



New South Wales
Law Reform Commission

Report
131

Compensation to relatives

October 2011
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Cataloguing-in-publication

Cataloguing-in-publication data is available from the National Library of Australia.

ISSN 1030 0244

ISBN 978-0-7347-2656-8



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Dear Attorney

Compensation to relatives

We make this report pursuant to the reference to this Commission received
3 November 2010.

The Hon James Wood AO QC
Chairperson
October 2011

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Acknowledgements

We acknowledge the assistance of Furzer Crestani Services, Chartered Accountants in providing the analysis of damages at page 42, Table 2.3.

Terms of reference

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.

[Reference received 3 November 2010]

Executive summary

Background

- 0.1 This Report follows on from our consultation paper *Compensation to Relatives* (“CP14”), concerning the application of the “*Strikwerda* principle”, in personal injury cases involving dust diseases, particularly asbestos-related diseases. In it, we identified six possible options for reform, some of which could have had an application beyond dust diseases cases.

The current law

- 0.2 Where the victim of a wrongful act brings, and concludes, a common law action for damages arising out of that wrong, he or she can recover from the wrongdoer damages for non-economic loss (for pain and suffering, loss of amenities and loss of expectation of life), as well as damages for past loss of earnings and expenses, loss of future earning capacity and loss of future capacity to provide domestic services to dependants. The conclusion of those proceedings will bring to an end any further entitlement, after the victim’s death, of the victim’s estate or dependants for the recovery of common law damages against the wrongdoer.
- 0.3 If the proceedings are not completed in the victim’s lifetime, then his or her estate can continue the action (an “estate action”) to recover damages for *economic* loss up to the time of the victim’s death, but not damages for future loss.
- 0.4 As a general principle, the victim’s entitlement to recover damages for non-economic loss will not survive his or her death. However, in 1998, an exception was introduced that allows the estate of a victim whose death was dust-related (but not otherwise), to recover damages for non-economic loss, so long as the victim commenced the common law proceedings before death.
- 0.5 Although the estate cannot recover, in an estate action, damages for losses occasioned after the victim’s death, the dependants of the victim can recover damages, in a dependency action brought under the *Compensation to Relatives Act 1897* (NSW), in respect of their loss of financial and domestic support consequent upon the death.
- 0.6 The primary issue in this reference arises from the 2005 NSW Court of Appeal decision in *BI (Contracting) Pty Ltd v Strikwerda*. It deals with the situation where:
- the victim of a dust disease commences an action in the Dust Diseases Tribunal (DDT) for common law damages but dies before that action is completed; and
 - the deceased’s estate continues the action as an estate action; and
 - the deceased’s dependants also bring a dependency action for their loss of financial and domestic support resulting from the death.
- 0.7 An application of the *Strikwerda* principle dictates that any part of the damages for non-economic loss recovered in the estate action, that filters through to a dependant, by transmission of the deceased’s estate, must be taken into account, or offset, in a dependency action when assessing the loss of financial or domestic support suffered by that dependant.

Asbestos

- 0.8 Although the reference applies to dust-diseases claims generally, the most significant impact of the *Strikwerda* principle occurs in relation to dependency claims arising out of exposure to asbestos and the Report is focussed accordingly.
- 0.9 Asbestos has a history of extensive use in Australia, in a wide variety of industrial and domestic contexts. Inhalation of asbestos fibres can cause a variety of health problems, including the fatal lung cancer mesothelioma. One significant feature of asbestos-related diseases is that they often do not emerge until 20 or more years after exposure, and once symptoms do occur, death can follow within a matter of months. The stressful nature and quick progression of the disease after diagnosis, and the consequent likely focus of the victim and dependants upon treatment or palliative care, have sometimes made it difficult for victims of such diseases to commence, and complete, common law actions for damages before they die.
- 0.10 As a response to the problems faced by asbestos victims in resolving damages claims in their lifetimes, NSW has instituted a number of substantive and procedural reforms in relation to the recovery of common law damages in the DDT. These reforms included the 1998 amendment mentioned above, that allows the estate of a dust diseases victim to recover damages for non-economic loss.
- 0.11 When that amending legislation was introduced, it appears that consideration was not given to the fact that, consistently with existing principle, as was later confirmed by the decision in *Strikwerda*, any portion of the damages for non-economic loss recovered in an estate action that passed to a dependant, would need to be offset, when calculating the quantum of that dependant's loss in a dependency action.

Abolition of the *Strikwerda* principle

- 0.12 In this Report, we recommend the abolition of the *Strikwerda* principle, in the context identified, even though we acknowledge that its application to dust diseases dependency actions accords with the law that was settled by the High Court in *Public Trustee v Zoanetti* (1945) 70 CLR 266.
- 0.13 There are several reasons for this recommendation:
- Such a change would bring the law in NSW into line with that which is applicable in Victoria, SA and WA, each of which has already abolished the *Strikwerda* principle (para 2.24-2.27).
 - Although the 1998 amendment preserves the right of the estate to recover damages for non-economic loss, the offset that is required by the *Strikwerda* principle when assessing damages in the dependency action, tends to nullify the benefit of that reform (para 2.64-2.66).
 - In practical terms, the abolition of the *Strikwerda* principle would not appear to lead to over-compensation, at the expense of defendants, whose negligence gave rise to the dust-related death. Its abolition would effectively allow the family of a person, who died from a dust disease, to recover, through the combined operation of an estate action and a dependency action:
 - the non-economic loss damages that the deceased could have recovered in his or her lifetime; and

- that proportion of the damages that could have been recovered by the deceased in respect of his or her loss of future earning capacity and capacity to provide domestic services, and that would, but for the death, have been available to support his or her dependants (para 2.67-2.69).
 - The *Strikwerda* principle can give rise to an inequality in outcomes for families of a dust-diseases victim, dependent on the deceased's testamentary arrangements; in that it will only apply to those dependants who receive the benefits of the estate action through testamentary disposition or upon the intestacy of the deceased (para 2.11).
 - The damages, that are recoverable in the lifetime of a dust diseases victim, will normally exceed the net damages that are recoverable through an estate action and a dependency action (para 2.78).
 - Abolishing the *Strikwerda* principle would not appear to generate any significant increase in the filing of dependency actions in the DDT, a conclusion that is based upon:
 - the historically low numbers of estate actions and dependency actions that have been filed in the DDT (para 2.71-2.73);
 - the significant advantages (both financial and emotional) for dust diseases victims in bringing and concluding proceedings in the DDT before dying (para 2.74);
 - the fact that many victims will have left the work force before diagnosis, so that that their dependants will be unable to demonstrate sufficient loss of support, after the death, to justify bringing a dependency action (para 2.75); and
 - the fact that generous dust diseases workers compensation benefits that include both a lump sum and income support are available, such that the dependants of those whose dust disease was work-related will generally have recourse to those benefits and will not seek damages through a dependency action (para 2.79).
 - The *Strikwerda* principle is likely to have its greatest impact on those dependants who are not able to access the statutory workers compensation death benefits (para 2.80).
- 0.14 It is recognised that the abolition of the *Strikwerda* principle is likely to result in a more favourable outcome for some dependants of dust diseases victims, than that which would apply for other categories of claimants. However, we do not consider this to be a sufficient reason to retain the principle. The significant differences between the common law compensation regimes in place in NSW, that are entrenched in legislation and that are based on considerations of policy, in relation to issues of fault, affordability, and funding, render arguments based on equity in outcome across claimant categories unhelpful (para 2.97-2.104).

Pre-death commencement requirement in dust disease cases

- 0.15 For a dust diseases victim's estate to recover damages for non-economic loss, the law currently requires the victim to have commenced proceedings in the DDT before dying.

- 0.16 We have recommended that this requirement be modified, to allow the recovery of damages for non-economic loss in dust diseases cases which are commenced either before, or up to 12 months following, the death of a dust diseases victim (para 3.41-3.45).
- 0.17 This reform would allow the recovery of damages for non-economic loss in the limited number of cases, where a victim failed to commence an action in the DDT prior to his or her death, for example, by reason of the rapid progression of the disease, or by reason of the stress associated with it, or by reason of ignorance of the law. It would also cater for the case where a relevant dust disease was only identified after death. We consider the 12 month limit would provide sufficient protection for defendants, in barring claims that were filed too late to allow proper investigation and, where appropriate, defence.

Further recommendations

- 0.18 We have made some recommendations to deal with certain subsidiary matters:
- an amendment to clarify when the estate of a deceased personal injury victim can recover damages for the loss of his or her capacity to provide services to others under s 15B of the *Civil Liability Act 2002* (NSW) (para 2.119-2.124);
 - the desirability of a review of the Claims Resolution Process which applies to all dust diseases claims in the DDT (para 2.125-2.135); and
 - whether or not our principle recommendation is accepted, an amendment to the *Dust Diseases Tribunal Act 1989* (NSW) that would allow the joinder of defendants and cross defendants, in an estate action both, before and after the victim's death. (para 3.46-3.49).

Options not resulting in recommendations

- 0.19 We do not believe that there are sufficient grounds for reform along the lines of the other possible options identified in CP14. We, therefore, do not support:
- the introduction of damages for bereavement suffered by the family members of wrongful death victims (para 4.4-4.20);
 - the extension of the right of recovery of damages for non-economic loss to all categories of claims arising from a wrongful death (para 4.21-4.35);
 - the expansion of the list of benefits that are to be disregarded in the assessment of loss in dependency actions (beyond that which would follow upon the abolition of the *Strikwerda* principle in dust diseases cases) (para 4.36-4.48); or
 - any expansion of the proposed abolition of the *Strikwerda* principle beyond dust diseases cases (para 4.49-4.60).

Recommendations

Chapter 2 – Retain or abolish the <i>Strikwerda</i> principle		page
2.1	Section 3(3) of the <i>Compensation to Relatives Act 1897</i> (NSW) should be amended to insert a direction that in assessing damages in a claim under that Act, a court is not to take into account any damages recovered or recoverable for the benefit of the estate of the deceased person under s 12B of the <i>Dust Diseases Tribunal Act 1989</i> (NSW).	49
2.2	Section 2(2)(a)(ii) of the <i>Law Reform (Miscellaneous Provisions) Act 1944</i> (NSW) should be amended to read as follows: (ii) any damages for the loss of the capacity of the person to provide domestic services or the loss of capacity of the person to earn, or for the loss of future probable earnings of the person, during such time after the person's death as the person would have survived but for the act or omission which gives rise to the cause of action.	51
2.3	A further review should be undertaken of the Claims Resolution Process and of the contributions assessment mechanism.	53
Chapter 3 – Remove the pre-death commencement requirement in dust diseases actions		page
3.1	Section 12B of the <i>Dust Diseases Tribunal Act 1989</i> (NSW) should be amended: (1) to allow recovery of damages for non-economic loss by an estate, so long as proceedings have been commenced by the victim before his or her death, or by the estate no later than 12 months after the victim's death; and (2) to require, in the case of proceedings commenced after the victim's death, that both the Statement of Claim and the Statement of Particulars are filed and served within the 12-month limit.	63
3.2	Section 12B of the <i>Dust Diseases Tribunal Act 1989</i> (NSW) should be amended to allow the joinder of defendants and cross defendants after the death of the victim.	64

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Background to this Report

1.1 The Commission's review arises from the following terms of reference issued by the Attorney General in 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 modeling 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.
- 1.2 In May 2011, we issued a consultation paper, Consultation Paper 14 – *Compensation to Relatives* (“CP14”), which identified several possible options for reform arising out of the terms of reference.
- 1.3 Details of the consultations held and the submissions received in response to CP14 can be found in Appendices B and C.
- 1.4 Although the issues that arise for consideration potentially apply to all categories of claimants seeking the recovery of damages for an actionable wrong, we have focused the inquiry on dust disease-related claims, and more specifically on those concerning asbestosis and mesothelioma, since they provide the genesis for this reference.

The *Strikwerda* principle

- 1.5 The primary issue in this reference arises from the 2005 NSW Court of Appeal decision in *BI (Contracting) Pty Ltd v Strikwerda*.¹ It deals with the situation where:
- the victim of a dust disease commences an action for compensation at common law but dies before that action is completed;
 - the action is then continued by the estate of the deceased under the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) (an “estate action”); and
 - the deceased’s dependants also bring an action for loss of support resulting from the death under the *Compensation to Relatives Act 1897* (NSW) (a “dependency action”).
- 1.6 In dealing with a case of this kind, the Court in *Strikwerda* applied a long-standing principle of law that had been stated by the House of Lords in *Davies v Powell Duffryn Associated Collieries Ltd*² and confirmed by the High Court in *Public Trustee v Zoanetti*.³ It held that where, in an estate action arising out of the wrongful death of a person, damages are recovered for non-economic loss (which include damages for that person’s pain and suffering, loss of amenity and loss of expectation of life), then any part of those damages, that filters through to a dependant by transmission of the deceased’s estate, must be taken into account, when assessing the loss suffered by that dependant in any subsequent dependency action brought under the *Compensation to Relatives Act 1897* (NSW) (the “1897 Act”) as a result of the death.
- 1.7 Although the principle is traceable to *Zoanetti* and to *Davies v Powell Duffryn*, we refer to it in this Report as the “*Strikwerda* principle”.
- 1.8 The *Strikwerda* principle only arises as an issue for consideration because in all States and Territories in Australia, legislation was introduced between 1998 and

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

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

3. *Public Trustee v Zoanetti* (1945) 70 CLR 266.

2007 to allow the recovery, in estate actions, of damages for non-economic loss in dust diseases cases.⁴ In all other cases, if a person dies, the ability to recover damages for non-economic loss dies with that person.

- 1.9 The *Strikwerda* principle has been abolished by legislation in South Australia, Victoria and Western Australia.⁵ In NSW, a private member's bill proposing the abolition of the *Strikwerda* principle was introduced into Parliament in 2010.⁶ The bill lapsed following the referral of the issue to this Commission.
- 1.10 To understand why the application of the *Strikwerda* principle has given rise to an issue requiring review, it is necessary to note:
- the factual background relating to asbestos and asbestos-related disease; and
 - the relevant aspects of the law concerning compensation for wrongful death, particularly in relation to the compensation available to dust diseases victims.

Asbestos and asbestos-related disease

Asbestos

- 1.11 Asbestos is a naturally occurring silicate mineral. It has a range of beneficial properties which led to its widespread use in a variety of industries and industrial and domestic applications. It is resistant to fire, heat and corrosion and it is strong, durable and flexible, with fibres that can be woven into cloth.⁷ Asbestos had extensive use in Australia between 1918 and the late 1980s, being mined here as well as imported and used in manufacturing and construction industries. It has been asserted that, in the 1950s, Australia had the highest per-capita usage of asbestos in the world.⁸
- 1.12 Exposure to asbestos dust has been linked to a range of diseases, which in many cases will be fatal. The use and sale of asbestos and asbestos-products in Australia was banned in December 2003.⁹

4. Dust diseases generally: *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). Asbestos only: *Civil Law (Wrongs) Act 2002* (ACT) s 16(4); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4(2)(a).

5. *Civil Liability Act 1936* (SA) s 24(2aa)(f) amended by *Dust Diseases Act 2005* (SA) Sch 1 cl 1; *Wrongs Act 1958* (Vic) s 19(1A) inserted by *Asbestos Diseases Compensation Act 2008* (Vic) s 12; *Fatal Accidents Act 1959* (WA) s 5(2)(d) inserted by *Fatal Accidents Amendment Act 2008* (WA) s 4.

6. Dust Diseases Tribunal Amendment (Damages – Deceased's Dependents) Bill 2010 (NSW) (D Shoebridge).

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

8. J O'Meally, "Asbestos Litigation in NSW" (2007) 15 *Journal of Law and Policy* 1209, 1210.

9. National Model Regulations for the Control of Workplace Hazardous Substances [NOHSC:1005 (1994)] sch 2.

Asbestos-related disease

1.13 CP14 sets out the major epidemiological and legal issues raised by asbestos-related diseases.¹⁰ Nevertheless, there are three key points that need to be highlighted:

- the long latency periods for some asbestos-related diseases;
- the speed of the progression of some asbestos-related diseases; and
- the changing patterns of exposure to asbestos.

Long latency

1.14 First, unlike many diseases or industrial injuries, asbestos-related diseases are typically characterised by long latency periods between exposure to asbestos fibres or dust particles and the subsequent manifestation of a disease caused by that exposure. For example, depending on the condition, the latency periods associated with asbestos-related diseases can range from 10 years up to around 40 years.¹¹

1.15 Actuarial analyses have estimated that, because of the extended latency periods associated with asbestos-related diseases, there are likely to be continued instances of asbestos-related disease at least until 2045,¹² and possibly as late as 2060.¹³ As CP14 identified, these long periods can make it difficult for businesses to plan for their asbestos-related liabilities.¹⁴

Speed of progression of disease

1.16 The progression of some asbestos-related diseases from first symptoms to death can create practical problems affecting the types and amount of compensation an asbestos victim or his or her family will be able to recover. Most victims of mesothelioma will die within one year of diagnosis,¹⁵ and the five-year survival rate is only five percent.¹⁶ The speed with which victims die means that it can be sometimes difficult for them to commence and complete proceedings in the Dust Diseases Tribunal (“DDT”) before they die. As we note later, this has a potential significance in relation to the quantum of damages recovered by the victim during

-
10. CP14, Ch 2 considers the aetiology and epidemiology of asbestos-related diseases, Ch 3 considers the dust diseases compensation framework in NSW, as well as trends in asbestos litigation.
 11. American Academy of Actuaries, *Overview of Asbestos Issues and Trends* (American Academy of Actuaries Public Policy Monograph, 2001) 2; CP14, 9, table 2.1. See also Safe Work Australia, *Mesothelioma in Australia: Incidence 1982 to 2007, Mortality 1997 to 2007* (2011) 6.
 12. KPMG, “Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities to be met by the AICF Trust – Prepared for Asbestos Injuries Compensation Fund Limited” (19 May 2011) 49.
 13. 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.
 14. CP14 [3.41]-[3.43].
 15. Allen Consulting Group, *Access to Treatment for Mesothelioma Patients, Report to the Asbestos Diseases Foundation of Australia Inc and Eli Lilly Australia Pty Ltd* (2007) 3.
 16. American Academy of Actuaries, *Overview of Asbestos Issues and Trends* (American Academy of Actuaries Public Policy Monograph, 2001) 2.

his or her lifetime, or by the dependants of the victim after death. In particular, where damages for non-economic loss are recovered in an estate action, then, if they pass to a dependant, they will need to be taken into account when damages are assessed in any dependency action.

- 1.17 The fact of rapid progression has been addressed in NSW by the introduction of a case management timetable that applies to all claims lodged in the DDT. The timetable specifies a maximum period of 12 weeks for the resolution of malignant claims (those involving asbestos-induced mesothelioma or carcinoma¹⁷) through compulsory mediation where there are multiple defendants, and nine weeks where there is only one defendant.¹⁸ If the compulsory mediation is unsuccessful, the claim is transferred to the DDT for hearing. If death is imminent, the claim can similarly be referred directly to the DDT, bypassing the mediation step. Although it appears that the vast majority of claims are resolved by settlement, or by judgment, prior to the victim's death, a small number of cases are not.¹⁹ We have been informed that the cases proceeding to hearing are generally those involving genuine issues for resolution.

Patterns of exposure

- 1.18 It is necessary to consider the changes in the profile of claims that have been made over the past decades, and how the profile of those making asbestos claims may change. The incidence of the disease and its diagnosis are tied to patterns of exposure. The bulk of people exposed historically to asbestos have been those who work in the places where it was mined, or where it was used in manufacturing and construction, or who otherwise handled it during transport or in repair work. Actuarial estimates suggest that Australia has either reached the peak of diagnosis for this group, or that the peak will occur in the next few years.²⁰
- 1.19 As the peak of industrial exposures passes, it is possible that a "third wave" of asbestos victims will begin to become more apparent. This third wave comprises people who were exposed to asbestos through activities such as home renovation, particularly do-it-yourselfers, or as family members of exposed workers.²¹ KPMG has noted that claims against the former James Hardie entities by people exposed in the course of DIY renovations have remained "broadly stable" since 2003/04.²² Third wave claims generally make up around 30% of all claims brought against the

17. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 12(1).

18. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 33.

19. See Attorney General's Department of NSW and The Department of Premier and Cabinet, *Review of the Dust Diseases Claims Resolution Process: Issues Paper* (2008) Appendix A, 6 (Table 6).

20. KPMG, "Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities to be met by the AICF Trust – Prepared for Asbestos Injuries Compensation Fund Ltd" (19 May 2011) 48-49; See also Allen Consulting Group, *Access to Treatment for Mesothelioma Patients, Report to the Asbestos Diseases Foundation of Australia Inc and Eli Lilly Australia Pty Ltd* (2007) 5.

21. See, eg, KPMG, "Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities to be met by the AICF Trust – Prepared for Asbestos Injuries Compensation Fund Ltd" (19 May 2011) 7.

22. KPMG, "Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities to be met by the AICF Trust – Prepared for Asbestos Injuries Compensation Fund Limited" (19 May 2011) 8.

James Hardie fund annually.²³ KPMG notes that, between 2004/05 and 2008/09 there were increases in “family”-type exposure claims, such as exposure when washing a family member’s clothing, or when hugging a worker with dirty clothes or when playing with asbestos as a child. However, in the past two years family and DIY claims have reduced in number, including an almost 50% reduction in the last year.²⁴

- 1.20 However, anecdotal evidence suggests that the number of people affected by non-workplace exposure may in fact be increasing.²⁵ This view gains some support from published data. A recent study of incidence of malignant mesothelioma in Western Australia found that the latency periods for people exposed to asbestos during home renovations were significantly shorter than those of people who were exposed to asbestos in other circumstances.²⁶ In addition, the study confirmed a rising trend in the diagnosis of malignant mesothelioma resulting from home renovations. The authors of the study conjecture that:

the continued widespread distribution of asbestos products in [Western Australian] homes, and the long latency period between exposure and diagnosis of [malignant mesothelioma], means that there is likely to be a further increase in cases of [malignant mesothelioma] attributable to home renovations.²⁷

One might expect a similar trend in other Australian States, including NSW.

- 1.21 Other epidemiological statistics show that there has been an increase in the number of women diagnosed with asbestos-related disease. It has been asserted that almost all women who receive such a diagnosis fall within the category of third wave claims, rather than within the group whose disease was the result of direct work-related exposure.²⁸
- 1.22 Since the injury to third wave victims will have occurred outside the work environment, those claimants, and their dependants will not be entitled to weekly workers compensation payments, or to the other benefits that are available on disablement and death under the dust diseases workers compensation scheme.²⁹

23. KPMG, “Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities to be met by the AICF Trust – Prepared for Asbestos Injuries Compensation Fund Limited” (19 May 2011) 8.

24. KPMG, “Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities to be met by the AICF Trust – Prepared for Asbestos Injuries Compensation Fund Limited” (19 May 2011) 8.

25. See, eg, B Everett, “Litigating the legacy of asbestos” (2010) Issue 491 *Lawyers Weekly* 14, 14-15.

26. N J Olsen, P K Franklin, A Reid, N H de Klerk, T J Threlfall, K Shilkin and B Musk, “Increasing incidence of malignant mesothelioma after exposure to asbestos during home maintenance and renovation” (2011) 195(5) *Medical Journal of Australia* 271, 273.

27. N J Olsen, P K Franklin, A Reid, N H de Klerk, T J Threlfall, K Shilkin and B Musk, “Increasing incidence of malignant mesothelioma after exposure to asbestos during home maintenance and renovation” (2011) 195(5) *Medical Journal of Australia* 271, 274.

28. The Asbestos Diseases Foundation of Australia, The Australian Manufacturing Workers’ Union, The Construction Forestry Mining & Energy Union, The Maritime Union of Australia, Queensland Asbestos Related Disease Support Society, *Supplementary Submission to Review of Legal and Administrative Costs in Dust Diseases Compensation Claims* (2005) [25].

29. See para 1.37-1.39.

The absence of such entitlements means that there could be an increased possibility of dependency actions being brought by this group.

- 1.23 It should be noted, however, that although there is some connection between the incidence of asbestos-related disease and of legal proceedings being brought against defendants, there is not necessarily a direct correlation.³⁰ Consequently, although predictions about diagnosis can provide some indication of the possible extent of future legal claims, there are other factors that can influence whether a person will sue for damages. This can make it difficult to predict whether there will be an increase in the number, or type, of cases that may be affected by the *Strikwerda* principle.

The legal framework for the compensation of personal injury in NSW

- 1.24 Against this factual backdrop, it is useful to note the framework that is in place in NSW for the compensation of those who acquire dust diseases, including asbestos-related diseases. In this section we note the jurisdiction of the DDT and the broad heads of damages that may be awarded at common law, as well as the workers' compensation benefits that are available to dust diseases victims.
- 1.25 By way of comparison, we also note the substance of the legislative schemes that are in place in NSW that provide for the receipt of compensation, or for the recovery of common law damages, by non-dust disease claimants. An appreciation of these schemes is relevant to the equity implications of any reform that the terms of reference require us to take into account.
- 1.26 The discussion in this chapter is limited to liability under the laws of NSW. Consequently, it does not consider the availability of compensation, either statutory benefits or common law damages, to those who are subject to the laws of another jurisdiction. The main example of such a category of plaintiff would be workers who were injured while working in NSW, but who were employed by the Commonwealth. Commonwealth employees are provided for by a statutory compensation scheme established under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).³¹

30. 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.

31. *Safety, Rehabilitation and Compensation Act 1988* (Cth) provides for statutory compensation benefits for Commonwealth employees (and in some cases their dependants) who are injured or killed in the course of their employment (see s 14). The Act restricts the recovery of common law damages from the Commonwealth or a Commonwealth authority where an employee is injured (s 44(1)), although if the employee has a right to recover damages for non-economic loss at common law, he or she can elect to pursue common law damages, rather than receiving statutory compensation for his or her non-economic loss (s 45). No restrictions are placed on dependency actions against the Commonwealth in regards to the death of a person who dies from an injury suffered in the course of his or her employment (s 44(3)).

Workers' compensation – no fault schemes

- 1.27 Where a person is injured or killed in the course of his or her work in NSW, that person and his or her dependants can claim compensation under the relevantly applicable workers' compensation scheme, which will be funded through statutory contributions.³²

General workers

- 1.28 For non-dust disease workers, the relevant scheme is that which was established under the *Workers Compensation Act 1987* (NSW) (the "1987 Act"). It provides for:
- indexed maximum weekly payments where a worker is rendered unable to work as a result of a workplace injury at the rate of the worker's current weekly wage to a maximum of \$1774.50 for the first 26 weeks,³³ and thereafter at the rate of up to 90% of the worker's current weekly wage per week to a maximum of \$417.40, depending on the level of the worker's disability, as well as additions for a dependant spouse or children;³⁴
 - the payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services;³⁵
 - lump sum permanent impairment payments dependent on the degree of the impairment, that are limited to a maximum award of \$220,000;³⁶
 - lump sum payments for pain and suffering if the claimant has at least a 10% impairment, limited to a maximum award of \$50,000;³⁷
 - the commercial cost of any reasonably necessary domestic assistance,³⁸ and
 - compensation, in some circumstances, for gratuitous domestic assistance provided to the victim.³⁹
- 1.29 In situations where a worker dies as the result of an accident or disease associated with his or her employment, the Act also provides for a lump sum death benefit.⁴⁰ This is currently \$465,100, and is to be apportioned between dependants,⁴¹ or

32. See, eg, *Workers Compensation Act 1987* (NSW) s 154D; *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 6.

33. *Workers Compensation Act 1987* (NSW) s 35. All The figures cited in this chapter are indexed and will increase at the designated time each year. The figures cited are correct to 30 September 2011.

34. *Workers Compensation Act 1987* (NSW) s 37.

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

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

37. *Workers Compensation Act 1987* (NSW) s 67.

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

39. *Workers Compensation Act 1987* (NSW) s 60AA(3).

40. See generally *Workers Compensation Act 1987* (NSW) pt 3 div 1.

41. *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.

otherwise paid to the legal personal representative of the worker.⁴² Provision is also made for weekly payments for dependant children⁴³ and funeral expenses.⁴⁴

- 1.30 This compensation scheme is administered by WorkCover NSW, which acts on behalf of the Nominal Insurer by contracting with scheme agents to provide workers' compensation services.

Dust disease workers

- 1.31 Separate provision is made for dust diseases victims, whose total or partial disablement for work was reasonably attributable to the exposure to dust, in the course of their work. The applicable no fault statutory scheme is established under the *Workers Compensation (Dust Diseases) Act 1942* (NSW) (the "1942 Act"), which is administered by the Dust Diseases Board ("DDB").⁴⁵
- 1.32 Decisions by the DDB in relation to the award of compensation follow upon assessment, and the issue of a certificate,⁴⁶ by the Medical Authority, which is also established under the 1942 Act. Decisions of the Medical Authority and of the DDB are subject to appeal to the District Court.⁴⁷
- 1.33 The benefits available under the dust diseases workers' compensation scheme similarly include:
- indexed weekly payments where a worker is rendered totally or partially disabled due to a dust disease, paid at the rate of the worker's current weekly wage for the first 26 weeks, and after 26 weeks, weekly payments up to a maximum payment of \$417.40 per week, depending on the extent of the disability;⁴⁸
 - payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services;⁴⁹
 - payment for the commercial provision of domestic assistance,⁵⁰ and
 - compensation, in some circumstances, for gratuitous domestic assistance provided to the victim.⁵¹

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

43. *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.

44. *Workers Compensation Act 1987* (NSW) s 26.

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

46. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 7-8.

47. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 81.

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

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

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

51. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(2)(d). Damages for gratuitous provision of attendant care services are also recoverable via common law action: *Civil Liability Act 2002* (NSW) s 15A.

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- 1.34 Where a worker dies as a result of a dust disease that was reasonably attributable to exposure to dust in the course of his or her work, those who were wholly dependent on that worker are entitled to compensation as follows:
- An indexed lump sum payment which increases annually from 2010, and accordingly will be one of the following:

2010 - \$268,375;

2011 - \$291,040; or

2012 - \$311,050.⁵²
 - An indexed weekly payment to a surviving dependent spouse, currently payable at \$243.60 per week,⁵³ which continues until re-marriage or the commencement of a de facto relationship,⁵⁴ or until the death of the spouse.⁵⁵
 - A weekly payment to each surviving dependent child, currently payable at \$123.10 per week,⁵⁶ where the child is aged under 16, which continues for children who are engaged in full-time education until the age of 21.⁵⁷
- 1.35 It is noted that, although the lump sum death benefit payable under the 1987 Act is greater than that payable under the 1942 Act, the surviving dependent spouse is entitled to weekly compensation benefits under the 1942 Act, but not under the 1987 Act.
- 1.36 In addition, unlike the general workers' compensation scheme, there is no compensation payable under the dust diseases workers compensation scheme for permanent impairment, nor for pain and suffering. Such damages must be recovered in dust diseases cases through a common law action brought in the DDT.
- 1.37 The 1942 Act provides the DDB with mechanisms for reducing payments made to an eligible claimant in certain circumstances. If a worker or a worker's spouse is qualified to receive a government pension, the Board can adjust the weekly payments to ensure they will still be entitled to receive that pension.⁵⁸ Additionally, where the claimant is entitled to receive compensation from another source, the Board can require a person to take all appropriate and reasonable steps to claim compensation from that other source and, if he or she fails to do so, it can reduce the dust disease compensation that would otherwise be payable.⁵⁹ It is an offence to fail to inform the DDB that a person is receiving compensation under another Act,

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

53. *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 s 8(3)(d); NSW, *Government Gazette* (No 24 of 4 March 2011) 1690-1691.

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

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

56. *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 s 8(3)(d); NSW, *Government Gazette* (No 24 of 4 March 2011) 1690-1691.

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

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

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

ordinance, or law of the Commonwealth, or of another State or Territory or of another country.⁶⁰

- 1.38 There are cases where a person who contracted a dust disease, including an asbestos-related disease, in the course of his or her work, will not receive workers compensation benefits. Such people include employees whose employers did not make contributions to the NSW workers compensation scheme (such as Commonwealth employees⁶¹) or independent contractors who were not covered by the workers compensation scheme.⁶² In such cases their dependants will similarly be unable to receive the statutory benefits that are available upon the victim's death.
- 1.39 It goes without saying that those whose exposure to dust was not work-related are ineligible for compensation under the 1942 Act.

Common law damages – fault-based liability

- 1.40 In NSW, the recovery of common law damages in respect of wrongfully caused injuries or death is subject to a different regime, depending on the circumstances in which the injury or death was caused. Separate provisions apply in relation to:
- general workers who have an entitlement to recover modified common law damages subject to the provisions of the 1987 Act;
 - dust disease workers;
 - those whose injuries or death arose out of a motor vehicle accident, and whose claim for damages is subject to the *Motor Accidents Compensation Act 1999* (NSW); and
 - those whose injuries or death arose as the result of a breach of the duty of care owed by health professionals, occupiers, and others and whose claim for damages is subject to the *Civil Liability Act 2002* (NSW).
- 1.41 The application of these separate regimes can result in material differences in the outcome of damages claims for comparable levels of incapacity and loss.
- 1.42 Moreover there is a difference in the jurisdictions in which awards of “common law damages” are made. Claims subject to the *Motor Accidents Compensation Act 1999* (NSW), the *Civil Liability Act 2002* (NSW) and the modified provisions of the *Workers Compensation Act 1987* (NSW), are brought in the District and Supreme Courts, from which appeal lies to the Court of Appeal. The jurisdiction to award “common law damages” in relation to dust diseases cases is vested in the DDT, from which appeal lies to the Court of Appeal.

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

61. *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61; *West v Workers Compensation (Dust Diseases) Board* (1999) 18 NSWCCR 60.

62. Although see *Workers Compensation Act 1987* (NSW) s 20.

Claims subject to the Motor Accidents Compensation Act 1999

1.43 The recoverability of “common law damages”, in respect of fault-based motor accident injuries is currently subject to the limitations arising from the *Motor Accidents Compensation Act 1999* (NSW). That Act imposes:

- a ceiling on the calculation of damages for past and future economic loss by a requirement to disregard any amount by which the victim’s net weekly earnings would have exceeded a sum currently fixed at \$3,966,⁶³
- a threshold on the recoverability of damages for non-economic loss (that is compensation for the victim’s pain and suffering, loss of bodily function, loss of enjoyment of life, loss of expectation of life, and disfigurement), dependent on the presence of a permanent impairment of the injured person that is greater than 10%,⁶⁴
- a ceiling on the maximum damages for non-economic loss currently fixed at \$432,000,⁶⁵
- limitations on the damages for the provision of attendant care services through the provision of a threshold and a cap,⁶⁶
- an exclusion of the damages payable for the loss of the services of a person;⁶⁷
- a restriction on the calculation of all future losses by requiring the assessment to be made by reference to the 5% actuarial discount tables,⁶⁸ in place of the 3% discount previously applicable at common law;
- an exclusion of the recovery of interest on damages awarded for non-economic loss and attendant care services, and a qualified right to interest in relation to other damages awards,⁶⁹ and
- an exclusion of the award of exemplary or punitive damages.⁷⁰

1.44 The recovery of compensation under this Act is regulated by procedural requirements that impose duties on authorised insurers to attempt expeditious claim

63. *Motor Accidents Compensation Act 1999* (NSW) s 125; *Motor Accidents Compensation (Determination of Loss) Order 2009* (NSW) O 3.

64. *Motor Accidents Compensation Act 1999* (NSW) s 131.

65. *Motor Accidents Compensation Act 1999* (NSW) s 134; *Motor Accidents Compensation (Determination of Loss) Order 2009* (NSW) O 4. (Current until 30 September 2011).

66. *Motor Accidents Compensation Act 1999* (NSW) s 128. No compensation is to be paid unless services were, or will be, provided for at least 6 hours per week, and for a period of at least 6 consecutive months, and the amount of compensation awarded for attendant care services must not exceed the average weekly total earnings in NSW.

67. *Motor Accidents Compensation Act 1999* (NSW) s 142.

68. *Motor Accidents Compensation Act 1999* (NSW) s 127(2).

69. *Motor Accidents Compensation Act 1999* (NSW) s 137. Interest is not payable unless the defendant has been given sufficient information to enable a proper assessment of the claim and the defendant has had a reasonable opportunity to make an offer of settlement, but has not done so, and in some other specific circumstances involving settlement offers.

70. *Motor Accidents Compensation Act 1999* (NSW) s 144.

resolution,⁷¹ and that provide for an assessment process as a precondition to commencement of court proceedings.⁷²

- 1.45 Special provision is made in this Act, to allow the recovery of damages for a limited class of no fault claimants. This is confined, however, to those cases where the victims were either children, or where the injury or death arose as the result of a blameless accident.⁷³ In these cases the accident is deemed to have been caused by the fault of the owner or driver of the relevant vehicle, provided it was the subject of motor accident insurance cover.
- 1.46 In addition, the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) has established a statutory compensation scheme that provides compensation for severe motor accident injury victims and that applies regardless of fault.⁷⁴ The injuries compensated include spinal cord injury, brain injury, multiple amputations, burns and permanent blindness.⁷⁵

Claims subject to the Civil Liability Act 2002

- 1.47 Claims under this Act for “common law damages” arising out of other forms of fault-based liability, are also subject to limitations. For example:
- damages for economic loss (past and future loss of earnings or of earning capacity) and loss of expectation of financial support are capped, with the maximum net weekly earnings that may be recovered currently being three times average weekly earnings;⁷⁶
 - damages for gratuitous attendant care services provided to the plaintiff are restricted with thresholds to be met, and a maximum allowable award specified;⁷⁷
 - damages for loss of capacity to provide attendant care services are restricted with thresholds to be met and with a maximum allowable award,⁷⁸

71. *Motor Accidents Compensation Act 1999* (NSW) pt 4.3.

72. *Motor Accidents Compensation Act 1999* (NSW) s 108. See pt 4.4 for details of the claims assessment process.

73. *Motor Accidents Compensation Act 1999* (NSW) Pt 1.2.

74. *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) s 4.

75. See *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) s 58; Lifetime Care and Support Guidelines 2010 - Part 1: Eligibility Criteria for Participation in the Lifetime Care and Support Scheme <[http://www.lifetimecare.nsw.gov.au/FileHandler.ashx?name=Guidelines for Professionals/LTCS Guidelines/Part_1___Guidelines_Oct_2010_.pdf](http://www.lifetimecare.nsw.gov.au/FileHandler.ashx?name=Guidelines%20for%20Professionals/LTCS%20Guidelines/Part_1___Guidelines_Oct_2010_.pdf)>.

76. *Civil Liability Act 2002* (NSW) s 12.

77. *Civil Liability Act 2002* (NSW) s 15. No damages may be awarded unless the gratuitous attendant care services were, or will be, provided for at least 6 hours per week and for a period of at least 6 consecutive months: s 15(3). Further, awards are capped at a maximum rate of 1/40th of average weekly earnings in NSW per hour (approximately \$25), up to a maximum of 40 hours per week: s 15(4), s 15(5).

78. *Civil Liability Act 2002* (NSW) s 15B. No damages for loss of a person’s capacity to provide services unless there is a reasonable expectation that the claimant would have provided those services to his or her dependants for at least 6 hours per week, and for a period of at least 6 consecutive months: s 15B(2)(c). Further, awards are capped at a maximum rate of 1/40th of average weekly earnings in NSW per hour (approximately \$25): s 15B(4).

- damages for loss of employer superannuation contributions are limited to the relevant percentage of the damages payable for the deprivation and impairment of the plaintiff's earning capacity on which the entitlement to those contributions is based;⁷⁹
- damages for non-economic loss can only be awarded if the severity of the non-economic loss is at least 15% of the most extreme case; and where the non-economic loss is equal to or greater than 15% of a most extreme case, damages are to be awarded in accordance with a table to a maximum award of \$500,500;⁸⁰
- the prescribed actuarial discount rate to be applied to the assessment of lump sum awards for future economic loss of any kind is 5%;⁸¹
- interest cannot be awarded on damages for non-economic loss, gratuitous attendant care services or loss of capacity to provide gratuitous domestic services to the plaintiff's dependants;⁸² and
- exemplary, punitive or aggravated damages cannot be awarded.⁸³

1.48 Some limits are placed on the recovery of damages where the injury is solely related to mental or nervous shock.⁸⁴ Damages cannot be recovered for pure mental harm, arising from mental or nervous shock in connection with another person's death or injury, unless:

- the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril; or
- the plaintiff is a close member of the family of the victim.⁸⁵

Additionally, the plaintiff needs to have developed a recognised psychiatric illness in order to recover damages for pure mental harm.⁸⁶

1.49 There are no provisions comparable to those that were introduced in relation to the Motor Accidents Scheme, that allow recovery for blameless injuries or injuries occasioned to children.

Claims by injured workers – general

1.50 In addition to the entitlement for workers compensation outlined above, an injured worker is also entitled to pursue common law damages, as modified by the 1987

79. *Civil Liability Act 2002* (NSW) s 15C.

80. *Civil Liability Act 2002* (NSW) s 16; *Civil Liability (Non-economic Loss) Order 2010* (NSW) O 3.

81. *Civil Liability Act 2002* (NSW) s 14.

82. *Civil Liability Act 2002* (NSW) s 18. See also s 11A(3) – interest on damages cannot be awarded contrary to the provisions in pt 2 of the Act, which includes s 18.

83. *Civil Liability Act 2002* (NSW) s 21.

84. *Civil Liability Act 2002* (NSW) s 29.

85. *Civil Liability Act 2002* (NSW) s 30.

86. *Civil Liability Act 2002* (NSW) s 31; and see also s 33 in relation to a similar requirement for the recovery of economic loss for consequential mental harm. The Act also provides that a defendant will only owe a duty of care to a plaintiff in regards to nervous shock if the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken: s 32.

Act against the party whose negligence or other wrongful act or omission led to the injury.⁸⁷

- 1.51 No damages are recoverable unless the worker dies or has sustained a permanent impairment of at least 15%.⁸⁸
- 1.52 The worker's claim for loss of economic capacity is confined to the recovery of past lost earnings and future loss due to the deprivation or impairment of the worker's earning capacity.⁸⁹
- 1.53 Future losses are currently calculated according to the 5% actuarial discount rate.⁹⁰
- 1.54 In awarding such damages, the Court is required to disregard the amount (if any) by which the worker's net weekly earnings would have exceeded the amount that is the maximum amount of weekly statutory compensation payable in respect of total or partial incapacity, currently \$1,774.50.⁹¹
- 1.55 Common law damages are not available in respect of the victim's non-economic loss, the recovery of which is confined to the statutory no fault lump sum benefits that are available to the claimant for such losses.
- 1.56 Interest on damages is not payable unless certain conditions are satisfied.⁹²
- 1.57 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 1987 Act in respect of the relevant injury including compensation that has not yet been paid;⁹³
 - any compensation that has already been paid in the form of weekly payments is deducted from the damages awarded, and is to be paid or credited to the person who paid the compensation;⁹⁴ and
 - the worker ceases to be entitled to participate in any injury management program provided for by the workers compensation scheme.⁹⁵

Claims by dust disease workers and other dust disease victims

- 1.58 During his or her lifetime, a person who suffers a dust disease can sue a person, whose wrongful act or omission caused or contributed to that injury, to recover

87. *Workers Compensation Act 1987* (NSW) s 151E.

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

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

90. *Workers Compensation Act 1987* (NSW) s 151J.

91. *Workers Compensation Act 1987* (NSW) s 151I.

92. *Workers Compensation Act 1987* (NSW) s 151M.

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

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

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

damages of the kind that were previously available under the common law. They include, accordingly:

(1) Damages in respect of:

- (a) past and future medical, hospital, rehabilitation and related expenses;
- (b) any paid and gratuitous attendant care services that are received by the plaintiff consequent upon the injury;⁹⁶
- (c) any inability of the plaintiff to provide the domestic services that he or she previously provided to others;⁹⁷
- (d) any loss of the plaintiff's earnings to the date of trial; and
- (e) any loss of future earning capacity.

(2) Damages for non-economic loss – including pain and suffering, loss of amenities and loss of expectation of life.

(3) Interest – on past losses to the time of judgment or settlement.⁹⁸

1.59 Successfully completing such an action, either by settlement or by judgment, during the plaintiff's lifetime, extinguishes the possibility of common law claims being brought after death, including claims by that person's estate, or by his or her dependants.⁹⁹ It does not, however, bar dust diseases victims or their dependants from claiming statutory dust diseases workers compensation benefits, where the victim's disease was work-related. In this respect, the 1942 Act does not contain a provision equivalent to that contained in the 1987 Act,¹⁰⁰ which has the effect of terminating any further entitlement to workers' compensation benefits, once common law damages are recovered.

1.60 As noted above, the DDT has exclusive jurisdiction in NSW in respect of all common law claims arising from injuries caused by exposure to dust, as well as proceedings for contribution between defendants, and questions arising under relevant policies of insurance.¹⁰¹ It has jurisdiction over any injuries caused by a "dust-related condition", which is defined in the *Dust Disease Tribunal Act 1989* (NSW) as meaning:

- (a) a disease specified in Schedule 1, or

96. *Civil Liability Act 2002* (NSW) s 3B(1)(b) and s 15A. These are also known as "*Griffiths v Kerkemeyer*" damages.

97. *Civil Liability Act 2002* (NSW) s 15B. These are also known as "*Sullivan v Gordon*" damages.

98. See *Borowy v ACI Operations Pty Ltd (No 2)* [2002] NSWDDT 21 [131]-[132].

99. See, eg, *Harding v Lithgow Municipal Council* (1937) 57 CLR 186, 191; *Kupke v Corporation of the Sisters of Mercy, Diocese of Rockhampton, Mater Misericordiae Hospital – Mackay* (1996) 1 Qd R 300, 306; *British Electric Railway Company Ltd v Gentile* [1914] AC 1024, 1041.

100. *Workers Compensation Act 1987* (NSW) s 151A(1)(a). See above, para 1.54.

101. *Dust Diseases Tribunal Act 1989* (NSW) s 10.

- (b) any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust.¹⁰²

1.61 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;
- coal dust pneumoconiosis;
- farmers' lung;
- hard metal pneumoconiosis;
- mesothelioma;
- silicosis;
- silico-tuberculosis; and
- talcosis.

1.62 Pneumoconiosis is any "disease of the lung caused by the inhalation of dust, especially mineral dusts that produce chronic induration and fibrosis".¹⁰³ The DDT's jurisdiction, therefore, includes diseases caused by asbestos dust, as well as a range of other diseases and conditions caused by exposure to industrial dusts.

1.63 In a number of respects differences exist in relation to the recoverability of "common law damages" in, and the procedures followed by, the DDT when compared with the recovery of such damages in accordance with the other schemes outlined above. They include, for example:

- the use, by leave, of historical and general medical evidence admitted in other cases,¹⁰⁴
- the use, by leave, and with the consent of the party who originally obtained the material or other prescribed persons, of material obtained by discovery or

102. *Dust Diseases Tribunal Act 1989* (NSW) s 3. As to the question of whether particulate matter in smoke amounts to dust for the purposes of the Act, see: *Eastwest Airlines Ltd v Turner* [2010] NSWCA 53 [59]-[67]; *Turner v Eastwest Airlines Ltd* [2009] NSWDDT 10 [86]-[91].

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

104. *Dust Diseases Tribunal Act 1989* (NSW) s 25(3).

interrogatories in one proceedings, in other proceedings, even if the proceedings are between different parties;¹⁰⁵

- precluding, without leave, the relitigation of issues of a general nature that were determined in other proceedings;¹⁰⁶
- the absence of any threshold dependent on a minimum specified degree of impairment, for recovery of damages, or of any caps on the maximum amount of damages that can be recovered;
- the ability to award interim damages;¹⁰⁷
- the ability to award provisional damages in relation to an established dust-related condition, that will allow the claimant to recover additional damages, if there is a proven or admitted chance of the party developing another dust-related condition;¹⁰⁸
- the calculation of future losses by reference to a 3% actuarial discount table;¹⁰⁹
- the exemption of the proceedings from the limitations periods that would otherwise apply;¹¹⁰
- some differences in the damages available for gratuitous domestic assistance and loss of domestic capacity;¹¹¹ and
- s 13(6) of the *Dust Diseases Tribunal Act 1989* (NSW) which provides:

Whenever appropriate, the Tribunal may reconsider any matter that it has previously dealt with, or rescind or amend any decision that the Tribunal has previously made.¹¹²

1.64 The recovery by a worker of compensation from one source may affect his or her ability to recover from another source. A recipient of benefits under the dust diseases workers compensation scheme cannot be required to repay anything to the DDB if he or she also receives compensation benefits for the same injury from another source.¹¹³ In this respect, the dust diseases workers compensation scheme is unlike the general workers compensation scheme where repayment can be required if, for example, the injured worker recovers common law damages for the

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

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

107. *Dust Diseases Tribunal Act 1989* (NSW) s 41.

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

109. No discount rate is provided for in any relevant legislation, therefore the common law rate of 3% applies: *Todorovic v Waller* (1981) 150 CLR 403.

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

111. See *Civil Liability Act 2002* (NSW) s 15A and s 15B. Although damages for loss of capacity to provide domestic services are available in both dust diseases cases and actions under the *Civil Liability Act*, there are some restrictions imposed on recovery of such damages in motor accidents claims: s 15B(8), (9). Additionally, while damages for gratuitous domestic assistance are limited to recovery for 40 hours per week of care (s 15(4)), there is no equivalent maximum number of hours in dust diseases cases (see s 15A(2)).

112. *Dust Diseases Tribunal Act 1989* (NSW) s 13(6). Although the occasion for its application will only arise in exceptional circumstances: *CSR Ltd v Bouwhuis* (1991) 7 NSWCCR 223 and *Browne v Cockatoo Dockyard Pty Ltd* (1999) 18 NSW CCR 618.

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

same injury.¹¹⁴ In addition, unlike the general workers' compensation scheme,¹¹⁵ recovery of common law damages does not bring an end to a worker's statutory compensation entitlements under the dust diseases workers compensation scheme.

- 1.65 However such payments are recoverable by the DDB from the wrongdoer who is, or who would have been, liable to the dust disease claimant if sued by that person.¹¹⁶
- 1.66 If a worker has received workers' compensation benefits prior to judgment in a common law action, any weekly benefits that have been received are to be taken into account and deducted from the common law damages for loss of earning capacity or economic loss recovered by the injured person or his or her estate.¹¹⁷ In addition, where a worker has an entitlement to statutory workers' compensation benefits but has failed to claim them, the failure to claim the compensation available under the statutory scheme may be construed as a failure to mitigate the worker's loss. Where a worker has failed to mitigate his or her loss, the DDT may make a deduction from an award of common law damages for the statutory compensation entitlements which the worker has not, but could have, claimed.¹¹⁸
- 1.67 On the other hand, statutory compensation benefits paid to a worker are not to be deducted from damages awarded for non-economic loss.¹¹⁹
- 1.68 The relatives of dust diseases victims can bring claims for nervous shock in the DDT.¹²⁰ Such cases are likely to be determined according to the common law principles, unaffected by Part 3 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).¹²¹

Post-death claims

Estate actions

- 1.69 The legal personal representative of the estate of a deceased person who was injured as the result of the wrongful act of another, can bring an action to recover common law damages on behalf of the estate, or continue an action already commenced by the deceased, provided the deceased had a cause of action. Such an estate action is not, however, available if the deceased commenced and completed an action for the recovery of such damages before dying.

114. *Workers Compensation Act 1987* (NSW) s 151A(1)(b).

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

116. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8E.

117. *Commercial Minerals Ltd v Harris* [1999] NSWCA 94.

118. See *Downes v Amaca Pty Ltd* [2010] NSWCA 76.

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

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

121. *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, which is established to fund the liabilities of former James Hardie subsidiaries (see para 2.106-2.107). This does not, however, preclude proceedings against employers or insurers or other co-defendants.

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- 1.70 This type of action is based on the survival of causes of action legislation that was introduced in NSW by the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) (the “1944 Act”).¹²² Similar provisions exist in other common law jurisdictions. Prior to its introduction any cause of action that was vested in the deceased died with that person.¹²³
- 1.71 In an estate action, the *economic loss* damages recoverable comprise:¹²⁴
- medical and hospital expenses incurred before the death, as well as damages for gratuitous care services both received by,¹²⁵ and provided by, the deceased to other people, prior to death;¹²⁶
 - the loss of the deceased’s earning capacity to the date of death; and
 - funeral expenses.¹²⁷
- 1.72 The damages recoverable by the estate, in an estate action, do not include any damages for the loss of the deceased’s earning capacity past the date of his or her death, (that is, during the “lost years”),¹²⁸ nor do they include exemplary damages.¹²⁹
- 1.73 In non-dust disease cases, damages for *non-economic loss* cannot be recovered in an estate action.¹³⁰
- 1.74 In dust diseases estate actions, damages for non-economic loss and interest thereon,¹³¹ including damages for the loss of the deceased’s expectation of life, can be awarded, but only if proceedings for damages had been commenced by the injured person during his or her lifetime.¹³² There is no restriction on the award of interest on damages for past economic loss. The entitlement to interest in such cases differs from that applicable to claims under the other compensation schemes.¹³³

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

123. The rule has been traced as far back as 1611: *Pinchon’s Case* (1611) 9 Co Rep 86b, 87a; 77 ER 859, 860, although various statutory and common law exceptions were created in the intervening years. 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).

124. See H Luntz, *Assessment of Damages for Personal Injury and Death* (Butterworths, 4th ed, 2002) 480.

125. *Civil Liability Act 2002* (NSW) s 15A. also known as “*Griffiths v Kerkemeyer*” damages.

126. *Civil Liability Act 2002* (NSW) s 15B. also known as “*Sullivan v Gordon*” damages.

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

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

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

130. The rationale for the non-survival of damages for non-economic loss in estate actions is that the estate, as an “impersonal body”, ought not receive damages for the pain and suffering of the deceased: NSW, *Parliamentary Debates*, Legislative Assembly, 18 October 1944, 523 (V Treatt).

131. See, eg, *Novek v Amaca Pty Ltd* [2008] NSWDDT 12 [53], where such interest was awarded in an estate action. Interest on non-economic loss damage is not available in proceedings under the civil liability, motor accidents and non-dust workers’ compensation schemes.

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

133. *Motor Accidents Compensation Act 1999* (NSW) s 137(4); *Workers Compensation Act 1989* (NSW) s 151M(4); *Civil Procedure Act 2005* (NSW) s 100(4).

Dependency' actions

- 1.75 The legal personal representative of a deceased person can also bring an action under the 1897 Act, on behalf of specified family members,¹³⁴ for compensation for the loss of support that they sustain, consequent upon the death of a person who died as the result of the wrongful act of another.¹³⁵ Only one such dependency action can be brought.¹³⁶
- 1.76 The damages recoverable in such an action, for the benefit of any eligible claimant, are limited to the loss of that dependant, that arose from the loss of the expectation of the deceased's financial support,¹³⁷ although they also include reasonable funeral or cremation expenses as well as the reasonable cost of erecting a headstone or tombstone.¹³⁸ Although the relevant provision does not explicitly limit the damages recoverable in this way,¹³⁹ this approach has been accepted in Australian law following decisions of the Privy Council. Where there is more than one dependant,¹⁴⁰ the amount recovered in the proceedings is apportioned between the dependants, according to their individual loss.¹⁴¹
- 1.77 The measure of damages available is the extent of the support that is lost by the dependant from the time of death, reduced by benefits obtained by the dependant as a consequence of the death, other than those benefits that are specifically excluded under s 3(3) of the 1897 Act.
- 1.78 Completion in the deceased's lifetime of an action, brought by the deceased, for damages arising out of the injury – either through settlement with the wrongdoer or through the judgment of a court – will mean that his or her dependants will no longer have a right of action under the 1897 Act. This is because a dependency action can only be brought, if the deceased would have been entitled to bring an action and to recover damages, as a result of the defendant's wrongful act or omission.¹⁴² Completion of an action in the deceased plaintiff's lifetime extinguishes any such entitlement.¹⁴³
- 1.79 Dependency actions are available in relation to each of the categories of liability previously mentioned. Once again, such proceedings are determined by the Supreme or District Courts, save for dust disease dependency actions which are determined in the DDT.

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

135. The rights conferred under the *Law Reform (Miscellaneous Provisions) Act* for the benefit of the estate of a deceased person operate in addition to, not in derogation of, any rights conferred under the *Compensation to Relatives Act 1897* (NSW): *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(5).

136. *Compensation to Relatives Act 1897* (NSW) s 5.

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

138. *Compensation to Relatives Act 1897* (NSW) s 3(2).

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

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

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

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

143. *Harding v Lithgow Municipal Council* (1937) 57 CLR 186, 191; *Kupke v Corporation of the Sisters of Mercy, Diocese of Rockhampton, Mater Misericordiae Hospital – Mackay* (1996) 1 Qd R 300, 306; *British Electric Railway Company Ltd v Gentile* [1914] AC 1024, 1041.

- 1.80 The loss that a dependant can recover in a dependency action is not limited to a claim for loss of financial support, but includes the value of domestic services that the deceased would have provided to the dependant.¹⁴⁴
- 1.81 Proceedings under the 1897 Act brought in the DDT are subject to the unmodified common law and, as a consequence, it has been accepted that damages for the dependant's future loss of support are calculated by reference to the 3% actuarial tables rather than the 5% tables that are applied in relation to claims by dependants under the other schemes.¹⁴⁵

Options in the Consultation Paper

- 1.82 CP14 identified six possible options that, with the exception of Option 3, respond to the *Strikwerda* principle in various ways. The options progress from no change, or reasonably limited changes to the law as it applies to dust disease cases, to far more radical changes that would affect personal injury law more generally. The terms of reference – particularly those referring to considerations of equity between categories of claimants – have made it necessary to consider these broader options. The options that we identified were as follows:

- Option 1: maintain the law in its current state;
- Option 2: abolish the *Strikwerda* principle in relation to dependency actions arising out of death due to dust diseases;
- Option 3: remove the requirement that currently confines the recovery of damages for non-economic loss in *estate actions* (in dust disease cases) to those cases where proceedings were already on foot at the time of death;
- Option 4: introduce an award of solatium or bereavement damages for the family members of wrongful death victims;
- Option 5: extend the entitlement to damages for non-economic loss, in estate actions, to all cases of wrongful death, or to all cases of wrongful delayed death;
- Option 6: expand the categories of benefits that are currently excluded from consideration by a court when assessing damages in a dependency action, so as to exclude a benefit of any kind that may accrue to the dependants on the deceased's death (as is currently the case in the UK).

Our approach

- 1.83 In Chapter 2, we focus on the abolition or retention of the *Strikwerda* principle (options 1 and 2) given that the primary issues for review are dust disease-related.
- 1.84 In Chapter 3, we consider Option 3.

144. *Walden v Black* [2006] NSWCA 170 [96].

145. See *Civil Liability Act 2002* (NSW) s 11A(1), 11A(2), 14; *Motor Accidents Compensation Act 1999* (NSW) s 127(1)(b), 127(1)(c); *Workers Compensation Act 1987* (NSW) s 151E(1), 151E(3), 151J.

- 1.85 Following consultation, we have formed the view that Options 4 to 6 are overly broad in their response to what is, in fact, quite a narrow problem. While the options do respond to the *Strikwerda* principle in various ways, they do so in a manner that would have far reaching consequences in areas extending beyond the compensation of those who are the victims of dust diseases. These options were raised for discussion on the basis that they were potentially relevant to the possibility of securing equality of treatment for all categories of injury victims.
- 1.86 As was pointed out in CP14, there is already a great deal of inconsistency between the compensation benefits that are currently available for different categories of injury victims.
- 1.87 In this respect, it is important to recall that when legislation was introduced to provide for no fault compensation, or to modify the fault-based common law entitlements of the victims of work related injuries, dust disease related injuries, motor accident injuries, and other general injuries, consideration was necessarily given to the extent to which reasonable levels of compensation or damages should be available and could be sustained. A balance needed to be struck that took into account the impact on employers, insurers, motorists and others, of the compulsory payment of premiums or levies that are required to fund these schemes.
- 1.88 Additionally, what was necessarily taken into account was the long-standing and accepted public policy that extends statutory no fault benefits to injured workers, while the award of damages for those whose injuries arise from motor accidents, medical negligence and other forms of actionable wrong, continues to be fault-based.
- 1.89 In those circumstances, it is inevitable that there will be inequalities in treatment across the various categories of those who are entitled to some form of compensation for damages.
- 1.90 Although limited support was provided, in some quarters, for reform of the law in accordance with options 4 to 6 in a way that was applicable across the board, it is clear that such reforms would have a significant impact extending well beyond any reform of the *Strikwerda* principle in relation to dust disease cases. In addition, such reform would not necessarily remove any existing inequalities in treatment.
- 1.91 For the reasons that are identified in Chapter 4, we do not consider that a case has been made out, at this time, for the adoption of any of those options. Any such reform would need to await a much more comprehensive and general inquiry into the adequacy, or otherwise, of the compensation laws that are in force in NSW.

2. Retain or abolish the *Strikwerda* principle

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2.1 In this chapter, we consider the issue identified in Options 1 and 2 set out in *Consultation Paper 14 – Compensation to Relatives* (“CP14”). They were whether the *Strikwerda* principle should be abolished or retained. Abolition of the principle would allow dependants in dust diseases cases to recover damages for the loss of support that they suffer by reason of the death of the victim of such a disease, without taking into account any benefit they may have received from damages for non-economic loss that were awarded to the estate.

2.2 In the course of the examination of this issue, we:

- outline the way in which the *Strikwerda* principle affects dependants;
- record the arguments relating to the abolition and retention of the *Strikwerda* principle; and
- identify the possible consequences of abolishing the *Strikwerda* principle, noting that our terms of reference indicate that, if we come to the view that its abolition is justified, we are to consider whether an actuarial assessment should first be conducted.

- 2.3 Finally, we consider, by way of an addendum to this chapter, the award of damages for the loss of a dust diseases victim's capacity to provide services to his or her dependants. While these damages are not directly associated with an application of the *Strikwerda* principle, certain stakeholders identified this as an issue of potential concern. We also refer to some concerns that have been brought to our attention in relation to the DDT's claims resolution process.

Background

The 1998 amendment to the *Dust Diseases Tribunal Act*

- 2.4 The *Strikwerda* principle is an issue only in dust diseases cases, because of the 1998 amendment to the *Dust Diseases Tribunal Act 1989* (NSW)¹ that enabled the estate of a dust disease victim to recover damages for the non-economic loss that would have been recoverable by the deceased arising from a wrongful act or omission. Damages for non-economic loss include damages for the pain and suffering of a person, and for any bodily or mental harm suffered by him or her prior to death, as well as for the curtailment of his or her expectation of life.
- 2.5 The amendment was introduced in response to the problems that were experienced by asbestos victims in finalising their claims for common law damages during their lifetime.² The provision allows the recovery of damages for non-economic loss by the victim's estate, so long as the victim had commenced proceedings in the DDT and they were pending by the time of his or her death.³ This amendment has been confined to dust disease cases so that damages for non-economic loss do not survive the death of victims of other wrongful acts or omissions.⁴
- 2.6 The amendment was seen as necessary to deal with the rapid progression of mesothelioma following diagnosis. It was intended to institute a "more humane approach" to the resolution of these cases, that would no longer require a "race against time" by a victim to finalise a claim prior to death, or a "death bed" hearing, in order to ensure that damages for pain and suffering, bodily harm and loss of expectation of life could be recovered.⁵ It was "intended to avoid the arbitrariness and distress" that arose in circumstances where damages for non-economic loss would otherwise die with the victim.⁶

The consequences of *Strikwerda* for a dependency action

- 2.7 The assessment of damages, in a dependency action brought under the *Compensation to Relatives Act 1897* (NSW) ("1897 Act"), requires an evaluation of the extent of the dependant's loss of support due to the victim's death. This requires a balancing of any financial gains that the dependant received, *as a result of or arising on* the death of the victim, against the loss of the support that the

1. *Dust Diseases Tribunal Act 1989* (NSW) s 12B.
2. NSW, *Parliamentary Debates*, Legislative Assembly, 29 October 1998, 9436 (K Yeadon); Legislative Council, 17 November 1998, 9973 (J Shaw).
3. *Dust Diseases Tribunal Act 1989* (NSW) s 12B.
4. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(d).
5. NSW, *Parliamentary Debates*, Legislative Assembly, 29 October 1998, 9436 (K Yeadon).
6. NSW, *Parliamentary Debates*, Legislative Council, 17 November 1998, 9973 (J Shaw).

dependant would otherwise have been expected to receive, had the victim not died.⁷

- 2.8 The relevant principle was accepted as settled in *Public Trustee v Zoanetti* where Justice Dixon observed:

In estimating the damages to be recovered under legislation taken from *Lord Campbell's Act* (the *Fatal Accidents Act 1846*, 9 & 10 Vict c 93) two rules are clearly settled. One is that what is recoverable for the benefit of the widow or other relative of the deceased is the pecuniary loss resulting from his death and that nothing may be recovered by way of solatium for the suffering that his death caused to his widow or relative. The other is that in ascertaining the pecuniary loss resulting from his death there must be taken into consideration, on the one side, the reasonable expectations of benefit upon which the claimant would have been entitled to rely, had his life not been brought to an end, and, on the other side, the pecuniary benefits, arising on his death, to which the claimant had a reasonable expectation, whether as a right or otherwise. For example, if the deceased leaves property in which under his will or on intestacy the widow takes a share or interest, the effect upon her financial position of her so taking that share or interest must be taken into account as against her loss of those material benefits which depended upon the continuance of her husband's life.⁸

- 2.9 The 1897 Act provides that some benefits do not need to be taken into account. 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 a benefit from a friendly society, benefit society, or trade union; and
- any sum paid or payable by way of a pension under five specified NSW and Commonwealth Acts.⁹

- 2.10 Since they are not explicitly excluded, any damages for non-economic loss that are awarded to the estate of a deceased victim, and that are then inherited by a dependant of that victim, will need to be taken into account in the assessment of that dependant's loss. The *Strikwerda* decision gave effect to this principle in relation to dust diseases cases.

- 2.11 It is important to observe that the *Strikwerda* principle will apply only where the dependants receive the benefit of the damages for non-economic loss awarded to the estate. If the deceased's estate is distributed in a way that directs the benefit of those damages to a third party, they would not be taken into account when assessing the loss of any dependants in the dependency action.¹⁰ CP14 pointed out that some victims may be able to avoid an application of the *Strikwerda* principle by leaving their estate to non-dependants, subject to an understanding that those people will, at a later time, transfer the assets to the dependants; while others will

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

8. *Public Trustee v Zoanetti* (1945) 70 CLR 266, 276-277.

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

10. See Asbestos Injuries Compensation Fund, *Submission CR3*, 2.

not take that course either because they die without a will, or because they are unaware of the potential impact of the *Strikwerda* principle.¹¹

- 2.12 One submission argued that a victim, who organised his or her testamentary affairs, so as to give an appearance (contrary to the true facts) that a dependant would not benefit from any damages received in the estate action, would be behaving dishonestly. It was submitted that “recommending a course to effectively condone dishonesty should form no part in the appropriate policy in this area”.¹² It is not a strategy that we recommend as a solution to the *Strikwerda* question.
- 2.13 In the following section of this chapter we note, and then evaluate, the arguments in favour respectively of the abolition and retention of the *Strikwerda* principle. In reaching a conclusion on this issue we have kept in mind the fundamental principle that the purpose of any award of damages is compensatory, that is, the damages are intended to place the victim of a wrongful act in the same position, so far as money can do so, as if the injury had not occurred.¹³
- 2.14 The corollary of that principle is that claimants should not be entitled to receive, and defendants should not be liable to deliver, over-compensation for a wrong.

Arguments in favour of abolition of the *Strikwerda* principle

- 2.15 In consultations, and in submissions, those who supported the abolition of the *Strikwerda* principle argued that it gives rise to an inequality and potential unfairness in the treatment of the dependants of dust disease victims.

Nullification of the 1998 amendment

- 2.16 Among other things, it was argued that it is inappropriate that an application of the *Strikwerda* principle should effectively negate the beneficial purpose of the 1998 amendment that allowed the estate of a dust disease victim to recover common law damages for non-economic loss.¹⁴
- 2.17 It was also argued that the precondition for an estate’s recovery of damages for non-economic loss, that depends on the victim having commenced proceedings in the DDT before death,¹⁵ can lead to a potentially unfair outcome. Reference was made, in this respect to those cases where the victim is too unwell to commence the proceedings in his lifetime, or where the presence of a dust disease, as a contributing cause of death, is not discovered until after death.
- 2.18 The application of the *Strikwerda* principle was said to be particularly problematic in mesothelioma cases, since the speed with which mesothelioma can progress after diagnosis, means that it can often be difficult for victims to commence or to complete proceedings in the DDT, while they are still alive. Furthermore, it was asserted that, in some cases, victims and their families are either unaware of the

11. CP14 [6.42].

12. Confidential Submission, *Submission CCR11*.

13. *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25, 39 (Lord Blackburn); *Manser v Spry* (1994) 181 CLR 428, 434.

14. D Shoebridge, *Submission CR7*, 2.

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

implications of the *Strikwerda* principle, or are insufficiently advised of their compensation entitlements until after the victim's death.

Special features of dust disease cases

- 2.19 Those who support the abolition of the *Strikwerda* principle placed some reliance on the fact that the legislature has recognised that victims of dust diseases are a “needy” group,¹⁶ whose diseases create “special circumstances”¹⁷ that require an appropriate response. One such response was the introduction of the provision that allows actions for damages for non-economic loss to survive the death of a dust diseases victim.
- 2.20 Particular attention was drawn to the circumstance that mesothelioma is an extremely unpleasant disease, which, in its terminal phase, causes intense pain and suffering to its victims and, consequently, to their families who must support them through this period of suffering.¹⁸
- 2.21 It was also contended that the offsetting of damages for non-economic loss does not reflect the culpability of asbestos defendants for the injuries caused by their actions or omissions when they allowed the product to be mined and used, for many years, in various aspects of industry and construction. Some submissions made a point of the continuing supply and use of asbestos products which the defendants made available, in spite of widespread knowledge concerning its harmful and sometimes deadly effects. Accordingly it was argued that a deduction of the damages for non-economic loss recovered in an estate action, from the damages recovered in a dependency action, unfairly gives defendants a discount on the consequences of their wrongdoing,¹⁹ which should be compensated fully.²⁰
- 2.22 In response to this argument, one submission suggested that to distinguish asbestos victims from other victims, on the ground that there was knowledge, on the part of the defendants, of the dangers involved with the product would effectively “introduce an element of punitive damages”. The submission went on to argue that anything, that amounted to the introduction of punitive damages, would “represent a significant departure from the common law in New South Wales”.²¹
- 2.23 Exemplary or “punitive” damages were formerly available in NSW to punish a wrongdoer when compensatory damages were insufficient. They are no longer generally available following the enactment of the *Civil Liability Act 2002* (NSW).²² This Act does not apply to dust diseases actions,²³ so that, in theory, there is nothing to prevent a dust disease victim being awarded exemplary damages, when he or she brings a personal injuries action; although, once that person dies, any entitlement to exemplary damages will die with him or her.²⁴

16. NSW, *Parliamentary Debates*, Legislative Assembly, 3 May 1989, 7399 (J Dowd).

17. NSW, *Parliamentary Debates*, Legislative Assembly, 29 October 1998, 9435 (K Yeadon).

18. See, eg, Australian Lawyers Alliance, *Preliminary Submission PCR6* [2].

19. D Shoebridge, *Submission CR7*, 1-2.

20. E Strikwerda, *Submission CR1*, 3.

21. DLA Piper Australia, *Submission CR6* [10].

22. *Civil Liability Act 2002* (NSW) s 21.

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

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

National consistency

- 2.24 It was contended that, since Victoria, SA and WA have each abolished the *Strikwerda* principle, NSW should follow suit in the interests of national consistency.²⁵
- 2.25 In CP 14, we suggested that this argument might need to be treated with care because of the differences in the compensation and other benefits that are available to victims and their dependants in these other jurisdictions.²⁶
- 2.26 Some submissions took up this point by arguing that the consistency argument lacked strength in light of the special measures that are in place in NSW for compensating dust disease victims, but that have no equivalent in the other jurisdictions.²⁷
- 2.27 It was also pointed out that the remaining Australian States and Territories have not altered their law in this regard.²⁸ Historically, however, it appears that most asbestos-related claims have been brought in NSW, Victoria, WA and SA.²⁹

Abolition of the *Strikwerda* principle would have minimal impact

- 2.28 Those who support the abolition of the *Strikwerda* principle also contend that this would have very little impact on defendants and insurers, because it would potentially apply in very few instances.³⁰
- 2.29 In this regard reference was made to:
- the small number of estate and dependency actions that have historically been brought in the DDT;³¹
 - the likelihood that, in most cases, the victim will endeavour to bring and finalise a claim for dust disease related damages before his or her death;

25. Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary Submission PCR1* [18].

26. CP14 [6.48].

27. Insurance Council of Australia, *Submission CR2*, 5.

28. Confidential Submission, *Submission CCR10*. Also, note that Tasmania is in the process of adopting a statutory no-fault compensation scheme which would apply to former workers: Asbestos-Related Diseases (Occupational Exposure) Compensation Bill 2011 (Tas). The scheme will require asbestos victims and their dependants to claim under the scheme before they can bring common law actions: cl 106. The provision of benefits to dependants of a deceased victim is likely to divert many common law asbestos claims, which may have been subject to the *Strikwerda* principle. It should, however, be noted that the overall level of claims in Tasmania is significantly lower than in NSW, Victoria and WA: see, eg, KPMG, "Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities to be met by the AICF Trust – Prepared for Asbestos Injuries Compensation Fund Ltd" (19 May 2011) 38.

29. See KPMG, "Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities to be met by the AICF Trust – Prepared for Asbestos Injuries Compensation Fund Ltd" (19 May 2011) 38 which indicates that most claims against James Hardie are brought in NSW, Vic and WA. However, this data will not recognise the claims brought in SA against defendants other than James Hardie such as BHP Billiton which operated shipyards in which asbestos was used.

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

31. See, eg, NSW Bar Association, *Submission CR15* [2].

- the entitlement of dependants to the benefits available under the dust diseases workers compensation scheme, that include a lump sum death benefit and ongoing weekly support payments; and
- the fact that the abolition of the *Strikwerda* principle in the other States does not appear to have had any significant impact on defendants or their insurers.

Arguments in favour of the retention of the *Strikwerda* principle

- 2.30 A number of arguments were developed in the submissions and consultations in support of retaining the *Strikwerda* principle.

Compensation for actual loss

- 2.31 Some of those supporting the retention of the *Strikwerda* principle emphasised that the purpose of a dependency action is to compensate the actual loss of support suffered by the dependants and, as far as possible, to place them in the same position as if the death of the victim due to the wrong had not occurred. Accordingly, if the estate received an injection of funds as the result of an award of damages in respect of the deceased's injury or death, then the net financial loss to the dependants resulting from the death will differ from the financial loss in a case where no such damages had been awarded. As such, it was asserted that, rather than being an "unfair deduction", the offset of any portion of the damages for non-economic loss that the dependants acquire through inheritance (as well as any other gains that need to be taken into account), is simply a part of a recognised and principled process for assessing damages in a dependency action. The abolition of the *Strikwerda* principle, it is argued,³² would result in dependants recovering more than they had actually lost.³³
- 2.32 Incidental to this argument was the contention that the pain and suffering, loss of amenity, and loss of expectation of life are losses sustained by the victim, rather than by the dependants, and that allowing them to retain the benefit of any damages recovered in an estate action, in addition to undiminished damages for any loss of future support arising by reason of the death, would lead to over-compensation and offend against the compensatory principle on the basis of which damages are assessed.
- 2.33 In response, it was pointed out that the total amount recovered in an estate action will normally be less than would have been recovered by a victim who had survived to complete his or her proceedings for damages for personal injury. For that reason, viewed pragmatically, it is not necessarily correct to assert that the dependants are receiving "more than their actual loss", as had the disease progressed more slowly, the victim would have been able to recover a larger sum before dying, and then to have passed on that amount to his or her dependants.
- 2.34 It was also pointed out that the damages that are awarded to the estate for the non-economic loss of the deceased, and the damages awarded in a dependency action

32. Insurance Council of Australia, *Submission CR2*, 4.

33. See CP14 [6.29]-[6.31]; see also *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111, 129-130 where the High Court stressed that a defendant's liability for a tort is determined by the extent of the plaintiff's actual loss that is causally attributed to that defendant's wrongful conduct.

do compensate two “quite different losses”.³⁴ As it was put in one submission, “the fortuitous, if common, circumstance that the dependants are the beneficiaries under the will does not seem to . . . be a good enough reason to reduce compensation paid for one purpose, by reference to the amount of compensation paid for quite another different purpose”.³⁵

Preferential treatment of dust diseases claimants

- 2.35 It was argued in some submissions that, in NSW, dust disease claimants and their dependants already possess significant advantages over other groups of injury victims including those whose injury is work-related. The abolition of the *Strikwerda* principle, it was argued, would serve to increase an inequity in the way in which injury victims are treated.³⁶
- 2.36 It was also asserted, in one submission, that there is no principled reason why a dust disease victim’s estate should benefit from damages for non-economic loss, when the estate of a victim, who dies as a result of medical negligence in not diagnosing a treatable form of cancer, cannot recover those damages.³⁷
- 2.37 It is clear that dust diseases claimants do have advantages, in relation to the recovery of statutory no fault compensation, and of common law damages.³⁸ It has been put to us that the judgments of the Dust Diseases Tribunal (the DDT) are more generous than those of the courts in the other States, in dust disease matters,³⁹ and of other NSW courts, in general personal injury cases.
- 2.38 The analysis submitted to us provides some support for that proposition.⁴⁰ For example, in a recent case in the DDT, damages of \$150,000 were awarded for non-economic loss for a 10-25% whole person impairment.⁴¹ This can be contrasted with the amounts available under the other schemes in place for the recovery of common law damages or compensation for non-economic loss in cases where the severity of the plaintiff’s loss is equivalent to 25% of a most extreme case.⁴²
- *Workers Compensation Act 1987* (NSW) - \$44,000 (under the statutory compensation scheme);⁴³ and
 - *Civil Liability Act 2002* (NSW) – \$32,500 (under modified common law).⁴⁴

34. M Lunney, *Submission CR12*, 3. See also Unions NSW and Asbestos Diseases Foundation of Australia, *Preliminary Submission PCR1*, 10; Australian Lawyers Alliance, *Preliminary Submission PCR6* [12].

35. M Lunney, *Submission CR12*, 3.

36. Confidential Submission, *Submission CCR 11*; DLA Piper Australia, *Submission CR6* [8].

37. CSR Ltd, *Submission CR8* [33].

38. See para 1.56.

39. See DLA Piper Australia, *Submission CR6* [7].

40. CSR Ltd, *Submission CR8* [73].

41. *Hicks v Amaca Pty Ltd* [2010] NSWDDT 16 [46].

42. The *Motor Accidents Compensation Act 1999* (NSW) does not provide for assessment of damages for non-economic loss on the basis of a percentage of degree of permanent impairment: *Brown v Lewis* [2006] NSWCA 87 [21]. In that case, the Court of Appeal did not disturb the lower court’s allocation of \$85,000 for damages for non-economic loss in a case of 25% impairment of the whole person.

43. *Workers Compensation Act 1987* (NSW) s 66(2)(c).

44. *Civil Liability Act 2002* (NSW) s 16(3).

- 2.39 Advocates for the abolition of the *Strikwerda* principle argue, in response, that the key issue of fairness concerns its application to the special circumstances relevant to the dependants of those whose death is dust disease-related, and that any comparison with the recovery of compensation or damages available for other categories of personal injury claimants and their dependants is irrelevant.

Increase in claims liabilities

- 2.40 Those in favour of the retention of the *Strikwerda* principle argue that its abolition would result in an increased number of dependency actions, and/or to an inflation in damages awards, with consequent adverse effects for employers and insurers, and for the pools that have been established to fund damages awards for asbestos-related claims.⁴⁵
- 2.41 It was contended that these funding pools are already stretched, and that to increase their potential exposure will mean that other deserving claimants would risk not receiving compensation, and/or that employers and the public or the State would have to bear the additional costs of providing any necessary supplementation.⁴⁶
- 2.42 As we note later,⁴⁷ there was also some concern that abolition of the *Strikwerda* principle would encourage the bringing of new categories of dependency actions; and more generally that it would “create a scenario where cases that are currently unsustainable and dubious [become] claims worth pressing, turn small claims into large claims and artificially increase the value of all claims”.⁴⁸
- 2.43 The possibility of an increase in claims exposure was identified as a particular issue for the compensation fund that was established to cover the liabilities of the former James Hardie entities.⁴⁹ It was submitted that the possible inflation of awards to dependants, who have not been directly exposed to asbestos themselves, would take away compensation resources from those who are most in need, specifically those who were directly exposed to the substance.⁵⁰ It was recognised that maintaining the *Strikwerda* principle might cause inequity to some dependants but, it was contended, “such inequity is justifiable to ensure that claimants who were personally exposed to asbestos are not further disadvantaged”.⁵¹
- 2.44 A counter argument was advanced to this submission: even if abolition of the *Strikwerda* principle were to have significant financial implications for defendants and insurers, those negative consequences are secondary to the financial consequences for victims and their dependants arising from their wrongful exposure to asbestos.⁵²

45. Suncorp, *Submission CR9*, 2; Confidential Submission, *Submission CCR11*; James Hardie Industries, *Submission CR13*, 2.

46. Confidential Submission, *Submission CCR11*.

47. Para 2.85.

48. Confidential Submission, *Submission CCR11*.

49. See para 2.105-2.113, below, for further discussion of the Fund.

50. James Hardie Industries, *Submission CR13*, 2.

51. James Hardie Industries, *Submission CR13*, 2.

52. E *Strikwerda*, *Submission CR1*, 3.

Need for certainty in business

- 2.45 Those who support retention of the *Strikwerda* principle placed considerable weight on the potential commercial impact of its abolition on defendants and their insurers, particularly those who conduct their business in NSW, or who insure their activities.
- 2.46 It was contended that the *Strikwerda* principle should be retained because it is simply the application of a well-established common law principle, by reference to which defendants and insurers have organised their affairs for some time.⁵³
- 2.47 The fact that a principle is well-established is not, by itself, sufficient justification for its retention. However, it is recognised that the longer a principle is in place, the greater the weight that can be given to the argument that it should not be abolished. That is particularly so where employers and insurers have organised their affairs on the assumption that it will continue to be the law.
- 2.48 In this respect, it was submitted that the absence of legislative change since *Strikwerda* was decided in 2005 is consistent with the existence of a deliberate decision by Government to allow the decision to stand,⁵⁴ and amounted to a recognition that the current situation represents an appropriate balance between the “needs of unfortunate sufferers of asbestos related diseases and the obligations of those businesses and insurers that manage claims in this area”.⁵⁵
- 2.49 While we accept that commercial certainty for defendants and insurers, including their ability effectively to assess, and provide for, long-tail liabilities, is an important consideration, governments are not precluded from reassessing policy positions simply because they have not chosen to act in the past.

Claims resolution impact

- 2.50 It was further contended that the abolition of the *Strikwerda* principle would lead to an increase in “costs and inefficiencies”, as this would remove the incentive for victims to resolve their claims during their lifetime.⁵⁶
- 2.51 It is implicit in this argument that the risk that the operation of the *Strikwerda* principle may deprive dependants of the benefit of damages for non-economic loss provides an incentive for victims to complete personal injury actions before they die. This does have some advantages for defendants, and for cross defendants where claims for contribution are brought, since, in contested cases, they will have an opportunity to cross-examine the victim, in particular to clarify the time when, and the place of employment where, the exposure to asbestos occurred. This clearly can be important for achieving an appropriate allocation of responsibility in those cases that potentially involve multiple employers, third party defendants, and insurers.
- 2.52 It is far from clear whether victims would be likely to use the abolition of the *Strikwerda* principle as a tactical mechanism, in order to gain an advantage over defendants, by delaying commencement of their action. Plaintiff lawyers indicated, in consultation, that they would invariably seek to complete a case in the lifetime of the victim since, even if the *Strikwerda* offset were abolished, the total damages

53. CP14 [6.8].

54. Insurance Council of Australia, *Submission CR2*, 4-5.

55. Insurance Council of Australia, *Submission CR2*, 4-5.

56. Asbestos Injuries Compensation Fund, *Submission CR3*, 2.

recovered in an estate action following a victim's death would always be less than the amount recoverable by the victim before death.

- 2.53 Additionally, it was asserted, asbestos victims do not deliberately delay completion of their claims, because of the natural desire that they have to ensure that their dependants will have sufficient provision, through the recovery of damages.⁵⁷ The peace of mind that completion of proceedings in the DDT brings about for victims was the subject of particular emphasis in consultations.

Costs inflation

- 2.54 It was argued that the recovery of additional damages, that would be available as a result of the abolition of the *Strikwerda* principle, risks being outweighed by the costs to defendants of investigating, and possibly defending, a dependency action. As explained in one submission, dependency actions "are complicated and require significant preparation", and can result in the parties incurring costs that can well exceed the damages recovered by the dependant, which might amount to only a modest sum. As this submission pointed out, in many of these cases, there can be three or four defendants with cross claims for contribution, so that the costs of the proceedings could exceed \$100,000, and in "real terms" be closer to \$150,000.⁵⁸ This argument assumes that abolition of the *Strikwerda* principle would lead to an increase in the incidence of dependency actions. Otherwise it is of neutral significance, since estate actions and victims' proceedings also require investigation and, on occasions, the mounting of a defence and the bringing of cross-claims.

Potential for unforeseen consequences and net widening

- 2.55 Some of those supporting the retention of *Strikwerda* were concerned about the potential for unintended consequences arising, that could disadvantage defendants and their insurers. This view seems to have been influenced by prior experience of changes that were made to the dust diseases compensation system. An example of a change of this nature was the reintroduction in 2006 of damages for the loss of a victim's capacity to provide services to others.⁵⁹
- 2.56 The Second Reading speech in relation to this amendment made reference to two cases that highlighted the potential hardship that could be experienced if damages for the loss of the victim's capacity to provide services were not available. The first case involved a mesothelioma victim who was the primary caregiver for triplets. Her husband worked full-time. It was noted that, in the absence of damages for the loss of her capacity to provide those services "the family would have [had] much more limited means to raise and care for the children". The second case also involved a mesothelioma victim who provided care for his blind wife. She relied on him to do household chores, to shop and to provide transport to medical and other appointments. These were cited as examples of cases of "the greatest need", where seriously injured people should be able to recover damages for the domestic services that they could no longer provide to dependants.⁶⁰

57. Australian Lawyers Alliance, *Submission CR14*, 2. See further discussion of this issue: para 3.32-3.33.

58. Confidential Submission, *Submission CCR11*.

59. *Civil Liability Act 2002* (NSW) s 15B. This issue was raised in consultation, but is discussed in a different context by DLA Piper Australia, *Submission CR6* [60]-[64].

60. NSW, *Parliamentary Debates*, Legislative Council, 6 June 2006 (J Della Bosca).

- 2.57 However, it was asserted that the provision is now being used to recover damages for the loss of the victim's capacity to provide lesser services, for example babysitting services for grandchildren. In *Amaca Pty Ltd v Novek*, \$193,000 was awarded for a loss of this kind.⁶¹ This case, and cases like it, it was argued, do not represent a case of the "greatest need". It was suggested, accordingly, that any change to the operation of the *Strikwerda* principle could result in much higher costs than were initially predicted.
- 2.58 An allied concern expressed in consultation was that abolition of the *Strikwerda* principle would constitute a further step in an incremental process of providing enhanced benefits to dust disease plaintiffs, at the expense of the rights of defendants.
- 2.59 The view advanced was that, even if its abolition could be regarded as a minor change that affected a limited number of cases, it needs to be looked at in the broader context of a dust diseases system in NSW that already heavily favours plaintiffs. The concern raised in this respect was that, if the *Strikwerda* principle was abolished, those who represent plaintiffs might be encouraged to seek further changes that would enhance their entitlement to compensation.
- 2.60 This does not seem to be a legitimate argument. If it is appropriate, as a matter of equity or principle, to abolish the *Strikwerda* principle, then this should occur regardless of the possibility that there might be other areas of the law in respect of which change is sought in the future. The answer lies, in any event, in the hands of the legislature which should be entrusted with the responsibility of considering change on its merits.

Analysis of the arguments

- 2.61 In coming to a conclusion in relation to options 1 and 2, we have given consideration to the issue of whether abolition of the *Strikwerda* principle would be likely to result in an increase in claims incidence and in damages awards, and to the arguments of principle outlined in the submissions. The issue needs to be considered in a context that presupposes that damages for non-economic loss will be recovered in an estate action, and that a dependency action will be brought by those who, through inheritance, derive some benefit from those damages.
- 2.62 The starting point for any such analysis turns upon the quantum of damages for non-economic loss that might realistically be recovered in an estate action in the DDT. It is that sum which those who support abolition of the *Strikwerda* principle argue should be available to the dependants, in addition to the damages recoverable in the dependency action. On the other hand, those who favour retention of the principle argue that its abolition would give rise to over-compensation, would place dust disease claimants in an even more favourable position than that which currently exists, and would lead to an increase in proceedings, and in damages awards, that would be unfair to defendants and insurers, and that would threaten the viability of the current compensation arrangements.

61. *Amaca Pty Ltd v Novek* [2009] NSWCA 50.

- 2.63 In this regard, since 2009, the DDT has assessed damages for non-economic loss in mesothelioma cases in the range of \$215,000 - \$290,000.⁶² In the same period, the DDT has awarded damages for non-economic loss in other dust disease cases (asbestosis and silicosis) in the range of \$75,000 - \$150,000.⁶³ These figures do not take into account the high proportion of cases that are settled on terms not to be disclosed, without any published dissection of the settlement sum which is likely to include damages for past and future economic losses (where the proceedings have been brought and concluded by the victim in his or her lifetime), and for past economic losses (where the settlement is reached in an estate action). However, it was accepted in consultations that the damages for this head of loss, recovered in an estate action based on an asbestos-related death, would be likely to fall within a range of \$200,000 to \$300,000.

The nullification argument

- 2.64 We consider that there is considerable force in the argument that the application of *Strikwerda* principle in dependency actions effectively negates the beneficial purpose of the 1998 amendments that allowed the estate of dust diseases victims to recover damages for non-economic loss.
- 2.65 We also acknowledge that the abolition of the *Strikwerda* principle would be contrary to a long-standing principle that has been accepted in Australian law at least since the High Court's decision in 1945 in *Public Trustee v Zoanetti*.⁶⁴
- 2.66 However, the suggested reform of the law is not based on an argument that the law is wrong in principle. Rather, it relates to the desirability, in the special circumstances of dust diseases cases, of allowing the dependants the right to recover damages in respect of each form of loss. As such, its resolution becomes a question of policy for government to decide, in the light of the arguments summarised in this Report, and in the light of an assessment of the number of cases that might potentially be affected.

Would abolition of the *Strikwerda* principle result in over-compensation?

- 2.67 We are not persuaded by the argument that abolition of the *Strikwerda* principle would lead to over-compensation of dependants.
- 2.68 Had the victim brought and concluded an action for damages in the DDT, those damages would have included damages for the loss of future earning capacity as well as damages for the loss of his future capacity to provide domestic services. Damages in relation to each of these components would have been available to be passed on to the dependants, along with the general damages for pain and

62. *McGrath v Allianz Australia Insurance Ltd* [2011] NSWDDT 1 (\$215,000); *Phillips v Amaca Pty Ltd* [2010] NSWDDT 11 (\$250,000); *Booth v Amaca Pty Ltd* [2010] NSWDDT 8 (\$250,000); *Roberts v Amaca Pty Ltd* [2009] NSWDDT 28 (\$275,000); *Mooney v Amaca Pty Ltd* [2009] NSWDDT 23 (\$290,000); *Kirkpatrick v Babcock Australia Pty Ltd* [2009] NSWDDT 4 (\$280,000).

63. *Sim v Allianz Australia Ltd* [2010] NSWDDT 19 (\$75,000, asbestosis); *Hicks v Amaca Pty Ltd* [2010] NSWDDT 16 (\$150,000, asbestosis); *Doughan v Amaca Pty Ltd* [2010] NSWDDT 13 (\$150,000, asbestosis); *Brooks v Trend Roofing Pty Ltd* [2009] NSWDDT 11 (\$80,000, asbestosis); *Hawchar v Dasreef Pty Ltd* [2009] NSWDDT 12 (\$150,000, silicosis).

64. *Public Trustee v Zoanetti* (1945) 70 CLR 266, 281-282.

suffering, loss of amenities of life and loss of expectation of life, that would have been recovered by the victim in his or her action.

- 2.69 In circumstances where these proceedings were not concluded by the victim before death, and an estate action (that effectively continued the proceedings commenced but not concluded by the victim) and a dependency action are brought, then assuming the dependants are the ultimate beneficiaries of each of the damages awards, abolition of the *Strikwerda* principle would allow them to recover a sum that is substantially equivalent to that which the victim would have recovered and been able to pass to them. In fact, that sum is likely to be somewhat less than the sum that would have been recovered by the victim, whose future loss of earning capacity will be assessed by reference to his actual earnings, whereas the damages for the loss of financial support suffered by the dependants will be assessed by reference to the extent of their dependency on the victim at the time of death. Accordingly this is a situation where, notwithstanding the argument of principle that arises, pragmatic considerations favour the view that there would not be any overcompensation at the defendant's expense.

Would abolition of the *Strikwerda* principle be likely to lead to an increase in filings?

- 2.70 We have given consideration to this issue by reference to such information as has become available to us, in relation to the number of cases in which estate actions and dependency actions have historically been brought in the DDT, and also by reference to the question whether abolition of the *Strikwerda* principle might lead to an increase in such cases.

Historical filings

- 2.71 Information provided by the DDT Registry reveals the following historical pattern in relevant filings between 2005 and 2011:

Table 2.1: Post death actions in the DDT

Financial Year	Claims in which plaintiff died prior to completion of claim (estate actions) ⁶⁵	Actions brought by relatives or dependants
2005-2006	24	7 ⁶⁶
2006-2007	34	7
2007-2008	24	9
2008-2009	21	3
2009-2010	41	3
2010-2011	30	2

Source: Data supplied by the Dust Diseases Tribunal Registry

- 2.72 Further analysis of the proceedings brought by relatives or dependants of a deceased, within the previous three years reveals the following:

Table 2.2: Actions by relatives and dependants in the DDT

	Claimant	Victim	Losses claimed
2010/2011			
1.	Widow	Husband was renovator using James Hardie products.	<ul style="list-style-type: none"> ▪ financial benefits ▪ domestic and financial support
2.	Widow	Husband worked as boilermaker.	<ul style="list-style-type: none"> ▪ domestic/household services ▪ financial support
2009/2010			
3.	Widow	Husband was homebuilder and renovator using/exposed to asbestos products.	<ul style="list-style-type: none"> ▪ financial assistance ▪ provision of services (childcare – babysitting grandchildren)
4.	Daughter	Father was renovator and art teacher using asbestos products.	<ul style="list-style-type: none"> ▪ psychological illness and depression caused by grief at her father's death
5.	Widow	Husband was cleaner and labourer at a James Hardie factory (retired).	<ul style="list-style-type: none"> ▪ anxiety and depression as a result of caring for husband as well as loss following death

65. These numbers assume that the estate continued all claims in which a plaintiff died prior to the completion of a claim. It is possible that in a limited number of cases this did not occur and a claim was discontinued following the death of a plaintiff. The data supplied by the DDT do not allow us to determine if this is the case.

66. There is a slight discrepancy between the Registry's data for dependency actions and the number of dependency actions in 2005-2006 noted by the review undertaken by the Attorney General's Department of NSW and the Department of Premier and Cabinet of the Claims Resolution Process in 2007. That review stated that there had been 8 dependency actions in the 2005-2006 period: *Dust Diseases Claims Resolution Process: Data For 2006-07* (2007) 6 note 1.

2008/2009			
6.	Widow	Husband had worked as logger (retired).	<ul style="list-style-type: none"> ▪ major depressive disorder
7.	Widow (employed)	Husband had worked for RAAF.	<ul style="list-style-type: none"> ▪ funeral expenses ▪ financial support (in relation to care of children)
8.	Widow	Husband had been home renovator.	<ul style="list-style-type: none"> ▪ medical expenses ▪ funeral expenses ▪ cost of home care ▪ services ▪ financial dependency

Source: Data supplied by the Dust Diseases Tribunal Registry

2.73 It can be seen that of these cases, three involved claims for nervous shock or mental harm rather than dependency actions.

Limiting factors

2.74 There are at least two factors that are likely to limit the incidence of estate actions, particularly in relation to dust diseases cases:

- the fact, as shown below,⁶⁷ that there is a significant advantage, and hence an incentive for a dust diseases victim to commence and complete common law proceedings, in his or her lifetime, since, in most, if not all, cases, the damages that are recovered will exceed those that are likely to be recovered in an estate action; and
- the commencement and conclusion of those proceedings will bring peace of mind to the victim, to the extent that he or she can be satisfied that damages have been recovered for the wrong, that can then be passed on to his or her family.

2.75 There are also several factors, specific to dust disease cases (particularly asbestos-related claims), where the victim's death was due to work-related exposure to dust, that limit the potential for a proliferation in dependency actions, namely:

- the fact that the long latency period typically involved means that many victims will have retired by the time when their injury manifests itself, with the result that it would be unlikely that sufficient loss of financial support could be demonstrated that would justify bringing a dependency action;
- the fact that the death benefits available (lump sum and ongoing financial support), under the dust diseases workers compensation scheme, will, in many if not most cases, adequately provide for the dependants of a victim whose injury was work-related; and
- the fact that, as those benefits would need to be offset, or taken into account, when assessing the quantum of loss in a dependency action, there would normally seem to be little point in bringing a dependency action, at least in work-


67. Para 2.77-2.80.

related death cases, save where the victim was relatively young, or where there was a potentially large claim for the loss of his or her capacity to provide services.

- 2.76 Clearly there is an advantage for a dust-diseases victim, who is entitled to bring a common law action for damages in the DDT, to do so, and to attempt to conclude those proceedings in his or her lifetime. In Table 2.3 we provide:
- first, a comparison between the likely outcome in a situation where a dust disease victim who *is not entitled* to dust diseases workers compensation:
 - brings and concludes such proceedings in his or her lifetime (**scenario 1a**); and
 - one whose estate continues and concludes those proceedings after his or her death (**scenario 1b**);
 - secondly, a comparison between the likely outcome in a situation where a dust disease victim who *is entitled* to dust diseases workers compensation:
 - brings and concludes such proceedings in his or her lifetime (**scenario 2a**); and
 - one whose estate continues and concludes those proceedings after his or her death (**scenario 2b**).
- 2.77 The differences in the outcomes are obvious, as is the effect of the application of the *Strikwerda* principle in the context of scenario 1b, that being the situation in which it would be likely to have the greatest impact.
- 2.78 Scenario 2a provides support for the argument that the dependants of dust diseases victims, who are able to complete a common law claim in the DDT before death, will fare better than the dependants of victims who are unable or fail to complete those proceedings before death, and that, to this extent, the *Strikwerda* principle frustrates the near equality in outcome that might have been expected.⁶⁸ It also supports the argument that dust diseases victims have a significant incentive to bring and complete their actions in the DDT before dying, a circumstance that, as we have observed, is likely to limit the incidence of estate and dependency actions.
- 2.79 In relation to scenario 2b, the *Strikwerda* principle does not arise for application, on the assumed facts, because the combination of the lump sum and weekly payments paid, and to be paid, by the DDB to the surviving spouse (amounting to \$542,956) will more than cover the \$451,786 that could be claimed for loss of financial support in a dependency action. The *Strikwerda* principle might have an impact in relation to scenario 2b, if the victim had earned substantially more than \$1,500 net per week or the surviving spouse could claim for loss of services, so that the financial loss the surviving spouse could claim in a dependency action would be greater than the amounts that the DDB could pay to the surviving spouse.

68. The argument, however, assumes that the dependants inherit through the deceased the full benefit of the common law damages recovered in the DDT.

Table 2.3: Comparison of different recovery scenarios – dust diseases victims

		Comparison of different recovery scenarios				
		Reference	Scenario	Scenario	Scenario	Scenario
			1a	1b	2a	2b
AMOUNTS AWARDED AT JUDGMENT						
NON ECONOMIC LOSS						
Pain & Suffering	a	250,000	250,000	250,000	250,000	
Loss of Life	b	29,000	30,000	29,000	30,000	
TOTAL NON ECONOMIC LOSS	A=a+ b	279,000	280,000	279,000	280,000	
CARE (ie Griffiths v Kerkemeyer damages)	B	79,966	13,193	79,966	13,193	
ECONOMIC LOSS						
Husband's Claim						
Past Loss of Income	c	78,225				
Past Loss of Income Net of Husband's DDB Payments	d			31,123		
Present Value of Future Loss of Income	e	545,725				
Present Value of Future Loss of Income Net of Husband's DDB Payments	f			532,941		
Sub Total	C=c+d+e+f	623,950	-	564,064	-	
Estate's Claim						
Past Loss of Income	g		14,151			
Estate's Loss of Income Net of Husband's DDB Payments	h				(512)	
Sub Total	D=g+h	-	14,151	-	No Loss	
Wife's Claim – Dependency Action						
Loss of Financial Support	i		451,786		451,786	
Less:						
Wife's Past & Present Value of Future Weekly DDB Payments	j				274,581	
Wife's Lump Sum Payment On Death	k				268,375	
Value of Estate's Damages for Non Economic Loss	l		280,000		280,000	
Sub Total	E=i-(j+k+ l)	-	171,786	-	No Loss	
TOTAL AWARDED AT JUDGMENT	F=A+B+C+D+E	982,916	479,130	923,030	293,193	
AMOUNTS AWARDED BY DUST DISEASES BOARD						
Husband's Past Weekly DDB Payments (Net of Tax)	m			46,621	17,542	
Husband's Future Weekly DDB Payments (Net of Tax)	n			12,784		
Wife's Past Weekly DDB Payments (With Nil Tax)	o				9,569	
Present Value of Wife's Future Weekly DDB Payments	p			258,727	265,012	
Wife's Lump Sum Payment On Death	q			291,040	268,375	
TOTAL AWARDED BY DUST DISEASES BOARD	G=m+n+o+p+q	-	-	609,172	560,498	
GRAND TOTAL	H=F+G	982,916	479,130	1,532,202	853,691	

Examples prepared by Furzer Crestani Services, Chartered Accountants - Forensic Accounting & Financial Investigations (refer www.fcsp.com.au)

The assumptions underlying this table are detailed in Appendix A to this Report.

- 2.80 As Table 2.3 shows, the abolition of the *Strikwerda* principle is likely to have the greatest impact in cases where the dependants of dust diseases victims are able to bring a dependency action, but are not entitled to the receipt of dust diseases workers compensation. Many of these claimants will be the dependants of the third wave of victims.
- 2.81 There are again some limiting factors in relation to the likely incidence of claims by this group. They include:
- the fact that the victims will have a similar incentive to bring and conclude claims for damages in their lifetime, to that which applies to those workers who have access to dust diseases compensation;
 - the fact that, in many cases, the onset of the disease will not become apparent, or the death occur, until relatively late, at a time when the degree of financial dependency will be relatively small, or of limited duration; and
 - the fact that, in some third wave cases, there may be considerable difficulties in identifying the time, place and nature of the exposure to asbestos, and, consequently, in identifying a defendant or defendants who could be joined to a dependency action.
- 2.82 Independently of the above, it can be observed that, although members of this group will not have an entitlement to dust diseases workers compensation, they will, in some cases, have access to ongoing financial support through life insurance or sickness and accident insurance taken out by the deceased, or to a pension, or to superannuation benefits consequent upon the victim's death. These would not be offset or deducted when the quantum of their loss is assessed for the purposes of a dependency action, yet, in a practical sense, their availability may mean that dependants will not pursue such a claim.
- 2.83 So far as the historical filings in the DDT, and the limiting factors noted above, can serve as a guide to the future, they would not seem to support any concern that abolition of the *Strikwerda* principle would result in any significant increase in dependency actions.

New reasons for claims

- 2.84 However, in the course of the submissions and consultations, it was suggested that there are some other factors that need to be taken into account that may, in the future, bring about an increase in filings.
- 2.85 For example, it was suggested that the age for first diagnosis for asbestos-related diseases is becoming lower,⁶⁹ and that this could lead to an increase in filings, by reason of the likelihood that, at the time of diagnosis, the victim will have dependants (both children and a spouse).
- 2.86 Whether this could result in an increase in the likelihood of a dependency action being brought would still depend upon the time of death, and upon whether the victim can bring and conclude an action for damages before his or her death.

69. Statistics published by Safe Work Australia, pertaining to diagnoses of mesothelioma, seem to support this view, indicating increases in categories of younger victims for both men and women, and, since 2003, a reduction in the numbers of people over 80 who were diagnosed: Safe Work Australia, *Mesothelioma in Australia: Incidence 1982 to 2007, Mortality 1997 to 2007* (2011) 9.

- 2.87 In that regard, it was pointed out that improvements in the treatment and management of asbestos-related disease make it more likely that victims will live long enough to complete their claims before they die. If so, this would tend to offset any potential increase in claims by dependants, since the completion of a claim by a victim will extinguish the possibility of the estate or dependants bringing any further claim for common law damages.⁷⁰
- 2.88 Another factor of relevance that was identified is the possibility that there are some categories of dependants, who potentially have claims that have not been pursued to date, and that abolition of the *Strikwerda* principle might make such claims “more commercially viable”, particularly for those dependants who do not have recourse to statutory dust disease workers compensation, but who could bring a dependency action.⁷¹
- 2.89 For example, it was suggested that the ability of dependants to bring claims for the loss of domestic services provided by the victim could substantially increase the pool of people likely to bring dependency actions.⁷²
- 2.90 Our attention was also drawn to the fact that a dependent’s action can be brought by a surviving spouse who was entitled to a pension, as part of a couple. The death of a spouse in such a case would result in the reduction of the pension received by the surviving spouse.⁷³ The resulting loss of support, it was argued, could provide a reason for bringing a dependency action. Abolition of the *Strikwerda* principle, the argument continued, could make such claims “more commercially viable”, giving rise to an increase in the incidence of dependency actions.⁷⁴
- 2.91 Whether this line of argument is more theoretical than real, is by no means clear. It would depend on the extent of the deduction in the pension, and on an allocation of how much of the full pension would have been expended solely for the victim’s benefit, since that proportion of the pension would not constitute a loss to the dependant.
- 2.92 While it is the case that dependency actions can be brought in order to recover damages for the loss of the kinds of support indicated, we doubt that abolition of the *Strikwerda* principle would be a factor that tipped the balance in favour of bringing such an action.

Would abolition of the Strikwerda principle have a significant impact on the costs of claims?

- 2.93 It is acknowledged that the dust diseases compensation scheme is supported by a fund that consists of money transferred from funds that were established under previously existing laws, of money paid by Workcover from contributions paid by insurers, and of money provided by the State. Save for the contributions made by the State, the primary sources for the fund have been, and continue to be, employers who are also exposed to common law claims. It is acknowledged that,

70. See para 1.59.

71. Asbestos Injuries Compensation Fund, *Submission CR3*, 2; DLA Piper Australia, *Submission CR6* [14]-[16].

72. Asbestos Injuries Compensation Fund, *Submission CR3*, 2; DLA Piper Australia, *Submission CR6* [16].

73. DLA Piper Australia, *Submission CR6* [14]-[15].

74. DLA Piper Australia, *Submission CR6* [15].

unlike the position of employers, who are indemnified in relation to their liability for modified common law damages under the *Workers Compensation Act 1987* (NSW), no such indemnity is provided in relation to employers who are held liable for common law damages in dust-related claims.

- 2.94 It is acknowledged that there are some cases where abolition of the *Strikwerda* principle would allow the dependant of a person, whose death was dust-related, to recover a larger sum through the combined outcome of an estate action and a dependency action. However, as we have noted, there are a number of factors that are likely to limit the bringing of a dependency action supplementary to an estate action.
- 2.95 The claims costs argument essentially turns upon the possibility that the abolition of the *Strikwerda* principle will make the bringing of a dependency action more viable, for example, where there is a potential to recover damages for lost services. We recognise the possibility of this being so, yet the number of cases where this would arise would seem to be relatively small. For the majority of cases it appears likely that the dependants would continue to prefer to take the statutory benefits in preference to damages in a dependency action.
- 2.96 Otherwise the claims costs argument turns upon the concern that any increase in dependency actions, as a consequence of the abolition of the *Strikwerda* principle, will result in increased legal and investigative costs. However, apart from the need to investigate any dependency issues, it would seem that much of the investigative and legal work would need to have been undertaken in relation to the estate action. If so, the extra costs associated with the dependency action would not seem to be excessive.

Would abolition of the *Strikwerda* principle give rise to an unfair inequality in treatment?

- 2.97 As we have noted, those claimants who are entitled to dust diseases workers compensation and common law damages, in accordance with the dust diseases scheme that is in place in NSW, do have a number of advantages compared, first, with general workers who are entitled to statutory compensation, and to modified common law damages under the *Workers Compensation Act 1987* (NSW); and, secondly, compared with those whose entitlements are confined to modified common law damages under the *Motor Accidents Compensation Act 1999* (NSW), or under the *Civil Liability Act 2002* (NSW).
- 2.98 Among those benefits in relation to proceedings in the DDT are:
- the procedural and evidentiary advantages that apply;
 - the absence of any limitations periods or of any caps or thresholds (with some limited exceptions) on the award of damages;
 - the application of a 3% (rather than a 5%) actuarial discount in the calculation of future losses;⁷⁵
 - the availability of interim and provisional awards of damages; and

75. See para 1.60.

- the availability, in certain circumstances, of a procedure for reconsidering any matter that has been previously dealt with.
- 2.99 Additionally, the bringing and conclusion of a common law damages action in the DDT does not extinguish the entitlement of a worker, and his or her dependants, to ongoing dust diseases workers compensation benefits.⁷⁶ This represents a departure from the position that applies to general workers under the *Workers Compensation Act 1987* (NSW).
- 2.100 This departure does not, however, go so far as to allow the claimant to receive compensation twice for the same loss. There has been some difference in opinion as to whether this depends on a discerned legislative intention that the dust diseases benefits are not to be regarded as a benefit additional to, or cumulative upon, the common law damages, or by reason of the common law requirement that the claimant mitigate his or her loss.
- 2.101 It is now established that, where the claimant has an established or clear entitlement to the receipt of dust diseases workers compensation in respect of weekly payments or the payments of future medical or related expenses, then they are to be offset or deducted from any common law damages that are awarded in relation to those losses.⁷⁷ They are not, however, offset in relation to the assessment of damages for non-economic loss.⁷⁸
- 2.102 When making any such assessment, where the entitlement of the claimant to the dust diseases compensation benefits is yet to be established, or has not yet been sought, the quantum of that compensation will need to be assessed in accordance with the principles enunciated in *Malec v J C Mutton Pty Ltd*.⁷⁹ Moreover, it would seem that if the assumption as to the claimant's entitlement to these damages is not made good, then it would be possible for the claimant to return to the DDT, to have the damages reassessed pursuant to s 13(6) of the *Dust Diseases Tribunal Act 1989* (NSW).⁸⁰
- 2.103 Although there are clearly differences in the outcomes for claimants, dependent upon the scheme pursuant to which compensation and/or damages are to be assessed, we are not persuaded that this provides sufficient reason, of itself, for retention of the *Strikwerda* principle. The differences that exist across the several different compensation schemes are entrenched in legislation that was introduced to reflect a number of considerations of policy and of affordability, including those that relate to the imposts upon employers, motorists, insurers and others, that support those schemes.
- 2.104 Comparative equality in outcome has not driven reform of the complex compensation systems that are in place in NSW. As we pointed out in CP14,⁸¹ the Statement of Compatibility presented with the amendments that abolished the *Strikwerda* principle in Victoria, which addressed the human rights implications of

76. *West v Workers Compensation (Dust Diseases) Board* (1999) 18 NSWCCR 60 [4].

77. *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1; *CSR Ltd v D'Arcy* (1996) 40 NSWLR 721; *Commercial Minerals Ltd v Harris* [1999] NSWCA 94; *Downes v Amaca Pty Ltd* [2010] NSWCA 76.

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

79. *Malec v J C Mutton Pty Ltd* (1990) 169 CLR 638.

80. *Downes v Amaca Pty Ltd* [2010] NSWCA 76 [145]-[150] (Handley AJA).

81. CP14 [6.24]-[6.25].

the law,⁸² concluded that it was not discriminatory to treat those with asbestos-related injuries differently from those with other injuries because they are not groups in the same or similar circumstances.⁸³ Consequently, victims of different injuries can be treated differently, without being treated unequally. Of more relevant concern is the impact of *Strikwerda* on dust diseases cases.

The James Hardie agreement

- 2.105 A final factor of some relevance, in relation to any potential reform of the law in this area, is the existence of the James Hardie agreement, so far as it is concerned with asbestos-related claims.
- 2.106 As discussed in CP14, James Hardie has entered into an agreement (the Amended Final Funding Agreement (“FFA”)), with the NSW Government and with other parties, in respect of its asbestos liabilities.⁸⁴ These liabilities have been transferred to two former subsidiary companies, and a compensation fund (the Asbestos Injuries Compensation Fund (“AICF”)) has been established to pay out those liabilities to asbestos victims affected by James Hardie’s products.
- 2.107 The FFA includes provisions relating to possible future regulatory or legislative changes, which may have an adverse effect on the liabilities of the former James Hardie entities. The FFA provides that a breach by the NSW Government of the agreement would give rise to a right to bring an action for damages.⁸⁵ The FFA also provides for a renegotiation or readjustment of its terms, if a government, other than the NSW Government, does anything that would constitute a breach of the FFA if it were done by the NSW Government.⁸⁶
- 2.108 A breach of the FFA does not necessarily mean that James Hardie will bring proceedings for damages. Whether it will do so inevitably depends on whether the consequences of any change in the law for the AICF, would justify the costs of such proceedings.
- 2.109 In this respect, it is noted that James Hardie has not made any attempt to renegotiate the FFA, or to secure a readjustment of it, in the light of the changes that have seen the *Strikwerda* principle abolished in three States. Some stakeholders argued that this tended to suggest that its abolition would not constitute an issue of any substance.⁸⁷ However, it is recognised that simply because James Hardie has not acted in the past, does not foreclose such action in the future, in particular, having regard to the fact that approximately 30-40 percent of the claims brought against it come from NSW.⁸⁸

82. The Statement of Compatibility was presented in compliance with the *Charter of Human Rights and Responsibilities 2006* (Vic) s 28.

83. Victoria, *Parliamentary Debates*, Legislative Assembly 9 October 2008, 4067 (T Holding).

84. CP14 [3.36]-[3.40]. 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 (14 December 2010) (“FFA”).

85. FFA cl 13(2).

86. FFA cl 14.

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

88. KPMG, “Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities to be met by the AICF Trust – Prepared for Asbestos Injuries Compensation Fund Ltd” (19 May 2011) 35.

2.110 In its submission, James Hardie drew attention to the fact that the AICF is facing a funding shortfall. In these circumstances, it advised:

If the funds available to the AICF are not sufficient to pay all claims received, any requirement, to pay increased claims and claims costs resulting from a *Strikwerda* change could prejudice AICF's ability to pay future claims to persons exposed to asbestos.⁸⁹

2.111 As a general proposition, it is undesirable that any government take action that would involve it in a breach of an agreement to which it is a party, unless there is a good cause for doing so. Clearly this is an issue on which it would need to take legal advice and engage in negotiations with James Hardie.

2.112 In these circumstances, we do not consider the existence of the agreement, of itself, to be persuasive one way or another, save so far as the existence of the agreement has a relevance in relation to the capacity of one significant source of funds to meet future asbestos-related damages claims, and in relation to the general argument that there should be no change in the law, because of the limited capacity of the available funding pools.

2.113 In that regard we also note that its existence has no relevance to claims arising from other forms of dust diseases caused by substances other than asbestos, and that, as a result of the decision of the High Court in *BHP Billiton Ltd v Schultz*⁹⁰ the concerns that might otherwise have existed, in relation to forum shopping causing an increase in filings in NSW, would seem to have been allayed.

Conclusion

2.114 On balance, we have reached the view that the *Strikwerda* principle can operate in a way that is potentially unfair, in its application to some dependants of dust diseases victims (and particularly victims of asbestos-related disease), depending upon whether or not:

- the victim was able to finalise personal injury proceedings in the DDT before dying; or
- an action was commenced before the victim died.

2.115 The considerations of cost and commercial certainty identified earlier are important, but ultimately their weight depends on whether abolition of the *Strikwerda* principle would generate any significant increase in filings or in the costs of claims. Our general impression is that it would not do so, although this could only be confirmed by actuarial prediction, that we are not in a position to make.

2.116 Actuarial assessment of whether abolition of the *Strikwerda* principle would be likely to lead to an increase in the number of cases in which estate actions and dependency actions were filed, and hence in the overall liabilities of dust diseases defendants and their insurers, would depend on several factors. Attention would at least need to be given to:

- (a) whether a change in the law would alter litigation practice;

89. James Hardie Industries, *Submission CR13*, 2.

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

- (b) the extent to which there is likely to be any change in the patterns, to date, of:
- (i) those people who die of a dust disease who are survived by a dependant, and the nature, duration and extent of any such dependency;
 - (ii) the proportion of cases respectively involving victims (and consequently their dependants) who were entitled to statutory dust diseases workers compensation, and victims (and their dependants) who had no such entitlement;
 - (iii) the proportion of claims that are brought and concluded by victims of a dust disease during their lifetime;
 - (iv) the incidence of the partners or spouses of those who suffer a dust disease being in the workforce;
 - (v) the extent to which victims of dust disease provided domestic services to others and the nature and extent of those services;
 - (vi) the age at which those with a dust disease have the disease diagnosed, the age at which they die, each of which may be dependent on advances in diagnostic or treatment modalities.

2.117 We are not in a position to make any assessment ourselves in this regard, and we note that several of the submissions received acknowledged the difficulty in making any such prediction. In these circumstances, it is acknowledged that before taking legislative action, it would be prudent for the Government to procure an independent actuarial assessment.

2.118 Otherwise we do not consider that there is any reason of principle turning upon equity between the categories of claimants subject to the modified common law damages regimes, or upon the over-compensation or double-compensation argument, that necessarily stands in the way of abolition of the principle.

Recommendation 2.1

Section 3(3) of the *Compensation to Relatives Act 1897* (NSW) should be amended to insert a direction that in assessing damages in a claim under that Act, a court is not to take into account any damages recovered or recoverable for the benefit of the estate of the deceased person under s 12B of the *Dust Diseases Tribunal Act 1989* (NSW).

Loss of services claims

2.119 As we noted above,⁹¹ the potential for an unexpected increase in claims liabilities, in the event of dependants instituting proceedings for the loss of the gratuitous services that were previously supplied by a victim, is an issue of concern to some defendants and insurers.

2.120 The issue arises out of an ambiguity, and possible overlap, in relation to the circumstances in which damages are recoverable for lost capacity of a victim to

91. Para 2.89-2.90.

provide domestic care services. The *Civil Liability Act 2002* (NSW) was amended in 2006, by inserting s 15B which allows damages to be recovered for the loss of a plaintiff's capacity to provide those services to another person, subject to certain thresholds and caps.⁹² The provision was extended to dust disease cases.⁹³ There is no temporal limit specified in the *Civil Liability Act*, in relation to the recoverability of these damages, and the concern has been expressed that it would be open to the estate, in an estate action, to claim for the loss of such capacity prior to death, as well as for any continued loss of capacity that resulted from the death. A potential for overlap is then suggested to arise from the fact that the dependants who were the recipients of care services provided by the victim (that met the threshold requirements) could also make a claim for the loss of those services as part of their dependency action.

- 2.121 It was submitted that the interaction between s 15B damages and damages in a dependency action:

remains the subject of confusion. That confusion arises because the separate notions of loss of capacity and loss of dependency are conflated.⁹⁴

It was suggested that, if the *Strikwerda* deduction or offset is removed, a dependency action might subsequently be brought for damages for the same loss as that which was recovered in the estate action, resulting in double compensation for the same harm.⁹⁵

- 2.122 Subsection 15B(7) of the *Civil Liability Act* could arguably meet this situation by preventing an award of damages in a dependency action for a loss of services, where damages have already been awarded in relation to a loss of capacity to provide those services.⁹⁶ There was no specific reference to this provision in the second reading speech to the Bill, however it does appear that it was intended to address any overlap and to ensure that "there will be no double recovery for the one loss".⁹⁷
- 2.123 One solution to any persisting uncertainty would involve confining the loss of capacity claim in an estate action to the period up to the time of the victim's death.⁹⁸ This would involve adding to the list of exclusions from the damages recoverable in an estate action for which provision is made in the 1944 Act.⁹⁹
- 2.124 Following the death, any loss of services would then become subject to a dependency action for loss of support. Such an approach would clarify the

92. *Civil Liability Amendment Act 2006* (NSW) inserting s 15A and 15B into the *Civil Liability Act 2002* (NSW). The amendments overcame the High Court's decision in *CSR Ltd v Eddy* (2005) 226 CLR 1, which had overruled the earlier NSW Court of Appeal's decision in *Sullivan v Gordon* (1999) 47 NSWLR 319.

93. *Civil Liability Amendment Act 2006* (NSW) sch 1[2].

94. *CSR Ltd*, *Submission CR8* [27].

95. *Asbestos Injuries Compensation Fund*, *Submission CR3*, 3.

96. The subsection reads: "A person (including a dependant of a claimant) may not be awarded damages for a loss sustained by the person by reason of the claimant's loss of capacity to provide gratuitous domestic services if the claimant (or the legal personal representative of a deceased claimant) has previously recovered damages in respect of that loss of capacity."

97. NSW, *Parliamentary Debates*, Legislative Assembly, 10 May 2006, 23018 (N Newell).

98. *CSR Ltd*, *Submission CR8* [27]-[29].

99. Under *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(a).

interaction of s 15B damages in an estate action and in a dependency action, and would avoid the risk of double recovery.¹⁰⁰

Recommendation 2.2

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

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

Claims resolution process

- 2.125 The Claims Resolution Process ("CRP"), which applies to all asbestos-related claims in the DDT,¹⁰¹ was introduced following a NSW Government review of the costs associated with dust diseases compensation claims. In March 2006, it recommended reforms to improve the efficiency of the system dealing with such claims.¹⁰²
- 2.126 It was intended to speed up the process for resolving these claims by promoting the early provision of information and particulars¹⁰³ and by encouraging early settlement.¹⁰⁴ At the same time, it was intended to result in legal and administrative cost-savings.¹⁰⁵
- 2.127 The CRP provides for compulsory mediation in relation to all asbestos-related claims,¹⁰⁶ although there is provision for certain claims to be removed from the mediation process.¹⁰⁷ They include:
- urgent claims;¹⁰⁸
 - claims that the parties agree should not be subject to the CRP (for example, where the claim raises novel issues that are unlikely to be resolved by the CRP);¹⁰⁹ or
 - claims where the DDT approved removal from the CRP, because the failure of a party to comply with a requirement of the CRP has resulted in substantial prejudice or substantial delay.¹¹⁰

100. CSR Ltd, *Submission CR 8* [29].

101. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 14.

102. Attorney General's Department of NSW & The Cabinet Office, *Review of Legal and Administrative Costs in Dust Diseases Compensation Claims: Report* (2005) 1.

103. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 13(a).

104. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 13(b).

105. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 13(c).

106. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 18.

107. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 22.

108. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 22(1)(a).

109. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 22(1)(b).

110. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 22(1)(c).

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- 2.128 The CRP sets out timetables that must be met in the process of mediation, with deadlines specified for the conclusion of mediation.¹¹¹ Malignant claims – those involving asbestos-induced carcinoma or mesothelioma¹¹² – are subject to shorter timetables than non-malignant claims.¹¹³
- 2.129 In cases where there are multiple defendants, the CRP also provides for an apportionment process to determine contributions between those defendants.¹¹⁴ Where there is a dispute between defendants as to the apportionment of liability, the CRP provides for a determination by an independent third party, referred to as a “contributions assessor”.¹¹⁵
- 2.130 The CRP has been subject to at least one completed review, the results of which were contained in a final report issued in January 2007. This report recommended minor amendments, which were implemented in the *Dust Diseases Tribunal Regulation 2007* (NSW). The review also recommended annual publication of data relating to the CRP.¹¹⁶ This recommendation resulted in CRP data for 2006-2007 being published in December 2007,¹¹⁷ and data for 2007-2008 being published in December 2008.¹¹⁸
- 2.131 The published data provides an insight into aspects of the CRP such as the numbers of claims being filed, the average costs for parties, the amount of compensation recovered and the time taken to finalise claims.¹¹⁹
- 2.132 An Issues Paper was released in December 2008 as part of an ongoing review of the CRP.¹²⁰ It suggested that the data available did not bear out concerns relating to delay between filing and service of statements of claim,¹²¹ or problems in relation to the resolution of malignant claims.¹²² Some stakeholders noted that submissions had been provided in response to the Issues Paper, but that no final report followed. In addition, it appears that no data has been published for the periods 2008-2009, 2009-2010 or 2010-2011.
- 2.133 The regulation establishing the CRP regime is slated for staged repeal under the *Subordinate Legislation Act 1989* (NSW) on 1 September 2012. As such, unless an

111. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 32, 33.

112. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 12(1).

113. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 33(1).

114. *Dust Diseases Tribunal Regulation 2007* (NSW) pt 4 div 5.

115. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 49.

116. Attorney General's Department of NSW and The Cabinet Office, *Review of the Dust Diseases Claims Resolution Process: Report and Proposed Regulation: Report and Proposed Dust Diseases Tribunal Regulation 2007* (2007) 41.

117. Attorney General's Department and the Department of Premier and Cabinet, *Dust Diseases Claims Resolution Process: Data for 2006-07* (2007).

118. Attorney General's Department of NSW and the Department of Premier and Cabinet, *Review of the Dust Diseases Claims Resolution Process: Issues Paper* (2008) Appendix A.

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

120. Attorney General's Department of NSW and the Department of Premier and Cabinet, *Review of the Dust Diseases Claims Resolution Process: Issues Paper* (2008).

121. Attorney General's Department of NSW and the Department of Premier and Cabinet, *Review of the Dust Diseases Claims Resolution Process: Issues Paper* (2008) 20-21.

122. Attorney General's Department of NSW and the Department of Premier and Cabinet, *Review of the Dust Diseases Claims Resolution Process: Issues Paper* (2008) 26.

order is made, a new regulation will need to be drafted and a regulatory impact statement prepared before that date.

- 2.134 In our consultation process, some stakeholders raised concerns about the current operation of some aspects of the CRP. In particular, we were advised that the CRP hampers the ability of plaintiffs to finalise malignant claims in their lifetime and that, as a consequence, the problem of bedside hearings, which the CRP had been intended to address, continues.
- 2.135 Otherwise we were advised that the CRP does not adequately deal with cases concerning contribution issues, and that this similarly leads to undue complexity and delay in the finalisation of proceedings.

Recommendation 2.3

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

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

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- 3.1 The third option that we identified in Consultation Paper 14 – *Compensation to Relatives* (“CP14”) was the removal of the restriction contained in s 12B of the *Dust Diseases Tribunal Act 1989* (NSW). Section 12B restricts the right of recovery for non-economic loss in estate actions to those cases where the victim had commenced proceedings in the Dust Diseases Tribunal (“DDT”), before his or her death.¹
- 3.2 Prior to the introduction of s 12B, a dust disease victim could only recover damages for non-economic loss if the proceedings were completed before death. As we noted earlier,² the amending provision was introduced to avoid deathbed crisis hearings,³ and “to avoid the arbitrariness and distress” that arose in circumstances where damages for non-economic loss died with the plaintiff.⁴
- 3.3 In this chapter, we consider the arguments for and against an amendment that would remove the requirement that proceedings must have been commenced before the plaintiff’s death. We have identified three possible approaches, namely an amendment that would either:
- eliminate the requirement altogether;
 - allow such proceedings to be instituted after death, either within the ensuing period of 12 months; or subject to the grant of leave by the DDT on being

1. NSW Law Reform Commission, *Compensation to Relatives*, Consultation Paper 14 (2011) ch 7.
2. See para 2.6.
3. See NSW, *Parliamentary Debates*, Legislative Council, 17 November 1998, 9973 (J Shaw); NSW, *Parliamentary Debates*, Legislative Assembly, 29 October 1998, 9436 (K Yeadon).
4. NSW, *Parliamentary Debates*, Legislative Council, 17 November 1998, 9973 (J Shaw).

satisfied that, in all the circumstances of the case, such leave should be granted;⁵ or

- confine the elimination of the requirement to asbestos-related diseases (that is, not extending it to other dust-related diseases).

3.4 We also consider whether an amendment should be made to allow the joinder of additional defendants after the plaintiff's death by the plaintiff's personal representative, and/or by an existing defendant seeking contribution or indemnity from an unjoined party.

Arguments in favour of removing the requirement

3.5 Damages for non-economic loss in a mesothelioma case can be in the range of \$250,000 to \$300,000, with awards for pain and suffering and loss of amenities constituting a large part of these awards.⁶ One submission pointed out that, in some dust disease cases, damages for non-economic loss (particularly pain and suffering) may be the principal head of damages.⁷ To bar such recovery, where the victim has failed to commence proceedings while alive, it was pointed out, can have very serious consequences for the victim's family.

3.6 Several submissions drew attention in this respect to the pressures that are placed on victims, and their families, where the diagnosis of an asbestos-related disease occurs shortly before the victim's death.⁸

3.7 The families of victims, with whom we spoke, also emphasised the nature of the stress that follows diagnosis. As they explained, the compressed timeframes which some asbestos victims face, mean that they may not be in a fit physical or mental state to engage lawyers. Instead their primary concerns become treatment or palliative care, and spending time with their families.

3.8 Additionally, since some families may not always appreciate that it is necessary to commence proceedings in the DDT to secure the right to recovery of damages for non-economic loss, they may delay seeking legal advice, in the belief that they will be able to recover suitable compensation following the victim's death.

3.9 Those who support removing the current requirement argue that this would address the problems faced by those victims and their families. It would also provide for any case where the fact that the victim's death was asbestos-related was only discovered after death.

5. CP14 [7.16].

6. See, eg, *McGrath v Allianz Australia Insurance Ltd* [2011] NSWDDT 1; *Phillips v Amaca Pty Ltd* [2010] NSWDDT 11; *Booth v Amaca Pty Ltd* [2010] NSWDDT 8; *Roberts v Amaca Pty Ltd* [2009] NSWDDT 28; *Mooney v Amaca Pty Ltd* [2009] NSWDDT 23; *Kirkpatrick v Babcock Australia Pty Ltd* [2009] NSWDDT 4.

7. M Lunney, *Submission CR12*, 4.

8. Australian Lawyers Alliance, *Submission CR14*, 2; D Shoebridge, *Submission CR7*, 2; M Gatt, *Submission CR4*.

- 3.10 It was argued, in any event, that there are no principled grounds for the retention of a provision that produces a potentially different outcome for families dependent solely on whether or not the victim had commenced the action prior to death. If the estate can recover damages for non-economic loss, then it was argued this should be the case regardless of when an action was commenced.⁹

Arguments in favour of retaining the requirement

- 3.11 Those who were opposed to any amendment of s 12B contended that it currently “strikes an appropriate balance between rights of plaintiffs and rights of defendants”,¹⁰ and that any change would shift the balance in a way that would be detrimental to defendants.
- 3.12 The core of this argument was the concern that, if claims are lodged after the victim’s death, defendants will be placed at an evidentiary disadvantage, it being contended that:
- In many asbestos claims, the relevant events occurred 30 or more years ago. Often, the only available evidence relating to the time, place and nature of the exposure, will need to come from the plaintiff. In any other context, it was asserted, a permanent stay of proceedings could be obtained. Accordingly the “currently well-understood rule” should be maintained.¹¹
 - Where there are liability issues, the defendant will be unable to test, through cross-examination, the evidence or the veracity of a victim’s claims.¹²
 - The inability of a defendant to obtain corroborative evidence from a victim, in support of a claim for contribution against other wrongdoers, would limit the defendant’s possibility of success in any such proceeding, and potentially increase the financial burden borne by that defendant.¹³
 - Where there are liability issues, there is a risk of victims choosing deliberately to delay commencing proceedings, to the likely prejudice of defendants.¹⁴
- 3.13 Attention was drawn to the fact that, in dust diseases cases, all limitation periods have been abolished.¹⁵ The requirement for the commencement of proceedings prior to death, was seen to act as a de facto limitation period, that provides some safeguards against the potential loss of evidence, and that avoids the uncertainty and the “disruptive effect of unsettled claims on commercial intercourse”.¹⁶ Its

9. See M Lunney, *Submission CR12*, 4; NSW Bar Association, *Submission CR15* [3].

10. CSR Ltd, *Submission CR8* [34].

11. CSR Ltd, *Submission CR8* [35].

12. Asbestos Injuries Compensation Fund, *Submission CR3*, 4; Suncorp, *Submission CR9*, 3; Confidential Submission, *Submission CCR11*.

13. Asbestos Injuries Compensation Fund, *Submission CR3*, 4; Confidential Submission, *Submission CCR11*.

14. Confidential Submission, *Submission CCR11*.

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

16. NSW Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, Report 50 (1986) [1.10], quoted in CSR Ltd, *Submission CR8* [38].

removal could lead to new claims being brought many years after the victim's death, with a significantly unfair impact upon defendants and insurers.

- 3.14 It was also argued that the entitlement of the estate to claim damages for non-economic loss, in dust disease cases, must be balanced against a need to "maintain the appropriate level of funding for dust disease claims, given that this is, in effect, a closed pool of funding".¹⁷ Any expansion of the entitlement to claim would threaten the viability of that pool, by allowing the recovery of damages for non-economic loss, in proceedings commenced after the victim's death, that could lead to an increase in claim cost and frequency.
- 3.15 It was also argued that the pressures experienced by asbestos victims, and their families, are no different from the pressures faced by other victims of wrongful acts or omissions,¹⁸ and do not justify special treatment, or the creation of a further imbalance in the rights attaching to the separate compensation schemes that are currently in place.
- 3.16 Otherwise, it was asserted that the pre-death commencement requirement had been the subject of lengthy submissions when the regulations establishing the Claims Resolution Process ("CRP")¹⁹ were being drafted. It was submitted that, since their introduction, the CRP has worked effectively, and that the majority of claims are commenced and resolved in a timely manner before death. The exceptions are those claims where there are significant liability or evidentiary issues.²⁰
- 3.17 Independently of the arguments that focused on the potential costs to defendants of any change in the law, some of those opposed to amendment contended that it would not achieve any beneficial purpose for claimants.
- 3.18 In this respect, several stakeholders asserted that DDT practice is well adapted to the quick and efficient resolution of asbestos claims, and that lawyers acting for plaintiffs in this area of litigation will invariably commence proceedings as soon as possible, if there are any indications that the plaintiff had an asbestos-related condition.
- 3.19 Another submission doubted whether there was any tangible risk of an asbestos-related disease remaining undiagnosed until after the victim's death. It argued that the current state of knowledge is such that it is extremely unlikely that a victim would be unaware that he or she had an asbestos-related disease, or that a treating doctor would not diagnose it. In any event, it was contended, legal proceedings will invariably be commenced, even though there was no certain diagnosis of its presence, wherever there was a possibility that asbestos might be involved in a victim's medical condition.²¹ It was pointed out, in this respect, that many of the specialists who treat asbestos-related diseases routinely refer patients to legal

17. Suncorp, *Submission CR9*, 3.

18. DLA Piper Australia, *Submission CR6* [21]-[22].

19. See *Dust Diseases Tribunal Regulation 2007* (NSW).

20. DLA Piper Australia, *Submission CR6* [20].

21. DLA Piper Australia, *Submission CR6* [27]-[28].

practitioners acting in this area. It might be expected that unions whose members have been affected by dust diseases would do likewise.

- 3.20 Finally, it was suggested by some respondents, that removal of the pre-death commencement requirement could, in fact, be counterproductive for claimants, because the preparation of a claim, particularly the gathering of relevant evidence, is easier while the victim is still alive. It was argued that, unless there is some “pressure on victims to obtain legal advice prior to their demise, they will not be made aware of the evidentiary issues which they will need to address”.²² Requiring victims to commence the action in their lifetime was said to be desirable in order to ensure that they have the strongest possible case, including the ability personally to provide the evidence required in support of their case.

Analysis of the arguments

Increase in inequality between categories of injury victims

- 3.21 It is accepted that repeal of the commencement requirement in s 12B could potentially operate to enlarge the group of dust disease claimants who are able to bring a claim for damages for non-economic loss, and, hence, increase the inequality between dust diseases victims and other classes of claimants.²³ However, that inequality already exists and the point in issue in this chapter is essentially one of procedure rather than substance.

Increase in number of claims following death

- 3.22 The primary concern that defendants and insurers expressed was related to the possibility that removal of the commencement requirement would result in an increase in the number of claims being brought after death, either because they were delayed claims, or were claims that would not previously have been brought.

Delayed claims

- 3.23 One concern of defendants is that victims might delay their claims, in order to gain a tactical advantage, by closing off the opportunity to subject their claims to the same degree of scrutiny, as would have been the case if it was still possible to cross-examine them.
- 3.24 We find more persuasive the argument that it would not have that result, “as many victims find comfort in knowing that their compensation has been received and will be available to take care of their families”.²⁴ We also note that the lawyers whom we consulted did not support the view that it was in interests of a victim to delay commencing proceedings.

22. DLA Piper Australia, *Submission CR6* [24].

23. DLA Piper Australia, *Submission CR6* [30]-[31].

24. Australian Lawyers Alliance, *Submission CR14*, 2.

- 3.25 In most cases there would seem to be little advantage, in fact, for a victim to delay commencing proceedings until after his or her death so as to allow an estate action to be brought. Instead, it seems that there would be significant disadvantages in delaying bringing a claim until after death, since such claims are likely to result in a reduced recovery of damages for the estate. For example, damages for future loss of earnings or earning capacity will not be recoverable in an estate action.²⁵

New claims

- 3.26 Of greater potential relevance is the question whether removal of the requirement would result in estate actions being commenced, that would not otherwise have been brought.
- 3.27 It is difficult to estimate with any accuracy the number of cases in which a victim has failed to commence a claim in his or her lifetime.
- 3.28 The anecdotal experience of stakeholders with whom we consulted is that, so far as they are aware, there are very few cases where a victim has not brought proceedings during his or her lifetime. Nevertheless, the possibility of such cases arising cannot be entirely excluded. In this regard we were advised in consultations that there have been some occasions where the presence of an asbestos-related disease was not discovered until an autopsy was carried out, although this was not thought to be a common occurrence.
- 3.29 Perhaps of greater relevance is the concern expressed, in consultations, that, apart from the s 12B requirement, dust disease claims are not subject to any limitation periods. Repeal of that requirement could open the way for claims to be commenced, by the estate of a deceased victim, at a time well after the victim's death, which could disadvantage defendants in investigating and then defending those cases.²⁶ This could however be addressed by allowing a limited period, after the victim's death, for commencement of the proceedings, or by adding a leave requirement.

Financial impact of change

- 3.30 It is not possible for us to estimate the number of cases that would be potentially affected by repeal of the s 12B requirement, and we doubt that any firm actuarial estimate could be provided of the overall costs of doing so. However in light of past experience, current medical knowledge and diagnostic practice, and current litigation practice, we believe that removal of the requirement would be unlikely to result in any significant increase in claims liabilities.²⁷

25. Confidential Submission, *Submission CCR11; Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(a)(ii).

26. See Insurance Council of Australia, *Submission CR2*, 5.

27. See Suncorp, *Submission CR9*, 3.

Possible solutions

- 3.31 There does not appear to be any principled reason for maintaining a distinction that depends on whether or not the victim commenced proceedings during his or her lifetime.²⁸
- 3.32 However, the concerns that defendants and insurers raised, in relation to the need for certainty in claims finalisation and in relation to allowing them a suitable opportunity for claims investigation, do need to be addressed. The submissions which supported the abolition of the requirement in fact recognised that some limitation might be required for pragmatic reasons.²⁹ Three possible approaches to reform have been identified.

Post-death extension period

- 3.33 One possible approach, that was supported by some stakeholders, would allow the claim to be brought so long as proceedings were commenced either before, or within 12 months after, the victim's death.³⁰
- 3.34 A 12-month extension would assist in addressing the concerns that defendants and insurers have, arising out of the uncertainty that surrounds the making of provision for their future asbestos liabilities, in relation to a disease that typically has a lengthy latency period. Allowing a 12-month limit extension would assist in achieving "relative certainty" for business,³¹ and would not seem unduly to affect the capacity of defendants to investigate such claims.
- 3.35 It would also provide useful flexibility for the rare case where the victim's illness was not diagnosed until after death.
- 3.36 It is generally presumed that the executor or administrator of an estate will complete the administration of an estate within one year of a person's death.³² This includes disposing of assets, paying funeral expenses, debts and legacies and handing over any residue to the relevant beneficiaries.³³ Although the one year period is not absolute, and the principle is not enshrined in statute in NSW,³⁴ the underlying assumption is that estates will be administered reasonably quickly following death. The bringing of a claim for non-economic loss within a one year period after death should not disrupt that practice, save in a relatively small number of cases.
- 3.37 One submission argued that the extension should be for only three months, as that should be sufficient for the completion of any post mortem examination that might

28. M Lunney, *Submission CR12*, 4.

29. M Lunney, *Submission CR12*, 4; NSW Bar Association, *Submission CR15*, 2.

30. Australian Lawyers Alliance, *Submission CR14*, 2.

31. NSW Bar Association, *Submission CR15*, 2.

32. See R F Croucher and P Vines, *Succession - families, property and death: text and cases* (LexisNexis Butterworths, 3rd ed, 2009) [17.66].

33. See *Wightwick v Lord* (1857) 6 HLC 217; 10 ER 1278, 1286.

34. See, eg, *Probate and Administration Act 1898* (NSW) s 92 which puts some time minimum limits on the distribution of assets in an estate, but does not specify a maximum time in which it must, or should, occur.

identify or confirm the presence of an asbestos-related disease, and its contribution to the death of the victim.³⁵

- 3.38 The same submission also suggested that there be a requirement that a Statement of Particulars be filed at the same time as the Statement of Claim, in lieu of the current practice that allows the particulars to be lodged within the period of six months following the filing of the Statement of Claim.³⁶ This would serve to minimise any prejudice occasioned to the defendant.³⁷ We note that an informal process has emerged by which plaintiffs notify defendants that they have commenced proceedings, prior to formally serving them with the Statement of Claim and Statement of Particulars, in order to allow defendants to begin any necessary investigations. This seems to be a sensible solution to the problem of late service.

Extension subject to leave

- 3.39 An alternative to the foregoing approach would involve the DDT being empowered to grant the estate leave to bring the relevant claim upon proof that, in all the circumstances of the case, it would be reasonable to extend the period for action. Matters that could be taken into account would include the period between diagnosis and death, the pressures generated on the family and ignorance of their right to claim such loss. However, the introduction of a leave requirement would not assist the need for certainty in claim finalisation, and it would add another step in the litigation process, that would generate further costs to the parties. For those reasons it does not seem to be a desirable option.

Restrict any extension to asbestos-related deaths

- 3.40 This option would permit a relaxation of the current requirement, so as to allow a claim for non-economic loss to be brought after the victim's death, but only in the case of asbestos-related deaths. It would recognise the particular problems faced by the families of mesothelioma victims. However, it does not seem appropriate to introduce any additional area of discrimination between different categories of dust disease victims.³⁸

Our conclusion

- 3.41 The problem identified in this chapter is a narrow one that appears to affect a very small number of asbestos victims and their families.
- 3.42 The Parliament has previously recognised that it is appropriate to amend laws to take into account the special difficulties attaching to asbestos-related diseases, and the stress associated with the speed of their progression.
- 3.43 In the light of the impact that the failure to commence proceedings in time can have on the dependants of asbestos victims, we are of the view that an amendment of

35. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 24(4); *Uniform Civil Procedure Rules 2005* (NSW) r 6.2(4)(a).

36. *Dust Diseases Tribunal Regulation 2007* (NSW) cl 24(4); *Uniform Civil Procedure Rules 2005* (NSW) r 6.2(4)(a).

37. DLA Piper Australia, *Submission CR6* [34]-[35].

38. NSW Bar Association, *Submission CR15* [4].

s 12B, to remove the pre-death filing requirement, is appropriate. It would cater for those potentially rare cases where proceedings are not instituted before death, and it would remove a provision that can have arbitrary consequences.

- 3.44 We do not support an unqualified removal of the provision, that would potentially allow claims to be brought many years after the death of the victim. Rather we are of the view that a 12-month extension period would provide sufficient protection for the families of those who die from dust diseases, and would not unfairly disadvantage defendants, or their insurers.
- 3.45 We consider that, in the case of proceedings commenced following the death of a dust disease victim, it would be appropriate to require that the Statement of Claim and the Statement of Particulars are both filed and served within the 12-month period following the victim's death. This would prevent plaintiffs from obtaining a de facto extension of the 12-month period, by filing a Statement of Claim at the end of the 12 months which remained valid for a further 6 months.

Recommendation 3.1

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

- (1) to allow recovery of damages for non-economic loss by an estate, so long as proceedings have been commenced by the victim before his or her death, or by the estate no later than 12 months after the victim's death; and
- (2) to require, in the case of proceedings commenced after the victim's death, that both the Statement of Claim and the Statement of Particulars are filed and served within the 12-month limit.

Joinder of defendants after death

- 3.46 The operation of s 12B has been limited by the decision of the Court of Appeal in *Amaca Pty Ltd v Cremer* which has held that the reference to "proceedings" in s 12B(2) is a reference to proceedings commenced by a plaintiff against a particular defendant. As the date of the commencement of the proceedings, against an additional defendant, is the date of the amendment which joined that party, the plaintiff's estate is unable to recover damages for non-economic loss from a defendant who is joined as an additional party after the plaintiff's death.³⁹ This approach would also appear to exclude a defendant or defendants, after the plaintiff's death, from claiming contribution in relation to damages for non-economic loss from another potential defendant who had not been joined before the plaintiff's death.⁴⁰
- 3.47 This decision has the potential to act to the detriment of a plaintiff in an estate action, where the existence of an additional, or more appropriate, defendant does not emerge, or become known, until after the victim's death. It also has the potential for adversely affecting a defendant, who is subsequently held responsible to pay damages for non-economic loss in an estate action, and who only becomes aware,

39. *Amaca Pty Ltd v Cremer* (2006) 66 NSWLR 400 [80], [92], [194]-[196], [202].

40. See *Amaca Pty Ltd v Cremer* (2006) 66 NSWLR 400 [85]-[87], [186]-[192].

after the victim's death, of the existence of another party from whom contribution could be sought.

- 3.48 This can have a particular significance for defendants who may have only a short time between the service of a Statement of Claim and the date of the victim's death to make the necessary enquiries in support of contribution proceedings. The practice, that allows a Statement of Claim to be filed but not served on the defendant, can be problematic in this respect.
- 3.49 In our view, whether or not Recommendation 3.1 is accepted, s 12B should be amended so as to allow the joinder by the plaintiff, in the estate action, of any defendant additional to those who had been joined in the proceedings instituted by the victim, and that a similar entitlement should be extended to defendants to bring cross claims against parties not already joined as defendants, or the subject of existing cross claims

Recommendation 3.2

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

4. Further options and other matters

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4.1 In Consultation Paper 14 – *Compensation to Relatives* (“CP14”) we raised three other options, in addition to those discussed in Chapters 2 and 3 of this Report. These options were:

- the introduction of an award of bereavement damages (commonly known as solatium) for the grief suffered as a result of the death of a family member (Option 4);
- the extension of the availability of damages for non-economic loss in estate actions beyond dust disease cases to all cases of wrongful death or wrongful delayed death, and removing the effect of the *Strikwerda* principle with respect to all such cases (Option 5); and
- the expansion of the range of benefits accruing on death to the estate or individual dependants which are to be disregarded when assessing damages in a dependency action (Option 6).

4.2 The three options were proposed in CP14 as ways to address questions of equity between categories of personal injury claimant, as well as addressing the effect of the *Strikwerda* principle in dust diseases cases.

4.3 Here we note the arguments relating to each of the options together with our reasons for rejecting them as possible avenues for reform in NSW at this time. In addition, at the end of this chapter, we note one additional matter raised by our review.

Option 4 – Bereavement damages

4.4 This option would allow a court or tribunal to award bereavement damages for the grief suffered by family members in wrongful death cases. They are not available in

NSW in relation to any of the existing categories of claimants for common law damages.¹

- 4.5 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 bereavement damages could then function as an alternative to the award of damages for non-economic loss in an estate action, although conceptually it comprises a different form of loss.
- 4.6 Bereavement damages are awarded directly to family members of wrongful death victims, not to the estate.² They are not taken into account in the assessment of damages in a dependency action.³ An award of solatium is not a *benefit* that results from the victim's death. Rather, it is a *loss* that the dependant suffers as a result of the death.
- 4.7 Such a reform could be applied generally or confined to dust disease cases.
- 4.8 Some jurisdictions do allow the award of bereavement damages although they differ in relation to the way in which they can be provided. For example:
- in one jurisdiction, bereavement damages are awarded at a fixed rate to entitled family members;⁴
 - in another jurisdiction, bereavement damages are capped at a maximum amount, and the court has the discretion to award up to that amount;⁵ and
 - in a third jurisdiction, the court has a discretion to determine the entitlement to, and quantum of, bereavement damages awards to family members who fall within specified categories.⁶
- 4.9 It is important to note that there is a difference between bereavement damages and damages for nervous shock (which are available in NSW), although there is the possibility for the boundaries between the two types of harm to be blurred unless care is taken to avoid that occurring.⁷ In the case of nervous shock, it is necessary

1. See *Public Trustee v Zoanetti* (1945) 70 CLR 266, 285 (Dixon J), quoting *Matthew v Flood* (1939) SASR 389, 392 which indicates that in a dependency action, damages for harm such as mental anguish or loss of society due to death could not be awarded "unless and until the legislature has altered that position if it should think fit to do so". NSW has not altered the common law position.

2. See, eg, *Civil Liability Act 1936* (SA) s 28(1), 29(1); *Compensation (Fatal Injuries) Act* (NT) s 8(2). It was suggested in two submissions that it was unlikely that the James Hardie Fund would be liable to pay bereavement damages because the Fund has been held to be liable to pay compensation only where there was personal exposure to asbestos or asbestos products, and that this liability does not extend to nervous shock claims: *Asbestos Injuries Compensation Fund, Submission CR3*, 4; DLA Piper Australia, *Submission CR6* [41]-[42]. See *Asbestos Injuries Compensation Fund Pty Ltd* [2011] NSWSC 97. The Court made this determination by constructing the terms of the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* (NSW) and the Final Funding Agreement. It is, however, not clear whether the same conclusion would be reached in relation to bereavement damages.

3. *Public Trustee v Zoanetti* (1945) 70 CLR 266.

4. *Fatal Accidents Act 1976* (UK) s 1A.

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

6. See, eg, *Compensation (Fatal Accidents) Act* (NT) s 10(1), 10(3)(f).

7. See CP14 [8.8].

to demonstrate that the harm caused amounted to a recognised psychiatric illness.⁸ In contrast, the harm for which bereavement damages compensate, 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. Claims for nervous shock or “pure mental harm” are generally subject to certain limitations imposed by Part 3 of the *Civil Liability Act 2002* (NSW). However, the *Civil Liability Act* generally does not apply in dust diseases cases.⁹ As a result, nervous shock claims in dust diseases cases are adjudicated according to common law principles.

- 4.10 No particular model for the award of bereavement damages in NSW was proposed in CP14, rather it was asked whether they should be introduced, and, if so, on what terms.¹⁰

The submissions

- 4.11 Four submissions supported the introduction of an award of bereavement damages in NSW,¹¹ although there was some disagreement as to the specifics of any such scheme.
- 4.12 It was argued that bereavement damages are desirable because they demonstrate the “importance of society recognising the grief and suffering of those who are wrongfully deprived of the life and company of a close loved one”.¹²
- 4.13 Three submissions supported the limiting of bereavement damages to a small class of claimants, such as spouses, parents and children.¹³ The fourth submission supported a broader class of claimant, extending the right to claim to any person able to bring a dependency action.¹⁴ Two submissions supported an entitlement based on proof of the existence of the relevant relationship. These two submissions also supported the award of a sum set by statute on proof of the existence of eligibility.¹⁵ The two other submissions supported a discretionary award guided by statutory criteria.¹⁶ One of these submissions indicated that the award should be subject to a statutory cap, but that the maximum sum needed to be adequate to “address the loss, and to justify a claim in the event of a dispute”.¹⁷ The other submissions did not address the issue of the size of any possible award.

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

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

10. See CP14, ch 8.

11. D Shoebridge, *Submission CR7*, 3; M Lunney, *Submission CR12*; Australian Lawyers Alliance, *Submission CR14*; NSW Bar Association, *Submission CR15*.

12. Australian Lawyers Alliance, *Submission CR14*, 2.

13. M Lunney, *Submission CR12*, 5; Australian Lawyers Alliance, *Submission CR14*, 4; NSW Bar Association, *Submission CR15* [7].

14. D Shoebridge, *Submission CR7*, 3.

15. M Lunney, *Submission CR12*, 5; Australian Lawyers Alliance, *Submission CR14*, 4.

16. D Shoebridge, *Submission CR7*, 3; NSW Bar Association, *Submission CR15* [8]-[9].

17. NSW Bar Association, *Submission CR15* [8].

- 4.14 Some of the submissions in favour of bereavement damages accepted that it would be necessary to put limits on their availability in order to minimise any adverse impact on defendants and insurers.¹⁸
- 4.15 Other submissions, however, opposed the introduction of bereavement damages on the following grounds:
- There is no current public policy problem warranting such an extension of damages in NSW.¹⁹
 - Such a new cause of action would have a “material effect on claim incidence” resulting in new claims that could not be brought under the current law.²⁰
 - There would be an increase in costs for defendants and their insurers. These costs would result not only from the greater number of claims, but also from the nature of the claims, requiring expert assessment of grief. The total cost of defending a claim could well outweigh the sum recovered, particularly if bereavement damages were capped at a low level. Increased costs would create an upward pressure on insurance premiums.²¹
 - There are problems inherent in defining the categories of family member who should be entitled to an award of bereavement damages. Fixed categories may result in problematic outcomes in some cases, such as where the deceased has been married more than once, and has children from more than one marriage. There could also be unfairness to family members who experienced grief but who fell outside a recognised category, because they would be denied any recovery.²²
 - Designating a very broad category of claimants in an attempt to avoid unfairness to claimants would increase the prejudice to the financial interests of insurers and defendants.²³
 - There would be problems associated with establishing proof of entitlement in any system that provided discretion to the court, particularly where it was necessary to assess the extent of a person’s grief.²⁴
 - Every person will die. The current law recognises this by providing for the recovery of damages in appropriate circumstances “where the actual manner of death gives rise to an abnormal grief reaction”, in particular by allowing recovery for nervous shock or psychiatric injury.²⁵
- 4.16 It was argued in some submissions, that bereavement damages should not be restricted to dust diseases cases for a number of reasons, including the fact that this would compound the inequity between the several categories of claimants in

18. M Lunney, *Submission CR12*, 5; Australian Lawyers Alliance, *Submission CR14*, 3.

19. Insurance Council of Australia, *Submission CR2*, 6; Suncorp, *Submission CR9*, 4.

20. DLA Piper Australia, *Submission CR6* [39].

21. See Insurance Council of Australia, *Submission CR2*, 6; DLA Piper Australia, *Submission CR6* [39], [40], [48]; Suncorp, *Submission CR9*, 4.

22. Asbestos Injuries Compensation Fund, *Submission CR3*, 4; DLA Piper Australia, *Submission CR6* [37].

23. DLA Piper Australia, *Submission CR6* [37].

24. DLA Piper Australia, *Submission CR6* [48]-[50].

25. Confidential Submission, *Submission CCR11*.

personal injury cases, giving rise to a further benefit available in dust diseases cases that would not be available elsewhere.²⁶

- 4.17 It was contended in some submissions, that substituting bereavement damages for damages for non-economic loss, awarded to the estate in dust diseases cases (although, logically, the argument would apply generally), would be preferable to damages for non-economic loss because bereavement damages more directly recognise the harm compensated.²⁷ It was noted in a submission that were such a substitution made, it would be necessary to make this an unlimited entitlement, to ensure that the awards kept parity with current awards of damages for non-economic loss.²⁸
- 4.18 Awards for bereavement that had parity with the current levels of awards for non-economic loss would, however, seem to distort the effect of bereavement damages. Such damages are, in general, awarded at a relatively low rate, due to the difficulty in quantifying an appropriate award for the subjective experience of grief.
- 4.19 There would seem to be little reason in principle to privilege the grief of family members in only one category of injury by allowing recovery of damages for their bereavement.²⁹ However, as it was argued in one submission, making bereavement damages available to family members in all personal injury cases would amount to a significant change in the law, and could have significant unintended consequences.³⁰

Our conclusion

- 4.20 There are no grounds for limiting any award of bereavement damages only to dust diseases victims. Furthermore, there are not sufficient grounds for introducing a more general bereavement damages award. Grief has never been recognised as compensable harm in NSW and there has been no identified problem which would justify changing the established approach. Furthermore, there are problems inherent in determining who should be entitled to an award and the terms on which it should be available. Finally, the direct and indirect costs that would be associated with this new cause of action are not justified, given the lack of any compelling reason for its introduction.

Option 5 – Extend the entitlement to damages for non-economic loss to all estate actions

- 4.21 A radical option would be to amend the *Law Reform (Miscellaneous Provisions) Act 1944 (NSW)* (“1944 Act”) to allow claimants in estate actions to recover damages for non-economic loss in all situations related to a dust disease, whether or not the cause of action that was vested in the deceased, and survived his or her death.

26. DLA Piper Australia, *Submission CR6* [41].

27. NSW Bar Association, *Preliminary Submission PCR8* [17].

28. NSW Bar Association, *Submission CR15* [10].

29. Australian Lawyers Alliance, *Submission CR14*, 2; NSW Bar Association, *Submission CR15* [5].

30. Suncorp, *Submission CR9*, 3.

- 4.22 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.
- 4.23 If this were to occur, it would be necessary to consider whether the *Strikwerda* principle should be abolished in respect of all such cases, or confined to dust diseases cases.
- 4.24 The bar on recovery of damages for non-economic loss in estate actions, that is contained in s 2(2)(d) of the 1944 Act, was introduced in NSW because of a concern that the estate, as an “impersonal body”, ought not receive damages for the pain and suffering of the deceased.³¹
- 4.25 This option arose for consideration because of the equity implications that we are required to consider under our terms of reference. Its introduction, it was argued, would ensure fairness between all categories of claimant.³²

The submissions

- 4.26 Four submissions supported this option, arguing that it was inconsistent to allow the recovery of damages for non-economic loss in dust disease cases, but not in any other cases.³³ As it was put, if the purpose behind the removal of the bar on recovery of damages for non-economic loss in dust disease estate cases is valid, it is “equally valid in all categories” of injury.³⁴
- 4.27 One concern that was expressed, in the course of the Parliamentary debates, was that if damages for non-economic loss die with a person, it becomes cheaper for wrongdoers to kill a person, rather than simply to injure their victim.³⁵ One submission made a similar point, arguing that, although the seriousness of the injury is greater when it causes death, it is when the injury causes death that such damages cannot be recovered.³⁶
- 4.28 Several submissions put forward arguments against any change to the current approach, including the contention that there is no relevant public policy concern warranting the overturning of established principle.³⁷

31. NSW, *Parliamentary Debates*, Legislative Assembly, 18 October 1944, 523 (V Treatt). See also NSW, *Parliamentary Debates*, Legislative Assembly, 18 October 1944, 524 (V Treatt); Legislative Assembly, 18 October 1944, 527 (Richardson); Legislative Council, 5 December 1944, 527, 1488 (H Manning).

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

33. D Shoebridge, *Submission CR7*, 3; M Lunney, *Submission CR12*; Australian Lawyers Alliance, *Submission CR14*; NSW Bar Association, *Submission CR15*.

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

35. NSW, *Parliamentary Debates*, Legislative Council, 8 November 1944, 828 (R Downing).

36. M Lunney, *Submission CR12*, 5.

37. Insurance Council of Australia, *Submission CR2*, 6; Suncorp, *Submission CR9*, 5.

- 4.29 Another submission argued that the exception to the general bar on recovery of damages for non-economic loss that applies in dust diseases cases was introduced to deal with the special features that those cases exhibit.³⁸ No equivalent circumstances exist in other injury cases warranting a more general overruling of the principle.
- 4.30 There was some disagreement as to the likely extent of the financial impact of this option, if it were adopted.
- 4.31 It was argued, in one submission, that the financial impact would be limited, because it would be likely that the larger claims (that is, those involving higher awards for pain and suffering) would be those cases in which the victim lived longer after suffering the relevant harm. This would maximise the possibility of the victim completing a claim for compensation in his or her lifetime without the need for the estate to bring an action. Additionally, it was submitted that the *Civil Liability Act 2002* (NSW) puts limits on the recovery of damages for non-economic loss. This means that damages would only be awarded in “respect of fairly serious injuries which continue over a fairly long period”.³⁹
- 4.32 Conversely, another submission suggested that allowing the recovery of damages for non-economic loss, in all estate actions, might allow the commencement of a large number of claims which had not previously been brought.⁴⁰ The limitation periods that apply in personal injury cases would provide a bar to some such cases, but would not eliminate the possibility of the commencement of actions that were not time-barred. These new claims would carry with them costs which could have significant financial consequences for defendants and their insurers.⁴¹ As a result, a change of this kind would risk significantly impacting on the cost and frequency of claims, that would then place upwards pressure on insurance premiums.
- 4.33 Another submission indicated that it saw a “potential for expansion” of the class of plaintiffs, who might benefit from damages for non-economic loss being awarded to an estate. This submission acknowledged that such an extension might be appropriate, in cases of non dust-related latent illness, such as non dust-related cancer, where there had been pain and suffering experienced between an injury and death. However, it suggested that any such change would be contingent on actuarial modelling to determine whether this option would “present an overly burdensome impact on society”.⁴²
- 4.34 Finally, one submission argued that there would be no point in the extension, because, outside dust diseases cases, deaths attributable to actionable wrongs occur in most cases instantaneously or shortly after the accident. In such situations, there would be no pain and suffering occasioned and, therefore, nothing to

38. Suncorp, *Submission CR9*, 4.

39. M Lunney, *Submission CR12*, 5-6. *Civil Liability Act 2002* (NSW) pt 2, specifically s 16, limits awards for non-economic loss to \$350,000 which is to be awarded only in the most extreme case. No damages can be awarded unless the severity of the non-economic loss is at least 15% of the most extreme case.

40. Insurance Council of Australia, *Submission CR2*, 6.

41. DLA Piper Australia, *Submission CR6* [67]. See also Suncorp, *Submission CR9*, 4.

42. Confidential Submission, *Submission CCR11*.

compensate.⁴³ However, this submission did not acknowledge the fact that damages for non-economic loss also extend to the loss of expectation of life.

Our conclusion

- 4.35 Although consistency in the law is a desirable goal, we consider that expanding the availability of damages for non-economic loss, in estate actions, beyond those arising out of a dust-related death, is undesirable in the current circumstances. There is no evidence to suggest that the factors which motivated the Parliament to bar the recovery of damages for non-economic loss in estate actions, are no longer valid. Furthermore, there continue to be specific features in dust diseases cases which justify an exception.

Option 6 – Alter the list of benefits which are to be disregarded when assessing damages in dependency actions

- 4.36 A final and far-reaching option would deal more generally with the deductions that are required in a dependency action, for example, by providing that all benefits accruing to the estate are to be disregarded, as is currently the case in England and Wales⁴⁴ and the Northern Territory.⁴⁵
- 4.37 It is acknowledged that, in 1999, the Law Commission of England and Wales 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.⁴⁶ The recommendation has not been implemented.
- 4.38 An alternative approach would be to mirror that which applies in Tasmania by 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 then taken into account in the assessment of damages.

The submissions

- 4.39 There was support, in some submissions, in favour of this option. Three submissions endorsed the reasons that were advanced in CP14 for excluding all benefits from consideration in dependency actions.⁴⁷ In short, these reasons were:
- It is easy for courts to apply.
 - It may be fairer to dependants as it does not privilege certain kinds of benefits or investments over others. That is, it does not favour a person who has purchased

43. Confidential Submission, *Submission CCR11*.

44. *Fatal Accidents Act 1976* (UK) s 4.

45. *Compensation (Fatal Injuries) Act* (NT) s 10(4)(g).

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

47. Australia Lawyers Alliance, *Submission CR14*, 5; NSW Bar Association, *Submission CR15* [13].

life insurance over investing in shares as a way of advancing the interests of surviving dependants if they bring a dependency claim. It avoids unfair outcomes when one dependant's gain due to a death is excluded, but another's is taken into account.⁴⁸

- It ensures the lump sum damages received by a claimant will be larger, thereby assisting to avoid the inevitable outcome that any lump sum will ultimately be inadequate to compensate a person's losses.⁴⁹
- 4.40 However, there was broad opposition from defendants and insurers to any change of the kind proposed.
- 4.41 Several submissions stated that there is no relevant public policy concern that would justify the implementation of this option.⁵⁰
- 4.42 It was submitted that excluding all benefits received by a dependant would have the result that, in many cases, dependants would receive double compensation.⁵¹
- 4.43 The general application of this option in both dust diseases and other cases would mean that costs would be affected in all categories of personal injury claim. This would put upward pressure on insurance premiums over the wide range of activities that are subject to personal injury and motor vehicle insurance.⁵²
- 4.44 As noted above, an alternative to excluding all benefits would be to adopt the Tasmanian approach, which excludes inherited benefits received by the dependant to a specified value. There was very little support for this approach. In particular, attention was directed to its likely impact in relation to housing values, which extend over a very considerable range in NSW, and the difficulties in ensuring that any cap kept pace with inflation.
- 4.45 One submission supported a cap on the basis that it would assist to ensure that "dependency claims retain at least some meaning as an action that covers the dependant's personal loss".⁵³ However, such an approach, it was argued, is likely to be arbitrary, leading to perceptions of unfairness between cases depending on which side of the statutory cap they fell.⁵⁴

Our conclusion

- 4.46 The current categories of benefit excluded from consideration in dependency actions are either private insurance-type arrangements or employment-related or welfare benefits. Their exclusion means that wrongdoers cannot take advantage of

48. M Lunney, *Submission CR12*, 7. See England and Wales, Law Commission, *Report on Personal Injury Litigation – Assessment of Damages*, Report 56 (1973) [256]; United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978) vol 1 [539].

49. See CP14 [10.15].

50. See, eg, *Insurance Council of Australia, Submission CR2*; CSR Ltd, *Submission CR8*; Suncorp, *Submission CR9*.

51. DLA Piper Australia, *Submission CR6* [73].

52. Suncorp, *Submission CR9*, 5.

53. M Lunney, *Submission CR12*, 7.

54. NSW Bar Association, *Submission CR15* [16].

their victims' (or their employers' or the state's) prudence in making arrangements to take care of their dependants.

- 4.47 Were all benefits to be excluded from the assessment of damages in a dependency action, there would obviously be a significant potential increase in the damages awarded in dependency actions that would result in upwards pressure on insurance premiums.
- 4.48 Introducing Option 6 would have the effect of overruling the *Strikwerda* principle in dust diseases cases, as well as for all other categories of personal injury. We do not believe that NSW should consider the implementation of this option, or the adoption of the Tasmanian approach.

Recovery for non-economic loss in cases of supervening events causing death

- 4.49 In general, s 2(2)(d) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) has the effect that any entitlement to damages for non-economic loss suffered by a victim of an injury caused by a wrongful act or omission will die with that person.
- 4.50 The major exception to this rule is in dust diseases cases where s 12B of the *Dust Diseases Tribunal Act 1989* (NSW) currently allows the estate of a deceased dust diseases victim to recover damages for non-economic loss where the victim had commenced proceedings in the Dust Disease Tribunal prior to his or her death.
- 4.51 In CP14 we identified a further exception to the general rule in s 2(2)(d) as an apparent anomaly. Where a person is injured by a wrongful act or omission, but then dies from some unrelated cause or event, s 2(2)(d) does not apply to extinguish the estate's entitlement to non-economic loss. Thus, for example, if a person's leg is amputated due to medical negligence and he or she dies from a heart attack prior to completing the action against the negligent medical practitioner, the estate of the deceased person can still recover any damages for non-economic loss consequent on the original injury.
- 4.52 However, in the circumstances described, any damages for non-economic loss awarded to the deceased person's estate in relation to the amputated leg would, in line with the principle originally stated in *Public Trustee v Zoanetti* (the *Strikwerda* principle in dust diseases cases), be taken into account in the assessment of damages in any dependency action that was brought in relation to any separate wrongful act that resulted in the victim's death.⁵⁵
- 4.53 The provision was introduced in response to the concern that, in cases where a victim of a wrongful act occasioning an injury was killed by a supervening unrelated cause, the victim's estate would be unable to recover non-economic loss damages for the original wrong, and would be left without adequate compensation.⁵⁶ It was

55. *Public Trustee v Zoanetti* (1945) 70 CLR 266, 277 (Dixon J).

56. See, eg, NSW, *Parliamentary Debates*, Legislative Council, 5 December 1944, 1488-9 (H Manning).

seen as a compromise between extinguishing all entitlements to damages for pain and suffering and loss of expectation of life on death, and ensuring that needy dependants would not be disadvantaged.⁵⁷

- 4.54 It seems likely that the legislature did not contemplate the possibility that the damages awarded to the estate for the first injury would be offset against the damages awarded in a dependency action brought against a subsequent and separate wrongdoer. The High Court's decision in *Zoanetti* had not been handed down at the time that Parliament was considering these provisions, so the possibility that it might occur is unlikely to have been raised.
- 4.55 In CP14 we asked whether it would be desirable to exclude the need for an offset of any damages for non-economic loss that were recovered by the estate pursuant to the operation of s 2(2)(d) of the 1944 Act, when assessing damages in a dependency action brought in relation to a supervening wrong.⁵⁸ Of the submissions that addressed this issue, the majority were against any change to the current operation of the law,⁵⁹ with the result that *Strikwerda* would continue to apply. However, in one submission it was suggested that damages for the initial wrong, that were awarded to the estate, should not be offset against any damages recovered by a dependant in a dependency action that was brought in relation to the later wrong.⁶⁰ A reason for not doing so is that they reflect different losses attributable to separate wrongs.
- 4.56 We recognise the force of this submission, and note that an application of the *Strikwerda* principle, in the case outlined, would effectively reduce the extent of the exposure of the subsequent wrongdoer. However, the exception to the general rule that allowed the survival of claims for non-economic loss, in the circumstances specified by s 2(2)(d) of the 1944 Act, was explicable by reference to the concern noted above that, unless those damages were recoverable, the dependants would be left without compensation.
- 4.57 As a result of that provision, the original wrongdoer remains liable for the non-economic loss damages attributable to his wrong, irrespective of the circumstances which bring about the victim's subsequent death. Allowing *Strikwerda* to apply and to require an offset, if a dependency action is brought in relation to a subsequent wrong, is consistent with the law that otherwise applies.
- 4.58 The distinguishing feature between that case and the dust diseases case that is the subject of our Recommendation 2.1 lies in the fact that the estate action, and the dependency action, both arise out of the wrongful act or omission of the defendant that allowed the victim to be exposed to the inhalation of dust, and hence to the development of a dust-related disease, and consequently to a dust-related death. It is the special nature of that circumstance that justifies a difference in outcome such that we do not consider any further relaxation of the *Strikwerda* principle, beyond that previously noted, is necessary.

57. NSW, *Parliamentary Debates*, Legislative Council, 5 December 1944, 1488 (R Downing); Legislative Council, 5 December 1944, 1488-9 (H Manning).

58. CP14, 85.

59. D Shoebriidge, *Submission CR7*, 3; NSW Bar Association, *Submission CR15* [12].

60. Australian Lawyers Alliance, *Submission CR14*, 5.

- 4.59 In any event, it is likely that the combination of circumstances under consideration will arise rarely. In most instances, the victim will be able to bring and conclude proceedings for the recovery of damages for both economic and non-economic loss in relation to the original wrong during his or her lifetime.
- 4.60 The assessment of damages in any dependency action, in relation to the subsequent wrong bringing about the victim's death, will be unaffected by the award of damages in the first case. The fact that the original injury may have reduced or substantially destroyed the victim's future earning capacity will obviously be relevant when a determination is made, in the dependency action, of the extent of any loss of future support that is sustained by the dependants. However, that is beside the point, since the subsequent wrongdoer is only liable for the consequences of his or her wrong.

Appendix A

Assumed facts underlying Table 2.3

Scenario 1: Non-worker

Common assumptions

- Husband was an electrician, working as an independent contractor. His business earned him \$1500 per week net.
- He has a wife who has been wholly dependent him.
- On 31 December 2010, the husband is diagnosed with mesothelioma at 55 years of age. He ceases work at this time.
- Husband required care from point of diagnosis. Wife provided gratuitous care of forty (40) hours per week, in addition to care provided by hospital/medical professionals from the date of diagnosis to the date of the husband's death.
- Husband brings claim in the Dust Diseases Tribunal.

Scenario 1a: completes action in lifetime

- Judgment entered 12 months after diagnosis while husband still alive. At the time of judgment, he has a prognosis of 6 months further life.

Scenario 1b: dies before completing action, actions completed after death

- Dies 3 months after diagnosis.
- Estate continues action. Judgment entered 12 months after diagnosis (9 months after husband's death).
- Wife brings dependency action in the Dust Diseases Tribunal for the loss of her husband's economic support.

Scenario 2: Worker

Common assumptions

- Husband was an employee of a business in NSW which made contributions to the workers' compensation scheme. He earned \$1500 per week net.
- He has a wife who has been wholly dependent him.
- On 31 December 2010, the husband is diagnosed with mesothelioma at 55 years of age. He ceases work at this time.
- Husband required care from point of diagnosis. Wife provided gratuitous care of forty (40) hours per week, in addition to care provided by hospital/medical professionals from the date of diagnosis to the date of the husband's death.

- Husband brings claim in the Dust Diseases Tribunal.

Scenario 2a: completes action in lifetime

- Judgment entered 12 months after diagnosis while husband still alive. At the time of judgment, he has a prognosis of 6 months further life.
- Husband applies for and receives Dust Diseases Board weekly payments.
- Following his death, widow receives lump sum payment and weekly payments from the Dust Diseases Board.

Scenario 2b: dies before completing action, actions completed after death

- Dies 3 months after diagnosis.
- Estate continues action. Judgment entered 12 months after diagnosis (9 months after husband's death).
- Wife brings dependency action in the Dust Diseases Tribunal for the loss of her husband's economic support.
- Husband applies for and receives Dust Diseases Board weekly payments.
- Following his death, widow receives lump sum payment and weekly payments from the Dust Diseases Board.

General assumptions

(a) Life expectancy is based upon:

- (i) date of birth of 31 December 1955 for both the husband and wife;
- (ii) life expectancy without mesothelioma is referable to the Australian Bureau of Statistics Projected Life Tables 2011; and
- (iii) an expected date of death without mesothelioma of:
 - A. Husband: 21 May 2041; and
 - B. Wife: 28 May 2044.

(b) The husband's expected date of death with mesothelioma:

- (i) Scenarios 1a and 2a: 30 June 2012; and
- (ii) Scenarios 1b and 2b: 31 March 2011.

(c) Date of calculation is 31 December 2011.

(d) Future vicissitudes of 15%.

(e) Husband's retirement age without mesothelioma of 67 years.

(f) Discount rate for future amounts of 3%.

- (g) The rate of dependency is 66%.
- (h) Savings in maintenance of \$200 per week.
- (i) Pain and suffering of \$250,000.
- (j) Loss of life based on \$1,000 for each lost year.
- (k) Items not considered:
 - (i) loss of superannuation;
 - (ii) loss of long service leave;
 - (iii) interest on past economic loss; and
 - (iv) impact the DDB payments have on the wife's current and future Centrelink payments.

Dust Diseases Board payments

- (a) Scenario 1:
 - (i) No DDB payments.
- (b) Scenario 2:
 - (i) DDB payments from 1 January 2011;
 - (ii) DDB payments referable to gross before tax income for the first 26 weeks, subject to the maximum payment of \$1,739.30 per week to 31 March 2011, increasing to \$1,774.00 from 1 April 2011;
 - (iii) after 26 weeks, the husband's DDB payments revert to the statutory rate with a dependant spouse, being \$527.40;
 - (iv) the husband would continue to receive DDB payments for the remainder of his life;
 - (v) after the husband dies, the wife will receive DDB payments of \$243.60 per week for the remainder of her life;
 - (vi) the husband's weekly DDB payments (past and future) have been deducted from the husband's economic loss; and
 - (vii) the wife's:
 - A. Weekly past and future DDB payments; and
 - B. Any lump sum on the deceased's death,have been deducted from the damages in the dependency action.

Appendix B

Submissions

- CR1 Mrs Eileen Strikwerda, 14 June 2011
- CR2 Insurance Council of Australia, 14 June 2011
- CR3 Asbestos Injuries Compensation Fund Ltd, 15 June 2011
- CR4 Ms Maryanne Gatt, 15 June 2011
- CR5 Safe Work Australia, 15 June 2011
- CR6 DLA Piper Australia, 15 June 2011
- CR7 Mr David Shoebridge MLC, 15 June 2011
- CR8 CSR Limited, 17 June 2011
- CR9 Suncorp, 17 June 2011
- CCR10 Confidential Submission, 20 June 2011
- CCR11 Confidential Submission, 20 June 2011
- CR12 Professor Mark Lunney, 20 June 2011
- CR13 James Hardie Industries, 27 June 2011
- CR14 Australian Lawyers Alliance, 1 July 2011
- CR15 NSW Bar Association, 2 July 2011

Appendix C

Consultations

Consultation with asbestos victims

19 May 2011

- Mr Barry Robson, Asbestos Diseases Foundation
- Ms Maree Stokes, Asbestos Diseases Foundation
- Ms Eileen Day, Asbestos Diseases Foundation
- Mr Michael O'Donnel, Asbestos Diseases Foundation
- Ms Catherine O'Farrell
- Ms Emma Maiden, Unions NSW

Consultation with defendants and insurers

23 May 2011

- Ms Lori Callahan, Allianz Australia
- Mr Nicholas Scofield, Allianz Australia
- Mr Nick Prentice, Ellison Tillyard Callanan (on behalf of Allianz Australia)
- Ms Sunila Prasad, Allianz Australia
- Ms Narreda Grimley, Asbestos Injuries Compensation Fund
- Mr Con Gotis-Graham, DLA Piper (on behalf of Asbestos Injuries Compensation Fund)
- Ms Justine Hall, Insurance Council of Australia
- Mr Alex Sanchez, Insurance Council of Australia
- Mr Grant McDonald, QBE Australia
- Ms Carmen Goldstein, Suncorp
- Ms Jacinta Montgomery, Wesfarmers
- Ms Vicki Sarfaty, WorkCover NSW

Consultation with James Hardie Industries

25 May 2011

- Mr Sean O’Sullivan, Vice President, Investor and Media Relations
- Mr Russell Chenu, Chief Financial Officer
- Mr Bruce Potts, Legal Counsel

Consultation with CSR Ltd

26 May 2011

- Ms Debbie Schroeder, Legal Counsel and Company Secretary
- Mr David Miller, Colin, Biggers and Paisely, former legal counsel for CSR

Consultation with plaintiff lawyers

2 June 2011

- Ms Dana McEarney, Maurice Blackburn and Australian Lawyers Alliance
- Ms Joanne Wade, Slater and Gordon
- Ms Tanya Segelov, Turner Freeman

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ISSN 1030 0244
ISBN 978-0-7347-2656-8

