

24 June 2011

The Hon James Wood AO QC  
Chairperson  
NSW Law Reform Commission  
GPO Box 5199  
Sydney NSW 2001

**James Hardie Industries SE**

Level 3  
22 Pitt Street  
Sydney NSW 2000 Australia

Tel: 02 8274 5239  
Fax: 02 8274 5218

GPO Box 3935  
Sydney NSW 2001 Australia

Dear Sir

### **Review of Compensation to Relatives Laws**

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

We understand the Commission is approaching this review with the application of the *Strikwerda* principle in asbestos-related cases as its primary focus. Given this, and given James Hardie's historical connection with asbestos and its continuing indirect involvement with asbestos claims through the payments it makes to the Asbestos Injuries Compensation Fund in accordance with the terms of the Amended and Restated Final Funding Agreement (**AFFA**), we understand the Commission is interested in any comments James Hardie may have in connection with the review.

To put our response in context, James Hardie has had no direct involvement in the handling and management of asbestos related claims since the establishment of the Medical Research Compensation Fund in 2001 and more recently, the establishment of Asbestos Injuries Compensation Fund Limited ("AICF") which took over handling such claims in 2007. As such, James Hardie has limited ability to comment on the potential impact of the changes being considered by the Commission from the perspective of a party actively or directly involved in asbestos related claims.

We understand that AICF and other defendant bodies have made submissions to the Commission in relation to this review. We consider that those bodies are best placed, in terms of their direct experience and knowledge of asbestos claims and the manner in which those claims are conducted, to make appropriate submissions on behalf of defendants and related bodies on the issues and various options being considered by the Commission.

James Hardie's comments in relation to the review and Consultation Paper are therefore limited to the extent to which the issues being considered potentially impact its rights and obligations under the AFFA and the operation of the AICF.

We do not intend to respond to each separate question raised by the Commission in the Consultation Paper. Rather, we wish to comment on two potential consequences of the abolishment of the *Strikwerda* principle or a related change in legislation (**Strikwerda change**).

We note the discussion in the Consultation Paper about the potential for a *Strikwerda* change to result in an increase in claims and claims costs<sup>1</sup>. We accept that there are two sides to this argument but consider that logically, it is not a question of whether claims and claims costs will increase as a result of a *Strikwerda* change but rather a question of how much they will increase by.

We note the statement made on behalf of the Greens as referred to in the Consultation Paper that the Greens understand that any abolition of the *Strikwerda* principle "*will not have a significant impact on the compensation scheme overall or on the James Hardie fund*"<sup>2</sup>. Taking into account the uncertainty involved in predicting the impact

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<sup>1</sup> Paras 6.32 to 6.37 and 6.53 to 6.61 of the Consultation Paper

<sup>2</sup> Para 6.54

of any change in legislation and adding to that the additional uncertainty associated with any estimate relating to future asbestos claims, we consider that such an emphatic statement should be treated with caution.

In this regard, we note the comments in paragraphs 61 and 62 of DLA Piper's submission to the effect that the claims being made under section 15B of the Civil Liability Act 2002, for damages for loss of domestic services, potentially include types of claims that were not contemplated by Parliament at the time the legislation was enacted. This demonstrates the difficulty in trying to estimate the extent of any potential change in claims and costs and the danger in assuming that a *Strikwerda* change will have little effect on defendants' liabilities.

If it is assumed that a *Strikwerda* change will result in at least some increase in claims and claims costs, we comment on two potential consequences.

First, we consider that, as noted by the Commission,<sup>3</sup> there is a potential consequence for the NSW Government arising from the "adverse legislative action" provisions in the AFFA.

Until such time as the precise nature of any *Strikwerda* change is known, and the potential impact of such change assessed, it is impossible to form a conclusive view on whether or not the adverse legislative action clauses in the AFFA will be engaged or, if they are, on the extent of any damages that may flow as a consequence. However, we note the Commission's conclusion in paragraph 5.19 that "... the only option identified [in the Consultation Paper] that would not come into conflict with the [AFFA] is option one, since it proposes that the existing law be maintained." We agree with this conclusion.

Second, any increase in claims and claims costs resulting from a change in legislation could potentially, subject to the terms of the AFFA, increase amounts payable by the AICF. As noted in the Consultation Paper<sup>4</sup>, and mentioned by the AICF in its submissions dated 31 January 2011, the AICF is already facing a funding shortfall which has led to the provision of a loan by the NSW Government, with assistance from the Commonwealth, to assist the AICF to make payments to future claimants. If the funds available to the AICF are not sufficient to pay all claims received, any requirement to pay increased claims and claims costs resulting from a *Strikwerda* change could prejudice AICF's ability to pay future claims of persons exposed to asbestos.

In this regard, we note the comments in the Consultation Paper about the difficulty of avoiding inequity between categories of claimants<sup>5</sup>. We also note the proposition included in the Statement of Compatibility presented with the Victorian amending Bill and referred to in the Consultation Paper<sup>6</sup> that: "*those with asbestos related injuries and those with other injuries are not groups in the same or similar circumstances and, as a consequence, they can be treated differently without being treated unequally*".

We suggest that a similar differentiation can be drawn between claimants who have a claim resulting from their own personal exposure to asbestos and claimants under compensation to relatives legislation. To the extent that maintaining the *Strikwerda* principle arguably results in any inequity to claimants under compensation to relatives legislation, we consider that, applying the proposition referred to above, such inequity is justifiable to ensure that claimants who were personally exposed to asbestos are not further disadvantaged.

We confirm that we do not require the Commission to treat this submission as confidential.

We would be happy to discuss this with you and provide the Commission with any further information or assistance if that would help its consideration of this matter.

Yours sincerely



Sean O'Sullivan  
**Vice President Investor and Media Relations**  
**James Hardie Industries SE**

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<sup>3</sup> Paras 5.13 to 5.19

<sup>4</sup> Paras 3.38 and 3.39

<sup>5</sup> Paras 6.14 to 6.25

<sup>6</sup> Para 6.25