15 June 2011

Asbestos Injuries Compensation Fund Limited
ACN 117 363 461

Suite 1, Level 7
233 Castlereagh Street
Sydney NSW 2000

PO Box A962
Sydney South NSW 1235

DX 11548
Sydney Downtown

Telephone: (02) 9277 6602
Fax: (02) 9277 6699

The Hon James Wood AO QC
Chairperson
NSW Law Reform Commission
DX 1227
SYDNEY

By email: nsw_lrc@agd.nsw.gov.au

Dear Sir

Compensation to Relatives – Consultation Paper 14, May 2011

AICF wishes to provide its comments in respect of the New South Wales Law Reform Commission Consultation Paper 14 – "*Compensation to Relatives*" (**the Paper**). The terms of reference of the Paper include:-

> Consider the merits of amending the legislation to overrule the principle that compensation to a relative for pecuniary loss is reduced to the extent that general damages to the legal personal representative of the Deceased have already increased the amount to the relative from the Deceased's estate.

This is otherwise known as the *Strikwerda* principle. In addition to the abolition of that principle, the Paper discusses a number of other reforms which we wish to provide comment on.

GENERAL

We refer to preliminary submissions set out in our letter of 31 January 2011. We maintain those submissions.

In addition:-

- We refer to the submissions made by DLA Phillips Fox on 27 January 2011 along with the recent submissions of DLA Piper of 15 June 2011. We adopt and endorse the submissions of DLA Phillips Fox and DLA Piper.
- We refer to our own attendance before the Commission as part of its consultation process on 23 May 2011.

We do not propose to outline the general principles which are summarised within the Paper.

We note that the Paper is premised on an assumption that a Dependant's action only arises in circumstances where there has been a pecuniary loss to an eligible Dependant, i.e. where there has been a loss of financial support. However, losses in regard to a

Dependant's action extends beyond the loss of financial support, it also extends to a loss of domestic services i.e. domestic services that the Dependant had a reasonable expectation would continue for a period of time, but for the death of the injured person e.g. gardening, cooking and cleaning. The extension to the principles was first addressed by the High Court in *Nguyen v Nguyen* (1990) 169 CLR 245.

There are therefore two elements to any loss of dependency claim: the loss of the financial dependency and secondly the loss of domestic services. In our view this broadens the scope of claims and potential Plaintiffs, and is at odds with the suggestion outlined in paragraph 5.29 of the Paper:-

"*Given the long latency periods in asbestos related diseases, the victims are likely to have retired or to be close to the end of their working lives, and to have non-Dependent adult children.*"

Why? Because the Paper suggests that the number of dependency claims are limited whereas we believe the fact that the Deceased is not working has little or no impact because the loss of dependency may include a loss of domestic services. We have seen dependency claims brought in those circumstances (*Novak*). Any suggestion that these claims will be limited in the future is, in our submission, incorrect.

In AICF's opinion, this demonstrates that the potential class of Claimant to a Dependant's action is still relatively significant, such that any legislative change such as is proposed by the Paper would have potentially greater impact on costs than appears to be outlined in the Paper.

LIMIT THE APPLICABLE CATEGORY

In AICF's view, any amendments which would only reduce the application of *Strikwerda* or limit its applicability in dust diseases claim is unfair, both in respect of non-dust diseases Claimants, but also in respect of those participants, namely Defendants and insurers who are involved in dust diseases litigation. It would ultimately, in our opinion, lead to an increase in the claims costs and lead to inefficiencies with the management and resolution of these claims. If the principle were abolished, there would be no impetus on Plaintiffs to resolve claims in a timely fashion and/or to resolve the claims within an injured person's lifetime.

FINANCIAL CONSEQUENCES

We do consider that any changes other than Option 1 would have significant financial consequences for Defendants and insurers, particularly as the scope of damages for loss of dependency would significantly increase.

The Paper appears to assume that the Estate actions and Dependant actions are brought simultaneously. This will not always be the case and the Dependant has a right to bring an action within 12 months after the finalisation of the Estate claim. In those circumstances, the offsetting that would occur in the Dependant's action would depend on a number of factors:-

(a) Is the Dependant bringing the action entitled to any benefit from the Estate?

If the Dependant was not a beneficiary of the Estate, then the principle outlined in *Strikwerda* would not apply at all.

(b) If the Dependant brought an action separate to an Estate claim and at a later time, then theoretically the Dependant may be able to seek damages which the Estate may have already been compensated pursuant to s15B.

If *Strikwerda* were abolished, in those particular circumstances there would be a duplication of compensation in respect of the same domestic services.

In our opinion, the retention of the principle in *Strikwerda* reduces the risk of that occurring.

ABOLITION OF THE PRINCIPLES IN STRIKWERDA

In AICF's submission, the principle established by a long line of common law authority in Australia including the decision of *Strikwerda* should not be abolished.

The reasons outlined in the Paper for the proposed abolition of the principles have no merit and the factors outlined in the Paper supporting the abolition are not sound. As we observe later in the Paper, recent legislative amendments in New South Wales (see s15B *Civil Liability Act* (NSW) (**CLA**)) mean that the damages that were only available in dependency actions now survive to the Estate and therefore would not be subject to the principles in *Strikwerda* i.e. a reduction of available damages.

There is a suggestion in the Paper that the need to conclude claims in a timely manner (within lifetimes) can lead to crisis settlements and undervaluing of claims. This is not supported by our experience. We attempt to settle all claims as quickly as possible.

At paragraph 6.41 of the Paper it is noted that if damages for non-economic loss (general damages) are awarded to the Estate, the benefit of those damages is lost if they are later deducted from damages awarded in a Dependant's action. In our submission, this statement clearly misunderstands that there are two separate and distinct actions and the damages of the Estate are reflective of damages which survive the death of the injured person. The Dependant's action is separate and historically has always been treated separately. The Paper presents no basis upon which this historical distinction should be abolished.

The assessment of damages in Estate and dependency claims is, as we have stressed previously, a balancing exercise and it may be a matter for a Court or Tribunal to determine it will only take into account part of the damages that were recovered by the Estate in that balancing exercise.

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

We do not believe that s12B of the *Dust Diseases Tribunal Act* should be amended to allow for damages for non-economic loss to be recovered in circumstances where the proceedings have been commenced after death.

The *Dust Diseases Tribunal Regulations* were introduced in response to lengthy submissions made on behalf of Plaintiffs and Defendants regarding the timeliness of resolution of dust diseases proceedings. The provisions of the Regulation provide for strict timetabling of claims and lead, in the majority of cases, to the early resolution of proceedings. It also ensures that Defendants are focused on resolving claims at the earliest possible opportunity, subject to appropriate evidence in regard to liability.

If s12B were amended to allow the recovery of damages for loss and suffering (general damages) in Estate claims which were commenced after death, it would create significant evidentiary hurdles for a Defendant. There would be no opportunity for a Defendant to test the evidence/veracity of a Plaintiff prior to their passing. This would have significant effects, not only in respect of the Plaintiff/Deceased's claim, but also the viability and availability of any contribution proceedings and would place Defendants at a significant disadvantage. We could envisage cases where there were evidentiary problems which may have been incurred by a Plaintiff which, whilst not apparent in an Affidavit or written format, would only become apparent upon the testing of the Plaintiff's evidence. In those circumstances, it is possible that likely avenues of recovery against other potential Defendants would not be available. In turn, this would increase the financial burden borne by the Defendant at first instance.

SOLATIUM OR BEREAVEMENT DAMAGES

The Paper proposes an issue of whether New South Wales should provide for awards of solatium or specifically to dust diseases claims.

Pursuant to the terms of the Amended and Restated Final Funding Agreement (**FFA**), AICF may only meet payment of "payable liabilities". In our opinion, in accordance with the decision of the Supreme Court of New South Wales on 2 March 2011 in *Asbestos Injuries Compensation Fund Limited* [2011] NSWSC 97, solatium or bereavement damages would not be "payable liabilities".

Without prejudice to AICF's right to maintain that solatium is not a payable liability, we would argue that the reintroduction of solatium, particularly as there is availability of awards for loss of domestic services both to the Estate and generally in dependency actions, that the reintroduction of solatium would be equivalent to double compensation.

The difficulty with an award for solatium is the defining factors, and in particularly to whom it should be awarded. Are estranged spouses, or for that matter Dependants, entitled to claim loss of solatium even though their contact with the Deceased was intermittent and sparse over the remaining years of their life?

It is our opinion that the introduction of the award for solatium would be punitive on a Defendant.

In those circumstances, we do not believe it is appropriate for any amendments to be made reintroducing solatium as a benefit.

CONCLUSION

Ultimately we are of the opinion there should be no amendment to the current law and that the common law principles annunciated in *Strikwerda* should remain, and Option 1: Maintain the current Law is the only reasonable option for consideration.

Yours faithfully

Narreda Grimley
General Manager