these should be considered as an "upper bound" or "lower bound" and it is possible that the actual outcomes could exceed the estimate under Method 2.

For Group C, we have used the following method:

1) Estimating the number of mesothelioma claimants in New South Wales currently not claiming under the Common Law system and the potential costs arising from this Group, allowing for the propensity to claim and the proportion of such claims to which AICFL may be joined.

3.2 Groups A and B – Method 1

Under this method, assumptions are required for:

1) the number of Estate and the number of Compensation to Relatives claims for mesothelioma expected to be brought against AICFL in New South Wales.

2) the proportions of these which are expected to be brought pre- and post-death of the claimant

3) the proportion of each of these claim types which would be affected by the removal of the Strikwerda principle

4) the increased damages potentially payable on these claims as a result of the Recommendations.

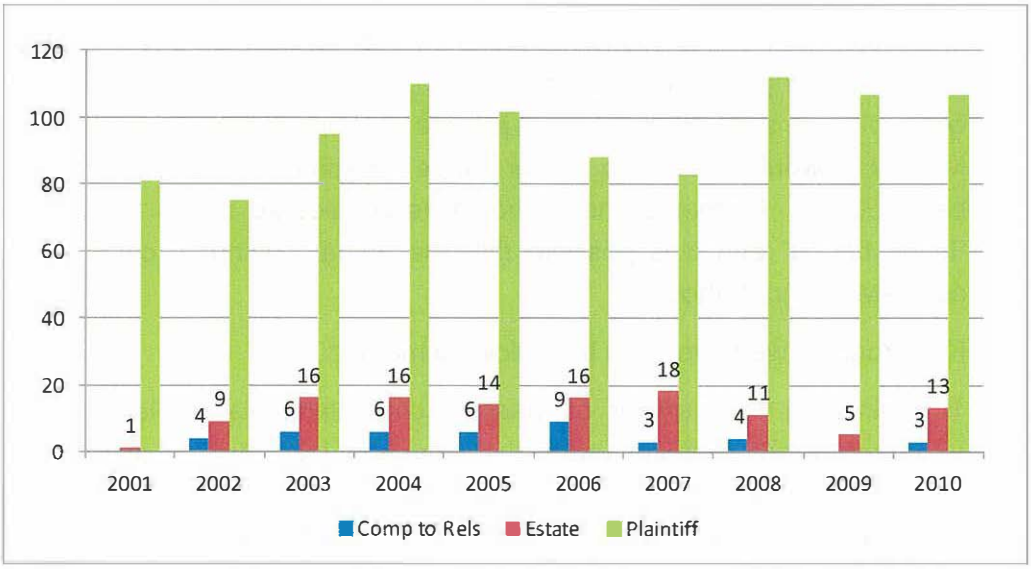
3.2.1 *Assumptions 1 and 2 – Estate and Compensation to Relatives claims numbers, and the proportions brought pre-death and post-death*

AICF Data

The graph below shows the split of NSW mesothelioma claims brought against the Liable Entities, separately by type of claim, being:

- Plaintiff claim – claim brought by claimant
- Estate claim
- Compensation to Relatives claim

Figure 4: NSW mesothelioma claims by claim type



It can be observed that the vast majority of claims (more than 80%) are "plaintiff claims".

Based on historic experience, we estimate that the number of Estate claims brought in the next year will be approximately 16, and the number of Compensation to Relatives claims in the next year will be 4.

In order to estimate the proportion of claims brought post-death, AICF provided us with details of a sample of approximately 40 recent NSW Estate and Compensation to Relatives claims. Based on this sample, we identified that approximately 20% of these claims are brought post-death, and this gives us the following breakdown of claims assumed.

Table 2: Breakdown of Estate and Compensation to Relatives claims

	Estate	Compensation to Relatives
Pre-death	13	3
Post-death	3	1
Total	**16**	**4**

DDT data

The DDT data provides a categorisation of claims which allows us to identify Compensation to Relatives claims. Note it has been assumed that all claims labelled as "Compensation to Relatives" are mesothelioma claims.

Table 3: Proportion of Compensation to Relatives claims: DDT data

Year	Compensation to relatives	Mesothelioma	Proportion
2005	6	125	5%
2006	8	159	5%
2007	8	165	5%
2008	3	164	2%
2009	3	115	3%
2010	1	133	1%
2011	6	149	4%
Total	35	1010	3%

Note: Data has been grouped into years defined by 1 April (year) to 31 March

The average of the recent experience of the DDT is 3%, which is in line with the proportion indicated by the AICF data of 4 Compensation to Relatives claims per annum (based on approximately 120-130 AICF claims in NSW annually).

The DDT data does not contain a categorisation of Estate claims, however, in some cases the date of death of the claimant was provided, allowing us to identify a subset of claims where the claim was lodged pre-death and finalised post-death i.e. matching our definition of Estate claims. Assuming that the date of death is always captured in cases where it occurs between lodgement and finalisation, we have used this data to estimate a proportion of Estate claims as set out in Table 4 below.

Table 4: Proportion of Estate claims: DDT data

Year	"Estate"	Mesothelioma (incl comp to rels)	Proportion
2005	11	125	9%
2006	26	159	16%
2007	21	165	13%
2008	14	164	9%
2009	21	115	18%
2010	19	133	14%
2011	7	149	5%
Total	119	1010	12%

Note: Data has been grouped into years defined by 1 April (year) to 31 March

The average proportion of the recent experience using the DDT data is 12%, which compares to an assumption of 15% of Estate claims indicated by the AICF data. However, if we exclude the partially complete years of 2005 and 2011, the average for the DDT data is 14%.

As discussed above, the date of death appears only to be captured in the DDT data where this occurs between the date of lodgement and finalisation. It is therefore not possible to derive an assumption of the proportion of claims lodged pre-death and post-death from this dataset.

Assumptions made

Given that the assumptions indicated by the AICF data are supported by the DDT data, we have assumed that:

- 16 claims are expected to be brought by claimants prior to their deaths (Group A), of which we assume there to be 13 Estate claims and 3 Compensation to Relatives claims.
- 4 claims are brought by the families of the "claimants" after the death of the individuals (Group B), of which we assume there to be 3 Estate claims and 1 Compensation to Relatives claim.

3.2.2 *Assumption 3 – proportion of claims affected by removal of the Strikwerda principle*

Our interpretation of the operation of the Strikwerda principle on Group A is that if an Estate claim is brought prior to death, this does not impact compensation payable. However, it will affect the value of a Compensation to Relatives claim.

A Compensation to Relatives claim is unlikely to be brought (in addition to the Estate claim currently in progress) in respect of claimants of a post-retirement age as the future economic loss component is likely to be close to zero and therefore the dependency claim will be limited even before application of the Strikwerda principle.

Where the claimant is of pre-retirement age, a future economic loss component would be available and a Compensation to Relatives claim may be made. Hence the removal of the Strikwerda principle would (all other things being equal) increase the compensation payable on these claims by the amount of non-economic loss (which would previously have been offset).

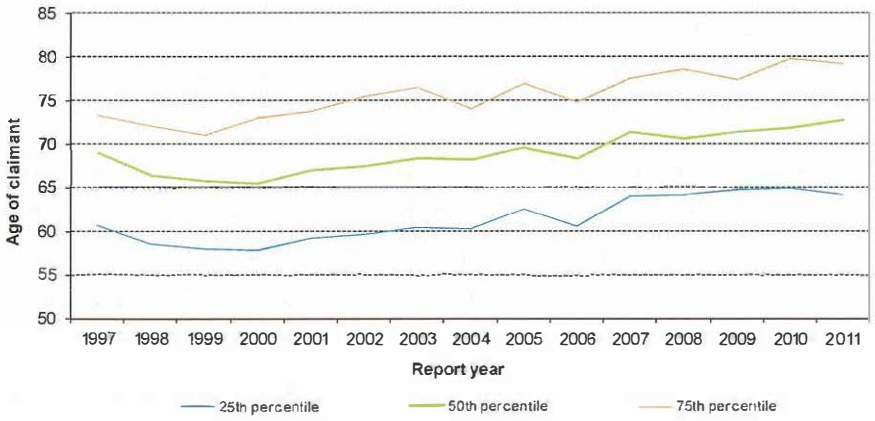
The proportion of claims which we expect would be affected by the removal of the Strikwerda principle is broadly speaking, the proportion of claimants likely to receive a future economic loss benefit, i.e. those aged 70 years old or less.

The chart below shows that approximately 25% of individuals are under 65 years of age, and slightly less than 50% of individuals are under 70 years of age at the date claims are reported.

On this basis, we have assumed that the appropriate assumption as to the proportion of claimants that would be affected by this aspect of the Recommendations is 50% of claimants.

We recognise that the median age is likely to continue to increase in future years. Whilst this may then lead to a conclusion that an assumption of lower than 50% might be appropriate in future years as time progresses, this would ignore the potential that retirement ages may also continue to rise. We consider that these two factors will act to broadly offset each other and accordingly we have not adjusted our selected assumption.

Figure 5: Age of claimants by reporting year



We note that the DDT data provided does not contain information on the date of birth of the claimant and can therefore not be used to test this assumption.

For Group B, as a claim is being brought post-death, non-economic loss compensation is not currently available. However, it would be available following the Recommendations.

Therefore all claims in Group B will be affected by the Recommendations.

3.2.3 *Assumption 4 – the increased damages payable*

AICF data

We have also analysed recent Compensation to Relatives and Estate claims in NSW to estimate the average non-economic loss component payable by AICF. This analysis yielded an average assumption of $208,000 (being 67% of $280,000 for general damages and 67% of $30,000 for loss of expectation of life where each of these amounts relate to our understanding of the typical levels of awards payable in NSW for these "heads of damage").

The 67% reflects AICF's average contribution rate on claims in which it is joined. This was derived using the following data.

Table 5: Contribution rate analysis – AICF data only

Year starting 1 April	Total settlement amount ($m)	AICF settled amount ($m)	Contribution rate
2008	105.8	79.2	74.8%
2009	96.4	69.0	71.6%
2010	93.8	72.4	77.2%
Total	**296.0**	**220.6**	**74.5%**

Note: For the purposes of this analysis, total settlement amounts exclude those on claims which are nil to AICF. Further, where a contribution rate of greater than 100% is implied, the total settlement amount has been set equal to the AICF amount.

As the contribution rate above excludes nil claims, we then need to make an allowance for nil claims, this is currently assumed to be 10% of mesothelioma claims (in our Annual Actuarial Report of 31 March 2011). This indicates an overall contribution rate of

$$74.5\% \times (1 - 10\%) = 67\%.$$

To the extent that a lower nil settlement rate were to be assumed, this would lead to an increase in the overall cost assessment. We make this comment because nil settlement rates have been trending downwards in recent periods.

By way of illustration, if we instead adopted a nil settlement rate of 8%, then the average claim size would rise to approximately $212,000 (a 2% increase from $208,000) and all of the costings made within this report would rise by around 2%. (This would be equivalent to assuming an overall contribution rate of 68.5%.)

DDT data

We were able to further supplement this analysis with average claim size analysis of the DDT data. Note that historic data has been inflated to 2011 values at a rate of 4% per annum. The data shown below already excludes nil claims and therefore does not require a further adjustment for such claims.

Table 6: Contribution rate analysis – allowing for DDT data

Year	DDT Data	AICF Data	Contribution rate
2005	341,537	303,367	89%
2006	433,394	355,813	82%
2007	378,174	318,894	84%
2008	499,679	398,064	80%
2009	811,270	359,446	44%
2010	518,844	324,140	62%
2011	356,876	260,528	73%
Average			**69%**
Excluding 05 and 11			**66%**
Excluding 05, 09 and 11			**76%**

Note: Data is grouped by year claim finalised (1 April to 31 March)

The DDT data broadly supports the contribution rate implied by the AICF data. However, we note that the 2009 year looks to have an exceptionally high average claim size for the DDT which appears to be due to a larger than usual number of "large claims" settled in the DDT, and may therefore understate the AICF contribution rate.

Excluding this year (in addition to the partially complete years of 2005 and 2011), would imply a contribution rate of 76%.

Assumptions adopted

The historical claims experience of AICF indicates a contribution rate of around 67%. Additionally, the DDT data appears to support this assumption but could in fact support an assumption between 66% and 76%.

Based on the above analyses, we have assumed a contribution rate of 67%.

We note that an increase in the contribution rate assumed to 70% would add around 4.5% to the average non-economic loss claim size (to $217,000) and would add 4.5% to all of the estimates contained within this report.

3.2.4 Calculation of impact

The impact from Group A is therefore estimated as:

Annual Cost	3 x 0.5 x $208,000	= $312,000
NPV	16.56[1] x $312,000	= $5.2m

The impact from Group B is therefore estimated as:

Annual Cost	4 x $208,000	= $832,000
NPV	16.56 x $832,000	= $13.8m

3.3 Groups A and B – Method 2

Under this method, assumptions are required for:

1) the total number of Estate or Compensation to Relatives claims for mesothelioma expected to be brought against AICFL in New South Wales.
2) the proportions of these which are expected to be brought pre- and post-death of the claimant
3) the proportion of each of these claim types which would be affected by the removal of the Strikwerda principle
4) the increased damages payable on these claims as a result of the Recommendations

The data analysis performed and conclusions reached in relation to Method 1 also apply here.

Based on historic experience, we estimated that the number of Estate or Compensation to Relatives claims in the next year in New South Wales is 24.

[1] The "NPV multiplier" has been calculated for mesothelioma and is calculated as $1,248.5m / $75.4m. These figures are sourced from Appendices B and C of the 31 March 2011 Annual Actuarial Report. A reasonable NPV multiplier could be picked that ranges from 16 to 17.

As previously assumed and discussed:

- 16 claims are expected to be brought by claimants prior to their deaths (Group A).
- 4 claims are expected to be brought by the families or Estates of the "claimants" after the death of the individuals (Group B).

In this method we assume that the split between Estate and Compensation to Relatives claims is unknown.

For Group A, the same reasoning applied as in the previous example, however we assume that all 16 claims are potentially Compensation to Relatives claims.

For Group B, as a claim is being brought post-death, non-economic loss compensation is not currently available, however this would change under the Recommendations. Therefore all claims in this Group will be affected by the Recommendations.

Assuming (as per method 1) an average general damages amount of $280,000 and a "loss of expectation of life" allowance of $30,000; and allowing for an AICF contribution rate of 67%, leads to an average non-economic loss payment amount of $208,000.

The impact from Group A is therefore estimated as:

Annual Cost	16 x 0.5 x $208,000	= $1,664,000
NPV	16.56 x $1.664m	= $27.6m

The impact from Group B is therefore estimated as:

Annual Cost	4 x $208,000	= $832,000
NPV	16.56 x $832,000	= $13.8m

3.4 Comparison of results under Method 1 and Method 2

The difference between Method 1 and Method 2 is that in Method 2 we have assumed that any claims labelled "Estate" within AICF's claims database are in fact both Estate and Compensation to Relatives claims and therefore an offset is taking place.

This then will only affect the Group A impact; the Group B impact is the same as under Method 1.

The DDT data does not provide clear categorisations of both Compensation to Relatives and Estate claims and therefore Method 2 is still necessary to capture all of the claims which will potentially be impacted by the Recommendations.

For Group A, method 1 results in a net present value estimate of $5.2m whilst method 2 results in a net present value estimate of $27.6m.

For Group B, both methods result in a net present value estimate of $13.8m.

3.5 Group C

Under this method assumptions are required for:

1) the total number of mesothelioma cases diagnosed in NSW in the next year which are not currently expected to result in a Common Law claim.
2) the proportion of these which may be expected to join AICFL as a party to the claim.
3) the damages payable on these claims.

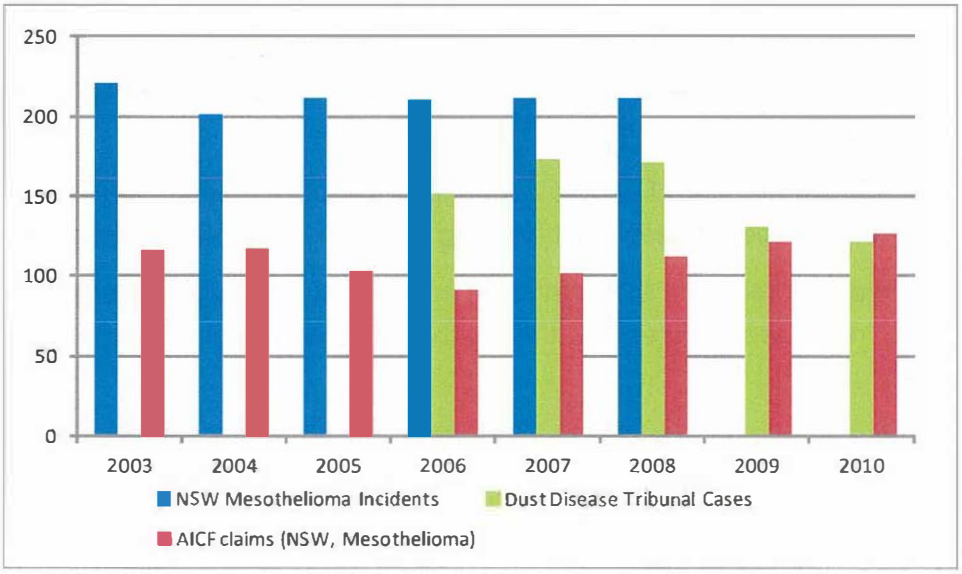
It should be noted that there are uncertainties and difficulties in completing the estimates of items (1) and (2) in the above list substantially due to limitations in the data that is available.

3.5.1 *Assumption 1 – mesothelioma case numbers not expected to result in a Common Law claim*

AICF, DDT and Cancer Institute data

The graph below shows the incidence of mesothelioma in NSW up to 2008, the number of claims AICF received in the years to 2010 and the number of cases lodged in the Dust Diseases Tribunal in the first five years following implementation of the claims resolution processes.

Figure 6: NSW mesothelioma trends



Note: NSW Meso Incidents are on a calendar year basis, Dust Diseases Tribunal is on a financial year basis (1 July 07 - 30 June 08) and AICF claims are on an 1 April to 31 March basis.

Between 2003 and 2010, the number of mesothelioma claims to the AICF in NSW has been relatively flat, although this has comprised two distinct trends: a reduction in claims activity between 2003 and 2006 and an increase in claims activity from 2006 to 2010.

Table 7: Proportion of claims currently not brought in the Common Law system

Year	DDT Data	Cancer Institute Data	Proportion not brought
2006	138	210	34%
2007	188	212	11%
2008	185	212	13%
Average			**19%**

Note: Data has been grouped into calendar years

The average proportion of cases of mesothelioma not brought in the Common Law system in the three years to 2008 is 19%.

Assumption made

- We estimate approximately 220 cases of mesothelioma in NSW annually,
- Around 20% of these cases are not brought in the DDT (based on experience in 2006 to 2008).
- This means a reasonable estimate of the number of potential additional claims (across the NSW 'system') would be 44 claims.

We note that the number of DDT cases fell in 2009 and 2010 and it may be that:

- Either the number of people contracting mesothelioma in NSW fell and the proportion of people not bringing a Common Law claim was little changed compared to the experience in 2008;
- Or the number of people contracting mesothelioma in NSW did not fall and the number of people not bringing a Common law claim increased.

In the first scenario, the number of potential claims might be slightly lower than 44. In the second scenario, the number of potential claims might be higher than 44.

There is no data available to us to better identify which of these two outcomes is more likely to prevail, and therefore we are of the view that placing a range around the 44 claims assumption would, at best, be speculative.

3.5.2 *Assumption 2 – proportion of cases which may be expected to make a claim against AICF*

AICF and DDT data

The table below shows the number of mesothelioma claims in each year to AICF and the DDT.

Table 8: Number of claims to the AICF and DDT

Year	DDT Data	AICF Data	Joining rate
2005	125	103	82%
2006	159	92	58%
2007	165	102	62%
2008	164	112	68%
2009	115	122	106%
2010	133	127	95%
2011	149	83	56%
Average			**73%**
Excluding 05, 09 and 11			**70%**

Note: Data has been grouped into years defined by 1 April (year) to 31 March

The average implied "joining rate" of all years is 73%. Excluding the partially complete years of 2005 and 2011, as well as the anomalous year of 2009, an average joining rate of 70% is observed.

Assumption made

We have assumed that 70% of cases to the DDT will involve AICF.

3.5.3 *Assumption 3 – the damages payable on these claims*

The data analysis performed and conclusions reached in relation to Methods 1 and 2 also apply here. We have therefore assumed an average non-economic loss payment of $208,000.

3.5.4 *Calculation of impact*

Our estimation of the current number of cases that do not become Common Law claims is as follows:

- We estimate approximately 220 cases of mesothelioma in NSW annually.
- Around 20% of these cases are not brought in the DDT (i.e. 44 cases).
- AICF is typically joined in approximately 70% of all NSW Common Law claims in the DDT.
- This means there is an "upper bound estimate" of 31 cases (i.e. 220 x 20% x 70%) that could be brought against AICF and the Liable Entities but which are not currently brought (assuming all potential claimants brought a claim).

- Assuming an average non-economic loss payment amount of $208,000.

The estimated potential impact from this group of potential claimants for 2012/13 is therefore:

$$31 \times \$208{,}000 = \$6.45\text{m}$$

The NPV is therefore $106.8m (being equal to $6.45m multiplied by the NPV multiplier of 16.56).

We again note that a precise estimation of the cost that will materialise is not possible. It is possible that an answer could be anywhere in the range $0-$106.8m.

It is also possible that the actual outcome could exceed $106.8m so care should be taken when interpreting this as an "upper bound".

We also note that we have not allowed for the potential that other "heads of damage" (such as past economic loss, medical costs, *Sullivan vs. Gordon* or *Griffiths vs. Kerkemeyer* costs) that may potential by be claimed for this group of "claimants" thereby giving rise to a greater total increase in costs than that quantified above.

We have only estimated the range of outcomes for the non-economic loss component.

3.6 Estimating the potential impact of the Recommendations upon non-mesothelioma claims

We have assumed that the impact on non-mesothelioma disease types would be in proportion to the estimated impact for mesothelioma claims. This gives an uplift of 23%[2] to each of the estimates produced under the two methods for Groups A and B.

Because the 23% has been calculated using net present value figures of non-mesothelioma claims as compared to mesothelioma claims, there does not need to be a further adjustment to this factor for the lower "NPV multiplier" that exists for non-mesothelioma claims (14.18) compared to mesothelioma claims (16.56) .

We recognise and note that this "uplift" by 23% is likely to be a conservative assumption in evaluating the impact on non-mesothelioma claims, given the less rapid onset of death for non-mesothelioma diseases as compared to mesothelioma.

This would tend to lead us to the conclusion that a greater proportion of non-mesothelioma claims are brought and settled before the death of the claimant, leaving a lower proportion of claimants that would benefit from the Recommendations.

However, there is no data available to us in relation to non-mesothelioma claims to enable us to make a determination as to the appropriate "uplift" factor.

We also note that the impact of this percentage (i.e. 23%) is not considered material to the totality of our estimates contained in this report.

By way of illustration, for Group A and Group B, the estimated impact for non-mesothelioma is $4.4m to $9.5m (based on the application of the 23% uplift factor). Selection of a factor of 11.5% would reduce the totality of our estimates by $2.2m to $4.7m.

[2] See Appendix C of 31 March 2011 Annual Actuarial Report.
Calculated as (182.1+47.9+52.2) / 1,248.5

3.7 Adjustments for legal costs, insurance and other recoveries

Defence legal costs for AICF are estimated at around 11.5% of gross liabilities.[3] We have no reason to believe that defence legal costs for managing the incremental matters arising out of the Recommendations would be less than is currently experienced.

Insurance recoveries are estimated at 11.2% of gross liabilities.[4]

The Recommendations have the potential to bring forward the insurance recoveries collectable by AICFL. However, as the insurance programme is substantially of an aggregate nature, and given that our Annual Actuarial Valuation implies total utilisation of the insurance cover, we expect that (if anything) the insurance recoveries (expressed as a percentage of the gross liabilities) would fall subsequent to the implementation of the Recommendations.

Cross claim recoveries are estimated at 2% of gross liabilities.[5]

Accordingly, in estimating a net impact to AICFL, we have concluded that using the gross impact would be a suitable approximation to determining the net impact.

Any variation to this conclusion would likely be of the order of 1-2% of our estimates, i.e. this is not material in the context of the overall uncertainties of our estimates.

[3] See Appendix B of 31 March 2011 Annual Actuarial Report.
Calculated as 10.9 / (75.4+10.2+5.2+4.5)
[4] See Section 8.5 and Appendix C of 31 March 2011 Annual Actuarial Report.
Calculated as (203.6-11.3) / (1681.2+30.9)
[5] See Section 7.6 of 31 March 2011 Annual Actuarial Report.

4 Results

4.1 Overall Summary of results

Our estimates contained within this report are based on the net present value estimate of the potential asbestos-related disease liabilities of the Liable Entities as at 31 March 2011 ($1,478m).

The table below summarises the results of our estimates of the net present value impact of the Recommendations.

Table 9: Summary of Net Present Value Estimates ($m)

Net Present Value ($M)	Mesothelioma		Non-mesothelioma		Total	
	Low	High	Low	High	Low	High
GROUP A	5.2	27.6	1.2	6.3	6.4	33.9
GROUP B	13.8	13.8	3.2	3.2	17.0	17.0
GROUP C	-	106.8	-	24.6	-	131.4
Group A + Group B	19.0	41.4	4.4	9.5	23.4	50.9
All	19.0	148.2	4.4	34.1	23.4	182.3

Note: For Group A and Group B, "low" refers to the NPV as calculated using "Method 1" assumptions and approach, whilst "high" refers to the NPV as calculated using "Method 2" assumptions and approach. They are not to be interpreted as "lower bound" or "upper bound" estimates.

In summary, our findings for Groups A and B are as follows:

- For mesothelioma claims, the potential net present value impact to AICFL (for the groups of claimants where the impact can reasonably be estimated, namely Group A and Group B), is estimated to be between $19m and $41m.
- For non-mesothelioma claims, the potential net present value impact to AICFL (for the groups of claimants where the impact can reasonably be estimated, namely Group A and Group B) is estimated to be between $5m and $10m (based on a 23% uplift factor as discussed in Section 3.6).

For Group C our findings are as follows:

- Due to the scarcity of data on such cases and due to the fact that the reasons as to why such people (or their families or their Estates) do not bring such claims are not known, it is not possible to identify with any precision the proportion of such potential claims that would ultimately result in a claim being brought subsequent to implementation of the Recommendations.

- The actual cost impact of this potential group of claimants cannot be estimated with any degree of accuracy. However, the "upper bound estimate" (which is the estimate if we assume all such cases that are currently not claimed under Common Law were to be claimed under Common Law) could potentially add up to a net present value of $107m for mesothelioma (and potentially a further $24m in relation to non-mesothelioma claims, again applying that 23% uplift factor).
- For the avoidance of doubt, we have not concluded that 100% of all potential claimants would in fact bring a claim and this range estimate should not be interpreted as such.
- We note that given the broader uncertainties as to the quantification of the totality of asbestos-related disease liabilities, such an estimate should also not be interpreted as a maximum value.
- We also note that we have not included an estimate of the impact of any potential other heads of damage for "Group C" if individuals (or their families or their Estates) in Group C bring a claim (i.e. we have not included the potential for past and future care costs, past economic loss, and so on).

4.2 Sensitivity of results to different assumptions

Table 9 of this report illustrates a range of outcomes depending on how we interpret the data and how the results differ according to different assumptions made.

We have also illustrated in the report how the different assumptions might affect the average non-economic loss size.

There are inevitably a large number of uncertainties, including those that relate to the net present value of the liabilities of the Liable Entities at 31 March 2011 (including the fact that discount rates are now considerably lower than they were at 31 March 2011: a lower discount rate increases the liability).

We have therefore not sought to try to provide a sensitivity test of the impact of the Recommendations to all such scenarios.

Readers of this report should not consider that the results contained in Table 9 represent a minimum or maximum possible outcome. The final outcome may be materially higher than those "high" estimates contained within Table 9.

5 Uncertainties

The valuation of asbestos-related disease liabilities is subject to considerable inherent uncertainty.

The estimate of the potential impact of the Recommendations is based on the assumption that the net present value estimate of liabilities of the Liable Entities as at 31 March 2011 (a net present value of $1,478m) represents the ultimate out-turn of experience. This estimate is, in itself, subject to material uncertainties.

We discuss the sources of such uncertainty in detail in Section 9 of our 31 March 2011 Annual Actuarial Report.

In relation to the potential impact of the Recommendations, there are some additional uncertainties, notably including:

- The estimation of the potential cost from Group C claims is particularly uncertain due to the difficulty in predicting changes in claimant behaviour as a result of the Recommendations. It is not possible to predict with any degree of accuracy what proportion of Group C individuals would in fact bring a claim following the implementation of the Recommendations.
- Our analysis was conducted using the data sources listed in Section 1.1. The volume of claims data we are using is small and this inherently increases the uncertainty and the potential range of outcomes.
- There may be secondary effects from the implementation of the Recommendations.

In respect of the other key assumptions:

- Numbers of claimants in Groups A and B – due to the inherently small volumes of claims and limited historic data, there is uncertainty in estimating the actual volumes of claims which will be brought in the future.
- The proportion of claimants impacted in Group A – we have used claimant age as a guide to estimating this proportion. However the individual characteristics of each claimant will ultimately determine the proportion affected and this cannot easily be predicted.

- Non-economic loss damages for all Groups – the characteristics of individual claims as well as other factors in the legislative environment give rise to uncertainty in estimating the damages payable. There is further uncertainty in estimating AICFL's share of these damages as past experience may not be a guide to future contribution rates. We have assumed a continuation of the current environment in relation to typical average payments for general damages for pain and suffering.
- Number of potential claimants in Group C – in addition to the uncertainty cited above regarding propensity to claim, the number of cases of mesothelioma as well as the proportion of these already expected to bring a Common Law claim, this number is difficult to estimate with certainty. Additionally, it is possible that of those extra claims that are brought, AICFL and the Liable Entities might be joined in a different proportion of cases than we have assumed (which is based on historic rates of joining of AICF in DDT cases).

Given the inherent uncertainties already contained within the commentary in this report, particularly around "Group C", we have not performed a sensitivity test of how the estimates may change with different assumptions.

In relation specifically to Group C, as noted previously, we consider any estimate of the proportion of individuals who might bring a claim is at best speculative as there is no information available to inform such an estimate. Accordingly, our approach in this Report has been to provide a range based on:

- No individuals in Group C bringing a Common Law claim
- All individuals in Group C bringing a Common Law claim