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NSW Law Reform Commission
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To the Law Reform Commission,

Thank you for the opportunity to make a submission on Consultation Paper 14: Compensation to relatives.

The fundamental unfairness of the current law as it applies in cases like Strikwerda was the reason why my office chose to introduce the Dust Diseases Tribunal Amendment (Damages-Deceased's Dependents) Bill 2010 as a private members bill last year.

Every year more than 700 people are diagnosed with mesothelioma, which is a cancer caused by exposure to asbestos. It only takes one fibre to put you at risk. Victims can be as young as 20 or as old as 90. Victims and families are given little time to get their affairs in order. The average time from diagnosis to death is just five months. Some people get only three weeks.

The period from diagnosis to death is an enormously emotional and traumatic time for families. There have been many changes in the past decades to have the law adapt to these realities. The Dust Diseases Tribunal has adapted its procedures to deal with the medical realities facing litigants, with limitation provisions and other technicalities relaxed or abolished.

However, one significant problem remains, namely that which arose in *Bi (Contracting) Pty Ltd v Eileen Sylvia Strikwerda and Anor*, a 2005 case in the New South Wales Court of Appeal. In that case, the widow's damages in proceedings in the Dust Diseases Tribunal were reduced by more than $80,000 by reason of the fact that as a widow she would receive a financial benefit in the form of a distribution from the estate that included the general damages her husband received for the painful and early death he suffered from asbestosis.

The Greens consider it unfair to allow a defendant to reduce the damages payable to dependants by reason of the painful and preventable death the defendant occasioned to the deceased. It is a stark injustice to allow an asbestos manufacturer such as James Hardie to obtain a discount in the damages it must pay to a dependant, normally a widow, by reason of the fact that it has been ordered to pay general damages to the deceased, normally the widow's husband, for causing him a painful and untimely death by reason of their known negligence. Imagine a widow having a lawyer explain to her that the company that killed her husband was going to argue successfully before the courts that, because it had paid some money as compensation for the painful and untimely death of her husband,

it would use that fact to argue the widow had received an economic benefit from her husband's death. It only has to be stated to realise how offensive that is in practice.

This consultation paper is a welcome step in the right direction in achieving justice for the families of those killed by asbestosis and other dust diseases.

Regarding the questions raised in Consultation Paper 14:

CHAPTER 6

6.1 No – for the reasons set out above changes are required to the current law, specifically the abolition of the Strikwerda principle.

6.2 No.

6.3 Yes, the Strikwerda principle should be abolished in all dust diseases cases.

6.4 It is estimated that the abolition of the Strikwerda principal would lead to only a minimal increase in filings in the Dust Disease Tribunal. To the extent there was a modest increase it would reflect the justice of the cases.

6.5 It is estimated that the abolition of the Strikwerda principle would lead to only minor financial consequences for defendants and insurers. This would remove a striking injustice from a small class of cases at minimal overall cost to the scheme.

6.6 Yes. Please see reasons set out above.

CHAPTER 7

7.1 (1)(a) Yes. The personal circumstances of families at the time of a worker dying are difficult enough without the added complexity of legal proceedings. The present situation forces many terminally ill workers to spend significant amounts of their time and personal energy on consulting lawyers and considering legal proceedings when this should instead be focused on their personal life, treatment and family.

7.1 (2) Such a limitation should be considered to allow for finality.

CHAPTER 8

8.1 (a) Yes.

8.2 (a) Yes, it should be as an additional head of damage as it deals with a discrete class of suffering.

8.3 Yes.

8.4 The NT provision would be the most appropriate. This provides that any person who is entitled to bring a dependant's action can bring a claim for solatium.

8.5 Again the NT model appears most appropriate, with a broad distraction exercised in light of statutory criteria.

8.6 See 8.5 above.

CHAPTER 9

9.1 (a) Yes.

9.2 No. This would only further the injustice seen in the Strikwerda principle.

9.3 No

CHAPTER 10

10.1(1) Yes, non-economic loss should be added to the existing benefits to be excluded, as should solatium if it was to be granted.

10.1(2) It should apply generally.

10.1 (3)(a) No, a monetary cap would not be appropriate.
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10.1 (3)(b) No.

10.2 This is not a matter on which this office seeks to make further submissions.

I am happy to discuss these matters further with you.

Yours sincerely,

DAVID SHOEBRIDGE MLC