



New South Wales
Law Reform Commission

Consultation
paper

14

Compensation to relatives

May 2011
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We seek your views on the issues raised in this paper and on any other matters you think are relevant to the review.

To tell us your views you can send your submission by:

- **Post:** GPO Box 5199, Sydney NSW 2001;
- **DX:** DX 1227 Sydney; or
- **Email:** nsw_lrc@agd.nsw.gov.au.

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Terms of reference

The Attorney General, the Hon John Hatzistergos, issued the following terms of reference (received on 3 November 2010):

The Law Reform Commission is to inquire into the legislation governing the provision of damages, including under the Compensation to Relatives Act 1897, Law Reform (Miscellaneous Provisions) Act 1944, Dust Diseases Tribunal Act 1989 and Civil Liability Act 2002.

In particular, the Commission is:

- to 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 be distributed to the relative from the deceased's estate;
- if this amendment is recommended by the Commission, advise as to whether other legislative changes should be made or further economic modelling undertaken if it appears that, on a global basis, liabilities may be materially affected;
- in considering any amendment, have regard also to the equity implications, including in terms of fairness as between defendants and claimants and as between different categories of claimants; and
- to consider any related matters that the Commission thinks appropriate.

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1. Introduction

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Terms of Reference

- 1.1 The purpose of this Consultation Paper is to consider the law that relates to the provision of damages to the relatives and dependants of victims of wrongful deaths. It arises from the following terms of reference issued by the Attorney General:

The Law Reform Commission is to inquire into the legislation governing the provision of damages, including under the Compensation to Relatives Act 1897, Law Reform (Miscellaneous Provisions) Act 1944, Dust Diseases Tribunal Act 1989 and Civil Liability Act 2002.

In particular, the Commission is:

- to 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 be distributed to the relative from the deceased's estate;
- if this amendment is recommended by the Commission, advise as to whether other legislative changes should be made or further economic modelling undertaken if it appears that, on a global basis, liabilities may be materially affected;
- in considering any amendment, have regard also to the equity implications, including in terms of fairness as between defendants and claimants and as between different categories of claimants; and
- to consider any related matters that the Commission thinks appropriate.

Context of review

- 1.2 When a person dies as a result of the wrongful act or omission of another, there are several options available to the estate or dependants of the deceased for recovering compensation for the losses that are occasioned by such an event:

- The legal personal representative of the deceased's estate can bring an action, or continue an action already commenced by the deceased, to recover common law damages on behalf of the estate, provided there was a cause of action already vested in the deceased. This type of action is based on the survival of

causes of action legislation in force in NSW¹ and in other common law jurisdictions. It is referred to in this Consultation Paper as an “**estate action**”.

- Where the deceased was killed in the course of his or her work, the dependants can claim the compensation that is payable on death under any relevant workers’ compensation scheme, including the dust diseases scheme, that is in force.²
- The legal personal representative can bring an action on behalf of specified family members for compensation for the pecuniary loss or losses arising from the death under the *Compensation to Relatives Act 1897* (NSW).³ These actions are referred in this Consultation Paper as “**dependants’ actions**”.

1.3 The damages available in an estate action can be categorised as either damages for economic loss or damages for non-economic loss. Damages for economic loss compensate actual and future economic loss experienced as a result of a wrongful act. These include loss of earning capacity and expenses incurred as a result of the injury such as hospital and medical costs, the cost of any required aids, appliances and nursing and assistance.⁴ Damages for non-economic loss – often referred to as “general damages” – compensate pain and suffering, loss of amenities (also known as “loss of the enjoyment of life” or “loss of bodily function”) and loss of expectation of life.⁵

1.4 The common law and legislation have established certain rules and principles in relation to these forms of recovery in order to prevent the double recovery of compensation, and to ensure that the compensation which is recovered reflects the actual loss of the claimant who brings the action, or on whose behalf it is brought. Three of these rules and principles are of immediate relevance for our Reference.

1.5 First, is the principle that dependants’ actions are only concerned with the pecuniary loss of an eligible dependant that arose from the loss of the expectation of the deceased’s financial support.⁶ This principle was accepted in Australian law following binding decisions of the Privy Council.⁷ It means that the damages that can be recovered in dependants’ actions “may not include anything by way of consolation for the dependants for grief or suffering; that their assessment is ‘a hard matter of pounds, shillings and pence’”.⁸

1.6 Secondly, is the well-established principle that, subject to certain statutory exceptions mentioned later, any benefits accruing to a particular relative, as a result

1. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1).

2. For example, *Workers Compensation Act 1987* (NSW) pt 3 div 1.

3. *Compensation to Relatives Act 1897* (NSW) s 3, s 4.

4. See H Luntz, *Assessment of Damages for Personal Injury and Death* (Lexisnexis Butterworths, 4th ed, 2004) 51.

5. H Luntz, *Assessment of Damages for Personal Injury and Death* (Lexisnexis Butterworths, 4th ed, 2004) 51.

6. *De Sales v Ingrilli* (2002) 212 CLR 338 [91].

7. For example, *Grand Trunk Railway Co of Canada v Jennings* (1888) 13 AC 800.

8. H Luntz, *Assessment of Damages for Personal Injury and Death* (Lexisnexis Butterworths, 4th ed, 2004) 490 quoting *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601, 617 (Lord Wright). There are certain statutory exceptions to this principle in some jurisdictions (such as solatium, discussed in Chapter 8), although none of these currently apply in NSW.

of the death, including inherited benefits, are taken into account and deducted from the damages awarded in a dependant's action. This principle was confirmed by the House of Lords in *Davies v Powell Duffryn Associated Collieries Ltd*⁹ and by the High Court in *Public Trustee v Zoanetti*.¹⁰

- 1.7 The benefit derived from the estate of the deceased that is to be offset is not the total value of the assets distributed to the claimant, rather it is the value of the accelerated receipt of the assets that is taken into account and deducted.¹¹ Nevertheless, this principle does have a potential impact on the recovery of damages by the dependants of a dust disease victim, by reason of the existence of a statutory exception to the rule next mentioned.
- 1.8 Thirdly, is the rule that damages for non-economic loss accruing out of a wrongful death are not recoverable in an estate action.¹² This is the case even though, had the deceased been able to bring and successfully complete proceedings for common law damages prior to his or her death, the damages recovered would normally have included an award of damages for non-economic loss. These damages for non-economic loss could have been expended during the deceased's lifetime or have formed part of his or her estate that was available for inheritance.
- 1.9 An exception exists in relation to those cases where the death of the deceased was attributable to a dust-related condition (referred to as a "**dust disease**") so that damages for non-economic loss are recoverable, but only where the deceased had commenced proceedings for damages in the Dust Diseases Tribunal,¹³ which has exclusive jurisdiction over such cases.
- 1.10 When the provision giving rise to this exception was enacted in 1998, consideration seems not to have been given to the fact that the decision in *Public Trustee v Zoanetti* would require the damages recovered in an estate action, including those for non-economic loss, to be taken into account when assessing damages in the dependants' action.
- 1.11 That this was necessary was accepted by the NSW Court of Appeal, in 2005, in *BI (Contracting) Pty Ltd v Strikwerda*,¹⁴ a dust disease case, in which:
- the estate of the deceased recovered damages in an estate action, the benefit of part of which passed to the deceased's widow; and
 - a dependant's action was also brought for the pecuniary loss that the widow suffered by reason of the death.

It was held that the benefit passing to the dependent widow, in consequence of being a beneficiary of an estate that was inflated by the award of damages payable in the estate action, had to be deducted from the damages payable in the

9. *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601.

10. *Public Trustee v Zoanetti* (1945) 70 CLR 266, 272 (Latham CJ), and 281, 286-288 (Dixon J).

11. *Horton v Byrne* (1956) 30 ALJR 583.

12. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(d).

13. *Dust Diseases Tribunal Act 1989* (NSW) s 12B.

14. *BI (Contracting) Pty Ltd v Strikwerda* [2005] NSWCA 288.

dependants' action. This principle is referred to in this Consultation Paper as the "**Strikwerda principle**".

1.12 One particular concern raised in the context of this review is that the operation of the *Strikwerda* principle unfairly disadvantages some dependants of those whose deaths were caused by dust diseases. The disadvantage can be seen by comparing the two scenarios that follow:

- The dust disease victim is able to complete or settle his or her action for damages before death. The damages which he or she can recover will include damages for non-economic loss. The amount representing these damages can be disposed of during the victim's remaining lifetime and, if given to his or her dependants before death, cannot be deducted from any damages available to the dependants in a dependants' action. If the victim dies before disposing of the amount of the damages, he or she can leave them, by will, to beneficiaries other than the dependants and this amount will not be deducted from any damages received that the dependants receive in a dependants' action
- The dust disease victim is unable to complete or settle his or her action for damages before death. The deceased victim's personal representative is able to carry on the action and recover damages for non-economic loss. However, if the damages for non-economic loss pass by way of succession to the deceased's dependants, the amount of the damages will have to be deducted from any amount awarded to them in a dependants' action.

1.13 The second scenario, where the dust disease victim is unable to complete or settle his or her action before death, arises quite frequently because of the accelerated progression of some dust diseases, between the time of diagnosis and death. This rapid, and unpredictable, progression leaves little time for dust disease victims to arrange their affairs advantageously for the benefit of their dependants. The compensation which the dependants receive, therefore, relies on seemingly arbitrary factors associated with the progression of some dust diseases.

1.14 As a result of this disadvantage, between 2005 and 2008, amendments were made to the relevant laws in WA, SA and Victoria to overcome the impact of the *Strikwerda* principle.¹⁵

1.15 In 2010, a private member's Bill was presented to the NSW Parliament to achieve a similar outcome.¹⁶ It sought to insert a new s 12E into the *Dust Diseases Tribunal Act 1989* (NSW). Its stated object was:

to amend the *Dust Diseases Tribunal Act 1989* to provide that the damages payable in relation to a compensation to relatives claim for the death of a person from a dust-related condition cannot be reduced to take into account that the claimant has an entitlement to participate in the distribution of the deceased person's estate in circumstances where the estate has been enlarged by a successful claim for the same dust-related condition.¹⁷

15. *Civil Liability Act 1936* (SA) s 24(2a)(f); *Wrongs Act 1958* (Vic) s 19; *Fatal Accidents Act 1959* (WA) s 5(2)(d).

16. Dust Diseases Tribunal Amendment (Damages—Deceased's Dependents) Bill 2010 (NSW).

17. Explanatory note to the Dust Diseases Tribunal Amendment (Damages—Deceased's Dependents) Bill 2010 (NSW).

- 1.16 Debate on this Bill was adjourned to allow us to consider the issues arising. The Bill has now lapsed.

Approach of the Commission to this issue

- 1.17 The Commission has approached this review with the application of the *Strikwerda* principle in asbestos-related cases as its primary focus. This is because the requirement that the damages for non-economic loss recovered in an estate action be deducted from the damages awarded in a dependant's action, although applicable to all dust diseases cases, is likely to have its greatest impact in asbestos-related cases.
- 1.18 Not all of the other dust diseases share the same rapid progression as that which is seen, for example, in mesothelioma and, for many of these, a victim would be able to commence and complete a common law action during his or her lifetime.

Outline of the paper

- 1.19 The remainder of this Consultation Paper is structured as follows:
- **Chapter 2** examines the nature and incidence of asbestos-related diseases.
 - **Chapter 3** identifies the framework for compensating victims of dust diseases and their dependants, and draws attention to the history of asbestos litigation in Australia, as well as the problems faced by those involved in this form of litigation.
 - **Chapter 4** summarises, in more depth, the current legal entitlements for the recovery of compensation or damages consequent upon the death of a person.
 - **Chapter 5** provides a summary of the options for reform of the law that the Commission has identified. It also identifies, in a summary way, the potential impact of the options on the parties involved.
 - **Chapter 6** addresses the issue whether the *Strikwerda* principle should be abolished.
 - **Chapter 7** addresses the issue whether the entitlement to claim damages for non-economic loss in an estate action should be available in dust diseases cases even though there were no proceedings on foot prior to the death of the dust disease victim.
 - **Chapter 8** considers the possibility of introducing an award of damages for solatium, that is, for the grief suffered as a result of the death of a family member.
 - **Chapter 9** considers the possibility of extending the availability of damages for non-economic loss, in estate actions, beyond dust disease cases, and removing the effect of the *Strikwerda* principle with respect to all such cases.
 - **Chapter 10** considers the possibility of expanding the range of benefits accruing, on death, to the estate or individual dependants which are to be disregarded when assessing damages in a dependant's action.

2. Nature and incidence of asbestos-related diseases

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Asbestos-related diseases	8

- 2.1 The nature of asbestos-related diseases raises some challenges for both claimants as well as for defendants in asbestos-related litigation. The most significant issue is that asbestos-related diseases (particularly mesothelioma, the most common asbestos-related cancer) display long-latency periods, followed by a swift death after diagnosis. In some cases the existence of an asbestos-related disease is not apparent or diagnosed until an examination is conducted of a person after death. This creates challenges for asbestos victims and for any dependants in obtaining appropriate compensation. It also creates significant problems for defendants and their insurers in predicting and planning for asbestos-related compensation.
- 2.2 In this chapter, we address the nature of asbestos-related diseases and the implications that their late diagnosis and rapid progression can have for the recovery of compensation. This chapter also refers to the other “dust diseases” that are dealt with under the same legislation.

Asbestos

- 2.3 Asbestos is a naturally occurring mineral. It has a range of beneficial properties that mean that it became widely used. It is resistant to fire, heat and corrosion and it is strong, durable and flexible, with fibres that can be woven into cloth.¹
- 2.4 Although there are six varieties of asbestos, only three of these are commonly used industrially. These are white asbestos (chrysotile), blue asbestos (crocidolite), and brown asbestos (amosite). All three types of asbestos have been mined in Australia at various times. Perhaps the best known of these mining operations was CSR’s crocidolite mine at Wittenoom, WA, which operated from 1937 to 1966. There were also mining operations in NSW including mines at Baryulgil and Woodsreef. The Woodsreef mine continued operation until 1983.²
- 2.5 Australia also imported a significant amount of asbestos – both as raw fibres and in manufactured goods such as asbestos cement products, asbestos yarn, cord and fabric, joint and millboard, friction materials and gaskets.³
- 2.6 Asbestos mined in Australia was sold as an export commodity and used in the domestic manufacture of products employed in the construction industry, in the manufacture of brakes and in the provision of heat insulation, among other uses.

1. American Academy of Actuaries, *Overview of Asbestos Issues and Trends* (American Academy of Actuaries Public Policy Monograph, 2001) 1.

2. J Leigh, P Davidson, L Hendrie and D Berry, “Malignant Mesothelioma in Australia, 1945-2000” (2002) 41 *American Journal of Industrial Medicine* 188, 189.

3. J Leigh, P Davidson, L Hendrie and D Berry, “Malignant Mesothelioma in Australia, 1945-2000” (2002) 41 *American Journal of Industrial Medicine* 188, 189.

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Cement manufacturing accounted for the highest proportion of asbestos use and consumption, with 60% of all production and 90% of all consumption of asbestos fibre occurring in this sector.⁴ Companies from the James Hardie Group were heavily involved in this respect. Much of the output was in fibre cement sheeting used for cladding houses and in sewerage piping.⁵ Other products, such as asbestos brake linings, were also produced by James Hardie Group subsidiaries.

2.7 Exposure to asbestos occurred in relation to those who:

- were engaged in its mining and processing;
- lived in the communities associated with mines (such as at Baryulgil and Wittenoom) or who were close relatives of mine workers;
- handled the product in the case of export – in bagging, transporting and loading it on trucks and ships;
- worked in the manufacture of asbestos products, particularly cement products; and
- used asbestos products in industry, such as the building industry, or in the course of employment in the Royal Australian Navy, or in the service and repair of brake systems used in trains and motor vehicles.

2.8 Under the National Model Regulations for the Control of Workplace Hazardous Substances, the use, re-use or sale of products containing any form of asbestos has been banned since 31 December 2003.⁶ In addition, stringent regulations apply to any form of construction or other activity that involves its removal or that would otherwise result in the release of asbestos dust fibres.⁷

Asbestos-related diseases

2.9 A number of diseases have been linked to asbestos exposure. These include mesothelioma, lung and other cancers and asbestosis (that is, diffuse interstitial pulmonary fibrosis). Typically there is a long latency period between exposure to asbestos fibres and manifestation of a disease.⁸ The following table sets out the diseases associated with asbestos and their consequences:

-
4. J Leigh, P Davidson, L Hendrie and D Berry, "Malignant Mesothelioma in Australia, 1945-2000" (2002) 41 *American Journal of Industrial Medicine* 188, 189.
 5. J Leigh, P Davidson, L Hendrie and D Berry, "Malignant Mesothelioma in Australia, 1945-2000" (2002) 41 *American Journal of Industrial Medicine* 188, 110.
 6. National Model Regulations for the Control of Workplace Hazardous Substances [NOHSC:1005 (1994)] sch 2.
 7. Code of Practice for the Management and Control of Asbestos in the Workplace [NOHSC: 2018 (2005)]; *Occupational Health and Safety Regulation 2001* (NSW) pt 4.2 div 2; *Protection of the Environment Operations (Waste) Regulation 2005* (NSW) cl 42.
 8. American Academy of Actuaries, *Overview of Asbestos Issues and Trends* (American Academy of Actuaries Public Policy Monograph, 2001) 2.

Table 2.1: Asbestos Diseases

Disease	Injury	Average Latency
Mesothelioma	<ul style="list-style-type: none"> ▪ A malignant tumor arising in the pleura membranes (of the lungs or diaphragm) and pericardial membrane of the heart. ▪ Symptoms may be vague, including chest pain, shortness of breath, weakness and weight loss. Diagnosis may be suspected by chest X-ray, but a full pathologist's microscopic exam is needed. ▪ Fatal within 1-2 years. 	30-40 years
Lung Cancer	<ul style="list-style-type: none"> ▪ A malignant tumor of the bronchi covering that grows to surrounding tissue. ▪ Symptoms include chest pains, cough, weakness, and shortness of breath. Chest X-rays may detect the cancer, but a pathologist's microscopic exam is needed. ▪ Often fatal. 	20-30 years
Possibly Other Cancers	<ul style="list-style-type: none"> ▪ Tumors of the throat, larynx, esophagus, stomach, colon, lymphoid. ▪ Chest X-rays may detect the cancer, but a pathologist's microscopic exam is needed. ▪ Often fatal. 	20-30 years
Asbestosis	<ul style="list-style-type: none"> ▪ A pulmonary insufficiency caused by scarring near alveoli. (As the body tries to dissolve asbestos fibers trapped in lung tissue, it produces an acid that does little damage to the fibers, but may cause severe scarring in the surrounding tissue.) ▪ Diagnosis through potential signs, history of exposure, pulmonary functioning test, CT scan/radiological findings. Some appreciable level of exposure over 10 years is likely required before a detectable significant amount of functioning is lost. ▪ Slowly progressive, potentially fatal. 	10-20 years
Pleural Injuries	<ul style="list-style-type: none"> ▪ Generally nonimpairing fibrosis or scarring of pleura tissue over the chest wall or diaphragm. ▪ Evidenced by effusion, thickening, plaque, or calcification. ▪ Do not appear to be pre-cancerous, but may increase risk of developing lung cancer in the future. 	20-30 years

Source: American Academy of Actuaries, *Overview of Asbestos Issues and Trends* (American Academy of Actuaries Public Policy Monograph, 2001) 2 (notes omitted).

2.10 Mesothelioma is the most common form of asbestos-related cancer and is one of the most lethal forms of cancer known with most people dying within a year of diagnosis. The five-year survival rate is only five percent.⁹

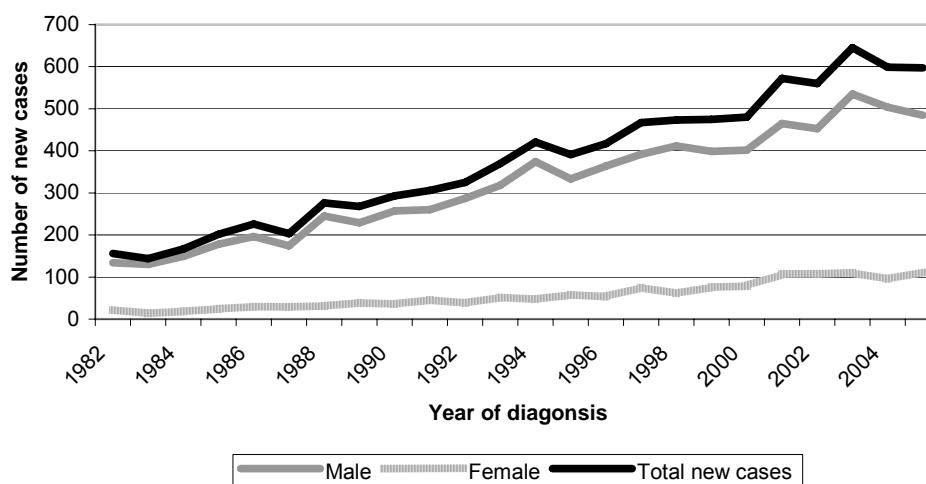
2.11 The time between exposure to asbestos and diagnosis of the disease will rarely be any less than 15 years, and will more often be 20 to 40 years.¹⁰ It may even sometimes be up to 60 years.¹¹

9. Allen Consulting Group, *Access to Treatment for Mesothelioma Patients, Report to the Asbestos Diseases Foundation of Australia Inc & Eli Lilly Australia Pty Ltd* (2007) 3.

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- 2.12 In 2003, there were 633 reported new diagnoses of mesothelioma in Australia, of which 83% were men. The median age of diagnosis for men and women was 70 and 71 years respectively.¹² In 2006, there were 579 new cases in Australia.¹³
- 2.13 Of the 535 claims made against James Hardie companies in the 2009-10 period, 262 (48.97%) were mesothelioma claims.¹⁴
- 2.14 The increase in mesothelioma diagnoses in Australia is now well-documented. The Australian Institute of Health and Welfare noted a 71.1% increase in mesothelioma cases from 1993 to 2003 and made reference to the significant spike in cases around 2003.¹⁵ Its most recent analysis demonstrates that this upward trend is generally continuing. Statistics from SafeWork Australia demonstrate the same trend:

Figure 2.1: New Cases of Mesothelioma: year of diagnosis by sex, 1982-2005



Source: Safe Work Australia, *Mesothelioma in Australia, Incidence 1982 to 2006, Mortality 1997 to 2006* (2009) 9.

- 2.15 Because of the time lag between exposure to asbestos and subsequent diagnosis, it is expected that the incidence of known cases of mesothelioma will not peak until after 2010,¹⁶ with predictions indicating that there will be a peak in the annual

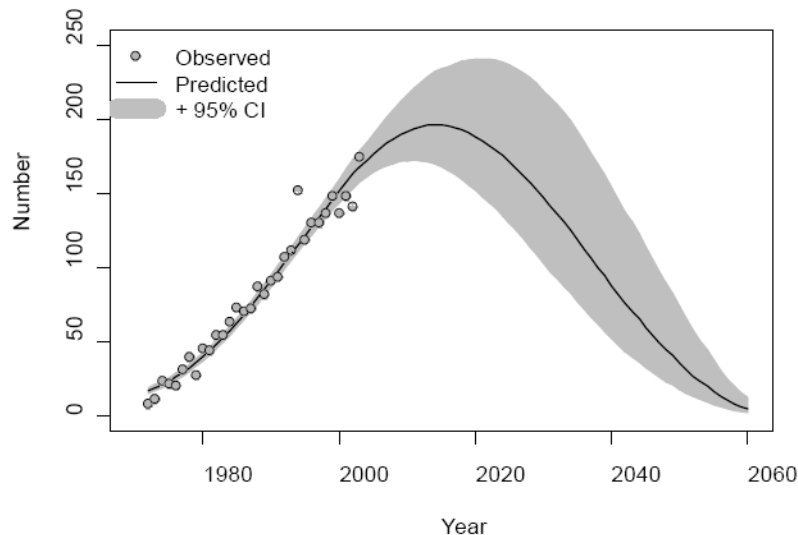
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10. Safe Work Australia, *Mesothelioma in Australia: Incidence 1982 to 2006, Mortality 1997 to 2007* (2010) 6.
 11. NSW Workers Compensation (Dust Diseases) Board, *Past and Future Incidence of Mesothelioma in Men in New South Wales* (2007).
 12. Allen Consulting Group, *Access to Treatment for Mesothelioma Patients, Report to the Asbestos Diseases Foundation of Australia Inc & Eli Lilly Australia Pty Ltd* (2007) 4.
 13. Safe Work Australia, *Mesothelioma in Australia: Incidence 1982 to 2006, Mortality 1997 to 2007* (2010) 3.
 14. KPMG, "Valuation of Asbestos-Related Disease Liabilities of Former James Hardie Entities ('The Liable Entities') to be Met by the AICF Trust" (2010) 46.
 15. Australian Institute of Health and Welfare and Australasian Association of Cancer Registries, *Cancer in Australia: An Overview, 2006* (2007) 31-103.
 16. Safe Work Australia, *Mesothelioma in Australia: Incidence 1982 to 2006, Mortality 1997 to 2007* (2010) 6.

number of new cases some time between 2017 and 2020.¹⁷ The Allen Consulting Group summarises the conclusions of several studies, which have made predictions in relation to the incidence of the disease:¹⁸

- One study estimates that the annual number of new cases for women and men will increase by 98% and 69% respectively between 2001 and 2011.¹⁹
- Another study suggests that by 2020, there will have been 18,000 cases of mesothelioma. The study suggests 11,000 cases will appear between 2002-2020.²⁰
- Another estimates there will be 21,700 mesothelioma cases between 2006 and 2060.²¹

2.16 Actuarial analysis indicates that mesothelioma cases are likely to continue to occur until around 2060. The following graphs show the predicted incidence of mesothelioma in males in NSW and Australia:

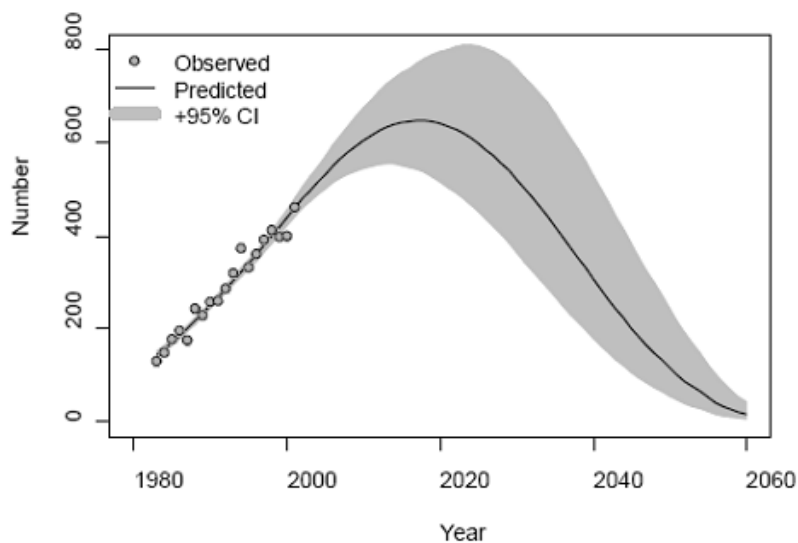
Figure 2.2: Predicted number of incident mesothelioma cases, NSW males



Source: M Clements, G Berry and J Shi, "Actuarial projections for mesothelioma: an epidemiological perspective" (Paper presented at Institute of Actuaries of Australia, XIth Accident Compensation Seminar, Melbourne, 1-4 April 2007) 13.

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17. Allen Consulting Group, *Access to Treatment for Mesothelioma Patients, Report to the Asbestos Diseases Foundation of Australia Inc & Eli Lilly Australia Pty Ltd* (2007), 5.
 18. Allen Consulting Group, *Access to Treatment for Mesothelioma Patients, Report to the Asbestos Diseases Foundation of Australia Inc & Eli Lilly Australia Pty Ltd* (2007), 5.
 19. I McDermid, *Cancer Incidence Projections, Australia 2002 to 2011*, (Australian Institute of Health and Welfare, Australasian Association of Cancer Registries and the National Cancer Strategies Group, 2005).
 20. J Leigh, P Davidson, L Hendry and D Berry, "Malignant Mesothelioma in Australia, 1945-2000" (2002) 41 *American Journal of Industrial Medicine* 188.
 21. M Clements, G Berry and J Shi, "Actuarial projections for mesothelioma: an epidemiological perspective" (Paper presented at Institute of Actuaries of Australia, XIth Accident Compensation Seminar, Melbourne, 1-4 April 2007).

Figure 2.3: Predicted number of incident mesothelioma cases, Australian males



Source: M Clements, G Berry and J Shi, "Actuarial projections for mesothelioma: an epidemiological perspective" (Paper presented at Institute of Actuaries of Australia, XIth Accident Compensation Seminar, Melbourne, 1-4 April 2007) 13.

- 2.17 The predictions for a peak in incidence in Australia around 2020 are consistent with predictions in other Western countries.²²
- 2.18 NSW has had the highest rates of mesothelioma in Australia.²³ The Dust Diseases Board predicts that, based on past incidence, the annual rate of new mesothelioma diagnoses in males in NSW will peak at 196 in 2014.²⁴
- 2.19 The individuals with the most significant risk of asbestos-related disease are those whose workplace still has, or formerly had, asbestos in it and those who worked with asbestos fibre products. They include those who worked in asbestos mines and factories, former power stations and shipyards, as well as dock workers, railway labourers and members of the defence force, especially the Navy.²⁵ However, the risk is not limited to those exposed at work. The Asbestos Diseases Foundation has observed:

The family of anyone who gets asbestos dust on his or her clothes is at risk. Owners and renovators of homes built even up to as late as 1987 may be at risk of developing an asbestos related disease. So can wives who shook out

22. J Leigh, P Davidson, L Hendry and D Berry, "Malignant Mesothelioma in Australia, 1945-2000" (2002) 41 *American Journal of Industrial Medicine* 188, 199; L Salvatori, A Santoni and D Michaels, "Asbestos: The current situation in Europe" (Paper presented at ASTIN Colloquium International Actuarial Association, Berlin, 23-27 August 2003) 3, 9, 25.

23. NSW Workers Compensation (Dust Diseases) Board, *Past and Future Incidence of Mesothelioma in Men in New South Wales* (2007) 3.

24. NSW Workers Compensation (Dust Diseases) Board, *Past and Future Incidence of Mesothelioma in Men in New South Wales* (2007) 21.

25. See J Leigh, P Davidson, L Hendry and D Berry, "Malignant Mesothelioma in Australia, 1945-2000" (2002) 41 *American Journal of Industrial Medicine* 188, 196-198 for a table with a breakdown of categories of circumstances of exposure.

asbestos workers' overalls before washing them. So can children who hugged someone with asbestos dust on their clothes.²⁶

The group of people who were exposed indirectly to asbestos through activities such as home renovation and cleaning work clothes have been described as constituting the "third wave" of asbestos victims.²⁷

2.20 Australia has had the highest reported rate of mesothelioma in the world.²⁸ The Allen Consulting Group explains that this is likely to be the result of a combination of several factors:

- There was significant asbestos mining and milling in Australia between the 1930s and 1983, when mining ceased.
- Australia had high rates of asbestos usage, particularly in the manufacturing, mining and building industries.
- An estimated one in three homes built before 1987 contains some form of asbestos-based product.²⁹

2.21 In summary, the size of the problem is illustrated by the fact that around 7,000 Australians have died as a result of mesothelioma since 1945, and the total number of deaths from that condition is estimated to rise to 18,000 by 2020.³⁰ It has been suggested that deaths from other asbestos-related cancers may reach 30,000-40,000 by the same time.³¹

26. Asbestos Diseases Foundation of Australia quoted in The Allen Consulting Group, *Access to Treatment for Mesothelioma Patients, Report to the Asbestos Diseases Foundation of Australia Inc & Eli Lilly Australia Pty Ltd* (2007) 2.

27. See, eg, KPMG, "Valuation of Asbestos-Related Disease Liabilities of Former James Hardie Entities ("The Liable Entities") to be Met by the AICF Trust" (2010) 8.

28. J Leigh, P Davidson, L Hendry and D Berry, "Malignant Mesothelioma in Australia, 1945-2000" (2002) 41 *American Journal of Industrial Medicine* 188, 188.

29. Allen Consulting Group, *Access to Treatment for Mesothelioma Patients, Report to the Asbestos Diseases Foundation of Australia Inc & Eli Lilly Australia Pty Ltd* (2007) 5.

30. P Prince, J Davidson and S Dudley, *In the Shadow of the Corporate Veil: James Hardy and Asbestos Compensation*, Research Note No 12 (Parliamentary Library, Commonwealth of Australia, 2004-5) 1.

31. J Leigh, P Davidson, L Hendrie and D Berry, "Malignant Mesothelioma in Australia, 1945-2000" (2002) 41 *American Journal of Industrial Medicine* 188, 199.

3. Dust diseases compensation framework in NSW

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- 3.1 In this chapter we note the legal context in which claims for workers compensation and for damages in relation to dust diseases are managed in NSW. We also survey the trends in relation to litigation concerning asbestos-related diseases and note some of the challenges that they pose for defendants and insurers in relation to long term planning to meet their compensation liabilities.

Dust disease defined

- 3.2 In NSW asbestos-related diseases fall within the scope of the *Dust Diseases Tribunal Act 1989* (NSW) and the *Workers Compensation (Dust Diseases) Act 1942* (NSW).
- 3.3 “Dust-related condition” is defined in the *Dust Disease Tribunal Act 1989* (NSW) as meaning:
- (a) a disease specified in Schedule 1, or
 - (b) any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust.¹
- 3.4 Schedule 1 to the *Dust Disease Tribunal Act 1989* (NSW) now lists, for the purposes of that Act, 14 dust diseases:
- aluminosis;
 - asbestosis;
 - asbestos induced carcinoma;
 - asbestos related pleural diseases;
 - bagassosis;
 - berylliosis;
 - byssinosis;

1. *Dust Diseases Tribunal Act 1989* (NSW) s 3.

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- coal dust pneumoconiosis;
- farmers' lung;
- hard metal pneumoconiosis;
- mesothelioma;
- silicosis;
- silico-tuberculosis; and
- talcosis.

Pneumoconiosis is any “disease of the lung caused by the inhalation of dust, especially mineral dusts that produce chronic induration and fibrosis”.²

- 3.5 The schedule to the *Dust Diseases Tribunal Act 1989* (NSW) was taken from a schedule to the *Workers Compensation (Dust Diseases) Act 1942* (NSW). This schedule was added to the *Workers' Compensation (Dust Diseases) Act 1942*³ by amendment in 1967.⁴ It initially included a number of diseases that are not listed in the current schedule. The second reading speeches indicate that the schedule was intended to cover “all known industrial dust diseases of the respiratory and pulmonary organs”.⁵
- 3.6 An amendment in 1983 inserted mesothelioma into the schedule, and provided that further amendments to it may be made by regulation.⁶
- 3.7 On 31 December 1987, a regulation was made removing 14 forms of “pneumoconiosis” from the schedule and inserting “asbestos induced carcinoma” and “asbestos related pleural diseases” into it.⁷ We have not located any explanatory memorandum for this regulation.
- 3.8 Although the dust diseases listed in the schedules to the two Acts are identical, each Act defines “dust disease” slightly differently. The definition in the *Dust Diseases Tribunal Act 1989* (NSW) extends the listed diseases to include “any other pathological condition of the lungs, pleura or peritoneum that is attributable to

2. A R Gennaro, A H Nora, J J Nora, R W Stander and L Weiss (eds), *Blakiston's Gould Medical Dictionary* (McGraw-Hill, 4th ed, 1979) 1068.

3. Previously the *Worker's Compensation (Silicosis) Act 1942* (NSW).

4. *Workers' Compensation (Dust Diseases) Amendment Act 1967* (NSW) s 3(1)(b), (m).

5. New South Wales, *Parliamentary Debates*, Legislative Council, 5 December 1967, 4010 (A D Bridges); see also 4009–4042; New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 1967, 3754–3784.

6. *Workers' Compensation (Dust Diseases) Amendment Act 1983* (NSW).

7. *Workers' Compensation (Dust Diseases) (Amendment of Schedule) Regulation 1987* (NSW). The forms of pneumoconiosis removed from the Schedule were: Baritosis; Boiler scalers' and repairers' pneumoconiosis; Carbon pneumoconiosis; Carborundum pneumoconiosis; Cement dust pneumoconiosis; Diatomite pneumoconiosis; Emery pneumoconiosis; Graphite pneumoconiosis; Micatosis; Pumice pneumoconiosis; Siderosis; Sillimanite pneumoconiosis; Stannosis; and Titaniosis.

dust”.⁸ However, the definition in the *Workers Compensation (Dust Diseases) Act 1942* (NSW) states that dust disease means:

any disease specified in Schedule 1, and includes any pathological condition of the lungs, pleura or peritoneum, that is caused by dust that may also cause a disease so specified.⁹

- 3.9 A question arises whether the definition contained in the *Workers Compensation (Dust Diseases) Act 1942* (NSW) is narrower in its reach than that provided in the *Dust Diseases Tribunal Act 1989* (NSW), with the consequence that certain dust diseases covered by the *Dust Diseases Tribunal Act 1989* (NSW) might be excluded from the dust diseases compensation scheme. For example, the 14 forms of pneumoconiosis removed from the schedule by the 1987 Regulation are excluded from coverage under the *Workers Compensation (Dust Diseases) Act 1942* (NSW), but are caught by the broad definition in the *Dust Diseases Tribunal Act 1989* (NSW) which includes, in addition to the schedule diseases “any other pathological conditions of the lungs...attributable to dust”. Similarly, wood dust-related and wheat dust-related asthma are examples of conditions that are covered by the *Dust Diseases Tribunal Act 1942* (NSW), but which, it has been suggested, fall outside the scope of the *Workers Compensation (Dust Diseases) Act 1942* (NSW).¹⁰
- 3.10 Only in limited circumstances will a condition not specified in the schedule to the *Workers Compensation (Dust Diseases) Act 1942* (NSW) be covered by the inclusive definition in that Act. For example, in *Manildra Flour Mills Pty Ltd v Britt*, the NSW Court of Appeal held that asthma caused by exposure to dust could only constitute a dust disease if the same dust was capable of causing farmers’ lung – a disease which is specified in the schedule.¹¹
- 3.11 Whether there is a material difference in the definitions, and whether this should be addressed by a reform that would achieve consistency in the two definitions is considered further in Chapter 6. In that chapter, we also draw attention to the fact that coal miners are subject to a separate set of provisions to those that apply in relation to other claimants, with regards to the basis on which they can be compensated for dust-related conditions arising from their work.

Dust diseases compensation

Dust Diseases Tribunal

- 3.12 The Dust Diseases Tribunal (“DDT”) was established in 1989 to expedite the hearing and disposition of death and personal injury claims arising from dust-related conditions.¹² The DDT is unique in Australia in that it has exclusive jurisdiction in

8. *Dust Diseases Tribunal Act 1989* (NSW) s 3.

9. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 3(1).

10. LexisNexis, *Mills Workers Compensation NSW* (at Service 122) [9010.1].

11. *Manildra Flour Mills Pty Ltd v Britt* [2007] NSWCA 48. See also *Davies v Manildra Flour Mills* [2006] NSWDDT 23.

12. NSW, *Parliamentary Debates*, Legislative Council, 11 May 1989, 8094 (E P Pickering).

relation to claims arising from “dust-related conditions,” as defined in s 3 of the *Dust Diseases Tribunal Act 1989* (NSW),¹³ having taken over the responsibility for cases that would previously have been heard in the Supreme and District Courts. In other Australian jurisdictions, asbestos and dust-related claims are heard as personal injuries claims, although some jurisdictions have established specialist lists¹⁴ and have introduced procedural reforms to assist dust diseases victims, such as expedited hearings.¹⁵

- 3.13 The provisions of the *Civil Liability Act 2002* (NSW) do not generally apply to proceedings within the jurisdiction of the DDT.¹⁶ The only exceptions are the rules regarding the calculation of damages for gratuitous attendant care services or loss of capacity to provide gratuitous attendant care services,¹⁷ and regarding the interest payable on such damages.¹⁸

1998 dust diseases amendments

- 3.14 In 1998, amendments were made to several Acts in NSW in order to address the issues which arise in relation to claims by victims that are attributable to their exposure to dust diseases.¹⁹ The objects of the legislation were described in the second reading speech as aimed at:

making workers compensation and common law entitlements for asbestos-related and other dust diseases more fair and just, improving procedures available to the Dust Diseases Tribunal so as to facilitate the proper settlement and payment of claims, and introducing administrative refinements.²⁰

- 3.15 The amendments:

- removed the limitation periods that would otherwise apply in respect of dust disease claims;²¹
- allowed for the recovery, in an estate action, of damages for non-economic loss where the deceased’s death was caused by a dust-related condition, provided that proceedings had been commenced and were pending before the DDT at the time of the death;²²
- clarified that settlement with one joint tortfeasor does not bar recovery against other joint tortfeasors;²³

13. *Dust Diseases Tribunal Act 1989* (NSW) s 11(1).

14. For example, District Court of South Australia, *Practice Direction 4.5 – Dust Diseases List – District Court Only*, 4 September 2006.

15. *Dust Diseases Act 2005* (SA) s 5.

16. *Civil Liability Act 2002* (NSW) s 3B(1)(b).

17. *Civil Liability Act 2002* (NSW) s 15A, s 15B.

18. *Civil Liability Act 2002* (NSW) s 18(1).

19. *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998* (NSW).

20. NSW, *Parliamentary Debates*, Legislative Assembly, 28 November 1998, 9345 (K Yeadon).

21. *Dust Diseases Tribunal Act 1989* (NSW) s 12A.

22. *Dust Diseases Tribunal Act 1989* (NSW) s 12B.

23. *Dust Diseases Tribunal Act 1989* (NSW) s 12C.

- exempted compensation paid or payable under the dust diseases compensation scheme from being deducted from damages for non-economic loss awarded by the DDT to dust diseases victims;²⁴
 - introduced provisions aimed at expediting hearings by, for example, not requiring the relitigation of general issues which had already been determined in proceedings before the DDT (even between other parties);²⁵
 - established an arbitration process for disputes as to the liability of insurers as referred to in s 151AC of the *Workers Compensation Act 1987*;²⁶ and
 - introduced interim damages awards, allowing dust diseases plaintiffs to recover a reasonable proportion of the damages that they would likely be awarded before their case is finalised.²⁷
- 3.16 These amendments were seen as necessary due to the “special circumstances that apply to dust diseases”.²⁸ In particular, the long latency periods associated with dust diseases were identified as requiring a special response, for example, the removal of the limitations periods that might otherwise have operated as a bar to the litigation. While previously the DDT had a discretion to extend limitations periods, this discretion was considered insufficient to address the “particular circumstances applicable to dust diseases” due to the “time and additional expense for claimants” involved.²⁹
- 3.17 Similarly, the extension of the ability of the DDT to award damages for non-economic loss following the plaintiff’s death, where proceedings were already on foot, was seen as necessary to deal with the very quick progression of mesothelioma after diagnosis. While it was recognised that the DDT had made “commendable efforts” to expedite hearings, the second reading speech notes that “a number of death-bed hearings have resulted, with claimants in extreme situations struggling to complete their evidence”.³⁰ This particular amendment attempted to institute a “more humane approach”, that no longer required a “race against time” to finalise a claim prior to death in order to ensure that damages for pain and suffering and loss of expectation of life can be recovered.³¹

Workers Compensation (Dust Diseases) Board

- 3.18 In addition to proceedings for damages that are brought in a dependant’s action or an estate action, there is a workers’ compensation scheme specifically applicable to injuries and deaths of workers attributed to dust-related conditions.³²

24. *Dust Diseases Tribunal Act 1989* (NSW) s 12D.

25. *Dust Diseases Tribunal Act 1989* (NSW) s 25A, s 25B.

26. *Dust Diseases Tribunal Act 1989* (NSW) Pt 5.

27. *Dust Diseases Tribunal Act 1989* (NSW) Pt 6.

28. NSW, *Parliamentary Debates*, Legislative Assembly, 28 November 1998, 9435 (K Yeadon).

29. NSW, *Parliamentary Debates*, Legislative Council, 17 November 1998, 9974 (J W Shaw), 9982 (I Cohen).

30. NSW, *Parliamentary Debates*, Legislative Assembly, 28 November 1998, 9436 (K Yeadon).

31. New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 1998, 9436 (K Yeadon).

32. *Workers Compensation (Dust Diseases) Act 1942* (NSW).

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- 3.19 Pursuant to the *Workers Compensation (Dust Diseases) Act 1942* (NSW), a Workers Compensation (Dust Diseases) Fund was established. This Fund incorporates all of the balances, investments and moneys previously constituting the Silicosis Fund, the Broken Hill Compensation Fund, the Dust Diseases Reserve Fund, as well as all moneys that are now to be paid to the Board or contributed by insurers or by the State for the purposes of the Fund.³³
- 3.20 The scheme is administered by the Workers Compensation (Dust Diseases) Board, which has exclusive jurisdiction to determine all questions and matters arising out of a claim for compensation under the Act as well as the function of making payments of such compensation.³⁴

Asbestos litigation

- 3.21 There are several defendants in the Australian context who are involved in the majority of the asbestos-related claims, either because of their position as miners of asbestos, or as manufacturers of products containing asbestos, or as employers of people where asbestos was used in the workplace.
- 3.22 The major asbestos defendants in Australia are:
- CSR, which operated an asbestos mine at Wittenoom in WA and also manufactured asbestos products on a small scale;
 - the James Hardie Group entities, which were the major manufacturers of asbestos products in Australia;
 - BHP Billiton, which operated shipyards in SA using products containing asbestos; and
 - the State and Federal governments, in their capacities as employers, for example, of Royal Australian Navy personnel or of railway maintenance workers.³⁵
- 3.23 The James Hardie Group, which made a wide range of products with asbestos, including building and construction products and brake linings, faces growing claims from its product users. In 2002, over half the claims made in the DDT were against James Hardie companies.³⁶ In 2009-10, 535 claims were made against James Hardie companies and KPMG has predicted that 582 claims will be made in 2010-11.³⁷
- 3.24 The liabilities of most of these defendants are subject to insurance and reinsurance arrangements in place with a variety of insurers and reinsurers or syndicates,

33. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 6.

34. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 5.

35. P Prince, J Davidson and S Dudley, *In the Shadow of the Corporate Veil: James Hardy and Asbestos Compensation*, Research Note No 12 (Parliamentary Library, Commonwealth of Australia, 2004-5) 1.

36. P Prince, J Davidson and S Dudley, *In the Shadow of the Corporate Veil: James Hardy and Asbestos Compensation*, Research Note No 12 (Parliamentary Library, Commonwealth of Australia, 2004-5) 1.

37. KPMG, "Valuation of Asbestos-Related Disease Liabilities of Former James Hardie Entities ("The Liable Entities") to be Met by the AICF Trust" (2010) 46.

although some are either self-insured or may now be liable without the benefit of previously available insurance cover.

Asbestos litigation trends

- 3.25 Estimates of Australia's total liability for future asbestos claims start at around \$6 billion.³⁸ The situation in Australia can be compared with the US where total losses due to asbestos liability have been predicted to range from US\$200 billion to US\$275 billion,³⁹ with between US\$78 billion and US\$175 billion of that liability not covered by insurance.⁴⁰ In the UK, actuarial estimates of asbestos-related claims predict that the undiscounted cost of asbestos-related claims could be around £11 billion for the period 2009 to 2050.⁴¹
- 3.26 Developments in the US have led to a perception that it is in the middle of an "asbestos litigation crisis".⁴² Major asbestos defendants in the US are concerned that they cannot get a fair trial in asbestos tort-litigation in state courts and that they are paying awards that should be funded by other parties.⁴³
- 3.27 One of the most marked changes in asbestos litigation in the US has been a widening of the net of potential defendants. Because companies directly implicated in the production of asbestos had often ceased to exist, lawyers began pursuing companies less directly linked with asbestos, for example, those that had used the material rather than those that originally manufactured the product and those that became owners of firms that had once produced asbestos. Another trend has been the filing of claims by people with little or no current signs or symptoms of asbestos-related disease or disability. This arises from the fact that exposure by itself has been recognised as indemnifiable. One study found that of the 59,200 claims made in 2000 in the US, 94% of those claims were by "non-malignant" claimants.⁴⁴
- 3.28 One commentator has pointed out that "Australia remains relatively free of any 'litigation crisis'...despite the fact that on a per capita basis [it] has one of the highest numbers of asbestos-related injuries in the world".⁴⁵ One reason for the difference between Australia and the US is the fact that claims by people, who have been exposed to asbestos but who have not (yet) developed any disease as a result of that exposure,⁴⁶ are unlikely to succeed in Australia.⁴⁷ Arguably they would

38. P Prince, J Davidson and S Dudley, *In the Shadow of the Corporate Veil: James Hardy and Asbestos Compensation*, Research Note No 12 (Parliamentary Library, Commonwealth of Australia, 2004-5) 1 citing B Quinlaven, "Asbestos: Powder traces", *Business Review Weekly* (2 June 2004) 12.

39. American Academy of Actuaries, *Overview of Asbestos Issues and Trends* (American Academy of Actuaries Public Policy Monograph, 2001) 4.

40. R Atherton, "Asbestos Litigation: Will It Survive?" *Plaintiff* (Issue 60, 2003) 18, 20.

41. See UK Working Party on Asbestos, *Update 2009* (2009) 4
<<http://www.actuaries.org.uk/sites/all/files/documents/pdf/b12asbestoswp.pdf>>.

42. R Atherton, "Asbestos Litigation: Will It Survive?" *Plaintiff* (Issue 60, 2003) 18, 20.

43. American Academy of Actuaries, *Overview of Asbestos Issues and Trends* (American Academy of Actuaries Public Policy Monograph, 2001) 6.

44. R Deutsch and C O'Dowd, "Asbestos – Where Will It All End?" *Risk Management Magazine* (online) 31 January 2006 <<http://www.riskmanagementmagazine.com.au/>>.

45. R Atherton, "Asbestos Litigation: Will It Survive?" *Plaintiff* (Issue 60, 2003) 18, 21.

46. L Salvatori, A Santoni and D Michaels, "Asbestos: The current situation in Europe" (Paper presented at ASTIN Colloquium International Actuarial Association, Berlin 23-27 August 2003) 4.

47. See, eg, *Thompson v CSR Ltd* [2003] NSWDDT 7 [21]-[23] where the Court rejected a claim for damages for the fear of contracting an asbestos related disease.

- be unable to prove that they have suffered any loss of the kind that is required for the purposes of establishing an actionable wrong.⁴⁸ Nevertheless, this remains “an area of uncertainty in assessing liabilities for Australian insurers”.⁴⁹
- 3.29 Notwithstanding this difference, and the fact that the volume of asbestos claims among Australian insurers flattened over the mid to late 1990s, a 2006 survey noted that surges in claims activity makes it difficult to estimate future claim volumes and whether they will continue to increase or whether they will decrease.⁵⁰
- 3.30 CSR has decided to resolve its liabilities by settlement, because the impact of litigation on its financial interests was believed to be too unpredictable. In 1989 it entered into a settlement with former workers and community members exposed to asbestos at CSR’s Wittenoom mine.⁵¹
- 3.31 In December 2010, CSR announced that it had received the final regulatory approval necessary to sell a subsidiary, Sucrogen, to a Singaporean company. Both the Australian Foreign Investment Review Board and the New Zealand Overseas Investment Office agreed to allow the sale once CSR had met requirements, which were intended to ensure that CSR’s asbestos liabilities would be met. CSR has indicated that the sale of Sucrogen would put CSR in a position where its assets would include a \$441.8 million provision for “all known claims and reasonably foreseeable future asbestos related claims”.⁵²
- 3.32 As major manufacturers of asbestos products in Australia, James Hardie companies faced increasing claims by people exposed to asbestos and, in 2001, they began a corporate reorganisation in an attempt to manage their asbestos liabilities.⁵³
- 3.33 The assets of two James Hardie subsidiaries, responsible for the manufacture of asbestos products in Australia (Amaca – building and construction products; Amaba – brake linings), were transferred to a company incorporated in the Netherlands. The transfer of these assets to the Netherlands was approved by the NSW Supreme Court on the basis of assurances by the James Hardie Group that partly paid shares could be called on to the value of \$1.9 billion to satisfy future asbestos claims.⁵⁴ Ownership of the subsidiaries was transferred to a new body. This body – the Medical Research and Compensation Foundation (MRCF) – was created to “manage and deal with the asbestos liabilities” of Amaca and Amaba.⁵⁵ The MRCF

48. *Thompson v CSR Ltd* [2003] NSWDDT 7 [22]. In the UK, this issue has been conclusively resolved, see the decision of the House of Lords in *Rothwell v Chemical and Insulating Co Ltd* [2007] 4 All ER 1047.

49. R Deutsch and C O’Dowd, “Asbestos – Where Will It All End?”, *Risk Management Magazine* (online) 31 January 2006 <<http://www.riskmanagementmagazine.com.au/>>.

50. R Deutsch and C O’Dowd, “Asbestos – Where Will It All End?”, *Risk Management Magazine* (online) 31 January 2006 <<http://www.riskmanagementmagazine.com.au/>>.

51. P Spender, “Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability” (2003) 25 *Sydney Law Review* 223, 238.

52. CSR, “CSR announces proposed capital management initiatives and management changes following completion of Sucrogen sale” (News Release, 15 December 2010) <http://www.csr.com.au/news/Pages/news_releases.aspx>.

53. James Hardie, *Asbestos Questions* (8 December 2004) James Hardie Investor Relations <http://www.ir.jameshardie.com.au/jh/asbestos_compensation/asbestos_questions.jsp>.

54. D F Jackson, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004) Vol 1 [2.47]-[2.48].

55. James Hardie, *Asbestos Questions* (8 December 2004) James Hardie Investor Relations <http://www.ir.jameshardie.com.au/jh/asbestos_compensation/asbestos_questions.jsp>.

was given \$293 million in cash and income-producing assets to fund future asbestos claims against James Hardie companies.⁵⁶

- 3.34 In March 2003, James Hardie cancelled the partly paid shares.⁵⁷ This meant that they were no longer available to satisfy the claims of asbestos claimants in Australia.⁵⁸ By the end of 2003, it was clear that the \$293 million provided to the MRCF was insufficient and the Foundation would soon be unable to pay asbestos claims.⁵⁹ As a result, at the beginning of 2004, the NSW government announced an inquiry (the Jackson Inquiry) to investigate the financial position of the MRCF, the James Hardie restructure and the relationship between the restructure and the insufficiency of the MRCF fund to meet its current and future asbestos liabilities.⁶⁰
- 3.35 The Jackson Inquiry found that it was likely that the assets set aside for satisfaction of claims would be exhausted by the first half of 2007, and that the fund had “no prospect of meeting the liabilities of Amaca and Amaba in either the medium or the long term”.⁶¹

The James Hardie Final Funding Agreement

- 3.36 Following the Report of the Jackson Inquiry, in December 2005, the James Hardie Group, the NSW Government, trade unions and asbestos victim support groups entered into the “Final Funding Agreement”⁶² which provided for:
- the establishment of [the Asbestos Industries Compensation Fund (“AICF”)] to compensate asbestos sufferers with claims against the former James Hardie Group subsidiaries, Amaca Pty Ltd, Amaba Pty Ltd or ABN 60 Pty Ltd;
 - initial funding of the [AICF] by James Hardie of approximately A\$154 million;
 - a two year rolling cash 'buffer' in the [AICF] and an annual contribution in advance, based on actuarial assessments of expected claims for the following three years, revised annually;
 - a cap on the annual James Hardie payments to the [AICF] in all years, except the first year, initially set at 35% of annual net operating cash flow of the [James Hardie] Group for the immediately preceding financial year, with

56. James Hardie, *Asbestos Questions* (8 December 2004) James Hardie Investor Relations <http://www.ir.jameshardie.com.au/jh/asbestos_compensation/asbestos_questions.jsp>.

57. D F Jackson, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004) Vol 1 [2.56].

58. P Prince, J Davidson and S Dudley, *In the Shadow of the Corporate Veil: James Hardy and Asbestos Compensation*, Research Note No 12 (Parliamentary Library, Commonwealth of Australia, 2004-5) 1.

59. P Prince, J Davidson and S Dudley, *In the Shadow of the Corporate Veil: James Hardy and Asbestos Compensation*, Research Note No 12 (Parliamentary Library, Commonwealth of Australia, 2004-5) 1.

60. D F Jackson, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004) Vol 1, 1.

61. D F Jackson, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004) Vol 1, 7 [1.4].

62. Amended & Restated Final Funding Agreement in respect of the provision of long term funding for compensation arrangements for certain victims of Asbestos-related diseases in Australia (14 December 2010) <<http://www.ir.jameshardie.com.au/public/download.jsp?id=4433>>. James Hardie, “James Hardie Board Approves Final Funding Agreement - Agreement To Be Signed Today” (Company Statement, 1 December 2005) <<http://www.ir.jameshardie.com.au/public/download.jsp?id=1667>>.

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provision for the percentage to decline over time, depending on James Hardie's financial performance and the claims outlook;

- no cap on individual payments to proven claimants; and
- special compensation arrangements for members of the Baryulgil community for asbestos-related claims arising from the activities of Marlew Mining Pty Ltd.⁶³

- 3.37 Actuarial assessment of the expected future liabilities of the AICF as at 31 March 2010 was set at approximately \$1.5 billion.⁶⁴ This assessment did not take into account possible future legal changes including judicial decisions or legislative changes, “especially those relating to tort reform for asbestos sufferers” and the “introduction of new, or elimination of existing, heads of damage”.⁶⁵
- 3.38 In December 2010, the Commonwealth and NSW governments announced that NSW would provide a loan, with the assistance of the Commonwealth, to support the AICF, making up for short-term funding shortfalls. The Commonwealth government has agreed to lend up to \$160 million to the NSW government and the NSW government has agreed to match this amount to provide a loan to the Fund of up to \$320 million. The loan will assist the AICF to meet funding shortfalls and to continue to make payments to claimants should contributions by the James Hardie Group under the Funding Agreement be insufficient to maintain the AICF's liquidity.⁶⁶
- 3.39 The funding shortfall has been attributed to the effects on the James Hardie Group of the Global Financial Crisis including the downturn in the US housing market. The NSW government has indicated that, without the loan, the AICF would be exhausted within 12 months. The loan is intended to ensure that the AICF can make payments for the next three years based on current claim rates.⁶⁷
- 3.40 Aspects of the Final Funding Agreement may be relevant to any move to amend the law in regards to compensation for asbestos-related injuries in NSW. These issues are discussed further in Chapter 5.⁶⁸

Compensation planning issues

- 3.41 A major problem for asbestos defendants and their insurers, in terms of compensation planning, is the fact that asbestos-related diseases can take decades

63. James Hardie, “James Hardie Board Approves Final Funding Agreement - Agreement to be Signed Today” (Company Statement, 1 December 2005) <<http://www.ir.jameshardie.com.au/public/download.jsp?id=1667>>.

64. KPMG, “Valuation of Asbestos-Related Disease Liabilities of Former James Hardie Entities (“The Liable Entities”) to be Met by the AICF Trust” (2010) <<http://www.ir.jameshardie.com.au/public/download.jsp?id=4223>>.

65. KPMG, “Valuation of Asbestos-Related Disease Liabilities of Former James Hardie Entities (“The Liable Entities”) To Be Met By The AICF Trust” (2010) 8 <<http://www.ir.jameshardie.com.au/public/download.jsp?id=4223>>.

66. James Hardie, “Standby facility for the Asbestos Injuries Compensation Fund” (Company Statement, 7 December 2010) <<http://www.ir.jameshardie.com.au/public/download.jsp?id=4424>>.

67. Premier of New South Wales, “NSW Welcomes Loan Agreement with Commonwealth to Give Certainty to Asbestos Victims” (News Release, 7 December 2010), 1; “James Hardie ‘Will Repay \$320m loan’”, *news.com.au* (online) 8 November 2009 <<http://www.news.com.au>>.

68. See para 5.13-5.22.

to develop. Latent claims, or “long tail liability” claims, pose many problems for insurers. Examples of the problems caused by the effluxion of time include:

- The wrongdoer may have died or become insolvent or, if a corporate entity, may have become insolvent, ceased to exist or have been transferred to new owners.⁶⁹
- It may be difficult to find a copy of the insurance policy in place at the time which is relevant for coverage and, if it cannot be found, the insurer may have to find someone who can testify about the standard terms of policies at various times. Determining which policy or policies were on foot can become an expensive exercise.⁷⁰
- It may be difficult to ascertain the exact date of the exposure to the asbestos and the onset of the disease and, as a consequence, to identify the relevant insurance policy.⁷¹
- The terms of the policy may require a determination whether the policy requires injury and the act causing that injury to have taken place during the period of coverage and, where that is the case, the court will have to determine what the relevant injury was and when and how it occurred, for example, the penetration of the lung lining by asbestos fibres.⁷²
- Science, which demonstrates causative links on the basis of epidemiological or statistical analysis, may not be sufficient to satisfy the legal requirements of causation, that is, showing that a particular person was responsible for the injury which caused the plaintiff’s loss.⁷³
- Disputes can arise as to which of the many potentially exposed insurers should pay and the amount(s) that they should pay.⁷⁴
- Complex issues of causation can arise where a plaintiff has been exposed to asbestos in multiple situations (such as in employment with different employers who used products containing asbestos). The extended latency periods can raise questions as to which asbestos exposure caused the asbestos-related disease and whether only some, or all, of the possible defendants are or should be liable.⁷⁵

69. J K Morgan and C Machin, “Liability Issues arising out of Latency Claims” (Paper presented at AILA National Conference, Sydney, 1 November 2006) 5.

70. D Miller, “Easy as ABC – Asbestos, Bodily Injury and Causation” (Paper presented at AILA National Conference, Melbourne, 15 October 2009) 19.

71. L Callahan, “Practical Application of Latent Claims in the Claims Unit: Liability Issues Arising Out of Latent Claims” (Paper presented at AILA National Conference, Sydney, 1 November 2006) 4.

72. D Miller, “Easy as ABC – Asbestos, Bodily Injury and Causation” (Paper presented at AILA National Conference, Melbourne, 15 October 2009) 19. See also L Callahan, “Practical Application of Latent Claims in the Claims Unit: Liability Issues Arising Out of Latent Claims” (Paper presented at AILA National Conference, Sydney, 1 November 2006) 4.

73. J K Morgan and C Machin, “Liability Issues arising out of Latency Claims” (Paper presented at AILA National Conference, Sydney, 1 November 2006) 6.

74. L Salvatori, A Santoni and D Michaels, “Asbestos: The current situation in Europe” (Paper presented at ASTIN Colloquium International Actuarial Association, Berlin 23-27 August 2003) 6.

75. See, eg, discussion in *Ellis, Executor of the Estate of Paul Steven Cotton (Dec) v South Australia* [2006] WASC 270 upheld on appeal (*South Australia v Ellis* (2008) 37 WAR 1), but overturned by the High Court on the basis that the trial judge could not have been satisfied to the required standard of proof on the evidence presented that the plaintiff’s lung cancer was caused by his

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Resolving such questions can also increase the complexity of such cases and, consequently, the cost and time required to resolve them.

- 3.42 Predicting the number of claims that may be brought in future is also a significant challenge. As Clements, Berry and Shi have explained in regards to actuarial assessment of potential future claims, although it is possible to predict with some certainty the future incidence of disease, this does not correlate directly with potential future legal claims, and “further effort is required by the actuary to calculate the propensity to claim, which is likely to be a complex and dynamic process”.⁷⁶
- 3.43 Various suggestions have been made to provide better protection for unascertained future claimants in long tail liability cases, such as to develop a trust system, or to include unascertained future claimants in the definition of contingent creditors under the *Corporations Act 2001* (Cth) and to legislate for lifting the corporate veil.⁷⁷
- 3.44 Although important for claimants and potential defendants and their insurers, any consideration of these issues falls outside our terms of reference and will not be further considered in this Consultation Paper.

asbestos exposure in employment and not his smoking: *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111.

76. M Clements, G Berry and J Shi, “Actuarial projections for mesothelioma: an epidemiological perspective” (Paper presented at Institute of Actuaries of Australia, XIth Accident Compensation Seminar, Melbourne, 1-4 April 2007) 1.

77. M Nehme, “Unascertained Future Claims: Current Issues and Future Reforms” (2009) 17 *Insolvency Law Journal* 7, 22-24.

4. Entitlements

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- 4.1 In this chapter we survey, in a little more depth, the various entitlements that are available in NSW for those who are injured in the course of their work, or otherwise, as a result of another person's actionable wrong (which can potentially include negligence, and breach of statutory duty or of contractual duty). We have undertaken this task because we need to address, in accordance with the terms of reference, the issue of equity between the various categories of claimants.
- 4.2 As noted earlier in this Consultation Paper,¹ the options for damages or compensation can be divided into two categories – common law damages, and benefits payable to a worker pursuant to a statutory workers compensation scheme.
- 4.3 Of importance is the distinction between statutory no-fault compensation benefits which are calculated and payable according to tables or provisions that are fixed by the legislature from time to time, and compensatory damages awarded according to conventional common law principles. The fundamental principle in this respect is that the compensation given, through an award of damages, is to comprise a sum which, so far as money can do, will put the injured party in the same position as he or she would be in if the wrong had not been committed.² In substance, this means that the claimant cannot recover more than he or she has lost.
- 4.4 For entitlements following death the options are broadly as follows:
- common law damages awarded in an estate action, where there was a cause of action vested in the victim that survives his or her death, and the proceedings are commenced or, if they were already on foot, are continued by that person's estate;

1. Para 1.2.

2. *Haines v Bendall* (1991) 172 CLR 60, 63.

- common law damages awarded in a dependant's action; and
- workers compensation death benefits.

Work-related injuries

- 4.5 An important issue is the context in which the injury occurred, specifically whether it occurred while the person was working. A person who is a “worker” within the meaning of the workers compensation legislation, and who is injured in the course of his or her work, is entitled to recover the compensation for which provision is made in that legislation, without any need to prove actionable fault on the part of his or her employer. Further, if the injury was caused by the negligence or breach of a statutory or contractual duty of the employer, the employee can sue the employer at common law for compensatory damages.

Workers compensation

General scheme

- 4.6 The *Workers Compensation Act 1987* (NSW) requires that employers obtain insurance from a licensed insurer, which covers the employer for the full amount of the employer's liability under the Act, as well as any liability arising under the general law, for any injury to a worker resulting in disablement or death.³ The Act establishes the Insurance Fund⁴ and a workers compensation Nominal Insurer,⁵ which is responsible for managing it. In practice, that function is performed by WorkCover NSW which acts on behalf of the Nominal Insurer by contracting with scheme agents who provide workers compensation services to employers, including the management of workers compensation claims.
- 4.7 The Act provides for a range of benefits to workers who are injured or disabled as a result of workplace injury or illness. “Injury” is defined for the purposes of the *Workers Compensation Act 1987* (NSW) as meaning a “personal injury arising out of or in the course of employment”, which includes diseases contracted while working, where the employment was a contributing factor. It does not include dust diseases,⁶ which are dealt with under the separate dust diseases workers compensation scheme discussed below.⁷
- 4.8 In general terms, the benefits available to a worker claiming workers compensation are as follows:⁸
- weekly payments providing income support for a worker and his or her dependants, when the worker suffers a partial or total incapacity for work;⁹

3. *Workers Compensation Act 1987* (NSW) s 155(1).

4. *Workers Compensation Act 1987* (NSW) s 154D.

5. *Workers Compensation Act 1987* (NSW) s 154A.

6. *Workers Compensation Act 1987* (NSW) s 4.

7. See para 4.13-4.22.

8. *Workers Compensation Act 1987* (NSW) pt 3.

- compensation for medical, hospital and rehabilitation expenses;¹⁰
 - compensation for domestic assistance;¹¹
 - lump sum compensation for non-economic loss consequent upon permanent impairment;¹²
 - compensation for certain types of property damage arising from the injury.¹³
- 4.9 In the event of permanent impairment, workers are entitled to a lump sum payment of up to \$220,000 and, in some cases, they may be entitled to an extra \$50,000 for pain and suffering.¹⁴
- 4.10 The workers' compensation scheme also provides for a death benefit to be paid to a worker's dependants, in the event of his or her death resulting from an injury or disease contracted in the course of his or her work.¹⁵ The death benefit is currently \$465,100, which is to be apportioned among those who are wholly or partly dependent on the deceased worker.¹⁶ If no dependants exist, this sum is to be paid to the deceased's estate.¹⁷ In addition, the Act provides for weekly payments, which are currently \$118.20 per week¹⁸ for dependent children under 16, and for those aged between 16 and 21, while they are students.¹⁹ No such provision is made for a dependent spouse.

Coal miners

- 4.11 Coal miners have historically been subject to separate workers' compensation arrangements from those applicable to other workers. This historical distinction was carried over into the workers' compensation scheme instituted by the *Workers Compensation Act 1987* (NSW). By reason of Schedule 6, Part 18 of the *Workers Compensation Act 1987* (NSW), coal miners are made subject to the provisions of the former Act (the *Workers Compensation Act 1926* (NSW)), for the purposes of weekly compensation payments. This Part also provides that coal miners are subject to the provisions of Part 5 of the *Workers Compensation Act 1987* (NSW) as it was in force prior to its amendment in 2001.²⁰

9. *Workers Compensation Act 1987* (NSW) s 33-37.

10. *Workers Compensation Act 1987* (NSW) s 60.

11. *Workers Compensation Act 1987* (NSW) s 60AA.

12. *Workers Compensation Act 1987* (NSW) s 65A, s 66, s 67.

13. *Workers Compensation Act 1987* (NSW) s 74, s 75.

14. WorkCover Authority of NSW, *Permanent Impairment* (16 February 2011) <<http://www.workcover.nsw.gov.au>>; *Workers Compensation Act 1987* (NSW) s 67.

15. *Workers Compensation Act 1987* (NSW) s 25.

16. *Workers Compensation Act 1987* (NSW) s 25(1)(a). See NSW, *Government Gazette* (No 24 of 4 March 2011) 1690, which provides the current indexed amount adjusted in accordance with *Workers Compensation Act 1987* (NSW) pt 3 div 6.

17. *Workers Compensation Act 1987* (NSW) s 25(1).

18. NSW, *Government Gazette* (No 24 of 4 March 2011) 1690.

19. *Workers Compensation Act 1987* (NSW) s 25(1)(b) which sets a sum of \$66.60 subject to indexation in accordance with *Workers Compensation Act 1987* (NSW) pt 3 div 6; NSW, *Government Gazette* (No 24 of 4 March 2011) 1690.

20. *Workers Compensation Legislation Amendment Act 2001* (NSW) and *Workers Compensation Legislation Further Amendment Act 2001* (NSW) sch 1, 2, 3 and 8.

- 4.12 Coal miners are excluded from the operation of the dust diseases workers compensation scheme, even where they are affected by a dust disease. “Worker” is defined for the purposes of the *Workers Compensation (Dust Diseases) Act 1942* (NSW) as not including workers “in and about a mine”.²¹ “Mine” refers to a mine within the meaning of the *Coal Mines Regulation Act 1982* (NSW) – that is, it only applies to coal mines.²² The definition of “worker” accordingly has the effect of excluding coal miners who contracted a scheduled dust disease, including an asbestos-related condition, while working in a coal mine. The definition of “injury” contained in the *Workers Compensation Act 1987* (NSW), however, means that such a condition constitutes a compensable injury under the coal miners’ compensation scheme which is continued by the *Workers Compensation Act 1987* (NSW).²³

Dust diseases

- 4.13 The *Workers Compensation (Dust Diseases) Act 1942* (NSW) creates a separate compensation scheme (“the dust diseases compensation scheme”) which applies specifically to those who are affected by dust diseases in the course of their work. The current arrangements replaced an earlier scheme that provided compensation for NSW workers affected by silicosis or other respiratory diseases, as a result of exposure to silica or other dust.²⁴
- 4.14 The Act establishes a Workers’ Compensation (Dust Diseases) Fund,²⁵ out of which all compensation under the Act is paid. All employers in NSW must take out a workers’ compensation insurance policy, and a dust diseases levy is imposed on employers to pay for this Fund.²⁶ The dust diseases compensation scheme is administered by the Dust Diseases Board.²⁷ The decisions of the Board are final and conclusive,²⁸ although there is a right of appeal to the District Court²⁹ where a person or the Minister is dissatisfied with the Board’s decision about whether compensation is payable, or with the decision of the medical authority appointed under the Act to make determinations of certain factual questions of disablement and of exposure to disease-causing dust.³⁰
- 4.15 The scheme provides for the payment of compensation to workers who have been certified by the medical authority as totally or partially disabled for work as a result of a dust disease, which is reasonably attributable to exposure to the inhalation of

21. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 3(1).

22. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 3(1).

23. *Workers Compensation Act 1987* (NSW) s 4(c).

24. See, eg, *Workmen’s Compensation (Silicosis) Act 1920* (NSW) (repealed).

25. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 6.

26. WorkCover Authority of NSW, *Dust diseases levy* (27 July 2010) <<http://www.workcover.nsw.gov.au>>.

27. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 5.

28. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 5(2)(c).

29. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8I.

30. See *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8.

dust in the course of their work.³¹ In addition, the scheme provides for compensation to be paid to their dependants.³²

- 4.16 Certain categories of people are excluded from the definition of “worker” for the purpose of this scheme. For example, where an employer has not contributed to the workers’ compensation scheme and to the dust diseases levy, the employees of that employer will not be able to receive dust diseases compensation. In *West v Workers Compensation (Dust Diseases) Board*, Justice Neilson, applying the High Court’s decision in *Telstra Corp Ltd v Worthing*,³³ held that the plaintiff, who had been employed by the Post Master General and Telecom, was not a “worker” for the purposes of the Act because the employers had not contributed to the workers compensation scheme under the *Workers Compensation Act 1987* (NSW), and had not paid the dust diseases levy.³⁴
- 4.17 For workers who experience total or partial disability, as a result of their dust disease, the dust diseases compensation scheme provides for weekly payments to be made at the same rates as for workers employed in or about a mine (that is, coal miners) under the *Workers Compensation Act 1987* (NSW)³⁵ and for medical, hospital and rehabilitation and related services.³⁶ The compensation payable is set by reference to the scheme which applied under the *Workers Compensation Act 1926* (NSW).³⁷ It is noted that the weekly payments under that scheme are less than those payable by way of compensation to other workers.
- 4.18 There is no entitlement, during the lifetime of a worker, to lump sum compensation for disablement under the dust diseases compensation scheme, this being left to be recovered in a common law action for damages.
- 4.19 Where a worker dies, as a result of a dust disease reasonably attributable to exposure to dust in the course of his or her work, then those who were wholly dependent on the worker have rights to an award of compensation at the following rates:
- A lump sum payment which increases annually from 2010, and accordingly will be one of the following:
 - 2010 - \$268,375;
 - 2011 - \$291,040; or

31. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(1)(a).

32. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(1)(b), s 8(1)(c).

33. *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61.

34. *West v Workers Compensation (Dust Diseases) Board* (1999) 18 NSWCCR 60 [12]-[13].

35. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(2)(a). The relevant rates can be found in WorkCover NSW, *Workers compensation benefits guide* (WorkCover NSW, 2011), 23-32 (for disablement benefits); 44-47 (lump sum death benefits and weekly payments for dependants).

36. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(2)(d).

37. *Workers Compensation Act 1987* (NSW) sch 6, pt 18 cl 1.

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2012 - \$311,050.³⁸

- A weekly payment to a surviving dependent spouse, currently payable at \$243.60 per week,³⁹ which continues until re-marriage, or the commencement of a de facto relationship,⁴⁰ or death of the spouse.⁴¹
- A weekly payment to each surviving dependent child, currently payable at \$123.10 per week,⁴² where the child is aged under 16, which continues for children who are engaged in full-time education until the age of 21.⁴³

- 4.20 We understand the Board has a practice of decreasing the lump sum death benefits according to the age of the dependants and the extent of their dependency at the time that they become eligible. Where the dependency is total, the full benefit is paid. Otherwise it is reduced according to a formula that takes into account the age of the dependants and the degree of the dependency. Provision is also made in the Act for the reduction of weekly payments due under the Act in order to ensure that a person who is entitled to those weekly payments remains qualified to receive an age, invalid, widow's or other pension from some other source.⁴⁴
- 4.21 The weekly payments that are provided to a dependent spouse under this scheme create a position of advantage over the dependent spouses of other workers for whom no such payments are available. However, that advantage is potentially offset by the fact that the lump sum death benefits, that are available under the *Workers Compensation Act 1987* (NSW), are larger than those payable under the dust diseases compensation scheme.
- 4.22 Section 8AA of the *Workers Compensation (Dust Diseases) Act 1942* (NSW) deals with cases where a worker or dependant, who is receiving or claiming compensation under the Fund, receives or is notified of an entitlement to receive compensation under another Act or law, where that compensation is referable to disablement or death due to a dust disease contracted in the course of Commonwealth employment, or employment under a contract of service or apprenticeship outside NSW. In such cases the claimant is required to inform the Board of such receipt or notification of entitlement;⁴⁵ and the Board can require the claimant to claim and recover such other compensation. If the claimant has failed to do so, it can reduce the compensation payable from the Fund.⁴⁶

38. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(2B)(b)(i).

39. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(2B)(b)(ii) which sets an amount of \$137.30 per week subject to indexation in accordance with *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(3)(d); NSW, *Government Gazette* (No 24 of 4 March 2011) 1690-1691.

40. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(2B)(bb).

41. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(2B)(b)(ii).

42. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(2B)(b)(iii) which sets an amount of \$69.40 per week subject to indexation in accordance with *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(3)(d); NSW, *Government Gazette* (No 24 of 4 March 2011) 1690-1691.

43. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(2B)(ba).

44. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8A.

45. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8AA(3).

46. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8AA(4).

Common law actions

- 4.23 As noted earlier, a worker who was injured as a result of a wrongful act on the part of his or her employer can bring a general or common law action for damages.

Workers Compensation Act

- 4.24 The damages recoverable in those cases where the worker comes within the reach of the *Workers Compensation Act 1987* (NSW) are assessable subject to Part 5 of that Act. The Act displaces the application of the *Civil Liability Act 2002* (NSW) which would otherwise apply.⁴⁷ In its present form, the Act effectively limits common law claims for work-related injuries to those cases where the injury has caused permanent impairment of at least 15%.⁴⁸ It also modifies the damages that would otherwise be recoverable at common law,⁴⁹ in that they are confined to damages for past economic loss due to loss of earnings, and for future economic loss due to the deprivation or impairment of the worker's earning capacity.⁵⁰ This limitation does not, however, apply to an award of damages under the *Compensation to Relatives Act 1897* (NSW).⁵¹
- 4.25 When the *Workers Compensation Act 1987* (NSW) was originally introduced it abolished all common law rights of workers to sue for damages.⁵² In 1989, Part 5 of the Act was repealed and replaced, reinstating workers' common law rights and allowing the recovery of modified damages for non-economic loss, subject to prescribed limits based on a Table of Maims,⁵³ as well as damages for economic loss. The 1989 amendments required an injured worker to elect between recovering statutory compensation and the capped common law damages.⁵⁴ This election was irrevocable (with some qualifications),⁵⁵ so a worker who opted for compensation could not claim damages and vice versa. The Act was amended again in 1991 increasing the maximum amount recoverable for non-economic loss in a common law action.⁵⁶
- 4.26 The *Workers Compensation Act 1987* (NSW) was further amended in 2001 to limit the common law damages recoverable to damages for economic loss, as noted above.⁵⁷ The only options for recovering compensation for non-economic loss, in relation to a workplace injury that is covered by the Act as it now exists, constitute a claim for the statutory lump sum for pain and suffering,⁵⁸ and an additional

47. See *Civil Liability Act 2002* (NSW) s 3B(1)(f), (g).

48. *Workers Compensation Act 1987* (NSW) s 151H.

49. *Workers Compensation Act 1987* (NSW) s 151E, s 151F.

50. *Workers Compensation Act 1987* (NSW) s 151G.

51. *Workers Compensation Act 1987* (NSW) s 151G(2).

52. See *Workers Compensation Act 1987* (NSW) s 150, as enacted.

53. *Workers Compensation (Benefits) Amendment Act 1989* (NSW) sch 1(1), s 151G, s 151H.

54. *Workers Compensation (Benefits) Amendment Act 1989* (NSW) sch 1(1), s 151A(2).

55. *Workers Compensation (Benefits) Amendment Act 1989* (NSW) sch 1(1), s 151A(4).

56. *Workers Compensation (Benefits) Amendment Act 1991* (NSW) sch 2(1), amending *Workers Compensation Act 1987* (NSW) s 151G.

57. *Workers Compensation Legislation Further Amendment Act 2001* (NSW) sch 1[7], substituting *Workers Compensation Act 1987* (NSW) s 151G.

58. *Workers Compensation Act 1987* (NSW) s 67, so long as the worker has suffered a degree of permanent impairment of 10% or more.

entitlement to compensation for permanent impairment, that is assessed according to the percentage of such impairment.⁵⁹

- 4.27 It is no longer necessary for a worker to elect between common law damages and statutory compensation; although if a worker sues an employer at common law, and receives damages, these will have an impact on the statutory compensation that he or she can receive. For example, an award of damages in a common law action will mean that:
- the worker ceases to be entitled to any further compensation under the *Workers Compensation Act* in respect of the relevant injury including compensation that has not yet been paid;⁶⁰
 - any compensation that has already been paid in the form of weekly payments is deducted from the damages awarded, and is credited (paid) to the person who paid the compensation;⁶¹
 - the worker ceases to be entitled to participate in any injury management program provided for by the workers compensation scheme.⁶²
- 4.28 The continued existence of the right to sue at common law does not mean that a failure to recover damages (because of an inability to establish the employer's negligence for example) will prevent the worker from claiming workers compensation.
- 4.29 Section 151Z of the *Workers Compensation Act 1987* (NSW) regulates the recovery of damages in relation to those cases where the worker, or a dependant following the death of the worker, can recover damages from both an employer and liable third party;⁶³ and also in relation to the situation where the worker or a dependant can recover damages against a third party and has, additionally, an entitlement to statutory compensation from the employer.⁶⁴

Workers Compensation (Dust Diseases) Act

- 4.30 Any person (including a worker) who sustains a dust disease that was attributable, or partly attributable, to a breach of a duty owed to that person, and who would have been entitled to bring an action for the recovery of damages at common law in relation to that condition, can bring those proceedings in the Dust Diseases Tribunal ("DDT"), but not in any other court or tribunal.⁶⁵
- 4.31 An earlier award of compensation to a worker under the *Workers Compensation (Dust Diseases) Act 1942* (NSW) does not prevent the bringing of such proceedings in the DDT.⁶⁶ Moreover, the existence of an award of damages by the DDT does not

59. *Workers Compensation Act 1987* (NSW) s 66.

60. *Workers Compensation Act 1987* (NSW) s 151A(1)(a).

61. *Workers Compensation Act 1987* (NSW) s 151A(1)(b). The position in relation to estate actions and dependant's actions is considered later: para 4.48-4.51 and para 4.57-4.58.

62. *Workers Compensation Act 1987* (NSW) s 151A(1)(c).

63. *Workers Compensation Act 1987* (NSW) s 151Z(2).

64. *Workers Compensation Act 1987* (NSW) s 151Z(1).

65. *Dust Diseases Tribunal Act 1989* (NSW) s 11.

66. See *Dust Diseases Tribunal Act 1989* (NSW) s 12D.

affect any entitlement to compensation that exists under the *Workers Compensation (Dust Diseases) Act 1942* (NSW), there being no provision in that Act equivalent to s 151A of the *Workers Compensation Act 1987* (NSW), which brings an end to the workers' entitlements under that Act, once common law damages are recovered.⁶⁷

- 4.32 The DDT, when assessing damages for non-economic loss, is not permitted or required to make a deduction for any compensation already paid or payable in the future under the dust diseases compensation scheme.⁶⁸ This provision was introduced as a response to the decision in *James Hardie and Co Pty Ltd v Newton*,⁶⁹ applying an earlier decision of the High Court,⁷⁰ where the Court of Appeal had held that payments paid or payable to a claimant under the *Workers' Compensation (Dust Diseases) Act 1942* (NSW) must be deducted from all common law damages, even though no claim is made for loss of past earnings or for loss of earning capacity. In justifying the amendment, the Attorney General argued that the approach taken in *James Hardie and Co Pty Ltd v Newton*⁷¹ resulted "in an inordinate reduction in the worker's overall entitlements".⁷²
- 4.33 The damages for non-economic loss to which this provision relates include those for pain and suffering, loss of amenities of life, loss of expectation of life, disfigurement, and the need for gratuitous attendant care (*Griffiths v Kirkemeyer*) services.
- 4.34 However, the DDT is required to take into account, and deduct, payments received pursuant to any award that has been made for compensation under the Act, when assessing damages for the plaintiff's economic loss or loss of earning capacity.⁷³
- 4.35 A similar provision to s 151Z of the *Workers Compensation Act 1987* (NSW) is contained in the *Workers Compensation (Dust Diseases) Act 1942* (NSW), to allow the Board to recover compensation payable under the Act where damages are recovered or recoverable from a third party.⁷⁴

Other common law actions

Motor accidents

- 4.36 A separate regime to the workers compensation and dust diseases schemes exists in NSW in relation to those whose injury or death arose out of a motor accident. In such a case, the entitlement to claim damages or ongoing assistance is determined according to the provisions of the *Motor Accidents Act 1988* (NSW), the *Motor*

67. But see *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8E which allows the Board to seek reimbursement from negligent third parties for compensation paid or payable by the Board.

68. *Dust Diseases Tribunal Act 1989* (NSW) s 12D(2).

69. *James Hardie and Co Pty Ltd v Newton* (1997) 42 NSWLR 729 (Cole and Stein JJA, Handley JA dissenting).

70. See *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1 [48].

71. *James Hardie and Co Pty Ltd v Newton* (1997) 42 NSWLR 729.

72. New South Wales, *Parliamentary Debates*, Legislative Council, 17 November 1998, 9973 (J W Shaw).

73. *Commercial Minerals Ltd v Harris* (1999) 18 NSWCCR 11 [22]-[23].

74. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8D.

Accidents Compensation Act 1999 (NSW), and the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW).

- 4.37 The scheme allows for the provision of fault-based damages, as well as for a limited class of no-fault compensation (for children and blameless accidents).⁷⁵ In general terms, the legislation regulates the award of damages for economic loss,⁷⁶ and for non-economic loss,⁷⁷ and imposes both thresholds and caps that differ from those available under the other statutory schemes, or under the *Civil Liability Act 2002* (NSW). The provisions of that Act do not apply to cases falling within the motor accidents legislative scheme except where expressly saved.⁷⁸

General common law actions

- 4.38 Those who have no entitlement to workers' compensation (either from the general scheme or the dust diseases scheme), or who do not fall within the motor accidents compensation scheme, must rely on a general common law action to recover compensation.
- 4.39 An actionable wrong causing injury in these cases is, as a general proposition, dealt with according to the provisions of the *Civil Liability Act 2002* (NSW), which has placed some caps and thresholds on the damages recoverable both for economic and non-economic loss (modified common law damages).⁷⁹
- 4.40 Even within this broad category of claimants, there are some categories of claims which are not subject to the Act, and for which conventional or non-modified common law damages remain available. They include:
- intentional acts done with intent to injure or kill or that involve a sexual assault; and
 - claims arising from smoking or other use of tobacco products.⁸⁰

Dust diseases

- 4.41 Additionally, as noted earlier, the DDT has exclusive jurisdiction over damages claims in respect of dust diseases in NSW. The whole of the *Civil Liability Act 2002* (NSW) is excluded from application to such cases,⁸¹ except for the rules for determining damages for gratuitous attendant care services,⁸² and for determining damages for the loss of capacity to provide domestic services.⁸³ Otherwise, all issues concerning the liability of the defendant and the assessment of damages are

75. *Motor Accidents Compensation Act 1999* (NSW) pt 1.2.

76. *Motor Accidents Compensation Act 1999* (NSW) pt 5.2.

77. *Motor Accidents Compensation Act 1999* (NSW) pt 5.3.

78. *Civil Liability Act 2002* (NSW) s 3B(1)(d), (e), s 3B(2).

79. *Civil Liability Act 2002* (NSW) s 11-26.

80. *Civil Liability Act 2002* (NSW) s 3B(1)(a) and (c).

81. *Civil Liability Act 2002* (NSW) s 3B(1)(b).

82. *Civil Liability Act 2002* (NSW) s 15A.

83. *Civil Liability Act 2002* (NSW) s 15B.

to be determined according to ordinary common law principles, subject to the provisions of the *Dust Diseases Tribunal Act 1989* (NSW).⁸⁴

Dependants' actions under the Compensation to Relatives Act

- 4.42 At common law, death due to the wrongful act or omission of another was not an event for which the dependants of the deceased could claim compensation. This rule appeared in 1808,⁸⁵ and its rationale is elusive. John Fleming suggests that it was, in fact “the result of a misreading of legal history”.⁸⁶
- 4.43 Fatal accidents legislation overturning the common law was first introduced in England in 1846.⁸⁷ It was intended to address the anomaly that a wrongful act or omission causing personal injury gave rise to civil responsibility but negligence causing death did not.⁸⁸ Similar legislation has since been passed throughout Australia.⁸⁹
- 4.44 In NSW, the relevant Act is the *Compensation to Relatives Act 1897* (NSW). In substance it provides that, where the death of a person is caused by the “wrongful act, neglect or default” of another person, which would have entitled the deceased to maintain an action to recover damages against that other person, then the executor of the deceased’s estate can bring an action for damages for the benefit of the relatives of the deceased.⁹⁰
- 4.45 The relatives entitled to compensation are defined by the Act as being the spouse (including de facto partner), sibling, half-sibling, parent or child of the deceased. The damages recovered in such an action are “proportioned to the injury resulting from the death” to the parties for whose benefit the action is brought, and the amount recovered is divided between those parties in such shares as the Court determines.⁹¹
- 4.46 It is now well established that damages under this Act are referable only to the loss of the chance of receiving financial support from the deceased following his or her death.⁹² This loss includes that which is referable to the financial support that the deceased would have provided through his or her earnings, and also the loss of the reasonably anticipated unpaid services that the deceased would have provided as a parent, or otherwise, in or about the home. There has been no statutory addition of

84. These provisions are outlined in para 3.15-3.17 in regards to the 1998 dust diseases amendments.

85. *Baker v Bolton* (1808) 1 Camp 493; 170 ER 1033.

86. J G Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 729.

87. *Fatal Accidents Act 1846*, 9 & 10 Vic, c 93 commonly referred to as “Lord Campbell’s Act”.

88. United Kingdom, *Parliamentary Debates*, House of Commons, 22 July 1846, vol 87, col 1366 (Sir F Thesiger), 1373-1374 (Sir G Grey).

89. *Civil Law (Wrongs) Act 2002* (ACT) s 24; *Supreme Court Act 1995* (Qld) s 17; *Compensation (Fatal Injuries) Act* (NT) s 7; *Civil Liability Act 1936* (SA) s 23; *Fatal Accidents Act 1934* (Tas) s 4; *Wrongs Act 1958* (Vic) s 16; *Fatal Accidents Act 1959* (WA) s 4.

90. *Compensation to Relatives Act 1897* (NSW) s 3(1).

91. *Compensation to Relatives Act 1897* (NSW) s 4.

92. *Blake v Midland Railway Company* (1852) 18 QB 93; *Nguyen v Nguyen* (1990) 169 CLR 245, 247; *Davies v Taylor* [1974] AC 207, 213; *De Sales v Ingrilli* (2002) 212 CLR 338.

damages for non-pecuniary loss (such as solatium or loss of consortium⁹³) in NSW, although legislation in SA does provide for the recovery of solatium⁹⁴ and legislation in the NT provides for the recovery of solatium and damages for the loss of consortium.⁹⁵

- 4.47 In 1994, a single judge of the Victorian Supreme Court held that exemplary damages are not available in dependants' actions.⁹⁶ There is, as yet, no higher authority on this point, although reliance was placed in that case on Canadian and US decisions.⁹⁷
- 4.48 Pecuniary benefits accruing to the relatives as a result of the deceased's death are, as a general proposition, taken into account when assessing the damages payable in a dependants' action.⁹⁸ As we have noted earlier,⁹⁹ the *Strikwerda* principle reflects this position, in requiring an offset in relation to the damages for non-economic loss recovered in an estate action that was commenced by the deceased in the DDT and then continued by his or her estate. There are some benefits that do not need to be taken into account under the *Compensation to Relatives Act 1897* (NSW). They comprise:
- any sum paid or payable on the death of the deceased under any contract of insurance;
 - any sum paid or payable out of any superannuation, provident, or like fund, or by way of benefit from a friendly society, benefit society, or trade union; and
 - any sum paid or payable by way of pension under five specified NSW and Commonwealth Acts.¹⁰⁰
- 4.49 In accordance with the general principle noted above,¹⁰¹ any death benefits payable to the dependants of the deceased under the *Workers Compensation Act 1987* (NSW), would need to be taken into account in assessing the damages in a dependant's action. Such benefits do not, on their face, fall within any of the statutory exceptions contained in s 3(3) of the *Compensation to Relatives Act 1897* (NSW).¹⁰² In particular, it appears to be accepted that they do not involve monies

93. Solatium is an award of damages for the grief arising out of the wrongful death of a family member or close relative; loss of consortium is an award of damages made to a person for deprivation of the comfort, society, and services of his or her spouse resulting from the death of the spouse: See para 8.3-8.6 for a further discussion of the nature of the solatium award.

94. *Civil Liability Act 1936* (SA) s 28-30.

95. *Compensation (Fatal Injuries) Act* (NT) s 10(3)(c) and (f).

96. *Reindel v James Hardie & Co Pty Ltd* [1994] 1 VR 619.

97. *Reindel v James Hardie & Co Pty Ltd* [1994] 1 VR 619, 629–630.

98. See *Davies v Powell Duffryn Association Collieries Ltd* [1942] AC 601; *Public Trustee v Zoanetti* (1945) 70 CLR 266.

99. Para 1.6-1.7.

100. *Compensation to Relatives Act 1897* (NSW) s 3(3).

101. Para 4.48; and see *Workers Compensation Act 1987* (NSW) s 151A(3) which requires repayment of any death benefits payable under pt 1 div 3 that have been received.

102. See *Mataic v Milinja* [1970] VR 862 where an amount paid or payable to the widow by the Workers Compensation Board under the *Workers Compensation Act 1958* (Vic) was held not to come within the exceptions listed in *Wrongs Act 1958* (Vic) s 19.

paid or payable under a contract of insurance of the kind considered in *Green v Russell*¹⁰³ or *Colebrook v Wide-Bay Burnett Regional Electricity Board*.¹⁰⁴

- 4.50 In principle, there does not appear to be any reason for applying any different treatment to benefits that can be received by dependants under the *Workers Compensation (Dust Diseases) Act 1942* (NSW).¹⁰⁵
- 4.51 It is understood that, although the weekly payments that are available under the *Workers Compensation (Dust Diseases) Act 1942* (NSW) continue after the conclusion of a dependant's action in the DDT, the fact of their continuing availability is taken into account when assessing the damages in those proceedings. Assuming this to be correct, there is no occasion for double compensation.

Estate actions under survival of actions legislation

- 4.52 At common law, it had long been the case that a personal cause of action would lapse on the death of either the injured party or the defendant.¹⁰⁶ This rule has been traced as far back as 1611,¹⁰⁷ although various statutory and common law exceptions were created in the intervening years.¹⁰⁸ The *Law Reform (Miscellaneous Provisions) Act 1934* abolished the rule in England and Wales, thereafter allowing the survival of actions in all but a handful of circumstances.¹⁰⁹
- 4.53 In NSW, the survival of causes of action is governed by Part 2 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW). Section 2(1) provides that a cause of action vested in a person shall survive his or her death for the benefit of his or her estate. The Act also provides for survival of a cause of action subsisting against a person who died. These provisions were intended to fill the gaps left by earlier legislation dealing with death, including the *Compensation to Relatives Act 1897* (NSW).¹¹⁰
- 4.54 The *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) however places certain limits on the damages that may be recovered in an estate action in NSW. The damages recoverable do not include:

103. *Green v Russell* [1959] 2 QB 226.

104. *Colebrook v Wide-Bay Burnett Regional Electricity Board* [1971] QWN 8.

105. There was an offset in *Borowy v ACI Operations Pty Ltd (No 2)* [2002] NSWDDT 21.

106. The Latin maxim is "actio personalis moritur cum persona".

107. *Pinchon's Case* (1611) 9 Co Rep 86b, 87a; 77 ER 859, 860.

108. For the history of the common law with respect to fatal accidents and the survival of causes of action, see: P H Winfield, "Death as Affecting Liability in Tort" (1929) 29 *Columbia Law Review* 239. See also: England and Wales, Law Revision Committee, *Interim Report* (1934).

109. *Law Reform (Miscellaneous Provisions) Act 1934*, 24 & 25 Geo 5, c 41.

110. New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 1944, 519–521 (W McKell). The Premier identified three specific gaps: (1) where the *defendant* dies; (2) where the plaintiff dies, but has no relatives eligible to make a claim under fatal accidents legislation; and (3) where the plaintiff dies, but the death is not caused by the negligence giving rise to the cause of action, leaving dependants without the right to make a claim under fatal accidents legislation.

- exemplary damages;¹¹¹ or
 - any damages for the loss of the capacity of the deceased to earn, or for the loss of future probable earnings of the deceased, during such time after the deceased's death as he or she would have survived, but for the act or omission which gives rise to the cause of action (often called the "lost years").¹¹²
- 4.55 Where the death has been caused by the act or omission which gives rise to the cause of action, then, as a general principle, damages will also not be available, in an estate action, for the pain or suffering of the deceased or for any bodily or mental harm suffered by the deceased, or for the curtailment of his or her expectation of life (that is, damages for non-economic loss).¹¹³ This is subject to the exception, previously noted, which exists in relation to dust diseases cases where the deceased had commenced proceedings in the DDT before his or her death.¹¹⁴
- 4.56 The Act further provides that damages are to be calculated without reference to any loss or gain to the estate of the deceased consequent on his or her death, although a sum for funeral expenses can be included.¹¹⁵
- 4.57 Where damages are recovered in an estate action, and workers compensation benefits have been received under the *Workers Compensation Act 1987* (NSW), those damages must be applied to repay any weekly compensation, as well as any permanent injury compensation and pain and suffering compensation that has been paid to the worker, in respect of the injury giving rise to the death.¹¹⁶
- 4.58 We were informed in one preliminary submission that, when an award of damages is made to the estate of a deceased in an estate action, the Dust Diseases Tribunal does not take into account the lump sum benefit that is payable under the *Workers Compensation (Dust Diseases) Act 1942* (NSW), with the consequence that a widow, for example, may recover a lump sum for damages for non-economic loss and also the statutory lump sum death benefit.¹¹⁷

Exemplary and aggravated damages

- 4.59 Exemplary damages were formerly available in NSW, in common law personal injury actions brought by a surviving claimant for the award damages. As a matter of principle, such damages are not awarded as compensation. Rather they are awarded when compensatory damages are insufficient to punish a defendant for "conscious and contumelious disregard for the plaintiff's rights". Their purpose is to prevent a wrongdoer from gaining by the wrongdoing, to deter the plaintiff from

111. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(a)(i).

112. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(a)(ii).

113. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(d). However, where the death was due to an independent cause, that is a cause not attributable to the act or omission of the defendant, damages for non-economic loss up to the date of death are available to the estate.

114. *Dust Diseases Tribunal Act 1989* (NSW) s 12B. See para 1.8-1.9.

115. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(c).

116. *Workers Compensation Act 1987* (NSW) s 151A(2).

117. DLA Phillips Fox, *Preliminary submission PCR2*.

- seeking revenge, or to mark the condemnation of the court.¹¹⁸ They depend on proof that the defendant has shown a “reckless disregard of the plaintiff’s rights and the defendant’s obligations”.¹¹⁹
- 4.60 By reason of s 21 of the *Civil Liability Act 2002* (NSW), exemplary or punitive and aggravated damages are no longer available in relation to claims brought in the Supreme or District Courts that are subject to that Act. However, since the *Civil Liability Act 2002* (NSW) does not apply to proceedings in the DDT they remain potentially available in dust disease cases, at least in relation to proceedings commenced by a victim of a dust disease that are completed before his or her death.¹²⁰ It would, however, seem that, by reason of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), any entitlement to exemplary damages in a dust disease case would not survive for the purpose of an estate action.¹²¹
- 4.61 Exemplary damages have been awarded in Victoria to a worker who contracted mesothelioma as a result of his employment.¹²² In SA, the survival of actions legislation has been amended to allow the award of exemplary damages in dust disease cases.¹²³
- 4.62 Commentators have argued that the exclusion of exemplary damages in estate actions is illogical. Since the object of such damages is primarily punishment, it is “difficult to see why in those rare cases where such damages are justified, the defendant’s punishment should be fortuitously mitigated by the death of the victim”.¹²⁴ By contrast, where the *defendant* dies, his or her liability to pay exemplary damages *does* survive his or her death. Commentators have similarly argued that this is unreasonable, as “many of the reasons for [their] award... no longer apply”.¹²⁵ A defendant can hardly be punished *after* his or her death.
- 4.63 Aggravated damages would appear to continue to be available in the DDT,¹²⁶ although they are not otherwise available by reason of s 21 of the *Civil Liability Act 2002* (NSW). They differ from exemplary damages in being purely compensatory, and being referable to the mental harm caused to the injured party by reason of the egregious quality of the defendant’s wrong.

118. *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 471 (Brennan J).

119. R P Balkin, *Law of Torts* (LexisNexis Butterworths, 3rd ed, 2004) 825.

120. *Trend Management Ltd v Borg* (1996) 40 NSWLR 500; *Amaca Pty Ltd v Banton* [2007] NSWCCA 336.

121. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(a)(i).

122. *Midalco Pty Ltd v Rabenalt* [1989] VR 461.

123. *Survival of Causes of Action Act 1940* (SA) s 3(2).

124. H Luntz, *Assessment of Damages for Personal Injury and Death* (LexisNexis Butterworths, 4th ed, 2002) [9.1.8].

125. R P Balkin, *Law of Torts* (LexisNexis Butterworths, 3rd ed, 2004) 825. On both points, see also England and Wales, Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Report 247 (1997) [5.274]–[5.278]; England and Wales, Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Consultation Paper 132 (1993) [3.108]–[3.110]; J Swanton and B McDonald, “Commentary on the report of the English Law Commission on *Aggravated, Restitutionary And Exemplary Damages*” (1999) 7 *Torts Law Journal* 184; J Manning, “Reflections on Exemplary Damages and Personal Injury Liability in New Zealand” (2002) 2 *New Zealand Law Review* 143, 177.

126. *Laurie v Amaca Ltd* [2004] NSWDDT 49.

CP 14 Compensation to relatives

- 4.64 The *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) does not expressly include aggravated damages in the list of the heads of damage that are not available in an estate action, although they would seem to fall within the paragraph that prevents the recovery of damages for non-economic loss.¹²⁷
- 4.65 If that is so, then the amendment in relation to estate actions, in dust disease cases, that permits the recovery of damages for non-economic loss, would arguably allow the recovery of aggravated damages (by way of compensation for mental harm) in such cases.

Damages for “the lost years” in estate actions

- 4.66 In 1982, the High Court found that there was nothing in the survival of causes of action legislation, as it then existed, to preclude an award of damages for future loss of the earning capacity of the deceased in estate actions (that is, in respect of the “lost years”).¹²⁸ All jurisdictions in Australia have subsequently enacted amendments overturning this decision.¹²⁹
- 4.67 In NSW, this amendment was passed in 1982.¹³⁰ The second reading speeches indicate that legislators were primarily concerned about the possible windfall to beneficiaries of the estate who were not in fact dependants of the deceased. The Attorney General noted that:

Dependants will continue to be able to recover damages under the Compensation to Relatives Act so that the person responsible for the death will not have to pay twice. It cannot be acceptable that the amount of damages payable should exceed the sum that the victim would ever have had to dispose of.¹³¹

There was also concern voiced about the need to protect insurers from “greatly increased payments” that were not previously envisaged.¹³²

- 4.68 The practical effect of this provision, in dust diseases cases, is that it can operate to disadvantage mesothelioma sufferers. If they are unable to finalise their cases before dying, any entitlement to damages for the lost years will die with them. On the other hand, a plaintiff with a disease that progresses more slowly, including some of the other dust diseases, is more likely to be able to finalise his or her claim before dying. He or she will then be in a position to pass on to his or her family members any damages that were recovered for the lost years.

127. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(d).

128. *Fitch v Hyde-Cates* (1982) 150 CLR 482.

129. *Civil Law (Wrongs) Act 2002* (ACT) s 16(3)(b)(ii); *Law Reform (Miscellaneous Provisions) Act 1956* (NT) s 6(c)(iii); *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(a)(ii); *Succession Act 1981* (Qld) s 66(2)(d)(ii); *Survival of Causes of Action Act 1940* (SA) s 3(1)(a)(iv); *Administration and Probate Act 1935* (Tas) s 27(3)(c)(iii); *Administration and Probate Act 1958* (Vic) s 29(2)(c)(iii); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(2)(e).

130. *Law Reform (Miscellaneous Provisions) Amendment Act 1982* (NSW) s 2.

131. New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 February 1982, 1708 (F J Walker). On this point, see also J G Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 743.

132. New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 February 1982, 1708 (F J Walker); Legislative Assembly, 9 March 1982, 2305 (F J Walker).

- 4.69 Unions NSW and the Asbestos Diseases Foundation of Australia have submitted that such an outcome is unfair for mesothelioma sufferers as it results from the “entirely unpredictable course of the illness”.¹³³

Damages for non-economic loss in estate actions

- 4.70 In the UK there is no statutory bar to the recovery of damages for pain and suffering, or for loss of expectation of life in estate actions. In *Rose v Ford* the House of Lords held that, in the absence of a statutory bar, damages for non-economic loss could be recovered in estate actions.¹³⁴ As noted above, the position is otherwise in NSW save for dust diseases cases where proceedings were on foot in the DDT at the time of death.
- 4.71 The rationale for the exclusion, that otherwise applies, is that the estate, as an “impersonal body”, ought not receive damages for the pain and suffering of the deceased.¹³⁵

Implications for our review

- 4.72 This brief overview of entitlements to compensation for personal injury in NSW demonstrates that there are legal regimes that apply in different and often inconsistent ways, depending on the nature of the person’s injury and/or the circumstances in which it is incurred. While all of the regimes aim to compensate plaintiffs and claimants for the loss which they have suffered, the amount of damages and/or compensation actually recoverable will depend on a variety of factors, such as who is making the claim, the legal regime which applies and when the claim is made or when the damages are awarded.
- 4.73 These inconsistencies in treatment and outcome arise equally in relation to dust disease victims and their families. The compensation they receive will depend on factors such as:
- How they contracted the disease – whether it was in the course of employment or in some other circumstances.
 - When their claim is resolved, since whether damages are assessed before or after a person dies will materially affect the sorts of damages that can be recovered, either by the victim or by his or her family.
- 4.74 The different applicable regimes in relation to personal injury and wrongful death, both generally and in dust disease cases, make a consideration of the equity implications of any reforms difficult, especially in achieving fairness between different categories of claimants over so wide a field. Our approach in the following

133. Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary submission PCR1* [25].

134. *Rose v Ford* [1937] AC 826, 834 (Lord Atkin), 838 (Lord Russell of Killowen), 852 (Lord Wright), 853 (Lord Roche). See also *Kandalla v British Airways Board* [1980] 1 All ER 341; *Gammell v Wilson* [1980] 2 All ER 557; New Zealand, *Parliamentary Debates*, Legislative Council, 15 March 1938, 382.

135. New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 1944, 523 (Treatt).

chapters is to focus on those equity implications affecting dust disease victims and their families. For example, we consider:

- the issue of fairness between workers and non-workers who contract dust diseases;
- the issue of recovery of non-economic loss in estate actions in dust diseases cases and the fairness of the requirement that the victim must have instituted proceedings prior to death in order to be able to recover such damages; and
- the fairness of the *Strikwerda* principle when applied in dependants' actions in dust diseases cases.

In addition to considering whether to extend benefits that are available to some dust diseases victims to other dust diseases victims who are not currently entitled to them, we also consider whether to extend those benefits more generally to other categories of claimant in the interests of fairness.

5. Options for reform

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Summary of main options

- 5.1 We have given consideration to the options for reform which are noted below. In general terms, they progress from an option that involves no change, to one that would constitute a significant departure from well established principles in relation to the damages recoverable in wrongful death cases. In chapters 6 to 10 we evaluate the merits of each. In this chapter, apart from identifying the options in a summary way, we note some of the implications for stakeholders of any changes to the law in this area.

Option 1: Maintain the current law

- 5.2 The first option is simply to maintain the law in its current state. This would have the effect of preserving the *Strikwerda* principle in dust diseases cases, resulting in the continued deduction of any damages for non-economic loss, that are awarded in estate actions and that increase a dependant's inheritance, from the damages awarded in that dependant's action under the *Compensation to Relatives Act 1897* (NSW).

Option 2: Abolish the *Strikwerda* principle

- 5.3 The second option is to follow the approach taken in WA, SA and Victoria, by abolishing the *Strikwerda* principle in relation to dust diseases cases either generally, or in relation to asbestos-related cases. This would effectively complete the process initiated by the introduction of the private members' bill into the NSW Parliament in 2010.¹ This could be achieved by adding a further exception to the list of exceptions that are already included in s 3(3) of the *Compensation to Relatives Act 1897* (NSW); or by inserting a provision in the *Dust Diseases Tribunal Act 1989*

1. Dust Diseases Tribunal Amendment (Damages—Deceased's Dependents) Bill 2010 (NSW).

(NSW) that would direct the Dust Diseases Tribunal (“DDT”) to disregard the damages for non-economic loss awarded in an estate action in the assessment of damages in a dependant’s action.²

Option 3: Expand the entitlement to damages for non-economic loss in estate actions to dust-disease actions commenced after death

- 5.4 This option would remove the limitation contained in s 12B of the *Dust Diseases Tribunal Act 1989* (NSW) and in s 2(2)(d) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), that confines the recovery of damages for non-economic loss in estate actions to those cases where proceedings were already on foot at the time of death. It would allow recovery in proceedings commenced after the death and, in particular, would accommodate those cases where the dust disease was not discovered until a post-mortem examination was held.

Option 4: Introduce damages for grief suffered by relatives

- 5.5 This option would allow a court or tribunal to award damages for the grief suffered by family members in wrongful death cases, that is, for “solatium” or “damages for bereavement” as it is referred to in the *Fatal Accidents Act 1976* (Eng).³ In making such a head of damages available, this option would seek to ensure that relatives have some appropriate legal recognition of the grief and sorrow that the death of a family member causes. As such, the award of solatium could then function as an alternative to the award of damages for non-economic loss in an estate action. Such a reform could be applied generally or confined to dust disease cases.

Option 5: Expand the entitlement to damages for non-economic loss in estate actions to all cases

- 5.6 A radical option would be to amend the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) by allowing claimants in estate actions to recover damages for non-economic loss in all situations, whether or not the cause of action that was vested in the deceased, and survived his or her death, related to a dust disease.
- 5.7 Again, there could be two possible approaches if this option were adopted:
- to confine its application to those cases where the deceased person had already commenced proceedings before death; or
 - to allow such an action irrespective of when the proceedings were commenced.

2. See, eg, Dust Diseases Tribunal Amendment (Damages—Deceased’s Dependents) Bill 2010 (NSW) sch 1[1].

3. *Fatal Accidents Act 1976* (Eng) c 30, s 1A.

Option 6: Alter the basis of assessment of damages in a dependant's action

- 5.8 A final and far-reaching option would deal more generally with the deductions that must be made in a dependant's action, for example, by providing that all benefits accruing to the estate are to be disregarded, as is currently the case in England and Wales.
- 5.9 The Law Commission of England and Wales has recommended a limited retreat from this approach by proposing a specific list of non-deductible benefits comprising those acquired through charity, insurance, survivor's pensions and inheritance.⁴
- 5.10 An alternative approach would mirror that which applies in Tasmania in excluding all inherited benefits (including those accruing from an estate action) up to a certain value. Any amount of inherited benefits that exceeds this cap is taken into account in the assessment of damages. The Tasmanian cap is currently \$250,000.⁵

Consequences for stakeholders of any reform of the law

- 5.11 The consequences of any reform of the law, in this area, for individual classes of claimants will be considered in some detail in the following chapters.
- 5.12 Some more general issues can, however, be identified, at this stage, in relation to its impact on:
- the State of NSW.
 - defendants and their insurers; and
 - victims and their families.

State of NSW

- 5.13 Certain provisions of the Final Funding Agreement entered into by NSW, the James Hardie Group and other parties, will have a potential relevance for any change of the law in NSW. The Final Funding Agreement specifically addresses the issue of any change in the law that would have an adverse impact on the James Hardie Group or on other bodies associated with that Group.
- 5.14 Clause 13.2(a) of that Agreement states:

Subject to the remaining provisions of this clause 13, the NSW Government undertakes to and agrees with JHINV [James Hardie Industries NV] and the Performing Subsidiary that it will not undertake any adverse legislative action directed at any member of the JHINV Group, the Trustee or any of the Liable Entities in relation to any of the Relevant Matters or in relation to Asbestos Liabilities.

4. England and Wales, Law Commission, *Claims for Wrongful Death*, Report 263 (1999) [5.25], [5.39].

5. *Fatal Accidents Act 1934* (Tas) s 10(1)(b).

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- 5.15 Clause 13.2(b) defines “adverse legislative action”, and provides that legislative action may still be adverse:

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.⁶

- 5.16 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.

- 5.17 Clause 13.2(h) continues:

The Parties acknowledge that this clause 13.2 does not prevent the proper exercise by the NSW Parliament of its legislative power, but that this clause 13.2(h) is without prejudice to the right of any other Party or Parties to claim damages from the NSW Government in respect of any breach by the NSW Government of its obligations under this clause 13.

- 5.18 Clause 13.3 deals with regulatory action⁷ and in substance mirrors the provisions in cl 13.2. It is more likely that any reform would require legislative change rather than regulatory change.

- 5.19 It is not appropriate for us to express a view on the enforceability of the Agreement or on the validity of any of its terms. Nevertheless, it should be noted that the only option identified that would not come into conflict with the Agreement is option one, since it proposes that the existing law be maintained.

6. Amended and Restated Final Funding Agreement in respect of the provision of long term funding for compensation arrangements for certain victims of Asbestos-related diseases in Australia (“Final Funding Agreement”) (14 December 2010) cl 13.2(b)(iv).

7. Regulatory action is defined in the Final Funding Agreement, cl 13.1(b) as meaning:
(i) the exercise of statutory functions (being functions, powers, authorities and duties conferred or imposed on any person or body by legislation); and
(ii) the exercise by the NSW Government of the powers and functions described in section 7 of the Australia Act 1986 (Cth) itself or by advising the Governor of New South Wales to exercise such powers and functions,
but excludes any action taken under and in accordance with the Transaction Legislation or the Release Legislation.

- 5.20 The NSW Parliament has ratified aspects of the Final Funding Agreement by enacting the *James Hardie (Civil Liability) Act 2005* (NSW), s 19 of which provides:
- (1) This section applies to any provision of the Final Funding Agreement or a Related Agreement that provides for the State not to carry out, or not to cause the carrying out of, legislative or regulatory action of a kind specified by the Agreement.
 - (2) For the avoidance of doubt, it is declared that a breach by the State of a provision to which this section applies is capable of rendering the State liable to pay damages for breach of contract if the breach is of such a kind as to warrant an award of damages for breach of contract at general law.
- 5.21 Section 20 of the Act, however, recognises that the State retains the power to legislate for change in this area:
- (1) Nothing in section 19, the Final Funding Agreement or any Related Agreement operates:
 - (a) to prevent the introduction of any Bill in, or the passage of a Bill through, a House of Parliament or prevent assent being given to any Bill, or
 - (b) to prevent the making of any other legislation, or
 - (c) to affect the validity of any legislation, or
 - (d) to affect the validity of any action taken, or not taken, by the State or any its officials, employees, authorities or agencies.
- 5.22 If the Final Funding Agreement is valid and enforceable, then any change to the law in accordance with any of the other options could expose the Government to an action for damages of the kind recognised in cl 13.2(h). The principle of parliamentary sovereignty dictates that Parliament is unable to bind its successors.⁸ Consequently, the existence of the Agreement alone cannot prevent Parliament legislating for change, as is recognised by s 20 of the Act.

Defendants and insurers

- 5.23 There are two general issues in relation to the impact of any change in the law for defendants and/or their insurers. The first is the question of whether a change in the benefits available to family members will result in an increase in the number of claims being brought. The second is whether such change will result in an increase in the recoverable damages and, hence, in the overall liabilities of defendants and/or their insurers.

Possibility of increase in number of claims

- 5.24 Several preliminary submissions argued that any change in the law, that had the effect of extending or increasing the benefits available to victims of actionable wrongs and their estates or to their relatives, would increase the number of claims

8. See A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, 10th ed, 1959) 39-41.

being brought. For example, the Asbestos Injuries Compensation Fund's (AICF) preliminary submission suggested that increased benefits would make actions more attractive, resulting in a likely increase in claims over time and, hence, in their overall cost.⁹

5.25 There is some empirical evidence to support AICF's claim, although whether it would carry over to dependants' actions in dust diseases cases is not necessarily clear. For example, in 1989, NSW introduced its compulsory third party (CTP) personal injury insurance scheme.¹⁰ One of the major policy objectives of the CTP scheme was to provide compensation for seriously injured victims of motor vehicle accidents.¹¹ A study undertaken ten years after the introduction of the scheme found an increased propensity to claim. Analysing claim numbers, the study found an increase of 62% in the number of claims being made between 1989-90 and 1994-95.¹² The study attributed the increase in claims to several factors, including an increase in advertising by personal injury lawyers. However, the primary factor that the study identified, as causing the increase in the number of claims, was that accident victims in 1994-95 were advised that their claims were potentially more valuable and were, therefore, worth pursuing.¹³

5.26 The UK Working Party on Asbestos, in its 2009 review, noted a doubling of claims in the UK relating to mesothelioma in the period 2004-2008.¹⁴ The Working Party identified the following factors as contributing to this increase:

- Publicity. With the various legal cases that have taken place over the last few years, compensation for mesothelioma has often been in the news headlines, and hence public awareness of the availability of compensation is likely to have increased.
- The use of the internet has increased over the last few years and hence access to specialist information and the ability to bring people with a common interest together, no matter the physical distance apart, has improved. There is a wealth of information available on the web to help patients and their carers find out more about asbestos-related conditions, treatment, symptom management and support, both personal and financial.
- The [UK National Health Service] National Mesothelioma Framework has improved support for mesothelioma sufferers. There has been an improvement in the pre-death diagnosis rate in a number of specialist centres. It is understood that the claim success rate increases when the claim is made prior to death due to the ability to obtain a witness statement from the sufferer. An increase in pre-death diagnoses has increased the likelihood of successful claims against former employers and/or their insurers.

9. Asbestos Injuries Compensation Fund, *Preliminary submission PCR 3*, 3.

10. *Motor Accidents Act 1989* (NSW) pt 3, since replaced by *Motor Accidents Compensation Act 1999* (NSW) ch 2.

11. T Wright, A Eyland and J Cox, *Claiming Under the Motor Accidents Scheme* (Justice Research Centre, 1998) [2].

12. T Wright, A Eyland and J Cox, *Claiming Under the Motor Accidents Scheme* (Justice Research Centre, 1998) [5].

13. T Wright, A Eyland and J Cox, *Claiming Under the Motor Accidents Scheme* (Justice Research Centre, 1998) [64].

14. UK Working Party on Asbestos, *Update 2009* (2009) 7
<<http://www.actuaries.org.uk/sites/all/files/documents/pdf/b12asbestoswp.pdf>>.

- Anecdotally, it was suggested that as awareness has improved it is possible that there has been an increase in the number of claims made retrospectively (eg by relatives after the sufferer has died) even where the death certificate did not state the cause of death to be mesothelioma.¹⁵
- 5.27 In the Australian context, actuarial studies have noted similar increases in claim activity to those that occurred in the UK.¹⁶ One important factor may be the increase in the diagnosis of new cases of mesothelioma and other asbestos-related diseases that has occurred in recent years.¹⁷ Given that a peak in diagnosis is not expected until around 2020, it might be expected that claim numbers will continue to increase until around the same period, regardless of the state of the law.
- 5.28 There are also a number of factors that mean that it is not clear that a change that affected only families involved in dust diseases cases would have any significant effect on claim propensity.
- 5.29 First, the number of dust diseases cases brought under the *Compensation to Relatives Act 1897* (NSW) that would benefit from the abolition of the *Strikwerda* principle is likely to be limited. That is because, to be affected by the required deduction, it is necessary to show that a pecuniary loss was caused by the death,¹⁸ giving rise to a right to recover sufficient damages in a dependant's action to justify the bringing of proceedings. In most cases, this would require, for example, that the deceased had still been working at the time of his death and that such event had deprived the family members of access to his or her future earnings and to the future support services that he or she would have provided. 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-dependant adult children. Moreover, the dependants of a deceased worker are entitled to weekly payments of compensation which, in the case of a widow, will extend past the age of 65 years.
- 5.30 Secondly, the availability of increased benefits is not the only factor affecting whether a person is likely to lodge a claim. The factors noted by the UK Working Party on asbestos indicate that knowledge about avenues of legal redress influenced claiming behaviour. In Australia, the state of knowledge regarding asbestos actions is such that those affected are likely to be already aware of the possibility of compensation. For example, these issues were highlighted by the asbestos-victim advocate Bernie Banton, whose case attracted significant media coverage.
- 5.31 However, the availability of an award of solatium to provide compensation for the grief experienced, as a result of the death of a family member, might have a material effect on claim incidence, depending on the size of any such award. Its availability would not depend on showing the existence of pecuniary loss and it would be a benefit not previously available.

15. UK Working Party on Asbestos, *Update 2009* (2009) 7
<<http://www.actuaries.org.uk/sites/all/files/documents/pdf/b12asbestoswp.pdf>>.

16. R Deutsch and C O'Dowd, "Asbestos – Where Will It All End?", *Risk Management Magazine* (online) 31 January 2006 <<http://www.riskmanagementmagazine.com.au>>.

17. See discussion at para 2.12-2.18 above.

18. Although the *Compensation to Relatives Act 1897* (NSW) does not explicitly state that it only applies to pecuniary loss, this is the accepted interpretation of s 3(1). See para 1.5.

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- 5.32 Any enlargement of the entitlement to recover damages for non-economic loss in estate actions beyond dust disease cases could, however, affect claim incidence.

Possibility of increase in cost of claims

- 5.33 Any change in the law that extends the ability of an estate to recover non-economic loss damages in estate actions other than those involving dust diseases, or that removes the *Strikwerda* principle either in relation to dust disease cases, or generally, could have a financial impact for defendants. Several preliminary submissions argued that any changes which had the effect of increasing the benefits available to claimants, would result in a material increase in premiums for workers compensation insurance, as well as for CTP and public and product liability insurance.¹⁹

- 5.34 In relation to dust disease claims, the situation is slightly more complicated as increases in payouts by insurers cannot simply be offset by a correlative increase in insurance premium levels in relation to dust disease policies. This was explained in a confidential submission:

Dust disease claims have the potential to be significant by way of damages and much more so if the legally-established methodology for the calculation of loss is overturned. The funding available to insurers to meet such an increase in the value of claims is limited by virtue of the fact that dust disease policies are no longer issued by insurers, and therefore the additional costs cannot be recouped by way of increased premiums.²⁰

- 5.35 The potential increase in liabilities incurred by defendants and insurers caused by a change in the law is an issue that cannot be overlooked. Nevertheless, such an increase in costs is not the only factor to be taken into account, as these financial issues need to be balanced against other issues such as fairness to victims and equity between classes of claimant.

Victims/claimants

- 5.36 The impact on victims or potential claimants or their families of any change in the law depends to a very significant extent on the content of the proposed change. Consequently, these issues, including questions of equity between categories of claimants, are addressed in the following chapters.

19. See, eg, Insurance Council of Australia, *Preliminary submission PCR9*, 2.

20. *Confidential preliminary submission CPCR10*.

6. Retain the current law or abolish the *Strikwerda* principle in relation to dust disease cases

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- 6.1 In this chapter we consider the options of abolishing, either wholly or partly, the *Strikwerda* principle as it applies to dust disease cases, or of retaining it unchanged.

Other jurisdictions

- 6.2 All jurisdictions in Australia have amended their laws to allow the recovery of damages for non-economic loss in estate actions where proceedings were on foot at the death of plaintiff, in either asbestos-related cases¹ or dust disease cases.² As we have previously noted, following the decision in *Strikwerda*, three jurisdictions – WA, SA and Victoria – amended their relevant legislation so as to allow the court, when assessing damages in a dependant’s action, to disregard any damages for non-economic loss that had been awarded to the estate in an estate action.³

South Australia

- 6.3 South Australia was the first Australian jurisdiction to introduce legislation of this kind.⁴ Other changes were made that were aimed at assisting the courts in

1. *Civil Law (Wrongs) Act 2002* (ACT) s 16(4); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(2a).

2. *Dust Diseases Tribunal Act 1989* (NSW) s 12B; *Law Reform (Miscellaneous Provisions) Act* (NT) s 6(2); *Succession Act 1981* (Qld) s 66(2A); *Survival of Causes of Action 1940* (SA) s 3(2); *Administration and Probate Act 1935* (Tas) s 27(3A); *Administration and Probate Act 1958* (Vic) s 29(2A).

3. *Civil Liability Act 1936* (SA) s 24(2aa)(f); *Wrongs Act 1958* (Vic) s 19(1A); *Fatal Accidents Act 1959* (WA) s 5(2)(d).

4. *Civil Liability Act 1936* (SA) s 24(2aa)(f).

managing the increasing number of cases involving dust diseases,⁵ in particular, to deal with the need for urgency in bringing those cases to a conclusion. Other amendments were made to allow for the award of provisional damages and of exemplary damages in those cases.⁶

Victoria

- 6.4 Victoria legislated for changes that broadly followed those made in SA,⁷ by:
- abolishing the *Strikwerda* principle in dust disease cases;⁸
 - introducing procedures to expedite hearings;⁹ and
 - allowing the award of provisional damages but only for asbestos-related conditions.¹⁰

Western Australia

- 6.5 In addition to abolishing the *Strikwerda* principle, in asbestos-related cases only,¹¹ WA also passed amending legislation to relax the limitation periods in asbestos cases.¹²

England and Wales

- 6.6 The legislature has gone further in England and Wales by excluding from consideration in dependants' actions any benefits at all accruing to the dependants from the estate.¹³ The exclusion would extend to any portion of the deceased's estate constituted by the deceased's entitlement to damages to which a dependant has become entitled.¹⁴

Retain the current law

- 6.7 Five reasons have been suggested for retaining the *Strikwerda* principle:
- It is based on long-standing precedent.

5. South Australia, *Parliamentary Debates*, House of Assembly, 30 November 2005, 4278 (M Atkinson).

6. *Dust Diseases Act 2005* (SA) s 9.

7. *Asbestos Diseases Compensation Act 2008* (Vic).

8. *Wrongs Act 1958* (Vic) s 19(1A).

9. *Accident Compensation Act 1985* (Vic) s 135BB.

10. *Asbestos Diseases Compensation Act 2008* (Vic) s 4.

11. *Fatal Accidents Act 1959* (WA) s 5(2)(d).

12. *Limitation Act 2005* (WA) s 56, s 57.

13. *Fatal Accidents Act 1976* (Eng) c 30, s 4.

14. See United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978) vol 1, 118 [537].

- Dependants are adequately compensated by the compensation and damages available in accordance with the law as it currently stands.
- Abolishing it in relation only to dust disease cases is inequitable for victims of other types of injuries.
- Abolishing it risks dependants in dust disease cases being over-compensated.
- Abolishing it will result in more claims being filed, with a consequent increase in the liabilities of defendants and their insurers, and in insurance premiums or levies.

Well-established principle

- 6.8 Several preliminary submissions noted that the *Strikwerda* principle is not new, but simply represents the application of a well-established common law principle,¹⁵ which does not give rise to any fundamental error in logic or legal analysis.¹⁶
- 6.9 Some preliminary submissions also argued that there is no compelling reason to abolish the application of the principle in dependants' actions, where the purpose of the award of damages is to compensate the dependant for the pecuniary loss arising from the death.¹⁷
- 6.10 It can be questioned, however, whether the fact that a principle is well-established is ever sufficient reason for its retention, particularly where circumstances arise which might occasion an unfairness to those whose interests it affects.

Dependants are adequately compensated

- 6.11 Some preliminary submissions have argued that dependants are adequately compensated by the compensation and damages available under the current law.¹⁸
- 6.12 Another preliminary submission argued that, "the current state of the law represents an appropriate balance of the needs of the unfortunate sufferers of asbestos related diseases and the obligations of businesses and insurers which operate in this area".¹⁹
- 6.13 However, as noted earlier, statutory compensation benefits are not available to:

15. Confirmed by the High Court in *Public Trustee v Zoanetti* (1945) 70 CLR 266.

16. *Confidential preliminary submission CPCR10*; Asbestos Injuries Compensation Fund, *Preliminary submission PCR3*; DLA Phillips Fox, *Preliminary submission PCR2*.

17. DLA Phillips Fox, *Preliminary submission PCR2*; NSW Bar Association, *Preliminary submission PCR8* [14]. See Lord Porter's comments in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601, 603.

18. DLA Phillips Fox, *Preliminary submission PCR2*, 3; Asbestos Injuries Compensation Fund, *Preliminary submission PCR3* [4].

19. Insurance Council of Australia, *Preliminary submission PCR9*, 1.

- people affected by asbestos who were working for an employer who was not required to be insured under the general workers compensation scheme in NSW;²⁰ and
- those who were exposed to asbestos outside employment who constitute the “third wave” of claimants.

The argument that no change to the law is required because the dust disease compensation scheme adequately compensates the surviving spouses and relatives of asbestos victims,²¹ does not apply in relation to those who come within this group because they are not eligible for statutory compensation. Precisely how many people from the third wave will be similarly placed is not clear.

Avoidance of inequity between categories of claimants

- 6.14 Another possible reason that has been identified for retention of the *Strikwerda* principle is that to create a specific exception confined to dust disease cases would privilege one group of victims over others, and would tend to promote inconsistency and inequity in the application of the law. For example, a preliminary submission argued that there is:

no basis to treat widows and relatives of different victims differently, and certainly, there is no basis ... to confer additional financial benefits on one type of relative or another.²²

- 6.15 Several submissions highlighted the extent of the benefits that are currently available in NSW to the victims of dust diseases, and to their relatives, compared with those that are available to other categories of claimants.²³ It was argued that such benefits had the effect of putting the families of dust disease victims in a better position than the families of other victims of wrongful deaths, and that the abolition of the *Strikwerda* principle would simply “perpetuate inequities” between them.²⁴
- 6.16 The question of consistency between categories of claimant is relevant, both in light of the terms of reference, but also because consistent application of legal principle, across relevant categories, is arguably more desirable than a system which applies inconsistent rules based only on the type of injury sustained, or on the context in which it occurred. On the other hand, there are any number of circumstances in which exceptions to general rules exist, for justifiable reasons, and it is clear that the law is not so rigid as to preclude this.
- 6.17 Moreover, when considering the equity issue, it is relevant to note that, leaving aside the statutory no fault compensation schemes, there are currently four separate categories of fault-based personal injury law in NSW, each of which is

20. See *West v Workers Compensation (Dust Diseases) Board* (1999) 18 NSWCCR 60. See discussion at para 4.16.

21. DLA Phillips Fox, *Preliminary submission PCR2* [3].

22. DLA Phillips Fox, *Preliminary submission PCR2*, 2. See also Asbestos Injuries Compensation Fund, *Preliminary submission PCR3*, 2.

23. See particularly para 4.13-4.22.

24. *Confidential preliminary submission CPCR10*, 3.

subject to a different regime in relation to the assessment of damages. They comprise:

- (a) work injury claims, for which modified common law damages are available and which are calculated according to Part 5 of the *Workers Compensation Act 1987* (NSW);²⁵
- (b) motor accident claims, for which modified common law damages are also available and which are calculated according to Chapter 5 of the *Motor Accidents (Compensation) Act 1999* (NSW);
- (c) subject to (d), all other forms of personal injury, in relation to which the recovery of damages is subject to Part 2 of the *Civil Liability Act 2002* (NSW); and
- (d) the miscellaneous category of claims which do not fall within (a), (b) or (c), arising out of:
 - certain intentional torts,
 - dust diseases, and
 - injury or death resulting from smoking or other use of tobacco products,for which unmodified common law damages remain available.

- 6.18 The funding arrangements for these schemes differ. They include compulsory workers compensation insurance premiums and levies paid by employers; compulsory motor accident (third party) green slip insurance premiums paid by the registered owners of motor vehicles; and non-compulsory insurance premiums paid by those who take out public or product liability or other forms of risk insurance. In some circumstances the funding arises through self-insurance.
- 6.19 The legislation that governs categories (a), (b) and (c) differs quite significantly in relation to the degrees of impairment that will qualify a claimant for the recovery of damages, and also in relation to the available caps on damages. Those limitations do not apply to cases within category (d) which continue to be governed by the common law.
- 6.20 The benefits payable under the statutory compensation schemes to workers and their dependants are not available to motor accident claimants, or to those who have public and product liability claims or other tortious claims and, to that extent, workers compensation and dust disease claimants are advantaged. As between those entitled to statutory no-fault compensation under the *Workers Compensation Act 1987* (NSW) and the *Workers Compensation (Dust Diseases) Act 1942* (NSW) respectively, there are differences, for example in relation to the size of the lump sum death benefit that is payable, and in relation to the entitlement to weekly payments.

25. As noted earlier (para 4.11-4.12), the position of coal miners bringing common law claims is subject to *Workers Compensation Act 1987* (NSW) pt 5 that was in force prior to 27 November 2001.

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- 6.21 There are also differences between the States and Territories in relation to the compensation or damages available within each of these four categories of cases; noticeably so in the case of dust disease compensation and/or damages.
- 6.22 It follows that any attempt to achieve equity across all categories of claimants and dependants, whether across all Australian jurisdictions or confined to NSW, is exceedingly difficult, not only because of the differences in the individual damages regimes, but also because of the differences in the nature and levels of risk of injury or death occurring within each category. This inevitably gives rise to differences in respect of the potential liabilities of the defendants, and in respect of any compulsory or voluntary premiums which they may need to pay for insurance against those liabilities.
- 6.23 It follows that much more than amendment of the relevant Acts and/or the abolition of the *Strikwerda* principle, would need to be considered, if a wholly coherent and single system of personal injury compensation, ensuring equality of treatment for all victims of wrongful acts and omissions, were to be introduced in NSW. A more general consideration of this kind falls well outside our current terms of reference and will not be addressed. Accordingly, we intend to confine our consideration, in terms of equity between claimants, to the consequences that would follow from the abolition or part abolition of the *Strikwerda* principle and/or any accompanying amendment of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) or of the *Dust Diseases Tribunal Act 1989* (NSW).
- 6.24 Although not directly relevant to the state of the law in NSW, the question of the change in the law in Victoria in the context of that State's Charter of Rights²⁶ provides some analysis of the question of equity between categories of claimant. The Victorian amending Bill which abolished the *Strikwerda* principle in relation to dust disease cases was presented with a Statement of Compatibility addressing its human rights implications.²⁷
- 6.25 In summary, the Statement of Compatibility justified the differential treatment by reference to the following propositions:
- those with asbestos-related injuries and those with other injuries are not groups in the same or similar circumstances²⁸ and, as a consequence, they can be treated differently without being treating unequally,²⁹
 - the amendment is a special measure (as permitted by the Charter³⁰) that has the purpose of assisting or advancing people or groups of people affected by asbestos-related conditions, who have been disadvantaged due to prior discrimination.
- 6.26 It is true that the abolition of the *Strikwerda* principle, in relation to dust disease cases, would confer a benefit on claimants in dependants' actions that would not be

26. *Charter of Human Rights and Responsibilities 2006* (Vic).

27. In compliance with *Charter of Human Rights and Responsibilities 2006* (Vic) s 28.

28. "Discrimination" in *Charter of Human Rights and Responsibilities 2006* (Vic) is defined by reference to the *Equal Opportunity Act 1995* (Vic).

29. Victoria, *Hansard*, Legislative Assembly, 9 October 2008, 4067 (T Holding).

30. *Charter of Human Rights and Responsibilities 2006* (Vic) s 8(4).

available for other categories of claimants. Two possible responses have been suggested to the proposition that this gives rise to an inequality or inequity between claimants.

- 6.27 First, it will be relatively rare for a person, who dies as the result of an injury stemming from an actionable wrong that is not dust-related, to experience the kind of severe pain and suffering and loss of amenities of life that are inherent in dust disease cases, particularly those that are asbestos-related. Where, as is more likely to be the case, the death follows immediately upon or soon after the injury occasioned by the wrong, there will be no opportunity for the victim to suffer such losses.
- 6.28 Secondly, the nature of asbestos-related diseases is such that their consequences for dependants, including the anxiety and distress in seeing a family member suffer and deteriorate, after diagnosis, towards an agonising death, would not otherwise be compensable, unless the dependants were able to overcome the limitations involved in substantiating a claim for nervous shock according to common law principles.³¹

Avoidance of over-compensation

- 6.29 It was suggested in some preliminary submissions that, by abolishing the *Strikwerda* principle, defendants might possibly have to pay out twice, or that the plaintiff might receive some measure of over-compensation.³² This was said to arise from the circumstance that, if no account is taken in a dependant's action of the damages for non-economic loss recovered by the estate in an estate action, and a family member, for whose benefit the dependant's action is brought, inherits the estate, he or she will receive those damages even though they represent the harm occasioned to the deceased rather than that occasioned to the dependant. In this respect it has been pointed out that damages for non-economic loss awarded in estate actions can be significant.
- 6.30 While it is true that damages are meant to compensate for a plaintiff's actual loss and no more,³³ the relevant question for our purposes is what loss is actually being compensated. On the one hand, in the estate action, damages for non-economic loss are being awarded that relate to the pain and suffering, loss of amenities of life and loss of expectation of life suffered by the victim of the dust disease during his or her lifetime. On the other hand, in the dependant's action the damages are being awarded to the family member for the loss of financial support that he or she has, or will experience, as a result of the death of the deceased. Since the damages are

31. In this regard it is noted that *Workers Compensation Act 1987* (NSW) s 151P is not replicated in the dust diseases legislation; otherwise *Civil Liability Act 2002* (NSW) pt 3 does not apply.

32. DLA Phillips Fox, *Preliminary submission PCR2*, 1 [1]; *Confidential preliminary submission PCR10*, 6; *Confidential preliminary submission PCR4*, 2.

33. See for example, *Skelton v Collins* (1966) 115 CLR 94, 128.

addressing two different injuries, it could be argued that over-compensation does not occur. Two preliminary submissions presented an argument to this effect.³⁴

- 6.31 Conversely, if the goal of damages in dependants' actions is to ensure that family members are placed in the same financial position that they would have been had the person not died, and no more,³⁵ then there is a possibility of over-compensation justifying retention of the *Strikwerda* principle.

Avoidance of increases in claims and claim costs

- 6.32 Some preliminary submissions drew attention to the possible financial implications for defendants and the Asbestos Injuries Compensation Fund if the *Strikwerda* principle were abolished in relation to dust disease cases.
- 6.33 One preliminary submission observed that, while "it is too early to calculate the impact of future claims", any change to the law which results in larger benefits being available to claimants would result in an increase in the number of claims.³⁶
- 6.34 To similar effect was the preliminary submission that changes in the available compensation can alter claiming behaviour:

If the reforms make claims of this nature more attractive (because they are more rewarding to claimants and plaintiffs), there is likely to be an increase in the number of claims over time. Hence, rather than being a simple increase in the cost of current claims, the reform may result in a much larger increase in the overall cost of claims if the propensity to claim is made more attractive.³⁷

This preliminary submission added that "behavioural change has been a key result of reforms to personal injury damages in other areas in the past".³⁸

- 6.35 The opposing arguments, which also support the abolition of the *Strikwerda* principle, are outlined below.³⁹
- 6.36 It is difficult to assess the strength of these arguments in relation to the dust disease cases. No clear empirical evidence or data was placed before us to indicate the number of dust disease cases that have been affected by the *Strikwerda* principle, nor on the likely effect on claim numbers or defendants' liabilities if it were abolished.
- 6.37 However, a review of the Dust Diseases Tribunal's claims resolution process reported that of the 916 claims commenced in the period 1 July 2005-30 June 2008,

34. Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary submission PCR1* [31]; Australian Lawyers Alliance, *Preliminary submission PCR6* [12]-[13].

35. Asbestos Injuries Compensation Fund, *Preliminary submission PCR3* [2]; DLA Phillips Fox, *Preliminary submission PCR2* [1].

36. DLA Phillips Fox, *Preliminary submission PCR2*, 3.

37. Asbestos Injuries Compensation Fund, *Preliminary submission PCR3* [5].

38. Asbestos Injuries Compensation Fund, *Preliminary submission PCR3* [5].

39. Para 6.53-6.61.

at least 73 plaintiffs died before their cases were finalised.⁴⁰ In the same period, 24 dependants' actions were commenced.⁴¹ It is not clear how many of the claimants in these dependants' actions would have benefited from the damages awarded in the estate actions continuing after the deaths,⁴² nor is it clear how many beneficiaries of the 73 potential estate actions would have a worthwhile claim to damages in dependants' actions in the absence of the *Strikwerda* principle.

Question 6.1

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

Question 6.2

Are there reasons in addition to those that we have identified which support not changing the current law?

Abolish the *Strikwerda* principle

- 6.38 Four reasons have been suggested for abolishing the *Strikwerda* principle in NSW:
- It is discriminatory and potentially unfair in the way that it affects some families.
 - It is desirable that there be consistency between jurisdictions.
 - It undermines the beneficial change which allowed the recovery of damages for non-economic loss in dust disease estate claims.
 - The amendments in other States have had little impact on the liabilities of defendants, and abolition of the principle is similarly unlikely to have any significant impact in NSW.

Discrimination and unfairness in the operation of the *Strikwerda* principle

- 6.39 The *Strikwerda* principle has been categorised as unfair because of its differential effects on victims. First, avoidance of the application of the principle depends on whether or not the victim of a dust disease can bring and conclude, either by hearing or settlement, a common law claim before dying. The need to conclude such a claim can subject the victim to significant emotional and physical pressure

40. 507 of these were malignant claims and, of these, 64 claimants died before the claims were resolved: Attorney General's Department of NSW and NSW, Department of Premier and Cabinet, *Review of the Dust Diseases Claims Resolution Process*, Issues Paper (2008) 25.

41. Attorney General's Department of NSW and NSW, Department of Premier and Cabinet, *Review of the Dust Diseases Claims Resolution Process*, Issues Paper (2008) Appendix A, 2. Attorney General's Department of NSW and NSW, Department of Premier and Cabinet, *Dust Diseases Claims Resolution Process: Data for 2006-07* (2007) 6, 7.

42. See the discussion at Attorney General's Department of NSW and NSW, Department of Premier and Cabinet, *Review of the Dust Diseases Claims Resolution Process*, Issues Paper (2008) 58.

and can lead to crisis settlements at an undervalue. Alternatively, it might encourage defendants to delay the litigation in the hope that the victim will die before their resolution, even though this would deprive them of the opportunity to cross-examine the victim. Secondly, the application of the principle can be avoided depending on whether the victim of a dust disease resorts to other strategies to defeat its application.

6.40 As was observed in the Second Reading speech in support of the amendments in WA:

asbestos disease victims feel pressured at an emotionally and physically harrowing time to resolve damages claims during their lifetime so that they can ensure that any award of general damages is inherited by their dependants. Moreover, asbestos disease victims are, in effect, discouraged from leaving the anticipated general damages component of their estates to their spouses and children or, alternatively, obliged to seek to put in place expensive, complex and perhaps uncertain inheritance arrangements or rely upon other beneficiaries voluntarily gifting their bequests to those dependants.⁴³

6.41 The problem does not arise if the victim of the dust disease is able to bring and conclude the claim for common law damages prior to his or her death. In such a case that person will recover, during his or her lifetime, damages for non-economic loss together with damages for any other pecuniary loss. However, if the proceedings are not concluded, and damages for non-economic loss are awarded to the estate, the benefit of those damages will disappear if they are deducted from damages awarded in a dependant's action. Alternatively, if the victim and spouse are in the latter part of their lives (with the consequence that the spouse's dependency claim is relatively small), the damages recovered in the estate action will effectively extinguish the spouse's damages.⁴⁴

6.42 It is possible that a person, who is aware of the potential effect of the *Strikwerda* principle, could arrange his or her affairs deliberately to ensure that those family members, on whose behalf a dependants' action could be brought, were not affected by the deduction. This could be achieved by bequeathing the damages awarded for non-economic loss to a third party. In that event, while the dependants of the deceased would not receive the benefit of the damages for non-economic loss awarded to the estate (since these would go to the third party), they would be no worse off, since those damages would not be offset when calculating their loss in the dependants' action.

6.43 It might also be possible for a person to arrange his or her affairs such that, although the damages awarded for non-economic loss are left to a third party, the benefit of the award is passed on to the family member. This could be achieved through the use of a willing third party beneficiary under the will such as an adult child or an extended family member, or through the use of legal mechanisms such as a discretionary trust, with the result that there would be no deduction through the application of the *Strikwerda* principle.

43. Western Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2057a (J McGinty).

44. Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary submission PCR1*.

- 6.44 The relatives of a person who, either through lack of time, or ignorance of the law, or imperfect legal advice, did not arrange his or her affairs in such a way, would effectively be disadvantaged in comparison with those who adopted such a strategy. One preliminary submission was particularly critical of such a possibility:

These anomalies could lead to a situation where in the last months of life, if the progress of the illness permits it, the victim whose dependants are also beneficiaries under his or her will may change the will to ensure that the estate is left to someone other than the dependants, such as a discretionary trust, in order to circumvent the effect of *Zoanetti* and *Strikwerda*. The law should not countenance such contrivances. Nor should the tortfeasor's overall liability to pay compensation be less simply because the dying victim leaves the whole of his or her estate to those closest to him or her, who are usually the dependants.⁴⁵

Consistency between jurisdictions

- 6.45 As we noted earlier, a single provision – inserted either into the *Dust Diseases Tribunal Act 1989* (NSW),⁴⁶ or into the list of exceptions in s 3(3) of the *Compensation to Relatives Act 1897* (NSW)⁴⁷ – would be sufficient to achieve the required change.
- 6.46 An amendment of this kind would bring NSW into line with WA, SA and Victoria, providing a measure of consistency in this aspect of their laws, although it would not necessarily result in an equivalence in the aggregate compensation or damages recoverable. Inconsistencies in relation to the laws in force in the remaining States and Territories would, however, continue.
- 6.47 The argument for consistency admittedly rests on an assumption that the legal landscape in all jurisdictions, or even within one jurisdiction, is otherwise identical. That is far from being the case. We have noted there are significant differences in relation to the compensation and damages that are available across the separate claimant categories.⁴⁸ There are also significant differences in the benefits available to the dependants of workers who sustained, and died from, a dust disease, in the four States, as appears from Table 6.1. Of the four States, it is only NSW that has a specific dust disease workers compensation scheme. In the three other States, the statutory benefits are the same as those applying to workers under each State's general workers compensation scheme. KPMG's annual actuarial report on the James Hardie Group's liabilities noted in 2010 that, as a general proposition, NSW claims result in higher payouts than those seen in the other States.⁴⁹

45. Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary submission PCR1* [30].

46. As proposed in the lapsed Dust Diseases Tribunal Amendment (Damages—Deceased's Dependents) Bill 2010 (NSW) sch 1[1].

47. This approach is supported by the Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary submission PCR1* [18].

48. Chapter 4 and para 6.14-6.28.

49. KPMG, "Valuation of Asbestos-Related Disease Liabilities of Former James Hardie Entities ("The Liable Entities") to be Met by the AICF Trust" (2010) 40, indicates that one third of all asbestos claims currently come from NSW, but NSW is responsible for a higher proportion of claims by cost.

Table 6.1: Comparison of dependants' entitlements on death of a worker between jurisdictions

	NSW	Vic	SA	WA
	<i>Workers Compensation (Dust Diseases) Act 1942 (NSW)</i>	<i>Workers Compensation Act 1958 (Vic)</i>	<i>Workers Rehabilitation And Compensation Act 1986 (SA)</i>	<i>Workers' Compensation And Injury Management Act 1981 (WA)</i>
Lump Sum	s 8(2B)(b)(i): <ul style="list-style-type: none"> ▪ 2011: \$291,040; ▪ 2012: \$311,050. 	s 9: <ul style="list-style-type: none"> ▪ \$511,920 for a family or to be shared between eligible dependants. (as at July 2010). 	s 45A: <ul style="list-style-type: none"> ▪ 2011 - \$437,401, divided among family members as directed by Act. 	Sch 1, cl 1: <ul style="list-style-type: none"> ▪ a minimum amount payable being a sum equal to the aggregate weekly payments for total incapacity of the worker at a rate calculated and varied in accordance with this Schedule as at the date of the worker's death for a period of one year after that date; ▪ current minimum sum - \$251 412, divided among dependants (Sch 1 cl 1-5).
Weekly Payments: Spouse	s 8(2B)(b)(ii): <ul style="list-style-type: none"> ▪ spouse or de facto \$243.60; ▪ until death, but expires on remarriage. 	s 9: <ul style="list-style-type: none"> ▪ for the first 13 weeks after date of death - 95% of the worker's pre-injury pay, to a maximum of twice the State Average Weekly Earnings - currently \$1,810 a week; ▪ 14 weeks to 3 years - 50% of the worker's pre-injury pay, to a maximum of twice the State Average Weekly Earnings - currently \$1,810 a week. 	s 44: <ul style="list-style-type: none"> ▪ total dependency: 50% of amount of the notional weekly earnings of the deceased worker (notional weekly earnings = the average weekly amount that the disabled worker earned during the period of 12 months preceding the relevant date in relevant employment); ▪ partial dependency: determined by Workcover Corporation depending on extent of dependency; ▪ payable until: Weekly payments shall not be paid beyond the date at which such payments would, assuming that the worker had survived but had been permanently incapacitated for work, have ceased to be payable to the worker (s 44(7)). 	Not available

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	NSW	Vic	SA	WA
	<i>Workers Compensation (Dust Diseases) Act 1942 (NSW)</i>	<i>Workers Compensation Act 1958 (Vic)</i>	<i>Workers Rehabilitation And Compensation Act 1986 (SA)</i>	<i>Workers' Compensation And Injury Management Act 1981 (WA)</i>
Weekly Payments: Children	s 8(2B)(b)(iii): ▪ \$123.10.	s 9: ▪ receive a weekly pension of 5% (up to a maximum of 25% for more than five children) of a worker's pre-injury pay from 14 weeks until the child turns 16 or between 16 to 25 years if the child is a full time student or full-time apprentice.	s 44: ▪ total dependency: 25% of amount of the notional weekly earnings of the deceased worker; ▪ partial dependency: determined by Workcover Corporation depending on extent of dependency.	Sch 1 cl 1A, 1B: ▪ \$48.10.
Funeral Expenses	s 8(3): ▪ reasonable funeral expenses not exceeding \$9,000.	s 26(1)(c)(ii): ▪ reasonable costs of burial or cremation.	s 45B: ▪ \$9,236.	Sch 1 cl 4 and 17(2): ▪ \$8,606.00.
Medical Expenses	s 8(3): ▪ reasonable costs.	s 26(1)(c)(i): ▪ reasonable costs.	s 30: ▪ costs reasonably incurred.	Sch 1 cl 17, 18A: ▪ \$55,018.00, but can be increased if arbitrator thinks appropriate.

- 6.48 The existence of these differences makes it very difficult to compare the four jurisdictions directly. Consequently, the consistency argument, whether advanced as a justification for a change of law in NSW or as a reason for resisting change, needs to be treated with care.
- 6.49 Of more direct importance is the question whether considerations of equity and social responsibility compel the conclusion, as was suggested in one preliminary submission,⁵⁰ that the victims of asbestos-related diseases and their dependants should be treated as a special case. The suggested reasons include the nature of the disease, the suffering caused, the unpredictable timing of spikes in symptoms and of death, as well as the lottery related to whether or not a victim can survive long enough to bring and conclude a claim.⁵¹
- 6.50 Another circumstance that might be relevant in this context is the overall history of the use of asbestos for many years, without any public warning having been given of its dangers, despite the existence of knowledge in some circles of its propensity to cause harm.

50. Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary submission PCR1*.

51. Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary submission PCR1*, [23]-[28].

- 6.51 In any event, as we later note,⁵² any inequity between claimants could be addressed by allowing damages for non-economic loss to be recovered in all estate actions, and by abolishing the *Strikwerda* principle generally.

The principle undermines the beneficial changes made in relation to estate actions

- 6.52 In both Victoria and WA, the abolition of the *Strikwerda* principle was justified on the basis that the deduction which was required in dependants' actions was "inconsistent with the beneficial intention"⁵³ of the earlier amendments in both States, which had removed the bar on the award of damages in estate actions for non-economic loss in dust disease and asbestos-related cases. It is clear that it has had this effect, although whether that is an argument in favour of abolition of the principle turns on whether it was appropriate to provide an exception for the recovery in estate actions of damages for non-economic loss, confined to dust disease cases. The answer to that turns upon the issues raised above.⁵⁴

Impact of the amendments will be insignificant

- 6.53 There was some disagreement in the preliminary submissions as to whether the abolition of the *Strikwerda* principle in relation to dust diseases would result in an overall increase in claims in NSW, with a corresponding increase in liabilities for defendants and their insurers.
- 6.54 Those who support the abolition of the principle argue that such a change will have little effect on defendants' liabilities. In the course of the Second Reading speech in support of the lapsed private member's Bill it was observed that:

The Greens understand that if the bill is successful it will apply only to a handful of claims in any given year and, while having a significant impact on the lives of those people, it will not have a significant impact on the compensation scheme overall or on the James Hardie fund.⁵⁵

- 6.55 A joint preliminary submission to the effect that "[t]here is no evidence that on a global basis liabilities will be materially affected"⁵⁶ was said to be supported by the fact that, since the amendments in WA, SA and Victoria, hundreds of asbestos-related dust disease claims have been filed against James Hardie subsidiaries, and "no concern has been raised by the James Hardie Fund to the effect that the abolition of the *Zoanetti / Strikwerda* principle in relation to general damages in dust disease cases has materially affected its viability".⁵⁷

52. Para 9.1-9.12.

53. Victoria, *Parliamentary Debates*, House of Assembly, 9 October 2008, 4071 (T Holding). See also Western Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2056b (J McGinty).

54. Para 6.14-6.28.

55. NSW, *Parliamentary Debates*, Legislative Council, 11 November 2010, 27636 (D Shoebridge).

56. Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary submission PCR1* [19].

57. Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary submission PCR1* [22].

- 6.56 The NSW Bar Association, in its preliminary submission, similarly suggested that, although it was unable to advance any meaningful submission concerning the economic implications of any reform of this kind, anecdotally it considered it unlikely that liabilities would be materially increased.⁵⁸
- 6.57 We have already noted the data relating to the period 1 July 2005 to 30 June 2008 which suggests that only about 73 dust disease cases (fewer than 25 per year) were capable of becoming estate actions.⁵⁹
- 6.58 The available data in relation to the experience in WA, SA and Victoria, in relation to dust disease cases, does not provide any clear answer either in relation to claim numbers or in relation to overall liabilities. The amendments are perhaps too recent to be able to gauge their effect, as was noted in one submission concerning the change in Victoria:
- The very small number of claims finalised since the law was changed in that State, and the difficulty of ensuring that any pre and post reform comparison of damages awards is being undertaken on a genuine "like with like" basis, has meant that to date it is not possible to form a view, on a proper empirical basis, of the financial impact of the reform in that State.⁶⁰
- 6.59 It might have been expected that more light would be thrown on this issue by the experience in SA, where the abolition of the *Strikwerda* principle has been in place for approximately five years. However, the available data does not assist. The yearly evaluation by KPMG of the James Hardie Group's asbestos-related liabilities does show an increase in 2005 in the claims for SA.⁶¹ However, the claims for SA are combined with other smaller jurisdictions, including Tasmania, the ACT and the NT, and the change to the law in SA did not come into effect until the beginning of 2006 and occurred in conjunction with other changes.⁶²
- 6.60 Furthermore, as the KPMG report points out, any increase in SA may be attributable to the High Court's decision in *BHP Billiton Ltd v Schultz*,⁶³ which confirmed that the most appropriate forum for the hearing of a dust disease case is the place where the injury occurred. This has resulted in many cases, that would otherwise have been brought in NSW, being brought in the State in which the plaintiff was originally injured. There was a significant decrease in the number of claims filed against James Hardie companies in NSW between 2004 and 2005 and they have not returned to pre-2005 levels.⁶⁴

58. NSW Bar Association, *Preliminary submission PCR8* [16].

59. Para 6.37.

60. Asbestos Injuries Compensation Fund, *Preliminary submission PCR3* [3].

61. KPMG, "Valuation of Asbestos-Related Disease Liabilities of Former James Hardie Entities ("The Liable Entities") to be Met by the AICF Trust" (2010) 40.

62. Such as the introduction of expedited procedures for the hearing of dust diseases claims. See para 6.5.

63. *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400.

64. KPMG, "Valuation of Asbestos-Related Disease Liabilities of Former James Hardie Entities ("The Liable Entities") to be Met by the AICF Trust" (2010) 40.

- 6.61 Whether or not any reform will have significant impact is potentially complicated by the third wave group of claimants. The position in this respect is fluid both in relation to the potential size of the group, and in relation to the jurisdiction in which they might bring proceedings. The most recent KPMG survey indicates that the number of third wave claims against James Hardie companies has remained relatively static since 2004/5, although a 20 per cent decline in such claims was noted in the 2009/10 period.⁶⁵ Nevertheless, there are around 500 such claims each year across all Australian jurisdictions, not all of which are associated with NSW. Further, the claims against James Hardie companies do not represent all third wave claims being brought in Australia or NSW, but only a proportion of the total claims against all defendants.

Question 6.3

Should the *Strikwerda* principle be abolished in relation to dust disease cases?

Question 6.4

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

Question 6.5

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

Question 6.6

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

65. KPMG, "Valuation of Asbestos-Related Disease Liabilities of Former James Hardie Entities ("The Liable Entities") to be Met by the AICF Trust" (2010) 9.

7. Expand entitlement to damages for non-economic loss in estate actions to dust disease actions commenced after death

- 7.1 The third option that has been identified is to remove the limitation contained in s 12B of the *Dust Diseases Tribunal Act 1989* (NSW), which restricts the recovery of damages for non-economic loss in estate actions to those cases in which the victim had commenced proceedings in the Dust Diseases Tribunal (“DDT”) before his or her death. This provision was introduced to avoid deathbed crisis hearings,¹ and has the effect of dissuading defendants from stalling proceedings in the expectation that any claim to damages for non-economic loss would die with the victim.
- 7.2 As a general principle, estate actions, in common with personal injury actions generally, are subject to statutory limitation periods. Once the limitation period, or any extension of it granted by the court, expires an injured person, or their estate, is barred from bringing an action.²
- 7.3 In dust diseases cases, however, all limitations periods have been abolished.³ As a result, an action can be brought at any time following the exposure to dust and consequent onset of a dust disease.
- 7.4 The requirement that the victim had commenced proceedings in the DDT during his or her lifetime, as a condition precedent to the recovery of damages for non-economic loss in an estate action, can place significant pressure on asbestos victims and their families. They must seek legal advice and ensure that a claim is lodged at a time when treatment of the victim’s medical situation and the need to deal with its impact on family members are likely to be of a higher priority. Moreover, there can be cases where proceedings were not commenced by the victim prior to death because of ignorance of the limitation or because of error on the part of the legal advisers of the victim and/or the family.
- 7.5 Removing the limitation would help to alleviate some of the pressures that are placed, in particular, on some mesothelioma victims and their families, at a very difficult time in their lives. It would also eliminate the current differences in outcome for families, whose current entitlement to claim damages for non-economic loss depends simply on whether proceedings were, or were not, on foot at the time of the victim’s death.
- 7.6 It would also cater for the recovery of damages for non-economic loss in the possibly rare case where identification or diagnosis of a dust or asbestos-related disease, as a causative factor in the victim’s death, only emerged during a post mortem examination.

1. See New South Wales, *Parliamentary Debates*, Legislative Council, 17 November 1998, 9973 (J Shaw); New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 October 1998, 9436 (K Yeadon).

2. *Limitation Act 1969* (NSW) s 50C(1).

3. *Dust Diseases Tribunal Act 1989* (NSW) s 12A.

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- 7.7 It was suggested in a preliminary consultation that, because of the state of awareness of asbestos-related diseases, and the accumulated experience of lawyers and medical practitioners, it would invariably be the case that proceedings would be commenced during the lifetime of the victim wherever there was a chance of a dual diagnosis being made. It was also observed, however, that on occasions deaths had occurred before proceedings could be commenced.
- 7.8 It is not known, at this time, whether there is a significant number of cases where the current limitation has, in practice, led to a reduction in the benefits ultimately available to the dependants of a dust disease victim. Nor is it known whether abolition of the limitation would encourage the filing of new estate actions, a circumstance that would be possible given the absence of a statutory limitation period.
- 7.9 This is, however, a consideration that would need to be taken into account in relation to any reform of the law, along with the more general considerations relating to the impact of any change in the laws concerning dust disease benefits that might increase the potential liabilities of defendants and insurers.
- 7.10 It is noted that damages for non-economic loss are recoverable in an estate action in England and Wales.⁴ There is no requirement that the victim commence proceedings before his or her death.
- 7.11 Additionally, consideration would need to be given to any impact that such reform might have on litigation practice in the DDT and, in particular, whether it would see a deferral of the filings in estate actions until after the death of the victim, or lead to a change in settlement trends. In preliminary consultations it was said to be unlikely that parties would, as a matter of tactics, delay filing until after the death occurred. The experience to date, it was suggested, has been to file and conclude proceedings before death to give the victim the comfort and satisfaction of knowing that compensation had been received that would go to the family and be available for its support.
- 7.12 Further consideration would also need to be given to the question whether a reform of this kind would unfairly prejudice defendants through the loss of any opportunity to cross-examine the victim while alive, for example, in relation to the places and times of any claimed exposure to dust inhalation. It was pointed out, in a preliminary consultation, that cross-examination is desirable in cases where liability is in issue because of uncertainty as to the identity of the employer, or of the additional parties who could be joined, or as to the nature of the product which the victim had handled. On the other hand, it was pointed out that very commonly the victim is too unwell to give evidence so cases of this kind normally proceed to a conclusion without cross-examination occurring.
- 7.13 Next, it is observed that the provisions in the *Dust Diseases Tribunal Act 1989* (NSW) apply to all dust disease victims, regardless of the manner in which the disease was caused and of the type of dust disease that is involved. In practice,

4. *Law Reform (Miscellaneous Provisions) Act 1934*, 24 & 25 Geo 5, c 41, s 1.

however, the current limitation most directly affects those who have asbestos-related diseases and, particularly, the more rapidly progressing forms of disease.

- 7.14 If removal of the limitation was seen to have a significant potential impact on claims, liabilities and insurance premiums, this could possibly be managed by excluding asbestos-related cases from the current limitation and leaving it in place for all other dust disease cases. This could be justified on the basis that, in the absence of a rapidly progressing disease, it should be expected that litigation could be commenced and completed before the victim dies.
- 7.15 In preliminary consultations there was strong opposition to drawing any distinction between mesothelioma and other dust diseases. For several of the other diseases there is a similar progression and suffering and the drawing of any distinction would be unfairly discriminatory.
- 7.16 An alternative approach that was considered, but not taken up, when s 12B of the *Dust Diseases Tribunal Act 1989* (NSW) was introduced, would be to allow an estate action to be commenced within the period of 12 months after the death. If there was concern as to any unfairness occasioned to a defendant arising from the loss of a reasonable opportunity to test the claimant's case, this could possibly be met by a leave requirement.

Question 7.1

(1) Should the requirement in s 12B of the *Dust Diseases Tribunal Act 1989* (NSW), that the victim commence an action in the Dust Diseases Tribunal before his or her death, as a precondition for recovery of damages for non-economic loss in an estate action, be repealed in relation to:

- (a) all dust diseases; or
- (b) asbestos-related diseases only?

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

- 7.17 Finally, it must be noted that this option does not directly address the issues that have been identified in relation to the perceived unfairness of the *Strikwerda* principle for the dependants of asbestos victims. Without its abolition, the implementation of this option would continue to see the damages for non-economic loss awarded to the estate, that flow to a dependant, being deducted from damages in that dependant's action.

8. Solatium or bereavement damages

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- 8.1 Some preliminary submissions raised the possibility of making an award of solatium, or of damages for bereavement, available to compensate the emotional pain and grief of the relatives of those who are wrongfully killed. In this chapter we consider the options for the introduction of such an award.

Function of solatium

- 8.2 Solatium is an award for the grief or emotional harm that family members of a deceased person may experience as a result of his or her wrongful death. There is no common law right to recover such damages.¹ Consequently, it must be the subject of express statutory provision.²
- 8.3 Only two Australian jurisdictions provide for the recovery of solatium. In SA, solatium provisions were introduced in 1940.³ They were intended to address the inability of family members to receive compensation for the death of a spouse or child where no economic loss was suffered.⁴ In *Jeffries v Commonwealth*, Chief Justice Napier held that what was required was a “moderate sum” which could be “reasonably regarded as an adequate acknowledgment of the pain and grief which have been caused to the surviving relative”.⁵ This approach recognises the difficulty in determining a monetary value for non-economic damages such as grief.⁶
- 8.4 In the NT, “solatium” is also available as compensation for the pain and grief suffered by relatives incidental to the bereavement.⁷

1. See *Baker v Bolton* (1808) 1 Camp 493, 170 ER 1033; *Woolworths Ltd v Crotty* (1942) 66 CLR 603.

2. H Luntz, *Assessment of Damages for Personal Injury and Death* (LexisNexis Butterworths, 4th ed, 2002) [9.7.1].

3. *Wrongs Act Amendment Act 1940* (SA) s 5, amending *Wrongs Act 1936* (SA). The current provisions are: *Civil Liability Act 1936* (SA) s 28, 29.

4. South Australia, *Hansard*, House of Assembly, 14 November 1940, 1428-1429 (S W Jeffries, Attorney-General).

5. *Jeffries v Commonwealth* [1946] SASR 106, 109.

6. As noted in, eg, *Rafferty v Barclay* [1942] SASR 147, 156.

7. *Compensation (Fatal Injuries) Act* (NT) s 10(3)(f); and, for the way in which it has been applied, see, eg, *Curator of Estates of Deceased Persons and Rozario v Fernandez* (1977) 16 ALR 445, 457 citing *Jeffries v Commonwealth* [1946] SASR 106, 108-109; *Cook v Cavenagh* (1981) 10 NTR 35, 37.

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- 8.5 In England, damages for bereavement were introduced in 1982.⁸ The Law Commission for England and Wales has stated that the introduction of this head of damages was “widely perceived as performing a...symbolic function of providing some ‘sympathetic recognition’ by the state of the fact of bereavement, and an expression on the part of society of the gravity with which it regards the loss of a human life”.⁹
- 8.6 It is important to note that there is a difference between solatium and damages for nervous shock, which is available in NSW and for which damages awards have been made within a range of \$20,000 to \$50,000. In the case of nervous shock, it is necessary to demonstrate that the harm caused amounted to a recognised psychiatric illness.¹⁰ In contrast, the harm which is compensated for by solatium relates to the emotional impact of the death of a close family member, which need not be so severe or prolonged as to amount to actual psychiatric harm.
- 8.7 The relatives of dust diseases victims can bring claims for nervous shock in the Dust Diseases Tribunal (“DDT”).¹¹ Such cases are likely to be determined according to the common law principles, unaffected by Part 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), which has been repealed and only replaced for proceedings subject to the *Civil Liability Act 2002* (NSW).¹²
- 8.8 A preliminary submission noted that the “courts would need to be astute to ensure that blurring of the distinction [between the two heads of damages] did not occur”.¹³ If there was a risk that recovery of both heads of damages would “materially affect liabilities in an unacceptable way”, then the suggested solution would be to deduct the solatium award from the damages given for nervous shock, and to require that receipt of damages for nervous shock would bar any subsequent claim for solatium.¹⁴
- 8.9 Another preliminary submission suggested that a solution of this kind would discourage small claims for nervous shock in favour of solatium and would be likely to lead to cost savings due to the elimination of the medical and legal expenses inherent to litigated nervous shock claims.¹⁵
- 8.10 If a solatium head of damages is introduced, the legislation would need to be framed in a way that would avoid the situation in assessing the amount of damages

8. *Administration of Justice Act 1982* (Eng) c 53, s 3, inserting s 1A into *Fatal Accidents Act 1976* (Eng) c 30.

9. England and Wales, Law Commission, *Claims for Wrongful Death*, Report 263 (1999) [6.1].

10. Mere emotional distress is not sufficient to found an action for nervous shock: see eg, *Tame v New South Wales* (2002) 211 CLR 317, 329; *Mt Isa Mines v Pusey* (1970) 125 CLR 383, 394.

11. *Mangion v James Hardie & Co Pty Ltd* (1990) 20 NSWLR 100; *Seltsam Pty Ltd v Energy Australia* [1999] NSWCA 89.

12. *Civil Liability Act 2002* (NSW) pt 3. It is also noted that, as a consequence of *Asbestos Injuries Compensation Fund Pty Ltd* [2011] NSWSC 97, such damages are not recoverable from the Asbestos Injuries Compensation Fund. This does not, however, preclude proceedings against employers or insurers or other co-defendants.

13. NSW Bar Association, *Preliminary submission PCR8* [20].

14. NSW Bar Association, *Preliminary submission PCR8* [21]. See also, Australian Lawyers Alliance, *Preliminary submission PCR6* [38].

15. Australian Lawyers Alliance, *Preliminary submission PCR6* [39].

payable that arose in *James Hardie and Co Pty Ltd v Newton*¹⁶ to which reference was made in Chapter 4.¹⁷

Solatium and non-economic loss, options for award

- 8.11 It has been suggested that a solatium award could fulfil the same function as that provided by an award of damages for non-economic loss in an estate action, and that the “compassionate motive” behind the arguments for abolition of the *Strikwerda* principle would be “better served” by an award of solatium.¹⁸
- 8.12 Some arguments in favour of the abolition of the *Strikwerda* principle are based on the notion that the dependants or relatives of those whose death is dust-related should themselves be entitled to compensation for non-economic loss because they witness and share the “enormous suffering of the deceased”.¹⁹
- 8.13 However, damages for non-economic loss awarded to the estate are calculated with reference to the pain and suffering of the *deceased*, not that of his or her relatives. So it is argued that, “[i]f close relatives deserve recognition of their grief, it should be done openly by awarding a solatium rather than by this stratagem”.²⁰ The same argument was put in a preliminary submission:

Given that the intended recipient can never enjoy them, the idea behind a proposal to make provision for the survival of damages for non-economic loss, in addition to damages for wrongful death, must be to assuage the grief and sense of loss of near relatives.²¹

The submission goes on to argue that it would be “better policy” and “fairer law” to address the needs of grieving relatives directly by solatium provisions.²²

- 8.14 If the solatium award is to be seen as fulfilling the same or a very similar function as an award of damages for non-economic loss in an estate action, then it follows that it could replace the award of damages for non-economic loss which is currently available where the death was dust-related. This would, however, require that any combined award of solatium for all qualifying relatives would need to approximate the damages currently available for non-economic loss, which we are informed generally fall in a range of \$200,000 to \$280,000. Otherwise, a reform of this nature would involve a significant reduction in existing rights.
- 8.15 The introduction of solatium would not give rise to any need for a deduction from the damages recovered in a dependant’s action. In *Public Trustee v Zoanetti* the High Court held that where legislation provided for the grant of an award for solatium to a

16. *James Hardie and Co Pty Ltd v Newton* (1997) 42 NSWLR 729.

17. Para 4.32.

18. NSW Bar Association, *Preliminary submission PCR8* [17].

19. Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary submission PCR1* [9].

20. J G Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 744 (citations omitted); see also M R Chesterman, *Accidents Compensation: Proposals to Modify the Common Law*, NSW Law Reform Commission, Consultants Paper 2 (1983) [4.3.15].

21. NSW Bar Association, *Preliminary submission PCR8* [18].

22. NSW Bar Association, *Preliminary submission PCR8* [18].

person, for the death of a family member, it would not be offset against the damages awarded in a dependant's action.²³

- 8.16 There are two possible options which arise for consideration:
- Solatium could be added to the heads of damages that are recoverable in dependants' actions or other proceedings in the DDT, and confirmed to be an excluded benefit for the purpose of s 3 of the *Compensation to Relatives Act 1897* (NSW).
 - The ability to recover damages for non-economic loss in estate actions arising out of dust-related death could be removed and replaced by a right exercisable by family members to recover solatium in dependants' actions.
- 8.17 While the second approach could be seen as a "substitution" of solatium for damages for non-economic loss, it would not result in a one-to-one substitution as solatium could be recovered by family members who would not have received any benefit from the damages awarded in an estate action. Moreover, if this were to occur, the estate would lose the ability to dispose of those damages according to the wishes of the deceased.
- 8.18 One further issue that arises is that an award of solatium may not successfully address the disadvantage that is currently claimed in relation to the application of the *Strikwerda* principle. That is, if NSW follows the general approach to awards of solatium taken in many other jurisdictions and sets a relatively small amount in recognition of grief,²⁴ the dependants of those who complete their claims prior to dying may still receive more, by way of damages for non-economic loss, than the dependants of those who die prior to resolving a claim. Allowing a greater amount to be awarded as solatium, in order to match the levels of damages for non-economic loss in estate actions, would risk moving away from the "moderate sum" which provides "adequate acknowledgement of the pain and grief"²⁵ of the surviving relatives. It may instead make solatium something which it was not intended to be, namely, a de facto award of damages for the victim's suffering.
- 8.19 If solatium is made available in relation to wrongful death in dust disease cases, then a question arises as to whether the head of damage should be confined to such cases, or extended to all wrongful death cases; and, if so, whether it should be treated as a benefit that would not be taken into account when assessing damages in dependants' actions. This could have significant financial implications, but it would also serve to achieve a degree of equity between claimants.

Question 8.1

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

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

23. *Public Trustee v Zoanetti* (1945) 70 CLR 266, 273, 275.

24. See para 8.29-8.34.

25. In the words of Chief Justice Napier, quoted above at para 8.3.

Question 8.2

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

- (a) the right to claim solatium is added to the existing heads of available damages; or
- (b) solatium takes the place of the estate's entitlement to recover damages for non-economic loss in dust diseases cases.

Question 8.3

If solatium is available, should it be an excluded benefit for the purposes of s 3 of the *Compensation to Relatives Act 1897* (NSW)?

Elements of an award of solatium

- 8.20 The existing solatium provisions differ in a number of respects, which give rise to a number of issues which would need to be clarified were NSW to introduce such a head of damages. These issues include:
- who would be entitled to claim solatium;
 - whether there should be a statutory cap on the amount that an individual claimant can recover, or in total if there is more than one claimant; and
 - to what extent the court should have a discretion in relation to any such award.

Entitlement to claim

- 8.21 The *Civil Liability Act 1936* (SA) provides for the recovery of solatium for the surviving spouse or domestic partner, including a same-sex partner,²⁶ of a person who is wrongfully killed. The Act also provides a right of recovery for the parents of a minor²⁷ who is wrongfully killed.
- 8.22 The *Fatal Accidents Act 1976* (Eng) allows for the recovery of damages for bereavement by either the husband or wife of the deceased²⁸ or, where the deceased was a minor who has never married, by the child's parents where the child was legitimate,²⁹ but only by the child's mother where the child was illegitimate.³⁰
- 8.23 In England, the Law Commission for England and Wales has recommended expanding the pool of possible claimants to include de facto partners (including those in same-sex relationships); parents of a deceased child, without limit as to

26. *Civil Liability Act 1936* (SA) s 3; *Family Relationships Act 1975* (SA) s 11A.

27. Referred to in the Act as an "infant": *Civil Liability Act 1936* (SA) s 28.

28. *Fatal Accidents Act 1976* (Eng) c 30, s 1A(2)(a). This does not include de facto or same-sex partners.

29. *Fatal Accidents Act 1976* (Eng) c 30, s 1A(2)(b)(i).

30. *Fatal Accidents Act 1976* (Eng) c 30, s 1A(2)(b)(ii).

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age, including adoptive parents; children of a deceased parent, including adoptive children; brothers and sisters of the deceased (including adoptive brothers and sisters); and the fiancé(e) of the deceased.³¹ This list is not directly equivalent to the list of dependants who are entitled to bring a claim for damages in a dependants' action.³²

8.24 Under the NT provision, any person who is entitled to bring a dependant's action can bring a claim for solatium.³³ This allows solatium to be claimed by:³⁴

- the spouse or de facto partner (which includes same-sex partners³⁵) of the deceased;
- a child (including an adult child) of the deceased person;
- a person to whom the deceased stood *in loco parentis*;
- a person who stood *in loco parentis* to the deceased;
- a parent of the deceased;
- a brother, a sister, a half-brother and a half-sister of the deceased; and
- a former spouse or de facto partner of the deceased.

8.25 Traditionally only those who were financially dependent on a deceased person have been able to bring dependants' actions. However, solatium is not founded on financial dependency, but arises from a recognition of the grief arising out of close family relationships.

8.26 The family members on whose behalf dependants' actions can be brought in NSW are:³⁶

- spouse, including a de facto partner;
- brother, and half-brother;
- sister, and half-sister;
- parent; and
- child (including adult and adopted children).

Although this grouping would seem to embrace those who are most likely to experience grief as the result of the death of a close relative, one preliminary

31. England and Wales, Law Commission, *Claims for Wrongful Death*, Report No 263 (1999) 99 [6.31].

32. *Fatal Accidents Act 1976* (Eng) c 30, s 1(3).

33. *Compensation (Fatal Injuries) Act* (NT) s 10(1).

34. *Compensation (Fatal Injuries) Act* (NT) s 4(2)(a)-(g).

35. *De Facto Relationships Act* (NT) s 3.

36. *Compensation to Relatives Act 1897* (NSW) s 4(1).

submission has proposed limiting recovery to the categories of parents of minors and spouses/domestic partners as in SA.³⁷

- 8.27 Extending the pool of possible claimants more broadly could have a significant financial impact, as it would enable a claim by non-dependants who would not otherwise have had any basis for recovery of compensation. This is particularly the case were solatium to be recoverable regardless of the type of injury sustained. The categories of family member who could claim solatium would therefore need to be carefully considered.

Question 8.4

Which family members should be entitled to claim for solatium, were NSW to introduce such a head of damages?

Amount of award

- 8.28 In SA, the court can award what it “thinks just by way of solatium for the suffering caused to the spouse or domestic partner by that death”.³⁸ The maximum award is currently \$10,000.³⁹ For a parent claiming for the death of a minor child, the maximum award is similarly \$10,000.⁴⁰ The maximum amounts recoverable have been increased several times since the introduction of the solatium provisions.⁴¹
- 8.29 Luntz suggests that the general approach in SA has been to award the maximum without further consideration of the issue as to the justness of any award, “unless there is a good reason for reducing it”.⁴² It should be noted, however, that there is nothing in the statute that dictates treating the maximum sum as a default award.
- 8.30 In the NT there is no cap on awards of solatium, although they have in general been moderate.⁴³ An early decision resulted in awards being assessed at between \$10,000 and \$15,000⁴⁴ and, in another case, at \$4000.⁴⁵ More recently, the court

37. NSW Bar Association, *Preliminary submission PCR8* [19].

38. *Civil Liability Act 1936* (SA) s 29(1).

39. *Civil Liability Act 1936* (SA) s 29(1)(b).

40. *Civil Liability Act 1936* (SA) s 28(1).

41. See, eg, *Wrongs Act Amendment Act 1974* (SA) s 3, s 4; *Statutes Amendment (Justice Portfolio) Act 2006* (SA) s 8, s 9.

42. H Luntz, *Assessment of Damages for Personal Injury and Death* (Lexisnexis Butterworths, 4th ed, 2002) [9.7.2] citing *Groom v Starling* [1967] SASR 352; *Hamlyn v Hamm* [1967] SASR 387; *Public Trustee v Paniens* (1971) 1 SASR 297; *Toth v Wolper* (1973) 7 SASR 574; *Wright v Johnston* (1980) 23 SASR 198; *Dunstan v SGIC* (1986) Aust Torts Reps 80-048; *Halligan v Drinkwater* (1991) 61 SASR 185; *Medcraft v Fitzpatrick* (1993) 173 LSJS 64.

43. Awards of solatium in the NT are often combined with awards for loss of consortium and awarded as a global sum: *Curator of Estates of Deceased Persons and Rozario v Fernandez* (1977) 16 ALR 445; *Bennett v Liddy* (1979) 25 ALR 340, 347; *Australian Telecommunications Commission v Parsons* (1985) 59 ALR 535, 545-546. *Hall v Alice Springs Veterinary Clinic Pty Ltd* (1989) 98 FLR 85, 93. This is done because of the overlap between solatium and loss of consortium. See, eg, *Curator of Estates of Deceased Persons v Fernandez* (1977) 16 ALR 445, 456.

44. *Curator of Estates of Deceased Persons v Fernandez* (1977) 16 ALR 445, 464.

45. *Bennett v Liddy* (1979) 25 ALR 340, 347.

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has awarded \$40,000 to a bereaved wife and \$30,000 each to the deceased's sons.⁴⁶

- 8.31 In England and Wales, the *Fatal Accidents Act 1976* (Eng) provides for a fixed sum of £10,000 where bereavement damages are awarded.⁴⁷
- 8.32 In Alberta, Canada, similarly to the position in England and Wales, the court has no discretion in relation to the amount of the award, which is set at \$75,000 for both spouses and parents of a deceased person, and at \$45,000 for a child. The Act also provides that solatium must be awarded "without reference to any other damages that may be awarded and without evidence of damage" if a dependant's action is brought.⁴⁸
- 8.33 The preliminary submissions that directed attention to solatium indicated that a cap of \$10,000 would be too low. One submission suggested that any maximum award should be fixed and indexed.⁴⁹ Another stated that the maximum award would need to be "the subject of mature consideration taking into account any necessary economic modelling on an actuarial basis, as this suggested reform would increase tort liabilities".⁵⁰
- 8.34 Three possible options emerge, which would respectively allow damages to be awarded:
- in a fixed sum for each claimant (as in England and Wales and Alberta), or for all claimants in combination;
 - in an amount considered appropriate to reflect the level of grief suffered by the claimant up to, and including, a specified maximum (as in SA); or
 - in an amount considered appropriate but not subject to a cap on damages (as in the NT).

Discretionary considerations

- 8.35 In *Cook v Cavenagh*, Justice Muirhead identified the following principles to be applied in the discretionary assessment of solatium in the NT:
- Solatium is neither defined nor is its assessment subject to a statutory maximum.
 - Whether any solatium should be awarded to a particular "member of the family" is a discretionary question for the court to determine.
 - A relevant family relationship does not automatically entitle a person to an award of solatium. The claimant must prove his or her entitlement.

46. *Young v Central Australian Aboriginal Congress Inc* [2008] NTSC 47 [280]-[281]; and see also *Castine v Smith and Amiet Engineering Pty Ltd* [2007] NTSC 16 [114].

47. *Fatal Accidents Act 1976* (Eng) c 30, s 1A(3). This was raised from £7,500 in 2002: *Damages for Bereavement (Variation of Sum) (England and Wales) Order 2002* (Eng) SI 2002/644, O 2.

48. *Fatal Accidents Act*, RSA 2000, c F-8, s 8(2)(a), (b), (c).

49. Australian Lawyers Alliance, *Preliminary submission PCR6* [32].

50. NSW Bar Association, *Preliminary submission PCR8* [19].

- Solatium is to be assessed objectively and separately, in the case of each relative, and determined by reference to the intensity and duration of sorrow as experienced by the claimant.⁵¹
- 8.36 As Luntz notes, in the application of the NT provision, “the actual circumstances of the death may also add to the suffering for which solatium is awarded”.⁵² So, for example:
- pregnancy at the time of the husband’s death may be an aggravating factor. Remarriage, or the formation of a similar relationship, may ease the suffering and reduce the award, despite the prohibition in the statute on taking remarriage into account.⁵³
- 8.37 Determining an appropriate measure of compensation for emotional loss is difficult as “grief cannot be measured in monetary terms”.⁵⁴
- 8.38 Any provision that requires the court to exercise a discretion in determining the extent of grief suffered will require the court to inquire into the severity and duration of the grief and suffering of bereaved relatives and dependants.
- 8.39 In so far as such an evaluation is possible, courts have generally recognised that an objective evaluation of grief is preferable, to an evaluation relying on subjective reporting.⁵⁵ Lord Pearce has cautioned that:
- It would be lamentable if the trial of a personal injury claim put a premium on protestations of misery and if a long face was the only safe passport to a large award.⁵⁶
- 8.40 Even an objective evaluation will require the court to make judgments about aspects of a person’s life, and his or her relationship with the deceased, which could be seen to be somewhat invasive. An objective evaluation can mean that the court may deny an award to, for example, young children because they are too young to appreciate the meaning of death or to experience grief resulting from that understanding.⁵⁷

Question 8.5

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

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51. *Cook v Cavenagh* (1981) 10 NTR 35, 36-37.
52. H Luntz, *Assessment of Damages for Personal Injury and Death* (LexisNexis Butterworths, 4th ed, 2002) [9.7.3].
53. H Luntz, *Assessment of Damages for Personal Injury and Death* (LexisNexis Butterworths, 4th ed, 2002) [9.7.3] citing *Cook v Cavenagh* (1981) 10 NTR 35; *Jones v Bleakley* (1981) 12 NTR 1; *Parsons v Australian Telecommunications Commission* (1983) 28 NTR 19, 29-30.
54. England and Wales, Law Commission, *Claims for Wrongful Death*, Report 263 (1999) 91 [6.1].
55. See eg *Cook v Cavenagh* (1981) 10 NTR 35, 37 (Muirhead J), noted above para 8.35.
56. *Rose v Ford* (1937) AC 826, 368. See also *Mazerall v Nightingale* [1991] 87 DLR (4th) 158 [15] (New Brunswick Court of Appeal, Angers JA).
57. See, eg, *Cook v Cavenagh* (1981) 10 NTR 35, 39.

Question 8.6

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

9. Expand the entitlement to damages for non-economic loss in estate actions

- 9.1 Several preliminary submissions raised the possibility of extending the availability of damages for non-economic loss, in estate actions, beyond dust disease cases, and removing the effect of the *Strikwerda* principle with respect to all such cases.
- 9.2 Such an extension would be relatively straightforward, requiring only two specific legislative changes:
- the repeal of s 2(2)(d) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW); and
 - the amendment of s 3 of the *Compensation to Relatives Act 1897* (NSW) by adding damages for non-economic loss to the list of benefits to be disregarded by the court when assessing damages in dependants' actions.¹
- 9.3 This option arises for consideration by reason of the equity implications which we are required to consider. Its introduction, it was argued, would ensure fairness between all categories of claimant.²
- 9.4 For example, one preliminary submission argued that if the purpose behind the removal, in dust disease cases, of the bar on recovery of damages for non-economic loss in estate actions is valid, it is “equally valid in all categories” of injury.³ Another preliminary submission argued that there is no “logical or moral reason” that damages for pain and suffering should go uncompensated because the victim dies, and that damages for non-economic loss should survive in all cases of “wrongful delayed death”.⁴
- 9.5 Adoption of this option would also address an anomaly in the operation of s 2(2)(d) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) in the context of estate actions which leaves open the recovery of damages for non-economic loss in relation to a negligently caused injury, in those cases where the deceased died from some unrelated medical causes or accident. For example, damages for non-economic loss for the loss of a limb due to the negligence of another party will be recoverable in an estate action, where the victim died of an unrelated heart attack. That the claim for such damages should survive seems to be inconsistent with the legislative intention that damages for the pain and suffering should die with the victim. It also gives rise to an inconsistency of outcome when compared with wrongful death cases that are not dust-related, where there is no right to recover damages for non-economic loss once the victim has died. Repeal of the subsection altogether would deal with this anomaly.

1. It might also be desirable to repeal the existing exception allowing award of damages for non-economic loss in dust diseases cases in *Dust Diseases Tribunal Act 1989* (NSW) s 12B.

2. See, eg, NSW Bar Association, *Preliminary submission PCR8* [14].

3. NSW Bar Association, *Preliminary submission PCR8* [14].

4. Australian Lawyers Alliance, *Preliminary submission PCR6* [14], [16].

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- 9.6 Preservation of the right to claim damages for non-economic loss, after the death of the victim, could apply either to all cases of wrongful death⁵ or be confined to cases of delayed wrongful death.⁶ If either change was to occur, so as to achieve equity between all categories of claimants, and if the *Strikwerda* principle was abolished in relation to dust-related deaths, then its abolition would need to be extended to cover the other cases as well.
- 9.7 Extension of the right to claim damages for non-economic loss, in estate actions, beyond those involving dust-related deaths, could lead to an increase in the liabilities of defendants generally. Before that was to occur, careful consideration would need to be given to its impact on the work injury and motor accident schemes, and on those who may become liable as defendants or insurers in relation to public and product liability claims.
- 9.8 We do not have the necessary information or resources to cost any such reform, although in consultation with legal practitioners it was suggested that the impact may not be significant. This arises from the fact that in the majority of wrongful death cases, the death occurs contemporaneously with the accident and ensuing injury, or within a short time thereafter. Where that is the case, there will be little, if any, basis for recovery of damages for pain and suffering or loss of amenities of life. A claim for loss of expectation of life would remain available. We were informed a rule of thumb for the assessment of damages for loss of expectancy of life has been adopted, for example, in the Dust Diseases Tribunal, by reference to a figure of \$1,000 for each year that is lost.
- 9.9 Some preliminary submissions, however, suggested that any such change, which would make compensation benefits available beyond the relatively small pool of dust diseases or asbestos victims, could:
- increase the number of claims since more claimants would be provided with more extensive options for recovering compensation than are currently available; and
 - place upwards pressure on premium rates in respect of the compulsory insurance that applies in relation to the general workers' compensation and motor accidents schemes; and insurance that is taken out in relation to public liability and product liability claims.⁷
- 9.10 No modelling has been placed before us to show the number of non-dust disease cases that would be affected by any abolition of the principle that extended beyond just dust disease cases.
- 9.11 Our earlier observations in relation to the difficulties in ensuring equity between all categories of claimants remain valid in relation to this option. Of particular relevance is the fact that the nature of the suffering of dust disease victims, and particularly those suffering from mesothelioma, asbestosis and lung cancers attributable to other forms of exposure to dust, and its impact on relatives, differ from that which is

5. NSW Bar Association, *Preliminary submission PCR8* [14].

6. See Australian Lawyers Alliance, *Preliminary submission PCR6*.

7. Insurance Council of Australia, *Preliminary submission PCR9*; *Confidential preliminary submission CPCR10*, 3, 7.

likely to be experienced in other cases of wrongful death. This provides some justification for confining the reforms discussed earlier to dust disease cases, or otherwise for limiting this option to cases of delayed deaths. If that were to be the preferred option then it would be necessary to identify an appropriate period of delay that would qualify for an award of damages for economic loss in an estate action.

- 9.12 In any such case involving a delayed death, it would seem appropriate for there to be an offset or recoupment of any damages for non-economic loss recovered by the victim before death. This would prevent double compensation and would place such victims in an equivalent position to that applicable to those whose death is dust-related.

Question 9.1

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

- (a) in all cases of wrongful death regardless of cause; or
- (b) in all cases of delayed wrongful death?

Question 9.2

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

- 9.13 Finally, if it was considered undesirable to amend s 2(2)(d) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), so as to give effect to one or other of the options discussed in this chapter, then attention would need to be given to the anomalous case mentioned above where a deceased had a claim to damages for non-economic loss for a wrongfully caused injury, but died of an unrelated cause.
- 9.14 Currently the relatives of these victims are placed in a similar position to relatives of those who die from dust diseases. They can get the benefit of damages for non-economic loss in relation to the wrongful injury through an award to the estate, but, where the unrelated cause of death gives rise to a dependant's action, those damages may be deducted from damages awarded in the dependant's action.

Question 9.3

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

10. Alter the list of benefits which are to be disregarded when assessing damages in dependants' actions

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- 10.1 In this chapter we consider the possible option of introducing a much more radical reform in relation to the assessment of damages in dependants' actions.
- 10.2 As we have noted above, it is a general principle that benefits accruing to the dependants as a result of the death, as well as the benefits lost, are taken into account when assessing the damages in dependants' actions.¹ As was pointed out in *Zoanetti* this "is no more than a specific application of a principle governing the ascertainment of a loss arising from a given occurrence in every case of legal responsibility".²
- 10.3 The *Compensation to Relatives Act 1897* (NSW) provides for exceptions to this principle in relation to:
- (a) any sum paid or payable on the death of the deceased under any contract of insurance, or
 - (b) any sum paid or payable out of any superannuation, provident, or like fund, or by way of benefit from a friendly society, benefit society, or trade union, or
 - (c) any sum paid or payable by way of pension under:
 - (i) the Widows' Pension Act 1925–1942,
 - (ii) the Coal and Oil Shale Mine Workers (Pensions) Act 1941–1942,
 - (iii) the Australian Soldiers' Repatriation Act 1920–1943 of the Parliament of the Commonwealth,
 - (iv) the Widows' Pensions Act 1942–1945 of the Parliament of the Commonwealth,
 - (v) the Invalid and Old-age Pensions Act 1908–1945 of the Parliament of the Commonwealth,or under any Act (Commonwealth or State) amending or replacing any such Act.³

1. *Davies v Powell Duffryn Association Collieries Ltd* [1942] AC 601; *Public Trustee v Zoanetti* (1945) 70 CLR 266.

2. *Public Trustee v Zoanetti* (1945) 70 CLR 266, 278.

3. *Compensation to Relatives Act 1897* (NSW) s 3(3).

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- 10.4 Where a deduction is made in relation to any other benefits, it is calculated by reference to the accelerated receipt of those benefits, that is, on the basis that they became available to the dependants earlier than would otherwise have been anticipated. The deduction is, accordingly, made in an amount that is less than their full value.
- 10.5 An issue which arises within our terms of reference is whether there should be an extension of the excluded benefits, either in total or subject to certain limits and, if so, whether that should occur in relation to all dependants' actions or be confined to those arising out of dust disease deaths.

The law in other jurisdictions

- 10.6 In three jurisdictions, England and Wales, New Zealand and the NT, no deduction is made in the assessment of damages for any benefits accruing to the dependants as a consequence of the wrongful death.⁴ This approach would overcome the consequences of the *Strikwerda* principle in relation to the damages for non-economic loss recovered in an estate action. Its adoption, as a general principle, would, however, have a much wider impact in relation to the damages recoverable in dependants' actions.
- 10.7 In Tasmania, by way of contrast to the law in force in England and Wales, the deduction is confined to that part of estate of the deceased person, that passes to the relevant members of the deceased's family, which exceeds the sum of \$250,000.⁵

England and Wales

- 10.8 Section 4 of the *Fatal Accidents Act 1976* (Eng) provides:
- In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.
- 10.9 The introduction of this broad exclusion followed upon recommendations made, in the 1970s, by both the Law Commission for England and Wales,⁶ and by the UK Royal Commission on Civil Liability and Compensation for Personal Injury.⁷
- 10.10 Previously, the *Fatal Accidents Act 1976* (Eng) had specified a range of benefits to be excluded from consideration, when assessing damages in dependants' actions, in the same way that s 3 of the *Compensation to Relatives Act 1897* (NSW) operates in NSW. The exclusions included any "insurance money, benefit, pension

4. *Fatal Accidents Act 1976* (Eng) c 30, s 4; *Law Reform Act 1936* (NZ) s 7; *Compensation (Fatal Injuries) Act* (NT) s 10(4)(g).

5. *Fatal Accidents Act 1934* (Tas) s 10(1)(b).

6. England and Wales, Law Commission, *Report on Personal Injury Litigation – Assessment of Damages*, Report 56 (1973).

7. United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978).

or gratuity" paid as a result of the death,⁸ "benefit" being defined as relating to social security benefits.⁹ These exclusions had been carried over from the previous version of the *Fatal Accidents Act*.¹⁰

10.11 In formulating their recommendations, the Law Commission and the Royal Commission drew attention to the perceived unfairness of the limited exclusions which meant that:

- there would be no deduction in the case of spendthrifts who had dissipated their earnings during their lifetime, compared with thrifty people who had invested their income and accumulated assets that would be passed on to their dependants and taken into account by way of deduction;¹¹
- there would be no deduction in the case of deceased people who had so arranged their affairs that benefits would be passed to their dependants through insurance or a pension, compared with deceased people who had invested in shares or other assets which would give rise to a deduction when passed to their dependants.¹²

10.12 The Law Commission considered various reform possibilities. They included extending the exclusion to all benefits, with limited exceptions, such as "an identifiable portion of the estate of the deceased which derived solely from his inheritance by the will or intestacy of another person";¹³ or "any benefit received below a certain figure".¹⁴ The latter was rejected on the basis that it would not necessarily be fair. The Law Commission ultimately concluded that "without limit, benefits from the estate of the deceased should not be taken into account".¹⁵ The Royal Commission came to a similar conclusion. It recommended that "benefits derived from the deceased's estate should be disregarded in the assessment of damages for lost dependency".¹⁶

10.13 Although in each case the recommendations were framed in such a way as to suggest the reform should operate so as to exclude only benefits inherited from the estate of the deceased, the amended section has been given a wide interpretation that would exclude all benefits accruing to the dependants as a result of the wrongful death.

8. *Fatal Accidents Act 1976* (Eng) c 30, s 4, subsequently amended.

9. *Fatal Accidents Act 1976* (Eng) c 30, s 4, subsequently amended.

10. *Fatal Accidents Act 1959*, 7 & 8 Eliz 2, c 65, s 2.

11. United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978) vol 1 [538].

12. England and Wales, Law Commission, *Report on Personal Injury Litigation – Assessment of Damages*, Report 56 (1973) [255]; United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978) vol 1 [537].

13. England and Wales, Law Commission, *Report on Personal Injury Litigation – Assessment of Damages*, Report 56 (1973) [255].

14. England and Wales, Law Commission, *Report on Personal Injury Litigation – Assessment of Damages*, Report 56 (1973) [256].

15. England and Wales, Law Commission, *Report on Personal Injury Litigation – Assessment of Damages*, Report 56 (1973) [256].

16. United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978) vol 1 [539].

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10.14 The Law Commission has subsequently noted that, “on a natural interpretation, [s 4] can be construed as requiring the courts to disregard *all* benefits accruing as a result of death”.¹⁷ It went on to point out that s 4 has been interpreted literally, and that its effect is potentially far wider than the Law Commission, the Royal Commission, or the legislature intended.¹⁸

10.15 It can be argued that a broad approach, that would exclude taking into account any of the benefits that accrue on the death of the deceased, has some advantages:

- Courts can apply it easily. Any benefits accruing to the estate or a family member, as a result of the death, are simply disregarded when assessing damages in dependants’ actions.
- It may be fairer to dependant family members because it operates regardless of the deceased person’s financial situation. That is, it does not favour the spendthrift over the thrifty, nor the deceased who has invested in insurance rather than in a share portfolio, or who has pension entitlements.
- The payment of compensation for personal injury or death in a lump sum “as a matter of actuarial inevitability, cannot hope to produce damages which are fair and adequate...for the wrong done”,¹⁹ a circumstance of some relevance in a legal environment where the discount factor (multiplier) employed in calculating future losses does not reflect the true rate.

10.16 On the other hand, there are several arguments against this course:

- It overturns a long established principle which accepted that it was necessary, when assessing a dependant’s loss, to take into account the gains as well as losses, in order to comply with the fundamental assumption on which damages are calculated, namely that the claimant should be placed in the same position, so far as money can do it, as if the wrongful death had not occurred.
- It risks overcompensating the dependants.
- It risks benefiting certain groups of people over others, such as was observed in a New Zealand decision:

It gives an advantage to richer dependants over poorer ones. The action is still based upon loss caused by death. A dependant who has acquired no gain from the death can still recover no more than his or her proved loss, whereas the dependant who has made a gain by the death, however large that profit may be, may pocket it and still recover damages based on a fiction that he or she has suffered loss which in fact has not been suffered.²⁰

10.17 In its 1999 report on Claims for Wrongful Death, the Law Commission for England and Wales drew attention to the concerns which have arisen in relation to the broad

17. England and Wales, Law Commission, *Claims for Wrongful Death*, Consultation Paper 148 (1997) [2.49].

18. England and Wales, Law Commission, *Claims for Wrongful Death*, Consultation Paper 148 (1997) [3.73].

19. Submission to Law Commission for England and Wales by Peter Andrews QC quoted in England and Wales, Law Commission, *Claims for Wrongful Death*, Report 263 (1999) [5.26].

20. *Alley v Alfred Buckland and Sons Ltd* [1941] NZLR 575, 584.

interpretation given to s 4 of the *Fatal Accidents Act 1976* (Eng).²¹ These concerns related, amongst other things, to the fact that there have been inconsistent decisions in relation to whether the care received by dependants, as a consequence of the death of the victim of an actionable wrong, is a "benefit" for the purposes of s 4.²²

- 10.18 Attention was also drawn to the possibility of double compensation occurring where the deceased had settled a claim for damages arising out of an actionable wrong during his or her lifetime and had passed on the amount to the surviving spouse through inheritance;²³ or where there was a cause of action available against multiple defendants, and settlement against one such defendant left open the possibility of a subsequent claim against the other parties.²⁴
- 10.19 The Law Commission, therefore, recommended that the Act be amended by replacing the general exclusion with a list of specifically excluded benefits, comprising those derived from charity, insurance, survivors' pensions and "any benefit which has or will or may accrue to any person from the deceased's estate".²⁵
- 10.20 In its Consultation Paper, the Law Commission argued that inherited benefits should not be taken into account because an inheritance "does not meet the same loss" as damages in a dependant's action. Damages in dependants' actions are meant to compensate for the loss of economic support provided by the deceased, and "an inheritance will generally be from funds entirely separate from those from which the dependant was supported".²⁶
- 10.21 It appears that the Law Commission intended the exclusion to extend to the inheritance of a specific asset and of a capital sum; as well as any asset that was converted into a capital sum in the course of the administration of the estate,²⁷ in order to allow for its distribution to multiple beneficiaries.
- 10.22 In support of its 1973 recommendation for the exclusion of inherited benefits, the Law Commission drew attention to the fact that no deduction was required for

21. England and Wales, Law Commission, *Claims for Wrongful Death*, Report 263 (1999) [2.37]-[2.54]. See also England and Wales, Law Commission, *Claims for Wrongful Death*, Consultation Paper 148 (1997) [2.50].

22. England and Wales, Law Commission, *Claims for Wrongful Death*, Report 263 (1999) [2.37]-[2.42]-[2.50]. In *Stanley v Siddique* [1992] QB 1 care of a child by its father's wife after the death of the child's mother was found to be a benefit for the purposes of s 4. However, in *Hayden v Hayden* [1992] 1 WLR 986 a father's care services were found not to be a s 4 benefit and could therefore be taken into account in assessing damages accruing to the child on the death of the child's mother. In *R v Criminal Injuries Compensation Board ex parte K* [1999] 2 WLR 948, *Stanley v Siddique* was accepted as binding.

23. England and Wales, Law Commission, *Claims for Wrongful Death*, Report 263 (1999) [2.52]-[2.53].

24. England and Wales, Law Commission, *Claims for Wrongful Death*, Report 263 (1999) [2.56]-[2.58].

25. England and Wales, Law Commission, *Claims for Wrongful Death*, Report 263 (1999) [5.39] and 126, 135.

26. England and Wales, Law Commission, *Claims for Wrongful Death*, Consultation Paper 148 (1997) [3.91].

27. See England and Wales, Law Commission, *Claims for Wrongful Death*, Consultation Paper 148 (1997) [3.92].

inheritance of the matrimonial home. However, a deduction was required for inherited cash or shares even though “it was likely that the plaintiff would have received the benefit of the money or property at a later date”, and even though the “support lost had not derived from that money or property”.²⁸

- 10.23 The proposal has attracted criticism as being overly broad and as leading to over-compensation.²⁹ In order to meet this type of criticism, the Law Commission proposed a qualification to its recommendation whereby the extension would not apply if there was some correspondence between a benefit received and a particular loss claimed in a dependant’s action.³⁰ If the correspondence was such that “in effect the loss is not suffered or is compensated for”,³¹ the court would be able to make a deduction equivalent to the benefit received.
- 10.24 The Law Commission gave as an example the case where a plaintiff inherited assets that had been “used by the deceased to support the plaintiff; for example, where the deceased lived off investments which were subsequently left to his or her dependants”.³² A deduction was justified in these circumstances, it suggested, because the income from the inheritance was meeting the loss caused by the death. Unless there was a deduction, the dependants would be in a better financial position than they would otherwise have been.
- 10.25 The Law Commission observed that in order to determine whether a deduction should be made:
- the court would need to make a decision (which would not always be straightforward), whether the sum inherited represented, wholly or partly, the source from which the dependant had been supported.³³
- 10.26 This approach would mean that any award of damages for non-economic loss awarded to the estate, and inherited by the dependant, would be disregarded, since those damages would not correspond with the loss claimed by the dependant. The damages for non-economic loss awarded to the estate could never have been used to support the dependant, and their award serves an entirely different purpose to that which underlies an award of damages in a dependant’s action.
- 10.27 The Law Commission’s recommendations, however, have not been adopted and, as a consequence, no account is taken of any benefits accruing to the dependants as a consequence of the wrongful death.

28. England and Wales, Law Commission, *Report on Personal Injury Litigation – Assessment of Damages*, Report 56 (1973) [255].

29. P Kutner, “Reforming Wrongful Death Law” (1999) 7 *Torts Law Journal* 46, 79-80.

30. England and Wales, Law Commission, *Claims for Wrongful Death*, Report 263 (1999) [5.43].

31. England and Wales, Law Commission, *Claims for Wrongful Death*, Report 263 (1999) 122.

32. England and Wales, Law Commission, *Claims for Wrongful Death*, Consultation Paper 148 (1997) [3.92].

33. England and Wales, Law Commission, *Claims for Wrongful Death*, Consultation Paper 148 (1997) [3.92].

Tasmania

- 10.28 In Tasmania, it is only where the value of that portion of the estate passing to the relevant family members exceeds \$250,000 that a deduction is made for the benefits over \$250,000 received as inherited property.³⁴
- 10.29 The current figure of \$250,000 was set in 2008,³⁵ in place of the previous figure of \$10,000 which had been set in 1955. The Second Reading speech in support of the 2008 amendment suggests that the figure of \$250,000 was chosen as the appropriate level as it would “prevent a very modest estate, perhaps consisting mainly of a small house, from being taken into account in the assessment of damages”.³⁶ It is possible that this provision, and its predecessors which date back to 1943,³⁷ was intended to overcome the problems of unfairness between rich and poor dependants of the kind to which reference was made in the New Zealand case of *Alley v Buckland*.³⁸
- 10.30 A provision of this kind would be of limited utility in those cases where the principal asset of the deceased was the family home, at least where, as is commonly the case, it is owned by the deceased and his or her spouse as joint tenants and, as a consequence, passes to the spouse by survivorship. The High Court has held that where property, such as the family home, transfers by survivorship, it will not be subject to a deduction:
- The matrimonial home and furniture therein ... should not be made the subject of a deduction when a widow merely continues to enjoy as owner what she previously enjoyed as wife.³⁹
- 10.31 Otherwise, a threshold set at a similar level for NSW would be unlikely to secure the apparent objectives of the Tasmanian provision, given the fact that the median house price in NSW is considerably higher than that in Tasmania.⁴⁰ While this could be remedied by setting a higher value before a deduction cuts in, the steady increase in house values which has been experienced in recent years would require regular amendment, or the addition of a provision for indexing against inflation.

The consequences of any enlargement of the excluded benefits

- 10.32 Any amendment of s 3 of the *Compensation to Relatives Act 1897* (NSW) to enlarge the category of excluded benefits, whether related to all benefits accruing to the dependants consequent upon the death of the deceased, or confined to those passing through inheritance, would have significant consequences.

34. *Fatal Accidents Act 1934* (Tas) s 10(1)(b).

35. *Justice And Related Legislation (Miscellaneous Amendments) Act 2008* (Tas) s 21.

36. Tasmania, *Parliamentary Debates*, House of Assembly, 29 May 2008, 57-58 (D Llewellyn).

37. *Fatal Accidents Act 1934* (Tas) s 2.

38. *Alley v Alfred Buckland and Sons Ltd* [1941] NZLR 575.

39. *Zordan v Metropolitan (Perth) Passenger Terminal Trust* (1963) 37 ALJR 159, 161, applied in *Parker v Commonwealth* (1965) 112 CLR 295, 311. See also *O'Connor v Lloyd* [1962] WAR 37 which applies the same principle to a husband who received property after his wife's death.

40. June quarter, 2010, \$435,000: Housing NSW, *Rent and Sales Report*, Issue 93 (2010) 1.

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- 10.33 While it might remove some of the disparity in outcomes that presently exist, as noted above, the overall impact would almost certainly result in a substantial increase in damages awards, with an upward pressure on insurance liabilities and premiums.
- 10.34 If it were to occur, then it would seem necessary that it apply across all categories of claimants who are entitled to bring dependants' actions. To confine it to dust disease cases, for example, or indeed to any specific class of claimants, would be to place them in a significantly advantaged position (particularly if they alone could recover non-economic loss in an estate action) compared with other claimants, for which it would be difficult to find any justification. However, as the terms of reference invite consideration of an option of this kind, we do see it as necessary to invite submissions as to whether the category of excluded benefits should be enlarged in any respect and, if so, whether that should occur across the board or be confined to dust disease cases.

Question 10.1

- (1) Should the list of benefits which are to be disregarded when assessing damages in dependants' actions, in accordance with s 3 of the *Compensation to Relatives Act 1897* (NSW) be enlarged and, if so, what additional benefits should be excluded?
- (2) If such an amendment is made, should it apply generally or be confined to dust disease cases?
- (3) If such an amendment were to include benefits acquired through inheritance:
 - (a) should there be a monetary value cap on the excluded benefits and, if so, what should that cap be and should it be subject to indexation; or
 - (b) should some factor other than a monetary value cap be adopted as the criterion for exclusion and, if so, what should it be?

Question 10.2

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

Appendix A

Preliminary submissions

PCR1	Unions NSW and Asbestos Diseases Foundation of Australia, 22 December 2010
PCR2	DLA Phillips Fox, 27 January 2011
PCR3	Asbestos Injuries Compensation Fund Ltd, 31 January 2011
CPCR4	Confidential submission, 1 February 2011
PCR5	Joanne Wade, 1 February 2011
PCR6	Australian Lawyers Alliance, 4 February 2011
CPCR7	Confidential submission, 9 February 2011
PCR8	NSW Bar Association, 10 February 2011
PCR9	Insurance Council of Australia, 11 February 2011
CPCR10	Confidential submission, 11 February 2011

Appendix B

Preliminary consultations

Consultation with legal practitioners

11 April 2011

- Stephen Campbell SC, Bar Association
- Tanya Segelov, Tuner Freeman
- Janet Abboud, DLA Phillips Fox
- Con Gotis Graham, Phillips Fox
- Ken Fowle, Slater and Gordon
- Theodora Ahilas, Maurice Blackburn
- Kasarne Robinson, Australian Lawyers Alliance
- Doug Vorbach, HWL Ebsworth

Table of cases

<i>Alley v Alfred Buckland and Sons Ltd</i> [1941] NZLR 575	10.16,10.29
<i>Amaca Pty Ltd v Banton</i> [2007] NSWCCA 336.....	4.60
<i>Amaca Pty Ltd v Ellis</i> (2010) 240 CLR 111	3.41
<i>Asbestos Injuries Compensation Fund Pty Ltd</i> [2011] NSWSC 97	8.7
<i>Australian Telecommunications Commission v Parsons</i> (1985) 59 ALR 535	8.31
<i>Baker v Bolton</i> (1808) 1 Camp 493; 170 ER 1033	4.42,8.2
<i>Bennett v Liddy</i> (1979) 25 ALR 340	8.31
<i>BHP Billiton Ltd v Schultz</i> (2004) 221 CLR 400	6.60
<i>Bl (Contracting) Pty Ltd v Strikwerda</i> [2005] NSWCA 288	1.11,6.2,6.44
<i>Blake v Midland Railway Company</i> (1852) 18 QB 93	4.46
<i>Borowy v ACI Operations Pty Ltd (No 2)</i> [2002] NSWDDT 21	4.50
<i>Castine v Smith and Amiet Engineering Pty Ltd</i> [2007] NTSC 16.....	8.31
<i>Colebrook v Wide-Bay Burnett Regional Electricity Board</i> [1971] QWN 8	4.49
<i>Commercial Minerals Ltd v Harris</i> (1999) 18 NSWCCR 11	4.34
<i>Cook v Cavenagh</i> (1981) 10 NTR 35	8.4,8.36
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